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IN THE SUPERIOR COURT OF WASHINGTON, D.C.
CIVIL DIVISION

Stephen Behnke
624 Maryland Avenue, NE
Apt. 8
Washington, District of Columbia 20002

and

L. Morgan Banks, III
880 Barber Rd
Southern Pines, North Carolina 28387

and

Debra L. Dunivin
5265 Cromwell Court
San Diego, California 92116

and

Larry C. James
3931 White Spruce Circle
Dayton, Ohio 45424

and

Russell Newman
5265 Cromwell Court
San Diego, California 92116

Plaintiffs,

v.

David H. Hoffman
c/o Sidley Austin LLP
One South Dearborn
Chicago, Illinois 60603

and

Case No. 2017 CA 005989 B

COMPLAINT

JURY TRIAL DEMANDED

Sidley Austin LLP)
One South Dearborn)
Chicago, Illinois 60603)
)
and)
)
Sidley Austin (DC) LLP)
1501 K. Street, NW)
Washington, District of Columbia 20005)
)
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)
_____)

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COMPLAINT

I. NATURE OF THE ACTION

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

2. The lawsuit arises from an independent review and report commissioned from Hoffman and Sidley by the APA (Hoffman Report or Report)[1]. The review was prompted and guided by claims that, in the aftermath of 9/11, the APA colluded with the Bush administration, the Central Intelligence Agency (CIA) and the U.S. military to support torture.

3. More specifically, the review was sparked by the 2014 publication of those claims in the book *Pay Any Price: Greed, Power and Endless War* by James Risen, who at the time, was a *New York Times* reporter. According to the APA Board of Directors' resolution authorizing the review, it was to consider the claims of collusion and, in particular, to focus on three specific allegations made by Risen.

[1] Three versions of the Hoffman Report were published or republished on nine occasions. Publicly available copies circulated and published by Hoffman and Sidley and republished by APA include a version published on the *Times*' website on July 10 (http://www.nytimes.com/interactive/2015/07/09/us/document-report.html). The APA also republished a version of the Report on its website on July 10 (http://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf), and a revised version on September 4 (http://www.apa.org/independent-review/revised-report.pdf). For ease of reference, all three will be referred to collectively as the Report(s) or Hoffman Report(s). Each of those documents is hereby incorporated by reference. Upon request, Plaintiffs will provide the Court with a printed copy of each of the Reports and their over 6,000 pages of exhibits.

4. Hoffman did not find evidence to support those allegations. As his review proceeded, however, it became a fishing expedition spanning decades of events not only within the APA, but also within the government, military and CIA. At its end, it resulted in a series of demonstrably false and defamatory allegations against the Plaintiffs.

5. This Complaint will provide concrete examples of the documents and other facts that demonstrate Defendants knew those allegations to be false or acted in reckless disregard of their truth. However, it is not only their cumulative weight that does the defamatory damage. Binding together the Report's 500-plus pages is an overarching false and defamatory narrative: from 2005 to 2014, Plaintiffs and others "colluded" to block the APA from taking any effective steps to prevent psychologists' involvement in abusive interrogations.

6. The Report expressly identifies each Plaintiff by name as being an active partner or participant on behalf of the APA or the Department of Defense (DoD) in this collusive joint enterprise (Hoffman Report, see for examples pp. 9, 10, 12, 36, 43, 65, 340, 363, 386, 388, 429, 446).

7. That narrative was adopted from long-standing critics of the Plaintiffs and the APA on whom Hoffman relied heavily during his investigation. Their narrative was driven by two goals: banning psychologists from any role in the interrogation process and holding psychologists "accountable" for their alleged complicity in torture. Despite having been rebuffed by the Federal Bureau of Investigation (FBI), for years they had been advocating for criminal prosecutions of the Plaintiffs and others.

8. Although with more sophistication and nuance, Hoffman and Sidley adopted the core of that narrative as their own. As is apparent from statements by those Hoffman and his team

interviewed as well as from the Report's language, he assumed the worst about the Plaintiffs' motives from the start, as had the critics, and then described the facts through that distorting lens.

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

10. Most egregiously, the Hoffman Report aligned perfectly with the critics' desire for criminal prosecutions. As they publicly acknowledged, they urged Hoffman to expand his investigation in part to overcome what they perceived as statute-of-limitation obstacles to prosecutions. Although Hoffman stated privately to the APA that he found no evidence of criminal activity, the Report deployed terms – "collusion," "joint venture," "joint enterprise" and "deliberate avoidance" – that Hoffman, a former federal prosecutor, knew were drawn from the context of criminal prosecutions. https://www.democracynow.org/2014/12/23/weaponizing_health_workers_how_medical_professionals

11. Predictably, the Report led immediately to renewed and ongoing calls for the Plaintiffs to be subjected to criminal and war-crimes prosecution.

12. At the same time, Hoffman nowhere presents a coherent, much less truthful, description of the Plaintiffs' version of the events he investigated – a version that is not only true, but supported by facts in his possession. The military Plaintiffs had worked for years in difficult circumstances, often at detention sites, to prevent abuses of the kind that followed 9/11. Soon after news of those

horrific abuses emerged, they became directly and energetically involved in drafting policies and implementing training and oversight to prohibit and, as far as possible, prevent future abuses. They could have played it safe in positions where no one could have falsely accused them of countenancing torture. But they did not. They stepped up, and for that Hoffman and their professional organization, the APA, have – shamefully – set out to punish them.

13. The military and the APA Plaintiffs then worked to ensure that the APA guidelines were drafted so that military psychologists could use them within the military to support efforts to prevent abuses, rather than having the military rebuff them as an interference with its ability to set policy for its own officers.

14. Hoffman nowhere allows that true story to be told. An independent and neutral investigator would have done justice to the positions and motives of both sides of these debates. Instead, from the Report's Executive Summary onwards, Hoffman consistently confines the Plaintiffs only to the rebuttal position, just as a prosecutor would in an indictment designed to make a case against them (Hoffman Report, pp. 1-4).

15. As a result, Hoffman failed to follow his charge from the Board to investigate "all the evidence" and "to go wherever the evidence leads." To make the specific allegations described below fit his pre-determined narrative, Hoffman cherry-picked evidence, ignored contradictory evidence, mischaracterized facts, relied on inferences the facts did not support, and failed to follow obvious investigatory leads. As he acknowledged in a meeting with the APA's Council, its governing body, he set out to "make [the] case" to support his conclusions.

16. That case not only aligned with the critics' long-standing agenda. It also aligned with the desire of some APA Board members to put controversy behind them, and insulate themselves, by blaming a "small underbelly" of psychologists who had been "involved in abusive interrogation

techniques." That was the language used by Dr. Nadine Kaslow, chair of the Special Committee formed to oversee the investigation, in a media interview after the Report's release.

17. To build its case, as this Complaint will demonstrate, the Report relies repeatedly on statements of fact that were made with the knowledge that they were false or in reckless disregard of whether they were false. Moreover, Defendants' conduct of the investigation and their actions surrounding and after its publication demonstrate that, at a minimum, they acted in reckless disregard of the truth both before and after the Report was completed.

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

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

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

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

20. Each of the three allegations is completely contradicted by documents that were in Hoffman's possession or by information he obtained during his witness interviews. The allegations rest, therefore, on the intentional and purposeful omission, distortion, and avoidance of evidence that shows them to be false.

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

- Omits documents showing that, by 2005, "existing" military interrogation policies contained rigorous prohibitions against abusive interrogation methods, including methods that Hoffman asserts were permitted. These policies, some of which the military Plaintiffs helped to draft, were incorporated by reference into the APA guidelines. The documents make nonsense of the Report's allegation that the Plaintiffs set out to avoid constraining abuses.
- Ignores documentary evidence, and distorts and mischaracterizes testimonial evidence, that the proposed ban against psychologists' participation in the interrogation process was debated openly, vigorously, and repeatedly during and beyond the relevant years.
- Excludes evidence in his possession about the investigation of the ethics complaints. That evidence included, for example, a statement by Dr. Kaslow, the then-APA President and later the Chair of the Special Committee, that the most prominent complaint was closed only after "as complete and careful a review of the available evidence … as possible."

22. In addition to its false and defamatory primary accusations, the Report is rife with many other false statements that also show, at best, a reckless disregard for the truth. They are listed in Exhibit A and fully incorporated herein by reference. Each of those statements was published with

knowledge of its falsity or a reckless disregard for the truth and is contradicted by documents in his possession.

Evidence of Actual Malice from the Conduct of the Investigation

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

- Hoffman collaborated with and gave preferential treatment to long-time critics of the Plaintiffs, promising them confidentiality, relying heavily on them for material, adopting their basic narrative of the events at issue, aligning with their desire to expand the investigation's original scope to provide the framework for criminal and war-crimes prosecutions, and encouraging the APA to give them access to the Report before it was publicly released.
- Hoffman was told by at least one witness that one of his key witnesses was unreliable and that she had fabricated her notes of the PENS meeting, but Hoffman then relies on those notes extensively in writing his Report.
- Defendants failed to warn Plaintiffs that the investigation could be adverse to their interests, even after Hoffman knew that it would be.
- Defendants failed to inform Plaintiffs of the issues that the expanded investigation was exploring, even in response to direct questions, thus making it impossible for them to rebut the allegations Hoffman was forming.
- Hoffman purposefully avoided obvious lines of inquiry, including lines suggested by the Plaintiffs that would have provided direct exculpatory information.

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

24. The Board's actions when it received the Report constituted at best a reckless disregard of the truth.

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

26. In the days following the Board's receipt of the Report, it continued to give preferential treatment to the Plaintiffs' critics while keeping Plaintiffs in the dark and giving them no effective opportunity to respond to the attacks against them.

27. On June 28, the day after the APA Board received the Report, it gave it to two of the Plaintiffs' long-time critics who had been sources for James Risen's reporting, and then met with them on July 2. In the following days, the critics published in several places their July 2 comments to the Board, comments that exaggerated and misstated the Report's conclusions.

28. On information and belief, Dr. Steven Soldz republished the Report by giving electronic access to Risen before the July 4, 2015, weekend.

29. On information and belief, Hoffman published the Report to Risen on or about July 7, 2015.

30. Throughout the period between receiving the Report and republishing it, the Board gave none of the Plaintiffs – including Dr. Behnke, an employee, and Col. James, then a member of the APA Council, its governing body – adequate opportunity to respond to the Report's accusations.

Plaintiffs Banks, Dunivin and Newman, all APA members at the time, realized they had been attacked only when they read *The New York Times* article on July 10.

31. Almost immediately after the Report's publication, APA members – by no means only the Plaintiffs – began to identify its factual omissions and distortions, provide documents and other evidence Hoffman ignored, and point out that their statements in interviews had been misrepresented. In a June 2016 open letter, nine former APA presidents said the concerns expressed by four APA divisions and others included – among other failings – "an apparent failure to properly vet" the Report. When the former presidents met with current Board members in August 2016, the current members admitted that "the report contains many inaccuracies" and that the Board's response to it had been "impulsive and not thought through."

32. Yet for more than a year, despite having been given direct evidence of the falsehoods in the Report, Hoffman, Sidley and the APA have taken no effective steps to correct its false statements. Although Defendants issued an errata sheet in September 2015 that corrected some factual inaccuracies, it corrected none of the serious falsehoods the Plaintiffs have pointed out. Instead, Defendants have circled the wagons to protect themselves from blame. In the process, as former chairs of the APA Ethics Committee pointed out in an open letter, they have ignored potential conflicts between their interests and the interests of the APA as an organization.

33. In its one significant attempt to address the Report's problems, in February 2016, the Board decided to re-hire Hoffman to review his conclusions about military interrogation policies. So clear was the conflict, however, that the Council, the APA's governing body, advised the Board not to rehire to Hoffman and Sidley. The Board ignored that advice, engaging Hoffman to produce a "supplemental" report that was due by June 8, 2016. It has still not emerged, and Defendants have

failed to make any public statement regarding its status for over a year. Nor have they made any statement that would mitigate the damage done to Plaintiffs' reputations.

34. As a result of the Defendants' sustained failure to correct the Report's false statements, the damage to the Plaintiffs' reputations and livelihoods has not only continued; it has increased. The Defendants' inaction manifests a clear and continued purposeful avoidance of the truth.

Damages to Plaintiffs

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

36. The Report's false accusations also caused severe damage to what had been the stellar professional and personal reputations of all the Plaintiffs. That damage has been public and sustained. Because Hoffman's engagement letter specified that the Report would be made public without changes, he was fully aware that his defamatory statements would be republished in the echo chamber of the press. In fact, a tidal wave of media coverage ensued.

37. Sample headlines from articles and editorials based solely on the Report's assertions make clear how the press and the public understood the allegations made in the Report and then reinforced by Dr. Kaslow in media interviews: "Psychologists Who Greenlighted Torture" (from a *New York Times* editorial), "Report: Top psychologists bolstered CIA, Pentagon torture," "US torture doctors could face charges after report alleges post-9/11 'collusion'," and "Justice Matters: Holding People Who Torture to Account."

38. 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

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 surrounding that book, and has no access to broad media channels to defend his reputation. Consequently, he is not a public figure 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. 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 surrounding that book, and he has no access to broad media channels to defend his reputation. Consequently, Plaintiff Behnke is not a public figure or limited public figure.

41. Plaintiff Dr. Debra L. Dunivin is an individual residing at 5265 Cromwell Court, San Diego, California 92116. Dr. Dunivin is a retired Army Colonel with 20 years of military service to the nation, for which she was awarded the Legion of Merit. She served as Chief of the Departments of Psychology at Walter Reed Army Medical Center and Walter Reed National Military Medical Center. She has consulted with commanders in Guantanamo, Iraq, and the Army

Medical Command. She served in the Army Inspector General's inspection of detention facilities. In a mid-level position within the DoD hierarchy, Dr. Dunivin was not in a position to make public or military policy, and 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 surrounding that book, and she has no access to broad media channels to defend her reputation. Consequently, Plaintiff Dunivin is not a public figure or limited public figure.

42. 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 surrounding that book, and he has no access to broad media channels to defend his reputation. Consequently, Plaintiff James is not a public figure or limited public figure.

43. Plaintiff Dr. Russ Newman is an individual residing at 5265 Cromwell Court, San Diego, California 92116. From 1994 to 2007, Dr. Newman was employed in Washington, DC, as Executive Director for the APA Practice Directorate, working on behalf of the nation's practicing psychologists and the patients they serve. In that role, he implemented legislative, legal, public education, and marketplace strategies to support psychology practitioners and to increase access

to psychological services. Most recently, Dr. Newman was Provost and Senior Vice President for Academic Affairs at Alliant International University, primarily a graduate school with nine APA-accredited clinical psychology doctoral programs. Plaintiff Newman was not in a position as an employee to make APA policy (that is the responsibility of the APA Council). Although Dr. Newman was named in James Risen's book, Mr. Risen did not interview him. He did not voluntarily interject himself into the controversy surrounding the book, and he has no access to broad media channels to defend his reputation. Consequently, Plaintiff Newman is not a public figure or limited public figure.

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

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

46. Defendant David H. Hoffman is an individual residing in Chicago, Illinois, with an office at One South Dearborn, Chicago, Illinois 60603. He is a partner of Sidley Austin LLP and a former

federal prosecutor and Inspector General of the City of Chicago. At the time of the research, drafting, delivery, and revision of the Hoffman Report, Hoffman was the lead partner on the matter for Sidley Austin LLP and the Report's primary author, and all times during that work was acting in his capacity as an agent of Sidley Austin LLP. He signed the cover letters delivering two versions to the APA on Sidley letterhead bearing his Chicago, Illinois, business address. All of the defamatory statements in the Reports originated from Illinois, Hoffman's domicile, and Sidley's principal place of business and organization. Hoffman is licensed to practice law only in Illinois. The engagement letter between APA and Sidley states that any claim arising under or relating to the engagement between them shall be governed by Illinois law. Hoffman was the only Sidley Austin LLP lawyer referred to in the public communications issued by the APA regarding the firm's engagement for the independent review.

47. Defendant Sidley Austin LLP is a law firm comprised of a group of limited liability partnerships practicing in affiliation. Sidley Austin LLP's principal place of business is One South Dearborn Chicago, Illinois, 60603 and it is organized under the laws of Illinois. Sidley Austin (DC) LLP's principal place of business is 1501 K. Street, NW, Washington, District of Columbia, 20005. Sidley Austin (DC) LLP is organized under the laws of Delaware and registered as a foreign limited liability partnership with a designated agent for the service of process in the District of Columbia. Sidley Austin LLP and its affiliated partnerships are vicariously liable for all the actions taken by Hoffman arising out of the events described in this Complaint.

48. Defendant APA has more than 117,500 members and 54 divisions in subfields of psychology across the United States. Volunteer governance members play a key role in the direction of the APA's work. The governance groups include the APA's Council of Representatives, which has the sole authority to approve policy and appropriate the association's

revenue; the Board of Directors, the administrative agent of the Council of Representatives; the APA President, elected annually by the membership to serve as the face of the association; and committees, boards, and task forces, which focus on particular issues in the field. The APA's daily operations are overseen by its senior staff at the APA headquarters in Washington, DC. The APA has over 500 staff members and is incorporated as a non-profit in the District of Columbia. Its principal and only place of business is at 750 First St., NE, Washington, District of Columbia 20002.

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

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

51. Non-party Dr. Susan McDaniel is a psychologist who was president-elect of the APA at the time Hoffman conducted his review. Dr. McDaniel is currently the immediate Past President of the APA (while President, she appointed Dr. Kaslow as the Council Parliamentarian) and a member of the Board of Directors. Dr. McDaniel's actions were undertaken at all times within the scope of her official duties as an APA officer, Board member, or member of the Special Committee with the full authority to act on the APA's behalf.

52. Despite their involvement in many of the events Hoffman investigated, unlike others with similar involvement Drs. McDaniel and Kaslow were not named in the Report and therefore not recused from participating in the response to it.

53. Non-party James Risen was a reporter for *The New York Times*. He is domiciled in Maryland. His work has previously been criticized by major publications and journalistic "watch-dogs" for his questionable reporting techniques in the case of government scientist Wen Ho Lee. As a result, he was well known publicly to be an unreliable source. http://ajrarchive.org/article.asp?id=32

54. Non-party Nathaniel Raymond is the director of a human rights program at Harvard. He was formerly employed by Physicians for Human Rights (a human rights group that has led the accusations against the APA) as director of the "Campaign Against Torture." He also served as a frequent source for James Risen at *The New York Times* in other matters, making allegations that government investigations failed to substantiate. He therefore was also publicly known to be an unreliable source. Mr. Raymond has made numerous false attacks against Plaintiffs over the last ten years and, in collaboration with Mr. Risen, he has tried without success to persuade the FBI and Department of Justice (DoJ) to open criminal investigations into events discussed in the Report.

http://www.hoffmanreportapa.com/resources/FBI%20Memo%20Gerwehr%20Files%20(1)_Redacted.pdf

55. Non-party Dr. Steven Reisner is a psychologist who is self-employed. He is a consultant for Physicians for Human Rights. At the time of the release of the Report, he was a member of the APA Council. Dr. Reisner has made numerous false attacks against the Plaintiffs over the last ten years and thus was known publicly to be an unreliable source. He was interviewed by Hoffman

but, in contrast to Hoffman's treatment of the Plaintiffs, the Report did not identify information drawn from his interview or disclose the date of the interview. Dr. Reisner has stated publicly that he was promised confidentiality by Hoffman.

56. Non-party Dr. Stephen Soldz is a psychologist on the faculty of the Boston Graduate School of Psychoanalysis. He is also a consultant for Physicians for Human Rights. At the time of the release of the Report to Dr. Soldz before its public release, he was not a member of the APA, although his membership was rushed through over that weekend. Dr. Soldz has made numerous false attacks against the Plaintiffs over the last ten years and thus was known publicly to be an unreliable source. He was interviewed by Hoffman but the Report did not identify information drawn from his interview or disclose the date of the interview.

57. Non-party Dr. Trudy Bond is a psychologist who is self-employed. Dr. Bond has made numerous false attacks on the Plaintiffs over the course of the last ten years, including filing formal ethics complaints against Col. James in Ohio, Louisiana, and Guam and with the APA, none of which resulted in findings against him. She was thus known publicly to be an unreliable source. Dr. Bond has also recently submitted the Hoffman Report and its contents as evidence of war crimes to the United Nations. She was interviewed by Hoffman on February 19, 2015.

58. Non-party Dr. Jean Maria Arrigo is a social psychologist and oral historian. She was a member of the PENS Task Force, and her notes and archives related to the events in question are partially presented in the Hoffman Report. Her notes were submitted by Mr. Raymond to the DoJ and she submitted them to the Senate Armed Services Committee (SASC), neither of which found any basis in them for action. She was thus publicly known to be an unreliable witness.

III. JURISDICTION AND VENUE

59. This Court has personal jurisdiction and venue over this action pursuant to the District of Columbia Code § 13-423. Personal jurisdiction based upon conduct:

(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's --

(1) transacting any business in the District of Columbia;
(2) contracting to supply services in the District of Columbia;
(3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
(4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;...

60. This Court enjoys personal jurisdiction over the Defendants because:

- APA's principal place of business and place of incorporation is the District of Columbia;
- Hoffman and Sidley were retained by Drs. Kaslow and McDaniel, as members of the Special Committee and Board acting on the behalf of the APA, to conduct an investigation for the APA;
- On information and belief, Sidley has partners domiciled in the District of Columbia;
- In proceedings on this case in Ohio, Sidley consented to jurisdiction in the District of Columbia;
- Sidley has an affiliated foreign limited liability partnership with a designated agent for service of process in the District of Columbia;
- 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; and
- as a result of that circulation, Plaintiffs were all injured by the defamatory statements in the District of Columbia in addition to their domiciles.

61. The publications and republications of the defamatory materials were widely circulated in the District of Columbia by each of the Defendants. For example, *The New York Times* has approximately 16,000 readers in the District of Columbia. The District of Columbia Psychological Association, an affiliated organization of APA, received the Report from APA, and posted it on its website for its members to read. A special web page was dedicated to the Report and to regular ongoing postings concerning discussion among the Association's members. At year-end it summarized some of this activity on its webpage:

> When the Hoffman Report regarding APA Leadership's involvement in facilitating the use of torture in government interrogations was published, DCPA kept you informed, posting to our website the Report, numerous articles, and the responses of other psychologists and organizations. Our Member Listserv facilitated discussion and response, culminating in an open letter to APA Leadership expressing the reaction and views of D.C. psychologists. http://www.dcpsychology.org/Hoffman-Report-Links

62. All relevant parties entered into a tolling agreement to extend the relevant statutes of limitations during the period up to and including February 16, 2017. Plaintiffs initially commenced an action in the Montgomery County Court of Common Pleas, in Dayton, Ohio on February 16, 2017 (the "Ohio Action"). In that action, Defendants filed Motions to Dismiss for Lack of Personal Jurisdiction and, in the alternative, on the grounds of Forum Non-Conveniens. The Ohio Action was dismissed for lack of personal jurisdiction with respect to Sidley and Hoffman on August 25, 2017. Although the dismissal with respect to APA was time-stamped on August 25, 2017, Plaintiffs did not receive notice of the APA dismissal from the Court until Monday August 28, 2017, when the filing of the order was made available in the electronic record on that date.

63. In a hearing on the motions to dismiss on August 25, 2017, and in their motion papers seeking that hearing, Defendants Hoffman and Sidley represented to the Ohio court that they were amenable to personal jurisdiction in the District of Columbia and "have no objection to Plaintiffs bringing this case in Washington, DC." Thus, David Hoffman and Sidley Austin LLP (and its

affiliated partnership in the District of Columbia) have consented to personal jurisdiction in the District of Columbia.

64. Each of the Defendants has asserted in the Ohio Action that Sidley's investigatory activities were centered in the District of Columbia.

65. Each of the Plaintiffs claims arise out of a common nucleus of facts: the same set of publications and republications, one investigation, and one alleged "joint-venture" or "joint-enterprise" of which Plaintiffs were each named as "key" players. Common issues of law and fact govern all of Plaintiffs claims which arise out of the same activities and defamatory statements. Dr. Behnke is a resident of the District of Columbia. Thus, all of Plaintiffs claims are properly joined with Plaintiff Behnke's claims in this action.

66. Defendants have each repeatedly represented in the Ohio Action that the District of Columbia is a more convenient forum for each of them and that this action is most properly initiated in the District of Columbia.

67. Venue in this Court is proper as the District Columbia has personal jurisdiction over each of the Defendants.

IV. FACTUAL BACKGROUND

A. Psychologists' Participation in National Security Interrogations

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

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

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

B. The PENS Task Force

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

71. During its December 10-12, 2004 meeting, the Board voted to fund a task force to "explore the ethical dimensions of psychology's involvement and the use of psychology in national security-related investigations." This task force became known as the PENS Task Force, "PENS" standing for Psychological Ethics and National Security ("Task Force" or "PENS").

72. The Board's charge was not to consider "if" psychologists should participate in those investigations, but "how." This is a critical distinction: much of Hoffman's Report, including its discussion of the Task Force's work, focuses on an alleged "collusion" among the Plaintiffs and

others to block the APA from banning its members from participating in any way in the interrogation process.

73. The Task Force consisted of 10 members: three military officers who had experience consulting to national security interrogations, including Plaintiffs Banks and James; three civilians who had previous military experience; and four members who had experience in ethics, human rights, and related issues. Dr. Behnke was to provide staff support.

74. Several observers, including Dr. Newman, were also named for the Task Force. They could not vote, and Dr. Newman did not have access to the Task Force listserv. Although Hoffman claims that Newman "led much of the task force discussions throughout the weekend" (Hoffman Report, p. 271), that assertion is directly contradicted by detailed, contemporaneous notes of the proceedings, which show that he spoke less frequently than many others. Hoffman relies on those notes extensively for other purposes to support his false narrative.

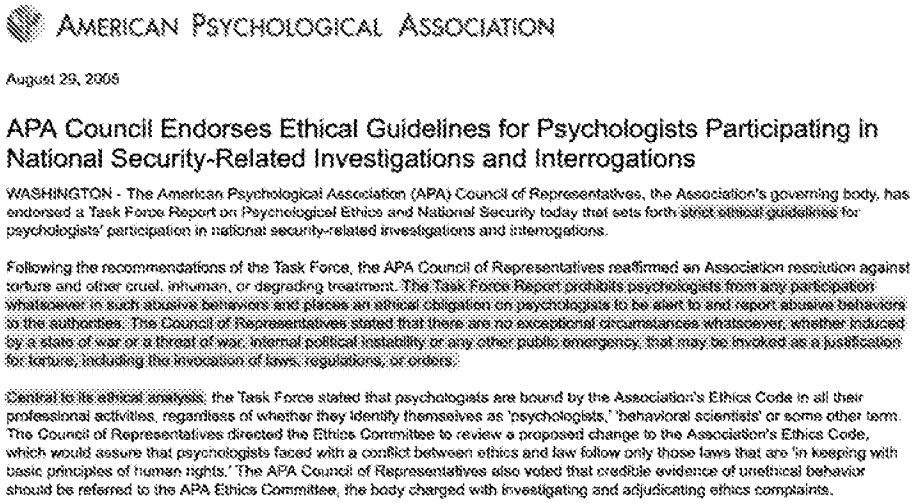
75. The Task Force met over three days in Washington, DC: June 24-26, 2005. At the conclusion of those meetings, it recommended twelve statements about the ethical obligations of the APA members (the PENS Guidelines).

76. Early during the week of June 27, 2005 the APA Ethics Committee approved the PENS Guidelines "as appropriate interpretations and applications of the American Psychological Association Ethical Principles of Psychologists and Code of Conduct (2002)." The PENS Guidelines do not represent changes to the Ethics Code.

77. The PENS Guidelines were then sent to the Board. Faced with new articles in the press, on July 1, 2005, then-APA President Dr. Ron Levant asked the Board to declare an emergency that would allow it to vote on the recommendations immediately, and asked it to approve them without

modification. The Board approved the PENS Guidelines over e-mail the same day, and they were released to the public the next day.

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



AMERICAN PSYCHOLOGICAL ASSOCIATION

August 29, 2005

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

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

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

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

C. The Critics on Whom Hoffman Relied

79. In addition to Risen's book and other reporting, Hoffman relied heavily on three long-time critics of the APA and the Plaintiffs: Drs. Steven Reisner and Stephen Soldz and Mr. Nathaniel Raymond (collectively with Dr. Trudy Bond, the Accusers). As the Complaint will describe, they worked closely with Risen and other journalists over the years in a coordinated series of attacks. The direction in which Hoffman took his investigation, therefore, was prompted by a sustained multi-year campaign that culminated successfully in the Hoffman Report.

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

80. Documents and other facts prove that Hoffman's three primary conclusions are false, and that he knew they were false or acted with reckless disregard of whether they were false when he

published the Reports to the Special Committee and Board. Those factual statements are defamatory *per se* because each alleges behavior that is incompatible with the Plaintiffs' continued practice of their professions and, taken together, they allege the criminal activity of colluding to enable torture.

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

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

83. Moreover, as several of those interviewed by Hoffman have stated, he quoted selectively and misleadingly from their interviews.

84. This pattern of selective inclusion, distortion, and omission does not result because Hoffman simply forgot a relevant point or omitted an important fact. Rather, it is a clear and intentional pattern of obfuscating the truth by selecting only those facts which support his false conclusions and consciously omitting or intentionally avoiding contradictory evidence that would not fit into his narrative.

85. So egregious is this pattern, and so obvious to those with first-hand knowledge of the underlying facts, that on July 18, 2015, shortly after the Report was released, one of the most vocal

advocates for a ban on the participation of psychologists in national security settings – and thus no fan of the Plaintiffs' position – sent Dr. Behnke a letter that stated:

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

86. The following paragraphs specify the documents and facts that demonstrate Hoffman knew that each of his three primary conclusions was false or acted with reckless disregard of whether it was false.

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

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

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

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

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

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

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

> "…abusive interrogation techniques had occurred in the past and that there was a substantial risk that they were continuing … [there was] an intentional effort not to dig into these concerns and allegations to try to determine whether they had occurred or were still occurring. … there was a deliberate and strategic attempt not to inquire…." (Hoffman Report, pp. 66-67)

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

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

90. In particular, the Report:

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

- Fails to disclose that the most recent policies, which would have included the regional policies in Afghanistan, Iraq and Guantanamo, were expressly incorporated by reference into the PENS Guidelines, along with the relevant Geneva conventions.
- Fails to describe the role the military Plaintiffs played in writing the regional policies, as well as taking other steps to prevent abuses at the sites to which they were posted.
- Omits articles and other documents passed out during the PENS meeting that focused on the abuses that had occurred at interrogation sites, and omits the prominent role that one of the Task Force members, Michael Gelles, played in calling abuses to the attention of the then-General Counsel to the Navy, Alberto Mora (Hoffman Report, p. 68).

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

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

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

93. Prior to 9/11, Army interrogators had relied on the guidance of the Army Field Manual (FM 34-52), which contained specific and explicit directions as to which interrogation techniques

were allowed and which were prohibited because they were considered abusive or cruel, inhuman or degrading treatment.

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

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

96. In late 2003, in response to the reports of abuses in Iraq, Afghanistan and Guantanamo, the Armed Forces began what would become a series of investigations into military detention facilities. Beginning in early 2004, these investigations were followed by numerous public government hearings. The reports of two of those investigations, the Church and Schlesinger investigations, unequivocally stated that none of the abuses that occurred were "authorized" because of the temporary expansion in allowable techniques. Instead, they were the result of behavior that went beyond the authorized interrogation techniques. Each of those Reports was in Hoffman's possession and part of his reference materials.

97. As a direct result of these events, starting in late 2003 policies governing interrogations became increasingly specific and rigorous. The Hoffman Report fails to describe these changes

accurately. Instead, it obscures or distorts the relevant history and leads the reader to believe that the Bush Administration's temporary expansion of permitted techniques was still in place by the time of PENS – even though the later developments were discussed extensively in the media beginning in late April of 2004, a full year before the PENS meetings.

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

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

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

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

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

103. At various points in this timeline, the DoD guidance for interrogations diverged significantly from the CIA guidance. DoD was governed by its own policies. By the time of the Philbin testimony at the very latest, those policies clearly did not authorize abusive techniques and were certainly not "loose." As Hoffman states he was told by one of the architects of the CIA program, Dr. James Mitchell, "DoD was genuinely interested in adhering to the Ethics Code and was seeking clarity about its guidelines, whereas the CIA would not have changed its operational decisions based on the ethical statements of a professional association" (Hoffman Report, p. 144).

104. Hoffman inexplicably fails to describe accurately these developments in late 2003, 2004 and early 2005 (Hoffman Report, p. 153). Instead, he purposefully omits critical details of the history. This is no accident: the Report cites a number of materials that reference Mr. Philbin's testimony, the approval of the specific 24 techniques, and the timeline of policy changes in detail,

as well as other materials that either discuss or refer to a discussion of the strict limitations in place by 2004.

105. For example, in his discussion of the outdated OLC memoranda on which he relies, Hoffman cites extensively from *The Terror Presidency* by Jack Goldsmith and *The Dark Side* by Jane Mayer. Each of those books describes the correct timeline of policy changes, at times within pages of information he does cite. They make it clear that, by the end of 2003, and certainly by the time of Philbin's public testimony, only the 24 techniques discussed in his testimony were authorized. They did not permit the abusive techniques of sleep deprivation and stress positions that Hoffman falsely claims were allowed in June of 2005 (Hoffman Report, p. 12). If Hoffman had included this information, he would have had to tell a much different story.

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

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

108. In what amounts to clear evidence of the purposeful avoidance of the truth, even after being pointed to these documents and policies, Hoffman and APA refuse, after almost two years, to acknowledge and correct the clear distortions, omissions and mischaracterizations in his Reports.

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

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

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

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

112. Numerous media reports, some citing a Pentagon announcement on May 14, 2004, refer to the strict prohibitions and limitations then put on interrogation methods. These reports appeared

in *The New York Times* and *Chicago Tribune* and on CNN, among other places. http://www.cnn.com/2004/WORLD/meast/05/14/iraq.abuse/

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

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

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

116. In the text of his Report, however, Hoffman instead analyzed extensively an outdated SOP (Hoffman Report, p. 214). As is evident from footnote 923, he retrieved that SOP from at least two sources that actually also included the updated SOP. Hoffman questioned Col. Dunivin extensively about the outdated SOP but he repeatedly refused to give her the questions she would have had to

provide the DoD to receive clearance to discuss other policies that she had drafted during her time at Guantanamo.

3. The PENS Guidelines Incorporated the Updated and Restrictive Policies

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

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

118. Hoffman had to have reviewed the Statement Four because he cites other language from it. So important was the language incorporating the local policies that it appears in the first draft of the original nine principals of the PENS Guidelines. That one-page draft was created by noon on the first day of the PENS meetings. Hoffman references the draft twice on page 273 of the Report and includes it in his supporting materials. But he ignores the language that expressly creates an obligation to "follow the most recent applicable regulations and rules" – including the regional policies in Afghanistan, Iraq, and Cuba. That language directly contradicts his false assertions that psychologists in regional facilities were not bound by the United Nations conventions (Hoffman Report, p. 305).

119. During the PENS meetings, Banks and James were highly vocal about their belief that the relevant Geneva Conventions unquestionably applied to interrogations, despite disagreements at

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

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

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

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

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

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

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

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

126. In stark contrast to Hoffman's allegations about the military Plaintiffs' intentions, Senator Levin, in his remarks when releasing the Senate Armed Services Committee Report in April of 2009, noted that military psychologists – including Col. Banks – warned against the use of harsh techniques as early as 2002: "On October 2, 2002, Lieutenant Colonel Morgan Banks, the senior Army SERE [Survival Evasion Resistance and Escape] psychologist, warned against using SERE training techniques during interrogations in an e-mail to personnel at GTMO …." (The Senior Army SERE Psychologist is a separate and distinct position from the Senior DoD SERE Psychologist from the Joint Personnel Recovery Agency.)

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

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

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

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

130. The Report's second primary conclusion stated:

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

131. Not only in the three years following the PENS report but up until 2016, the APA repeatedly discussed the possibility of a total ban on its members' participation in the national-security interrogation process. The issue was openly debated on Council floor and in numerous meetings, including a mini-convention on the topic. (After the Report's publication, the Council voted in favor of the ban but then, in August 2016, it again changed course and rejected the inclusion of a ban in the Ethics Code, which would have rendered it enforceable. Although Col. James, then a member of the Council, spoke in opposition to the motion for a ban, Plaintiffs Banks, Dunivin, and Behnke were not present.)

132. The claim that the Plaintiffs somehow colluded to defeat the ban over a decade is contradicted by the clear evidence of an open and ongoing debate. Hoffman had much of that evidence in his possession. Transcripts of those debates still exist and other documents online refer to them. Hoffman failed to include this exculpatory documentation in his Report – although it was easily available on the APA website, among other locations.

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

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

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

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

136. In a continuation of the pattern of misleading and obfuscatory reporting, Hoffman fails to identify any conduct by Col. James that would deserve censure or any substantive procedure not

followed by Dr. Behnke. Instead, to make his claims Hoffman once again omits or distorts key facts that were in his possession.

137. *First*, Hoffman fails to state that the same complainant who filed the APA complaint against Col. James filed multiple complaints against James with two state licensing boards and that no board, and no court reviewing any of those state board decisions, had found those allegations to have any merit. At this point, Col. James' conduct has been the subject of at least seven actions, none of which has been upheld.

138. Moreover, the Martinez-Lopez Report, the report of an investigation for the Army Surgeon General into detainee medical operations that covered the periods when Col. James was working in Iraq and at Guantanamo, states unequivocally that there was "no indication that BSCT personnel participated in abusive interrogation practices" and "clear evidence that BSCT personnel took appropriate action and reported any questionable activities when observed." That report is still available online.

139. Although Hoffman references the Martinez-Lopez Report for his own purposes, he does not include those exculpatory findings. Instead, employing a tactic he uses time and time again, he states that Col. James was present at Guantanamo when the "most serious abuses" were occurring – thus coaxing readers who do not know the facts to conclude falsely that Col. James was involved in those abuses.

140. *Second*, Hoffman never describes policies or procedures for handling ethics complaints that were ignored or violated. In fact, he acknowledges that the handling of James' case was technically permissible under the rules and procedures governing the APA ethics adjudication program (Hoffman Report, pp. 59 and 522). In October of 2016, nine former ethics chairs issued a statement noting that Hoffman did not identify a single procedure (except for a document placed

in a wrong file) or Board policy that had been violated. By using the word "improper," Hoffman leads the reader to believe there was untoward behavior on the part of Dr. Behnke to protect military psychologists. In fact, the word "improper" appears to mean that Hoffman, after the fact, merely did not like the process that the APA Board had adopted as policy.

141. *Third*, as to the complaint against Major Leso, Hoffman implies that the staff of the Ethics office took little investigatory action beyond "conducting internet searches" (Hoffman Report, p. 60). However, Hoffman and Danielle Carter, a second Sidley partner involved in the investigation, had information in their possession that showed this statement to be false.

142. When Ms. Carter reviewed the Leso file, she found a long list of the voluminous evidence the Ethics Office had gathered and analyzed.

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

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

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

> Each ethics complaint filed with the APA Ethics Office is individually and thoroughly reviewed based on the available evidence. In keeping with the committee's rules and procedures, and based on its commitment to due process, the committee moves to open a specific case against a member only if certain conditions are met. Specifically, the Ethics Committee bears responsibility for proving any charges of unethical behavior. Further, the committee must base its actions on specific evidence of individual wrongful behavior that can be shown to be directly attributable to the accused. In the matter related to Leso, the committee did not proceed with formal charges against Leso because it was determined that the allegations could not be proven consistent with the committee's burden of proof. The review process continued for an extended period of time (seven years) in order to include additional information as it was released into the public domain. In other words, as complete and careful a review of the available evidence was undertaken as possible. The review consisted of evidence (as opposed to supposition) and was conducted in a manner to ensure that the ethics process was kept insulated from political pressures.

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

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

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

148. In addition, as former chairs of the Ethics Committee noted in an October 24, 2016 letter, Hoffman failed to examine how the handling of other matters compared to the handling of the matters on which he focused. If he had done so, he would not have been able to conclude that those matters received improperly different treatment. At most, the "flaws" he identifies – such as a too-

limited approach to reviews that favored those accused – were flaws in the processes created by the APA Board, not an attempt by Dr. Behnke to protect specific military psychologists from censure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Obscuring the Investigation's Expanded Scope and Direction

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

165. Within the first few weeks of his review, however, Hoffman met with three other vocal and long-time Accusers of the APA: Drs. Soldz and Reisner and Nathaniel Raymond. As Hoffman and the Special Committee knew, these critics had collaborated closely with Risen and served as sources for his reporting.

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

167. Thus, what had begun as a "review" with a specific purpose became a full-blown "investigation" of the Plaintiffs' conduct and motives over the course of ten years, conducted within the framework of a narrative constructed by their Accusers.

168. The investigation's new direction was not disclosed to anyone other than the Accusers and the Special Committee. The Plaintiffs were kept in the dark. Even in response to direct requests to

explain the investigation's focus, Hoffman repeatedly refused to clarify its scope adequately or to inform the Plaintiffs what questions, beyond those initially posed by the Board, he was exploring.

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

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

171. Because of Hoffman's and the APA's failure to clarify the investigation's expanded scope or the questions on which Hoffman was focusing, the Plaintiffs could rely only on Dr. Kaslow's initial description of the investigation's limited scope (for those who received it) and Hoffman's letter to those interviewed stating that he was "conducting the review in a completely independent fashion …." They were unable to take steps to protect themselves and, eventually, were blindsided by false assertions without having been able to provide contradictory evidence.

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

172. Far from treating the Plaintiffs and Accusers even-handedly and neutrally, Hoffman collaborated closely with the Accusers while keeping the Plaintiffs at arm's length and in the dark. As a result of that undisclosed collaboration, Hoffman failed to take an independent approach, maintain the objectivity of the investigation, or present a neutral and objective review of the evidence. Instead, Hoffman used the Accusers' perspective to construct a narrative into which he fit cherry-picked pieces of distorted evidence.

173. Documents, e-mails and other evidence demonstrate his overreliance on the Accusers:

- He acknowledged publicly that he set out to win their trust.
- He promised the Accusers confidentiality, something not offered to the witnesses supporting the Plaintiffs' accounts of the events in question. At the same time, he failed to prevent the Accusers from leaking information from their conversations with him. The Accusers worked together with Hoffman to build his case; Hoffman told the Plaintiffs not to speak to each other.
- So close did the relationship between Hoffman and the Accusers become that, according to one Accuser, they joked that when Hoffman needed a document, he called Dr. Soldz. https://www.youtube.com/watch?v=i9u1EOgeEqw.
- Hoffman knew that many of the Accusers' allegations were to be published by Risen in a *New York Times* article while his investigation was taking place. Shortly after that article was published, Dr. Reisner stated publicly that they had given "detailed updates" about the document on which the article was based to Hoffman "every step along the way."

174. Despite knowing about the close, undisclosed collaboration between Risen, whose allegations sparked the investigation, and the other Accusers on whom Hoffman relied, he did not

disclose, much less explore, those facts. Instead, he investigated the actions and motives of only one side of the controversy. If he had turned his prosecutorial zeal to examining the Accusers' "collusion," he would have had to tell a very different story about the genesis of the charges he was investigating.

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

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

177. A close examination of their actions and relationships shows that most of the accusations against the Plaintiffs over the last decade originated with the three of them. They collaborated with several national journalists, including Katherine Eban of *Vanity Fair*, Jane Mayer of the *New Yorker* (who is married to James Risen's former editor at *The New York Times*), Mark Benjamin of *Salon*, and ultimately, James Risen. Hoffman relies on reporting from all of these journalists to support his allegations against the Plaintiffs, but never discloses these journalists' relationships with the same Accusers on whom he was relying.

178. Predictably, given Hoffman's collaboration with the Accusers, the Report aligns with their agenda: to have the APA ban psychologists' participation in the interrogation process, and to have the Plaintiffs and others prosecuted domestically under the RICO statute and internationally for war crimes. That alignment is demonstrated not only through the facts Hoffman selectively chose

to include or exclude. As previously noted, it is also demonstrated by his use of language such as "collusion," "undisclosed joint venture," and "joint enterprise" that is typically applied to criminal activity, as Hoffman, a former federal prosecutor, knew full well. As the Accusers' actions after the Report's publication demonstrated, that language directly supported their efforts to generate criminal and war-crimes prosecutions.

179. No reasonable reader could see the repeated use of those terms without assuming that criminal activity had taken place. And, indeed, press coverage of the Report reflected that assumption.

180. The use of this language reflecting the Accusers' goals is particularly reprehensible because, after the Report's publication, Hoffman acknowledged privately in a meeting with the APA that he had found no criminal activity. http://www.aol.co.uk/video/former-apa-president-says-stephen-behnke-was-'terminated'-518940743/ It is revealing that, at another closed-door meeting with the Council, Hoffman also acknowledged that terms such as "behind-the-scenes communication" would have been more accurate than "collusion." http://www.hoffmanreportapa.com/resources/David%20Hoffman.pdf

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

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

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

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

183. As they stated in public interviews, the lone non-recused members of the Special Committee, Drs. Kaslow and McDaniel, wanted to use the Hoffman Report to "unite" psychology. Their strategy was to blame a "small number of officials" or "small underbelly" of psychologists or "small part of APA" who had been "involved in abusive interrogation techniques" – terms Dr. Kaslow used in an audiotaped interview – to deflect accountability from them and from the APA's flawed governance procedures.

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

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

186. As they took these steps, Drs. Kaslow and McDaniel were not disinterested parties. As a result of the investigation's expansion, it covered events – such as the ethics reviews and the debate about banning psychologists' participation in the interrogation process – in which they and other members of the Board had been significantly and directly involved. They had a stake, therefore, in how their roles in those events might be portrayed.

187. Yet, despite their involvement in the underlying events, they were improperly not named in the Report, as were others with equivalent involvement, and therefore were not recused from the Committee's or the Board's work. As a result, they were protected by a Report they had been

intimately involved in overseeing, including approving the expansion of its scope that resulted in payments of more than $4 million to Hoffman's firm.

188. Moreover, they had substantial control over the actions of the Board and the APA in response to the Report. Dr. McDaniel was President-Elect in 2015, when the Report was republished, and President and chair of the Board in 2016 when, against the advice of the Council, it agreed to pay Hoffman $200,000 to produce a "supplemental" report. Plaintiffs have a statement from a Board member to a third party that other Board members were instructed they could not vote against re-hiring Hoffman.

E. Failure to Follow All the Evidence: Exculpatory Leads

189. The Report ignores entire areas of inquiry that, if presented in the Report, would have fundamentally changed its narrative for a reader. Hoffman failed to interview key witnesses and to explore Plaintiffs' exculpatory evidence.

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

191. Two of the witnesses interviewed, one a former member of the military and the other a civilian working for the Defense Intelligence Agency, have told the Plaintiffs that Hoffman's team focused on issues largely irrelevant to their substantive work and did not focus on their first-hand

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

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

193. Another military witness has stated that, when he asked Hoffman if he wanted to discuss a certain issue, Hoffman asserted it wasn't relevant. But Hoffman then wrote 10 pages on the subject in the Report.

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

195. In addition to failing to conduct a balanced series of interviews, Hoffman failed to ask Plaintiffs questions that would have elicited information about their efforts to halt abuses, and failed to follow up adequately when they suggested relevant information. Those failures were

especially destructive because they did not know enough about the investigation's direction to insist on providing that information in the face of his apparent indifference.

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

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

198. At one point, Hoffman told Col. Dunivin in an e-mail that the only relevant facts were about her interactions with APA. In light of the Report and its focus on interrogation policies and conduct, and of his questions about the 2004 BSCT policy, that statement was profoundly misleading.

199. Taken as a whole, this pattern demonstrates purposeful avoidance of lines of inquiry that would have undercut the tale Hoffman spun in the Report for his readers.

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

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

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

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

> A lawyer retained by a corporation to conduct an internal investigation represents the corporation only, and not any of its constituents, such as officers or employees. Corporate constituents have no right of confidentiality as regards communications with the lawyer, ***but the lawyer must advise them of his position as counsel to the corporation in the event of any ambiguity as to his role***. … The corporate constituent being interviewed by a lawyer for the corporation, however, may consider the lawyer as also representing the employee's personal interests, absent a warning to the contrary. ***The employee could understandably conclude that, since he is employed by the corporation and the lawyer has been retained to serve the interests of the corporation, the lawyer would not be pursuing interests adverse to those of the employee.*** Rule 1.13(b) specifically addresses this ***potential for misunderstanding by the corporate constituent by requiring the lawyer to explain the identity of the lawyer's client "when it is apparent that the organization's interests may be adverse to those of the constituents with whom the lawyer is dealing.***" Comment [8] to Rule 1.13 advises the lawyer in such a situation to advise any constituent . . . of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain separate representation. ***Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide representation for that constituent individual, and that the discussions between the lawyer for the organization and the individual may not be privileged.***
>
> Disclosure is required not just when an actual conflict exists between the interests of the corporation and those of the employee (for example, when the corporation has already confided to the lawyer that it will concede wrong-doing by the employee but will attempt to avoid corporate responsibility for any illegality). ***Disclosure is also required when there "may be" an adversity between the interests of corporation and employee. There "may***

> ***be" an adversity when the corporation has not yet irretrievably committed itself to a position in the matter, but where one such position might be adverse to the employee. Such a possible adversity would almost always arise, then, when the corporation is able to take a position adverse to the employee.*** On the other hand, Rule 1.13(b) applies only when the possible conflict is "apparent," which we interpret to mean ***actually apparent to the lawyer or apparent to a reasonable lawyer under the circumstances***. As so interpreted, the obligation of disclosure would not arise in those situations where the lawyer had no reason to believe that there was any possibility of adversity between corporation and employee when the interview was conducted.

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

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

205. The Plaintiffs thought Hoffman and Sidley were acting as a neutral, objective third party to determine the facts of their actions, all of which had been undertaken in their roles as APA employees or persons who were appointed by APA to become involved in its activities. Several others interviewed by Hoffman's team have stated that they initially had the same belief. However, witnesses have also stated that by the time they were interviewed, as early as one month into the investigation, it was clear that Hoffman had an agenda to attack the Plaintiffs.

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

A. The Report Conflates DoD and CIA Policies

206. Hoffman repeatedly ignored the critical distinction between DoD and CIA policies at the time of PENS. Those policies had dramatically diverged and were governed by different OLC

memos as well as by differing organizational policies. However, instead of analyzing the DoD policies in place at the time that prohibited abusive techniques, Hoffman cites the CIA policies that allowed for abusive interrogation methods. Because his conclusion dealt solely with the DoD, his focus on the irrelevant CIA policies to support his false conclusions is additional evidence of actual malice.

207. This conflation of policies has resulted in ongoing damage to the Plaintiffs in the media. It has enabled the Accusers, including James Risen in *The New York Times*, to continue to contend that the APA did in fact "collude" with the CIA, a conclusion the Report itself denies, and to attribute the CIA's attitude towards acceptable interrogation techniques to military psychologists (and therefore the Plaintiffs).

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

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

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

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

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

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

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

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

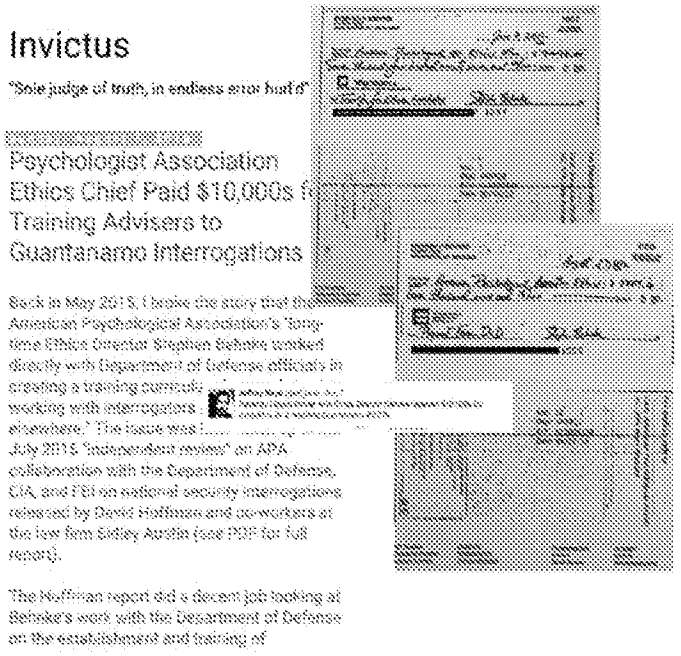
215. Given these facts, and the absence of any evidence that Col. Banks and Dr. Behnke wished to hide their ongoing communications for an improper purpose, Hoffman's inference is intentionally false, reckless, and damaging.

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

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

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

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



219. Moreover, despite Hoffman's assertion that the Board did not know about Dr. Behnke's DoD workshops (Hoffman Report, p. 38), he had in his possession at least one e-mail that clearly showed the APA Chief Executive Officer, a Board member, was very aware of the ethics workshops. Hoffman was directed to that e-mail, in fact, by the APA's Chief Operating Officer, Michael Honaker, after his interview with Hoffman discussing the Board's knowledge of the workshops.

220. *Example Three*: In order to create collusion between two organizations, the DoD and the APA, Hoffman overstates the ability of the Plaintiffs to control events and to speak for their organizations. For example, he states that Dr. Behnke "regularly sought and received pre-clearance from an influential, senior psychology leader in the U.S. Army Special Operations Command before determining what the APA's position should be, what its public statements should say, and what strategy to pursue on this issue."

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

222. If Hoffman had wanted to pursue the truth about the military Plaintiffs' role, he could have easily found it. Two former Army Surgeon Generals, Maj. Gen. (Ret.) Kevin Kiley (whom Hoffman interviewed) and Lt. Gen. (Ret.) Eric Schoomaker (to whom Col. Banks pointed Hoffman), have told Plaintiffs' counsel that Banks, Dunivin, and James could not set policy or speak on behalf of the DoD.

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

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

225. Dr. Newman had disclosed the marriage to his Board and his superiors as well as to many others. In October 2002, in fact, the marriage was reported in the *Monitor*, the official publication of the APA which is sent to all members, with a picture listing Dr. Newman's and Col. Dunivin's titles and positions. Many members of the Task Force were aware of the relationship, and the APA

had no conflict of interest policy at that time or at the time of PENS which prohibited Dr. Newman's participation in the Task Force as an observer.

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

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

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

229. As a non-voting observer, Dr. Newman was not a member of the Task Force or of its listserv and did not help to draft its report. A review of the notes of the Task Force meetings finds that he spoke less frequently than many others, and his comments were appropriate for his position as the Executive Director for Professional Practice and for his duty of loyalty to his employer. A review of Dr. Arrigo's notes, on which Hoffman relies, shows that Dr. Newman spoke only 22

times over the course of three days, less than others in attendance. For example, Dr. Robert Fein, whom Hoffman characterizes as having "offered few comments during the PENS meetings," spoke 27 times in the two days for which he was present (Hoffman Report, p. 251).

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

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

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

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

232. Their participation in underlying events gave the Interested Directors first-hand knowledge of many of the events the Reports described. When they republished the Reports, they knew that

many of the underlying events in which they had participated were distorted, mischaracterized, or omitted in order to create a false and destructive narrative to attack the Plaintiffs. That knowledge establishes that, at a minimum, the Board acted with reckless disregard on each occasion when it republished the Reports' defamatory contents.

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

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

235. In sum, given Board members' significant and material involvement in many of the events Hoffman investigated, the Board knew of the Reports' distortions and omissions when it republished multiple Reports on multiple occasions.

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

237. Moreover, from 2008 to 2010, Dr. McDaniel was on the Committee for the Advancement of Professional Practice, which opposed the moratorium on psychologists' participation in national security interrogations that was proposed in 2007. Dr. Kelly was chair of the Board of Professional Affairs when that body voted that the Council should not adopt the 2007 moratorium resolution.

238. These Board members also knew that, given the APA's governance structure, the Plaintiffs could not have determined the outcome of these debates. They also knew that Dr. Behnke did not speak on behalf of APA. They therefore knew the Report's second conclusion to be false or acted with reckless disregard of whether it was false.

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

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

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

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

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

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

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

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

246. The Board also knew about the Accusers' active engagement with the press during the course of the investigation. For example, Hoffman, the Special Committee and the Board knew that Soldz and Reisner had worked closely with James Risen just two months earlier.

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

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

249. On information and belief, on or about July 7, 2015, David Hoffman provided a word file of the Report to Risen.

250. Risen wrote about the Report in the *Times* on July 10, 2015, and republished a copy of it in full on the paper's website where it could be downloaded and republished repeatedly. Mr. Risen was the first journalist to report the story.

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

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

C. Defendants Failed to Give Plaintiffs an Opportunity to Respond to Allegations

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

254. After having been given approximately 24 hours to respond to the Report's contents, Dr. Behnke registered his objections in writing on July 2, 2015. His attorney, who had been prohibited from participating in a meeting with APA's acting CEO and assistant General Counsel regarding a personnel action against Dr. Behnke, voiced similar complaints on July 7, 2015. On July 8, 2015,

APA fired Dr. Behnke, who had worked for the APA for almost 15 years, without a notice period and without a severance payment, and without allowing him to meet with the Board before it acted.

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

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

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

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

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

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

D. Dr. Kaslow's Statements During and After the Investigation Bolstered the Report's False Conclusions

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

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

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

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

265. In order to reach other audiences, the videotape was repackaged and rebroadcast online under the same title. In all, the tape was repackaged at least four times and made available on multiple websites.

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

> … Kaslow said the APA would deliver the Hoffman report to the Senate armed services and intelligence committees and the inspectors general of the Pentagon and the CIA. But she stopped short of committing to referring it to the FBI for potential criminal inquiry, saying Hoffman drew a line short of that in internal discussions. "The issue with the FBI is something we're continuing to discuss," she said.
>
> Stephen Soldz, a longtime critic of the APA's involvement with torture, urged the APA to make such a referral in a meeting the APA held with its dissidents on 2 July in Washington. "We must refer this report and its findings to the FBI and we must cooperate fully in any ensuing investigation," Soldz urged, according to a presentation acquired by the Guardian.
>
> https://www.theguardian.com/us-news/2015/jul/11/cia-torture-doctors-psychologists-apa-prosecution

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

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

- August 11, 2015, radio interview with WNYC: Title: ***APA Votes to Get Out of the Torture Business.*** Quotes: "Small number of officials that were involved in this." "I think what this was, was a small group of people potentially involved or involved with something that was just horrific and wrong and that takes us away from our values on human rights." http://www.wnyc.org/story/apa-torture-scandal/
- July 21, 2015, radio interview with WBUR in Boston: Title: ***Report Reveals Close Ties Between Psychologists' Association and Pentagon.*** Quotes: "I think it was a small part of the APA that strayed from that mission. And much of APA was very firm and clear in saying that torture was absolutely unacceptable. So I think that unfortunately we didn't realize that

there was sort of an underbelly, a small underbelly, that was having, as you said, loose ethical guidelines that may have allowed for psychologists to engage in enhanced interrogations." "I think the report was clear and that the facts of the report speak for themselves on this matter." "In terms of the issue of Dr. Behnke being a scapegoat, I think that the report goes into exhaustive detail about Dr. Behnke's role and the facts really do speak for themselves." http://www.wbur.org/radioboston/2015/07/21/apa-pentagon

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

E. Defendants Made False Claims of Privilege and Work Product

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

> We and the APA agree as follows with regard to the application of privileges to this Representation. **First, except as provided in the sentences in parentheses that follow 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.)
>
> http://www.hoffmanreportapa.com/resources/Sidleyengagementletter.pdf

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

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

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

274. Second, Defendants claimed the sole objective of the "independent" review was to determine the truth, and their after-the-fact claims of giving legal advice are contrary to the facts. Hoffman was hired to find the truth, not to provide legal advice, and the Report states that he made no recommendations (Hoffman Report, p. 72). The engagement letter's *pro forma* assertion that Hoffman was engaged to provide legal advice is not enough to transform his fact-finding work conducted in the ordinary course into legal advice, in light of the facts of the investigation and the other representations made by Hoffman during its course and in the Report. Moreover, if he had been providing legal advice, as the DC Ethics Opinion referenced above makes very clear, he had an obligation to inform the Plaintiffs, who were constituent members of the corporation to which he was giving advice, that he was engaged for that purpose and that the investigation might be adverse to their interests.

275. Third, the Report relies upon Hoffman's assertions about the content of his team's interviews, assertions that have been contradicted by many of those interviewed. In certain places, the Report actually refers the reader to "See" an interview the notes of which he and the APA now

refuse to disclose (Hoffman Report, pp. 88, 89, 114, 223, 240, 349). Plaintiffs have a number of statements from witnesses who claim that their interviews were mischaracterized, distorted, or too superficial to elicit relevant information.

276. By relying on witness statements and other documents that they withhold from the Plaintiffs, Defendants are engaged in a fundamentally unfair attempt to shield from the Plaintiffs and the public evidence that could directly contradict Hoffman's conclusions and that could allow the Plaintiffs to further demonstrate the requisite degree of Defendants' fault in publishing and republishing their false statements.

277. Moreover, those documents are not protected by the work-product doctrine. There was no threat of litigation, and no legal advice was expected or provided at all, much less in anticipation of litigation. Even if the doctrine applied, the protection has been waived: Hoffman relies heavily not only on assertions about what witnesses said, but also at times on his direct sharing of his impression of their credibility.

278. Finally, and most importantly, the Plaintiffs cannot adequately rebut Hoffman's claims without access to the documents.

F. Defendants Failed to Respond to Evidence of the Report's Falsity

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

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

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

282. On October 26, 2015, David Ogden, APA's outside counsel was specifically directed to material that undercut the majority of the Report's findings, including the facts outlined in the DoJ, Office of Professional Responsibility Report that chronicled the timing and substance of the OLC memoranda, including the relevant DoD legal guidance. (http://www.hoffmanreportapa.com/resources/RESPONSETODAVIDHOFFMAN1026.pdf at p. 5.) In his role as Deputy Attorney General of the United States from 2009 to 2010, Mr. Ogden was one of only a handful of people initially privy to the DoJ, Office of Professional Responsibility Report and the facts surrounding the timing and the issuance of the relevant memoranda. Mr. Ogden's knowledge of facts directly contradicting the Reports may be imputed to his client, APA.

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

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

285. In the former presidents' August 2016 meeting with current Board members, the current members made the following admissions:

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

286. Since the Report's publication, however, neither Hoffman nor the APA Board (led until the end of 2016 by Dr. McDaniel), one of the two non-recused member of the Special Committee, has taken any effective steps to correct its demonstrated factual distortions or to adequately address the Plaintiffs' objections. Hoffman's sole response has been the incomplete errata sheet issued on September 4, 2015, with the corrections incorporated into a revised Report published on the same day. Hoffman refuses to correct the Report's inaccurate portrayal of military policy despite having been given clear and direct evidence of his purposeful distortions. http://www.hoffmanreportapa.com/resources/RESPONSETODAVIDHOFFMAN1026.pdf

287. APA continues to display two versions of the Report prominently on its website, despite Board members' admission that it contains inaccuracies.

288. The Defendants' continued unwillingness to correct the Report's demonstrated falsehoods provides clear evidence of purposeful avoidance of the truth.

289. On January 30, 2017, at a meeting in Washington, DC, the new APA President, Dr. Antonio Puente, approached one of the leaders of APA's military psychology division, to which the three military Plaintiffs belong. Dr. Puente told the division leader that, if the division helped the Plaintiffs, he would see to it that the division suffered adverse consequences. At the same time, however, Dr. Puente admitted that the Board had gone overboard in its actions responding to the Report. He also stated that, after the Plaintiffs' litigation ends, the division would receive what he described as a favorable response to its detailed and thorough critique of the Hoffman Report, a

critique that clearly demonstrated the Report's falsehoods. http://www.hoffmanreportapa.com/resources/TF19%20Response%20to%20the%20Hoffman%20Report.pdf

G. The APA's Re-hiring of Hoffman Despite Conflicts

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

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

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

293. The APA has not responded to the letter publicly, and through early 2017 continued to assert that Hoffman would produce a "supplemental" report. It was due on June 8, 2016.

294. Despite the potential conflict the former Ethics Chairs identified, throughout 2016, her tenure as APA president, Dr. McDaniel continued to be one of only two APA Board members in charge of matters related to announcements concerning the Report and important Board deliberations about its contents. According to statements from APA Board members to third parties, the full APA Board was not been informed for many months as to the status of discussions

with the Plaintiffs. Recently, members have been falsely told that APA is working diligently to attempt to settle the matter with Plaintiffs.

IX. ONGOING DAMAGES TO PLAINTIFFS

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

296. The damage has continued to this day. Dr. Trudy Bond, one of the Accusers, has repeatedly submitted information to the United Nations Committee Against Torture, mentioning Col. James specifically in those documents and encouraging prosecutions. On June 27, 2016, Dr. Bond, relying on the Hoffman Report, again asked the Committee to move forward with the prosecutions.

297. The Report has also been submitted in support of war crimes prosecutions to the International Criminal Court.

298. Despite knowing about the Report's falsehoods and about the ongoing damage they have been causing, Defendants have repeatedly refused to take any action to repair or mitigate the damage to Plaintiffs. They have turned a blind eye as the damage continues.

299. APA has continued to allow members of its governing body and Drs. Stephen Soldz and Reisner to make false and defamatory statements about military psychologists in general and Plaintiffs specifically, statements that go beyond even the false findings in the Reports, despite those statements being repeatedly brought to the attention of APA's counsel. Conversely, APA has continued to exclude governance members from participating in Council activities if they supported Plaintiffs or provided affidavits of publicly available activities or admissions that counter APA's false narrative.

X. COUNTS 1-12

COUNT 1

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

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

301. On June 27, 2015, Hoffman and Sidley published a draft of the Hoffman Report to the Special Committee and the Board of Directors of the APA without the exhibits. The Report was subsequently republished to additional parties as detailed below.

302. On information and belief, electronic access to the Report was provided to Risen on or about July 2, 2015. A word file of the Report was subsequently provided to *The New York Times* during the next week. A copy of the Report was made available online on their website here: http://www.nytimes.com/interactive/2015/07/09/us/document-report.html

303. The Report contained the false and defamatory statements concerning the Plaintiffs.

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

305. These statements are false.

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

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

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

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

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

311. Hoffman's statements were made in the course and scope of his employment by Sidley. Hoffman was the only partner of Sidley referenced in public materials about the Report, and he signed the cover letters publishing the Report on each occasion where a letter was included with the Report.

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

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

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

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

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

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

318. Hoffman and Sidley's false statements have injured the Plaintiffs in their trade or professions; have damaged their careers and reputations; in some cases have prevented the

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

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

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

COUNT 2

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

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

322. On June 28, 2015, within 24 hours of receiving a draft of the 542-page Hoffman Report, the Special Committee and Board republished a "draft" of the Report to Drs. Soldz and Reisner.

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

324. On information and belief, that "draft" Report is the document leaked to *The New York Times*. A copy of the Report was made available online here:

http://www.nytimes.com/interactive/2015/07/09/us/document-report.html

325. The Report contained the false and defamatory statements concerning the Plaintiffs.

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

327. These statements are false.

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

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

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

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

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

333. The republishing of the Report by the members of the Special Committee and Board to Drs. Reisner and Soldz was carried out by those individuals in their official capacities as members of the Special Committee and APA Board.

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

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

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

337. The Defendants' conduct amounts to actual malice.

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

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

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

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

COUNT 3

(Defamation *Per Se* for the False and Misleading Statements in the Hoffman Report Republished on or about July 2, 2015, and July 7, 2015, to James Risen and *The New York Times*)
All Plaintiffs against All Defendants

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

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

344. On information and belief, electronic access to a true and correct copy of the Report was given to James Risen of *The New York Times* on or about July 2, 2015.

345. A word file of the Report was given to James Risen of *The New York Times* on or about July 7, 2015. That copy of the Report was made available online here: http://www.nytimes.com/interactive/2015/07/09/us/document-report.html

346. The Report contained the false and defamatory statements concerning the Plaintiffs.

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

348. These statements are false.

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

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

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

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

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

354. Each of the Defendants when acting were doing so within their capacities on behalf of their respective organization, company or firm.

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

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

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

358. The Defendants purposefully avoided the truth, and purposely avoided interviewing sources and following fundamental investigative practices in order to avoid the truth.

359. The Defendants' conduct amounts to actual malice.

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

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

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

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

COUNT 4

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

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

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

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

367. The Report contained the false and defamatory statements concerning the Plaintiffs.

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

369. These statements are false.

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

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

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

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

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

375. Hoffman's statements were made in the course and scope of his employment by Sidley. Hoffman was the only partner of Sidley referenced in public materials about the Report, and he signed the cover letter publishing the Report that was included with the Report.

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

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

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

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

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

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

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

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

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

COUNT 5

(Defamation *Per Se* for the False and Misleading Statements Republished by the APA to the APA Council on July 8, 2015)
All Plaintiffs against All Defendants

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

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

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

388. The Report contained the false and defamatory statements concerning the Plaintiffs.

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

390. These statements are false.

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

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

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

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

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

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

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

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

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

400. The Defendants' conduct amounts to actual malice.

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

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

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

COUNT 6

(Defamation *Per Se* for the False and Misleading Statements in the Report Republished on July 10, 2015, by James Risen and the *New York Times* to the World)
All Plaintiffs against All Defendants

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

405. The Defendants published and republished both a draft of the Hoffman Report and the final version of the Report a combined total of five times, prior to the publication by *The New York Times* of a copy of the full Report. By publishing and republishing those two versions of the Report to multiple parties, the Defendants excessively and recklessly distributed the Report, foreseeably causing harm to Plaintiffs' reputations.

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

407. The Report contained the false and defamatory statements concerning the Plaintiffs.

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

409. These statements are false.

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

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

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

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

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

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

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

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

418. Defendants' conduct amounts to actual malice.

419. That republication was reasonably foreseeable, because the engagement letter among the Defendants provided that the Report would become public without modification.

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

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

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

COUNT 7

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

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

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

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

426. The Report contained the false and defamatory statements concerning the Plaintiffs.

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

428. These statements are false.

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

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

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

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

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

434. Each of the Defendants when acting were doing so within their capacities on behalf of their respective organization, company or firm.

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

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

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

438. The Defendants' conduct amounts to actual malice.

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

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

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

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

COUNT 8

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

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

444. Dr. Kaslow made a number of false and defamatory statements on behalf of the APA in her capacity as the head of the Special Committee.

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

446. The APA's disparate treatment of Dr. Behnke, including its wrongful discharge of him and its defamatory statements, has caused, and continues to cause, grave personal, financial and emotional damage.

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

448. These statements are false.

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

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

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

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

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

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

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

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

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

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

458. The APA is liable to the Plaintiffs for compensatory damages arising out of their defamation of Plaintiffs.

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

COUNT 9

(Defamation *Per Se* for the False and Misleading Statements in the Hoffman Report published by Hoffman and Sidley on September 4, 2015 to the Special Committee and Board of APA)
All Plaintiffs against Defendants Hoffman and Sidley

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

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

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

463. The Report contained the false and defamatory statements concerning the Plaintiffs.

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

465. These statements are false.

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

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

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

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

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

471. Hoffman's statements were made in the course and scope of his employment by Sidley. Hoffman was the only partner of Sidley referenced in public materials about the Report, and he signed the cover letters publishing the Report on each occasion where a letter was included with the Report.

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

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

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

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

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

477. On June 27, 2016, Dr. Trudy Bond, a psychologist who had repeatedly filed multiple ethics complaints against Col. James, used a copy of the September 4, 2015, Report to encourage the United Nations Committee Against Torture to seek prosecution of the persons named in the Report for authorizing, acquiescing, or consenting to acts of torture. This action was reasonably foreseeable because she had previously filed multiple complaints with numerous agencies, including the APA (as stated in the Report), seeking censure for Col. James' conduct. Hoffman and Sidley interviewed Dr. Bond during the investigation but intentionally omitted that information from the Report.

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

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

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

COUNT 10

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

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

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

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

484. The Report contained the false and defamatory statements concerning the Plaintiffs.

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

486. These statements are false.

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

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

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

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

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

492. Each of the Defendants when acting were doing so within their capacities on behalf of their respective organization, company or firm.

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

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

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

496. The Defendants' conduct amounts to actual malice.

497. On June 27, 2016, Dr. Trudy Bond, the psychologist who had repeatedly filed multiple ethics complaints against Col. James used a copy of the September 4, 2015 Report to encourage the United Nations Committee Against Torture, to seek prosecution of the persons named in the

Report for authorizing, acquiescing, or consenting in any way to acts of torture. This action was reasonably foreseeable because she had previously filed multiple complaints with numerous agencies, including the APA (as outlined in the Report), seeking censure for Plaintiffs James' conduct. Hoffman and Sidley interviewed Dr. Bond during the investigation but intentionally omitted that information from the Report.

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

499. Defendants are liable to Plaintiffs for compensatory damages arising out of their defamation of Plaintiffs.

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

COUNT 11

(Defamation by Implication or Libel Per Quod)
All Plaintiffs against Hoffman and Sidley

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

502. Plaintiffs plead in the alternative that Hoffman and Sidley's statements described herein constitute defamation by implication for the following reasons:

503. By the use of the terms "joint venture," "joint enterprise," "deliberate avoidance," and "collusion," Hoffman and Sidley deliberately or intentionally implied that the Plaintiffs had engaged in criminal conduct.

504. At various points throughout the Report, Hoffman simply repeats the false and defamatory statements of the Accusers without supplying contradictory information in his possession and thus

allows the reader to infer a false and defamatory meaning from one-sided narrative. See, e.g. Hoffman Report, p. 4: "Some label APA's actions "criminal,"…with a request they be prosecuted."

505. Hoffman omits from the Report the details of the crucial military history in late 2003, 2004 and early 2005 and the development and implementation of strict and clear "DoD interrogation guidelines." That omission causes the reader to conclude that the out of date guidelines and OLC opinions presented by Hoffman were still in effect and allowed for abusive interrogations. Had Hoffman and Sidley included the facts he intentionally omits from the Report, each of his primary conclusions, and a majority of his false statements would have been directly and substantially contradicted by those intentionally omitted facts. A reader would have been able to reach non-defamatory conclusions of and concerning the Plaintiffs.

506. Despite acknowledging to the APA that he found no criminal activity, Hoffman makes no such statement in the Report.

507. Hoffman knew that the Accusers had submitted much of the information he relied on to the SASC and FBI, but neither of those organizations had found any actionable conduct. He omits those facts from the Report and such deliberate and intentional omission damaged Plaintiffs' reputations.

508. Hoffman knew the Accusers wished to overcome what they perceived to be a statute of limitations problem in order to resubmit the Report to the FBI to support criminal prosecutions against the Plaintiffs.

509. It was reasonably foreseeable that the Accusers would use the Report to renew their calls for criminal prosecution, and that the media would infer the possibility of criminal liability.

510. On June 27, 2016, Dr. Trudy Bond, a psychologist who had repeatedly filed multiple ethics complaints against Col. James, used the revised Report to encourage the United Nations Committee Against Torture to seek prosecution of those named in it. This action was reasonably foreseeable given her previous persistence in filing complaints against Col. James. Hoffman and Sidley interviewed Dr. Bond during the investigation but omitted that information from the Report.

511. All publications of the Hoffman Report contained the false and defamatory language implying criminal conduct and the deliberate (or intentional) omission of the facts damaged Plaintiffs' reputations.

512. True and correct copies of the Reports are available online here: http://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf and here: http://www.apa.org/independent-review/revised-report.pdf

513. Those Reports contained the false and defamatory statements concerning the Plaintiffs.

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

515. These statements are false.

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

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

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

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

520. The statements are defamatory because they accuse the Plaintiffs of unlawful conduct.

521. The statements are defamatory because they impugn the Plaintiffs' fitness for and conduct in their professions.

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

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

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

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

526. The Plaintiffs have suffered lost employment, emotional distress, and severe personal and professional humiliation and injury to their reputations in the community as a direct and proximate result of Hoffman and Sidley's false and defamatory statements.

527. Col. James has experienced an exacerbation of his post-traumatic stress disorder symptoms as a direct and proximate result of the false and defamatory statements made by Defendants.

COUNT 12

(False Light Invasion of Privacy)
Plaintiffs Behnke, Dunivin, and James against All Defendants

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

529. The defamatory statements alleged herein constitute false light invasion of privacy in that they have subjected Plaintiffs Behnke, Dunivin, and James to unreasonable and highly

objectionable publicity by falsely attributing to them characteristics, conduct or beliefs that place them in a false light before the public.

530. The false light in which the Plaintiffs Behnke, Dunivin, and James have been placed would be highly offensive to the reasonable person.

531. Defendants had knowledge of the falsity of the defamatory statements or acted in reckless disregard as to their falsity and the false light in which the Plaintiffs would therefore be placed.

532. Plaintiffs Behnke, Dunivin, and James have been damaged by the Defendants' publication of the defamatory statements because, among other accusations, they impute criminal conduct and unethical practice regarding their personal and professional character as psychologists.

533. Publication of the defamatory statements has caused and will continue to cause Plaintiffs Behnke, Dunivin, and James and members of their families to suffer great mental anguish and emotional distress.

534. Publication of the defamatory statements has caused Plaintiffs Behnke, Dunivin, and James to suffer severe personal and professional humiliation and injury to their reputations in the community – reputations they have built over many years.

535. Consequently, Plaintiffs Behnke, Dunivin, and James' standings in the community have been damaged by publication of the defamatory statements.

X. REQUEST FOR RELIEF ON COUNTS 1-12

WHEREFORE, Plaintiffs demand judgment jointly and severally against APA, Hoffman and Sidley for (1) compensatory damages in an amount to be proven at trial; (2) punitive damages in an amount to be proven at trial; (3) all costs, interest, attorneys' fees, and disbursements to the highest extent permitted by law; and (4) such other and further relief as this Court may deem just and proper.

Dated: August 28, 2017

Respectfully submitted,

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EXHIBIT A
List of False Statements (Exact Quotations) from Three Versions of the Report

Statement Number	Page NYT Version	Page 7/2/2015 Version	Page 9/4/15 Version	False Statement from the Hoffman Report (HR) Per Se Defamatory Statements in Bold
1	1	1	1	**APA made these ethics policy decisions as a substantial result of influence from and close relationships with the U.S. Department of Defense (DoD), the Central Intelligence Agency (CIA), and other government entities, which purportedly wanted permissive ethical guidelines so that their psychologists could continue to participate in harsh and abusive interrogation techniques being used by these agencies after the September 11 attacks on the United States. Critics pointed to alleged procedural irregularities and suspicious outcomes regarding APA's ethics policy decisions and said they resulted from this improper coordination, collaboration, or collusion. Some said APA's decisions were intentionally made to assist the government in engaging in these "enhanced interrogation techniques." Some said they were intentionally made to help the government commit torture.** Allegations along these lines had been most recently and most prominently made in a book by *New York Times* reporter James Risen, published in October 2014, based in part on new evidence he had obtained.
2	2 & 4	2 & 4	2 & 4	**Among other things, the critics have charged that the policy set few meaningful limits on the participation of psychologists in interrogations, despite widespread concerns about abusive conduct in such interrogations, and must therefore have been closely coordinated with the government (perhaps principally the Defense Department and the CIA) and motivated by a desire to curry favor with the government .(p.2)….They describe APA's apparent motive and intent in different ways, from a desire to curry favor with the government to an intent to help government officials engage in torture. (p.4)**
3	3-4	3-4	3-4	This information establishes that in the months following 9/11, the President authorized the CIA to engage in "enhanced interrogation techniques." These techniques were not methods of asking questions of a detainee, but were rather ways of attempting to break the will of uncooperative detainees so that they would answer the interrogators' questions and provide intelligence information. These "techniques" included waterboarding, harsh physical actions such as "walling," forced "stress positions," and the intentional deprivation of necessities, such as sleep and a temperature-controlled environment. **The Secretary of Defense authorized the Defense Department to**

				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.** [OMITS HERE THAT THESE MEMOS WERE WITHDRAWN AND OTHER CRUCIAL POLICY DEVELOPMENTS IN LATE 2003, 2004 AND EARLY 2005 SO READER USES THESE DEFAMATORY STATEMENTS TO CONCLUDE "EXISTING" DOD INTERROGATION GUIDELINES ON P. 9 ALLOWED FOR ABUSE AND TORTURE IN JUNE 2005.] **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."
4	8	8	8	We are cognizant that our report and its findings cannot and will not resolve all the intense disputes on this issue; but it is not meant to. **We provided conclusions where the evidence allowed us to reach them, but otherwise we described the evidence thoroughly so as to present as many facts as we were able to discover. In this way, we attempted to stay true to our task to go where the evidence would lead us.** Sometimes it led us to answers, but sometimes it led us to more questions. As a result, our report and its findings will not be considered satisfying or sufficient to all who read it. But we are also confident that it represents conclusions about what happened, and why, that are based on and squarely supported by the extensive evidence we have reviewed.
5	9	9	9	**… key APA officials, principally the APA Ethics Director joined and supported at times by other APA officials, colluded with important DoD officials to have APA issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines.**
6	9	9	9	**We also found that in the three years following the adoption of the 2005 PENS Task Force report as APA policy, APA officials engaged in a pattern of secret collaboration with DoD officials to defeat efforts by the APA Council of Representatives to introduce and pass resolutions that would have definitively prohibited psychologists from participating in interrogations at Guantanamo Bay and other U.S. detention centers abroad.**
7	9	9	9	**We did not find evidence to support the conclusion that APA officials actually knew about the existence of an interrogation program using "enhanced interrogation techniques." But we did find evidence that during the time that APA officials were colluding with DoD officials to create and maintain loose APA ethics policies that did not significantly constrain DoD, APA officials had strong reasons to suspect that abusive interrogations had occurred. In addition, APA officials intentionally and strategically avoided taking steps to learn information to confirm those suspicions.**
8	9	9	9	**[I]n colluding with DoD officials, APA officials acted (i) to support the implementation by DoD of the interrogation techniques that DoD wanted to implement without substantial constraints from APA; and (ii) with knowledge that there likely had been abusive interrogation techniques used and that there remained a substantial risk, that without strict constraints, such abusive interrogation techniques would continue; and (iii) with substantial**

				indifference to the actual facts regarding the potential for ongoing abusive interrogations techniques.
9	9-10	9-10	9-10	**…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.**
10	9&10	9&10	9&10	**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 (p.9)….** **…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. (p.10)**
11	10	10	10	**…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.**
12	10	10	10	Premise to false statement below: 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.**
13	10-11	10-11	10-11	**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 [sic] was married to one of the military's lead psychologists who supported interrogations at Guantanamo Bay— became involved in important ways in the development of both the task force itself and the ethical guidelines it issued.
14	11	11	11	**The evidence supports the conclusion that APA officials colluded with DoD officials to, at the least, adopt and maintain APA ethics policies that were not more restrictive than the guidelines that key DoD officials wanted, and that were as closely aligned as possible with DoD policies, guidelines, practices, or preferences, as articulated to APA by these DoD officials.**
15	11	11	11	**Notably, APA officials made their decisions based on these motives, and in collaboration with DoD officials, without serious regard for the concerns raised that harsh and abusive techniques were occurring, and that they might occur in the future. APA chose its ethics policy based on its goals of helping DoD, managing its PR, and maximizing the growth of the profession. APA simply took the word of DoD officials with whom it was trying to curry favor that no such abuse was occurring, and that future DoD policies and training would ensure that no such abuse would occur. APA officials did so even in the face of clear and strong indications that such abuse had in fact occurred (and APA did not even inquire with CIA officials on the topic, despite public allegations that the CIA had engaged in abusive interrogation techniques). Based on strategic goals, APA intentionally decided not to make inquires [sic] into or express concern regarding abuses that were occurring, thus effectively hiding its head in the sand.**
16	11	11	11	**APA remained deliberately ignorant even in light of obvious countervailing concerns that counseled in favor of crafting clear policies.... Being involved in the intentional harming of detainees in a manner that would never be justified in the U.S. criminal justice system could do lasting damage to the integrity and reputation of psychology, a profession that purports to "do no harm." And engaging in harsh interrogation techniques is inconsistent with our fundamental values as a nation and harms our national security and influence in the world. These countervailing concerns were simply not considered or were highly subordinated to APA's strategic goals.**
17	11-12	11-12	11-12	**…key APA officials were operating in close, confidential coordination with key Defense Department officials to set up a task force and produce an outcome that would please DoD, and to produce ethical guidelines that were the same as, or not more restrictive than, the DoD guidelines for interrogation activities.… guidance (which used high-level concepts and did not prohibit techniques such as stress positions and sleep deprivation)….**

False Statements

18	12	12	12	**… 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.**
19	12	12	12	**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.**
20	12	12	12	**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.**
21	12	12	12	**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.**
22	13	13	13	**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.**
23	13	13	13	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.**
24	13-14	13-14	13-14	**Newman had an obvious conflict of interest, since his wife, Debra Dunivin, was highly interested in the outcome of this policy decision by APA and was one of the DoD psychologists who would be most affected, positively or negatively, by the ethical position about which APA was supposed to be deliberating. Newman owed a duty of loyalty to APA, which was in the midst of determining its ethical position on this critical issue. In doing so, APA needed to determine how to balance at least two important values: (i) the importance of psychologists assisting the government in getting accurate intelligence information about potential future attacks in order to protect the public; and (ii) the importance of psychologists not intentionally doing physical or psychological harm to individuals, perhaps especially in the situation in which the individual is in custody and is outside the protections of the criminal justice system. In determining its position, APA also needed to balance the views and positions of military and national security psychologists with the views and positions of those outside the military, and national security systems.**
25	14	14	14	**Because of Dunivin's obvious and strong interest and bias on these points, Newman had a classic conflict of interest. It was therefore incumbent upon him and APA to keep him out of the discussions and deliberations on this topic, and to disclose the conflict. In fact, the opposite occurred. No disclosure was made. Newman and Dunivin were included at many of the key points of the process, including the task force selection process and the task force deliberations; and both Newman and Dunivin inserted themselves and influenced the process and outcome in important ways. The various APA officials who were aware of the conflict and of all or some of Newman's and Dunivin's involvement—including principally Ethics Director Behnke, Deputy CEO Michael Honaker, APA President Ron Levant, and APA President-Elect Gerald Koocher, and also including to a lesser extent CEO Norman Anderson and General Counsel Nathalie Gilfoyle—took no steps to disclose or resolve the conflict.**
26	14	14	14	**The very substantial benefits APA obtained from DoD help explain APA's motive to please DoD…**
27	15	15	15	**The only solution that met all these goals was an outcome that allowed them to take a public position that pleased DoD, that did not significantly restrict an important group of psychologists, and**

				that avoided the difficult issue by keeping ethical guidelines at a high level.
28	15	15	15	**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.**
29	15-16	15-16	15-16	**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.**
30	16	16	16	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.
31	16	16	16	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.
32	18	18	18	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.
33	19	19	19	**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.**
34	21	21	21	**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).**
35	22	22	22	**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.
36	23	23	23	**As a result of this opposition the report rejected the use of or reference to international law, except to the extent it was incorporated into and consistent with U.S. law (as then defined, including through the DOJ memos).** Premise to *preceding* false statement - Some say that this conclusion shows the automatic impact that selecting a majority of DoD officials had on the task force's conclusion. But we think that it actually shows an even more intentional decision by the APA task force leaders and the DoD psychologists not to voluntarily commit psychology as a profession to a more robust set of ethical limitations. To do so would have shown leadership on the issue in a way that likely would have put APA at odds with DoD and the Administration. This may have caused a conflict that would have caused DoD to employ fewer psychologists or to write policy that subordinated the role of psychologists in interrogation and detention matters; and it may have prompted some DoD psychologists to leave APA membership (although Banks was already outside the APA).
37	25-26	25-26	26	**Adding to this dynamic was the participation of Koocher (on the first day) and Newman (throughout the meeting) who both spoke up forcefully in opposition to some of the key points of the non-DoD task force members. Banks and the DoD task force members had allies in Koocher, Newman, and Behnke. These APA officials agreed with the strategy of deferring to DoD's preferences and shared the goal of ensuring that the result of the meeting was a document that APA could use for positive PR purposes, which "calm[ed] the issues," avoided "rekindling the fires," and "clarified" and "simplified" the message that press accounts had "messed up." In their view, APA needed a clear, straightforward, public statement—without delay—that would solve the PR problem by portraying APA as a professional association that was taking action to set ethical guidelines rather than sitting on the sidelines, while keeping DoD psychologists as involved and unconstrained as possible.**
38	25-26 FN10	25-26 FN10	26 FN10	**Newman…told us that when he spoke up at the task force meeting, he was doing so with the clear purpose of trying to strongly influence the outcome.**
39	27	27	27	Premise to false statement below: Their theory is therefore that when psychologists are involved in an interrogation of a non-cooperative foreign detainee considered an "unlawful combatant" suspected of knowing important information, in an environment of intense pressure to produce actionable intelligence to protect the American public and in which the protections of the criminal justice system do not apply, psychologists should be playing two roles at the same time: (1) strict monitor of the interrogator, including promptly telling the interrogator (or telling his supervisor or commander) that he is going too far and

				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 naïve or intentionally disingenuous.**
40	28	28	28	Premise to false statement below: 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.**
41	30	30	30	**Similar, [sic] the PENS report refused to take a position on sleep deprivation despite being asked to do so.**
42	30	30	30	Premise to false statement below: 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.**
43	30	30	30	Premise to false statement below: 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.**
44	31	31	31	**Behnke and the APA's position on this issue therefore fits the pattern we saw in this investigation regarding PENS: positions were taken to please DoD based on confidential behind-the-scenes discussion and with an eye toward PR strategy.**
45	35	35	35	**The day of the *Times* story, Behnke drafted a response letter to the editor for Levant, which was published in the *Times* over Levant's name on July 7. In the letter, Levant claimed that the PENS report contained 'strict ethical guidelines' and then repeated some of the statements in the PENS report. From this point on, the media strategy was clear: emphasize that PENS said that psychologists could not engage in torture or cruel, inhuman or degrading treatment and claim PENS as a strong, pro-human-rights document. The principal purpose of PENS – to state that psychologists could in fact engage in interrogations consistent with the Ethics Code – was relegated to the sidelines, since any message seen as pro-DoD or permissive regarding the involvement of psychologists in interrogations was deemed bad media strategy in light of the intense and quick criticism of PENS. And of course, the principal motivation for Behnke and other APA officials in drafting PENS the way they did – pleasing DoD – remained fully concealed.**
46	36	36	36	Premise for false statement below: *B. Conclusions Regarding Secret Joint Venture Between APA and DoD Officials In Years After PENS*.... From the time of the PENS Task Force through at least the next three years, and through the end of the Bush Administration, Behnke led the extensive efforts by APA to defend the PENS report, to beat back criticisms on the issue through public statements and interviews, and to defeat efforts by the APA Council of Representatives to pass resolutions that would have definitively prohibited psychologists from participating in interrogations at Guantanamo Bay and other U.S. detention centers abroad. **In these efforts, Behnke effectively formed an undisclosed joint venture with Banks – sometimes joined by Dunivin and some of the DoD officials who had served on the PENS Task Force – to ensure that APA's statements and actions fell squarely in line with DoD's goals and preferences.**
47	36	36	36	Premise for false statement below: 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.**
48	37	37	37	**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.**
49	37 FN 22	37 FN 22	37 FN 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 [sic] evidence as DoD had Behnke's bank account information, presumably for direct deposits.**
50	39-40	39-40	39-40	***6. Obstruction on amending Ethics Code Standard 1.02 ....*****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.**
51	42	42	42	***7. Behind-the-scenes attempts to manipulate Council of Representatives actions in collusion with, and to remain aligned with DoD*** **…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….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.**
52	43	43	43	**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.
53	43	43	43	**Behnke engaged in his usual highly confidential communications with Banks (as well as Dunivin and James, and sometimes Gelles) in order to jointly determine what strategy or position was best for DoD, to seek pre-clearance of specific language, and to work on drafts of key documents together.**
54	48	48	48	**We know that some of the most significant critics of APA—who have had access to the emails of the RAND employee and CIA contractor (Scott Gerwehr, now deceased), which revealed frequent emails with Hubbard, Mumford, and Brandon—have posited that there must have been significant CIA influence regarding the outcome of the PENS Task Force in light of the substantial APA-CIA interactions shown in these emails and the highly suspect content of the PENS report. Without the same access we had to APA emails and documents showing extensive APA–DoD collaboration in and after the time of the PENS Task Force, this is an understandable inference, once one reaches the conclusion that the PENS Task Force could only be explained by some sort of governmental influence.**
55	55-56	55-56	55-56	**APA critics have alleged that the revisions to Standard 1.02 were the product of collusion with the government and had the effect of providing psychologists with a defense to torture. Specifically, they allege that the revised language in Standard 1.02 was developed with the government to permit psychologists' participation in interrogations and that it created a loophole that allowed psychologists to ignore their ethical obligations when these obligations conflicted with law, regulations, or other governing legal authority…. Given what we now know about the role some psychologists played in designing the enhanced interrogation program, the government's narrow definition of "torture" during the early years of the war on terror, and the way in which the military used psychologists as members of the behavioral science consultation teams at Guantanamo, the critics' argument is understandable.**
56	59	59	59	**Although the way in which the Ethics Office handled the James matter was technically permissible under the Rules, it demonstrates just how little effort the Ethics Office expends in its "investigation" of ethics complaints, the way in which the Ethics Offices stretches to construe the Rules in a way that is favorable to the accused, and how much the Ethics Office falls back on the rationale that standards in the Ethics Code were too vague to put psychologists on proper notice that certain interrogation**

				techniques were unethical—a rationale that was never shared with APA membership, or the general public.
57	60	60	60	**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.**
58	64	64	64	Premise to false statement below: 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. … **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.**
59	65	65	65	**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.**
60	65	65	65	Premise to the false statement below: 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 [sic] 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.
61	66	66	66	**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 [sic] 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.**

False Statements

62	66-67	66-67	66-67	**They therefore intentionally did [sic] make any effort to seek out more information that might corroborate or contradict the DoD assurances, strategically emphasizing that they were unlikely to get definitive details regarding potential interrogation abuses because the information would be classified.**
63	67	67	67	***"Deliberate avoidance"*…The approach that Behnke and Koocher (principally) recommended and that APA took was to deliberately avoid probing or inquiring into the widespread indications that had surfaced about harsh interrogation techniques being conducted by the CIA and DoD, even though they knew that psychologists were involved in CIA and DoD interrogations.**
64	67	67	67	**…if one compared the reports of harsh interrogation techniques to internationally- accepted definitions of torture, such as in the UN Convention Against Torture, rather than the bizarrely narrow definitions set out by the Justice Department in its memos, one would have been suspicious that some of the harsh interrogation techniques allegedly being conducted by the CIA and DoD constituted torture.**
65	67	67	67	**And given their contacts in the CIA and DoD, they may well have been able to learn some significant information that would have helped them assess the likelihood that the problem had occurred or was still occurring, and the risk that it would occur in the future.**
66	68	68	68	**A more accurate description is that the collusion was done to support the implementation by DoD of the interrogation techniques DoD wanted to implement, without substantial constraints from APA; with knowledge that there likely had been abusive interrogation techniques used and that there remained a substantial risk that without strict constraints, such abusive interrogation techniques would continue; and with substantial indifference to the actual facts regarding the potential for ongoing abusive interrogation techniques. The collusion relating to PENS and the post-PENS period—and the actions in protecting national security psychologists from disciplinary sanctio [sic]—reflects a clear intent to take actions in order to please and curry favor with DoD.**
67	68	68	68	**Further, the APA officials who led the PENS Task Force process pursued an ethics policy that intentionally sought to please DoD and not place specific ethical constraints on it beyond the general formulations DoD was comfortable with. The position was intentionally pursued to allow DoD to have discretion, subject to its own internal constraints, to determine what interrogation techniques to pursue under the individual circumstances.**
68	68	68	68	**These APA officials took this position while intentionally avoiding an effort to gather information about whether "enhanced" interrogation techniques were still occurring—although they would have had every reason to believe that stress positions and sleep deprivation (among others) were still being used at the time**

				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.
69	68	68	68	**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.**
70	70	70	70	**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.**
71	70	70	70	**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.**
72	71	71	71	**APA officials made such a decision in 2005. Their decision was to keep the limits on this behavior loose and high-level.**
73	71	71	71	**… 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.**
74	115	115	115	**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.
75	134	134	134	Premise to false statement below: However, it seems likely that Banks's condemnation of the techniques listed in the BSCT memo is less sweeping than it first appears. Banks explained that, in the SERE community, "physical pressure" is a term used in contrast to "psychological pressure." He added that, by using the term physical pressures, he was not approving of the use of psychological pressures.[463] However, his explanation seems odd, given that he identified the vast majority of the techniques identified in the BSCT memorandum as psychological pressures.[464] Banks went on to explain that it is more difficult to define when psychological pressures are impermissible because a psychologist would need to assess whether such a technique would be safe, legal, ethical, and effective. For example, Banks thought that the use of stress positions might or might not be permissible depending on whether it was safe under the circumstances.[465] **Therefore, Banks's email, when read in context, recommends against the use of only those few techniques that qualify as "physical pressures," and could have been read as an implicit endorsement of the majority of the techniques listed in the BSCT memo.**
76	153	153	153	On June 13, the *Washington Post* published copies of the memoranda. **Shortly after, Assistant Attorney General for the Office of Legal Counsel Jack Goldsmith, withdrew the 2002 and 2003 memoranda at issue.**
77	186	186	186	**Even at this early stage in APA's consideration of ethical issues in the national security context, the APA's internal discussions suggest that a primary issue of importance to APA was messaging and publicity. Though it is likely that APA staff were motivated by the goal of providing substantive guidance to military psychologists as well, their initial internal communications turned on the opportunity to take the lead on an issue that was drawing public attention. Throughout the APA's consideration over the next several years of the ethical issues raised by psychologists working in national security, considerations of messaging and public image would continue to dominate the conversation.**
78	191	191	191	Premise to false statement below: 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.**
79	192-193	192-193	192	**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.**
80	193-194	193-194	193	**This exchange demonstrates that APA staff was 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.**
81	196	196	196	**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-sponored [sic] 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.
82	209	209	209	**Behnke also articulated this strategy of avoiding the difficult questions by playing up the lack of perfect knowledge regarding both facts and "context" in a similar exchange with Farberman in the same group email…**
83	210	210	210	**Behnke's comment that "much thinking and development needs to take place" on the issues before ethical declarations could obviously be considered a fair substantive point. But APA ended up pursuing its course of action not based on additional "thinking and development" on ethics issues, but on strategic and PR considerations. If Behnke and APA had declined to issue ethical guidance or take an ethical position on the issue for (say) 12 months while they carefully studied issues of torture, interrogation practices, the role of health care practitioners in interrogations, and ethical issues relating to war and capture, and publicly explained that they were not issuing guidance because this study was taking place, that would be one thing. But APA did the opposite.**
84	210	210	210	**As set out below, in order both to address perceived PR concerns (that APA's silence on these issues was costly from a perception standpoint because it showed an absence of leadership and relevance), and to please the Defense Department (which wanted both timely action from APA that would reflect positively on DoD, and ethical guidelines that gave DoD substantial flexibility and were as close as possible to existing or draft DoD policies on the topic), APA issued a task force report that evaded the difficult questions that APA knew inevitably needed to be answered if psychologists were to be authorized to engage in interrogation activities. Simultaneous with its PENS report, APA claimed that (1) the report was not evasive but was in fact a clear, strong, pro-human rights statement against torture; (2) the report was evidence of APA acting as a "leader" on this issue; (3) the report provided "clear guidance" on this issue; and (4) it was unfair to label the report as evasive because (a) the issue was complicated (so they needed more time), (b) they needed more facts (even though the contemporaneous emails show they expected to never obtain meaningful facts because of the activity's classified nature), and the report should be seen as merely an "initial step" with the promise of a more detailed "casebook" (which never occurred).**
85	210	210	210	**But as set out below, the evidence shows that what explains the PENS report is a desire to please DoD by following its requests about how to proceed, and the desire to create a positive-sounding policy statement in a short time frame in order to respond to the pressure of negative press reports.**
86	215	215	215	**The conflict of interest on this issue resulting from Russ Newman, the head of the Practice Directorate, being married to Debra Dunivin, the lead Army BSCT psychologist at Guantanamo Bay,**

				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.
87	216 FN 934	216 FN 934	216 FN 934	**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.)**
88	219 FN 945	219 FN 945	219 FN 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.**
89	226	226	226	**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.**
90	227	227	227	**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]**
91	232	232	232	**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]**
92	240	240	240	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"),
93	242	242	242	**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.
94	243	243	243	Some APA officials and staff involved in the selection process claim that the ultimate breakdown between military and non-military members ignores the diversity within the DoD members of the task force. But there is no documented discussion in the first part of 2005 about the diversity of the DoD members. On the contrary, Behnke's handwritten notes indicate he grouped all of the DoD members together in his categorization of potential task force members.
95	243	243	243	These importantly-timed and confidential consultations with Banks and Dunivin appear to have been unique—we did not find evidence of APA having similar consultations with other individuals or constituencies. And they were highly influential.
96	243	243	243	Premise to false statement below: While some APA officials and staff involved in the selection process claim that the 6-4 majority did not matter because the eventual report was a "consensus document," the discussions in the first part of 2005 indicate an awareness and importance about members who could vote. **The consensus argument made today appears to be a post-hoc response to the critique about the composition of the task force and, as seen below, was not an argument raised at the time when this criticism first arose. In short, it would have been clear to everyone involved in early 2005 that selecting six voting, DoD members would be a dominant voting bloc within the task force, and would send a very strong positive message to DoD about APA's support.**
97	249	249	248	**Behnke's staunch handling of Moorehead-Slaughter's communications, coupled with Moorehead-Slaughter's lack of experience in national security issues, signal that Moorehead-Slaughter was used primarily as Behnke's agent during the PENS process.**
98	255 FN 1140	255 FN 1140	255 FN 1140	**Gravitz made a point of speaking to Behnke about the case and warning him that action against Gelles could harm national security. Behnke said that this had no effect on him, but he later took over the investigation from the assigned investigator (who strongly believed that Gelles had committed an ethical violation) in an unusual fashion during her temporary absence, causing the investigator to say that Behnke was manipulating the situation and taking advantage of her absence. After Behnke's involvement, the APA Ethics Committee voted unanimously to find no violation against Gelles.**
99	256	256	255	**Both Gravitz (who was there for days two and three of the meeting) and Newman spoke during the meeting in ways that supported the military/DoD psychologists. And, as discussed more below, Newman spoke forcefully about the importance of achieving APA's PR goals in a manner that was inconsistent with**

				the efforts by some of the non-DoD psychologists to push for stricter, more specific ethical guidelines.
100	256	256	256	**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.**
101	256	256	256	**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.**
102	258	258	258	**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.**
103	258	258	258	**Behnke also failed to add as observers Gregg Bloche and Jonathan Marks.**
104	261	261	261	**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.**
105	262	262	262	**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.
106	262	262	262	**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.
107	262-263	262-263	262	**The framework—the interrogation practices must be "safe, legal, ethical and effective"—was touted by Banks as a safeguard that would somehow ensure the humane treatment of detainees, when in reality it was (as discussed more later) a malleable, very high-level formula that easily allowed for subjective judgments to be made, including by people such as Banks who interpreted the formula to permit stress positions and sleep deprivation in some circumstances.**
108	263	263	263	**The meeting group was expanded in a careful way by adding two "observers" who were affiliated with the military and intelligence community. After several days of internal staff consultation and planning about how to add observers to the task force meeting, Behnke (through Moorehead-Slaughter) posted an email on the listserv inviting observer recommendations. In a coordinated fashion, APA Practice Directorate chief Russ Newman was added as an observer, despite Newman's conflict of interest because of his marriage to the Army's lead interrogation-support psychologist at Guantanamo. Michael Gelles subsequently recommended long-time CIA contractor/ psychologist Melvin Gravitz, and he was quickly "confirmed" by Moorehead-Slaughter. As discussed later, both Gravitz and Newman spoke during the meeting in ways that supported the military/DoD psychologists. And Newman spoke forcefully about the importance of achieving APA's PR goals in a manner that was inconsistent with the efforts by some of the non-DoD psychologists to push for stricter, more specific ethical guidelines.**
109	263-264	263-264	263	DoD members, however, did have differences of opinion on the best use of psychologists in these settings and whether psychologists could ever play a more direct role in interrogations. Several members appear to show an openness to using the Geneva Conventions as a guiding principle in outlining what psychologists can do in interrogation settings, though not necessarily as an ethical requirement as seen during the PENS meetings.
110	264	264	264	**Banks came into the task force with a concrete idea of what the task force report should say and should not say, as he and Dunivin had already drafted what would become Army (and therefore DoD) policy regarding the details and limitations on using psychologists in interrogations**, a confidential internal Army document that he distributed at the meeting.
111	265	265	264	**The evidence shows that at the meeting, Banks was "persistent" about his agenda, in the words of a DoD task force member. His agenda was, according to the same DoD task force member, to get APA's "good housekeeping" seal of approval for the involvement of psychologists in interrogations and to otherwise keep the status quo and to avoid limits or constraints beyond the ones the Army or DoD had in place or would decide to put in place in the future.**

False Statements

112	265	265	265	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.
113	266	266	265-266	**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 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").**
114	267	267	267	**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 [sic], 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.**
115	267	267	267	**Based on what we have seen in our investigation, we agree with the three contributing non-DoD task force members that it 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.**
116	268	268	268	**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.**

False Statements

117	271	271	271	**Newman led much of the task force discussions throughout the weekend. He often appeared to limit discussion on issues outside the perceived scope of the task force's mandate.**
118	274	274	274	**Ultimately, the PENS report included language that did not ethically bind psychologists by human rights standards, but did state that psychologists should review the Geneva Convention Relative to the Treatment of Prisoners of War and the U.N. Convention Against Torture since they were "fundamental to the treatment of individuals."**
119	274	274	274	**Wessells told Sidley that he pressed his point several times to add binding language from the Geneva Conventions and the U.N. Convention Against Torture but that it was a "complete loser" with the DoD people in the room. He noted that the DoD members were "passionate" about upholding the existing military regulations at the time, which permitted what he called " torture-lite."**
120	274-275	274-275	274	**While several DoD PENS members expressed an openness to abide by the Geneva Conventions or the U.N. Convention Against Torture, none appeared comfortable mandating that psychologists in detainee interrogation settings follow them at all times.**
121	277	277	277	**Some say that this observation about avoiding international law shows the automatic impact that selecting a majority of DoD officials had on the task force's conclusion. But we think that it actually shows an even more intentional decision by the APA task force leaders and the DoD psychologists not to voluntarily commit psychology as a profession to a more robust set of ethical limitations. To do so would have shown leadership on the issue in a way that likely would have put APA at odds with DoD and the Administration. This may have caused a conflict that would have resulted in DoD employing fewer psychologists or to writing policy that subordinated the role of psychologists in interrogation and detention matters; and it may have prompted some DoD psychologists to leave APA membership (although Banks was already outside of APA membership).**
122	277	277	277	**By going along with the "simply follow U.S. law" position of the DoD task force members, the APA task force leadership was making an explicit choice to follow what DoD wanted rather than making an independent decision about what were the appropriate ethical rules for psychologists in these situations (other than the decision that was best for DoD was best for APA).**
123	286-287	286-287	285-286	**So after one day of task force deliberations, Behnke drafted a document that would largely become the final PENS report's twelve statements….Behnke's draft also created a novel second limitation…**
124	288-289	288-289	288	**When asked why he removed the full paragraph instead of only the statement citing Standard 8.07 (or refine the "legitimate purpose test" another way), Behnke responded that he likely viewed the paragraph as one unit; once the research sentence was**

				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.
125	289	289	288	**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.**
126	293	293	293	Premise to false statement below: 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 limitiations were intentionally chosen by Behnke because they reflected what Banks wanted and, by extension, reflected what key parts of DoD wanted.**
127	296 FN 1313	296 FN 1313	295 FN 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.**
128	296	296	295-296	**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 therefore Behnke's and APA's) that the role of psychologists not be limited beyond whatever constraints DoD itself had in place.
129	298	298	297	**Instead, the PENS report banned participation in torture and CID but avoided defining these terms at a moment where precision and explanation were crucial for the psychologists working in these interrogation settings.**
130	299-300	299-300	299	**Behnke also claimed that prohibiting specific techniques at the time would have raised concerns that the group may unwittingly exclude a technique and, therefore, provided an explicit loophole for interrogators to exploit. It was not until March 2007, Behnke argued, when he attended an event at the Wright Institute with Professor Alfred McCoy, that he realized that there was a fairly consistent list of techniques that interrogators used consistently and he incorporated this thinking into what ultimately became the 2007 APA Resolution that banned the use of specific techniques.[1331] This assertion, too, is incorrect. Behnke and Banks engaged in a dialogue as early as October 2006 about adding specific techniques as part of a substitute motion in response to Neil Altman's moratorium resolution, discussed further in the next section of this report. What is more, Behnke's worry that a non-listed technique could be used had an easy resolution—to insert language that the list was not exhaustive and that the underlying principle was about not inflicting abuse or harm upon individuals.**
131	301	301	300	**In the end, the report was general enough that it gave the DoD the flexibility to make more specific calls on what was permissible despite troubling institutional pronouncements on what constituted torture and what protections detainees ought to receive.**
132	301	301	300	**Sidley separately posed to both Behnke and Banks whether interrogations involving certain kinds of stress positions would run afoul of the "safe, legal, ethical, and effective" analytical framework or the PENS report in general. Neither could provide a clear answer based on these two sources alone.[1336] Behnke struggled to respond to which types of stress positions, each with varying levels of pain to the detainee, would be considered "safe." His response shifted to the effectiveness point—technically an incorrect approach since a psychologist was supposed to have gone [sic] the four terms in order—where he noted that, even if a particular position was safe, it likely was not effective. When asked how he knew that, Behnke believed that studies about interrogations would dictate that rapport-building was the best way to interrogate a detainee.[1337] If this was true and others agreed, then the PENS report could have explicitly mentioned that rapport-building was the best way to handle detainee interrogations—it did not.**

False Statements

133	302	302	301	**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.**
134	303	303	302	**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 requrests [sic], the PENS report allowed this access.**
135	304	304	303	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.**
136	304	304	303	**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.**
137	304-305	304-305	304	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.
138	305	305	304	Premise to the false statement below: Both Behnke and Banks contended that the statement referred to all U.S. civil and criminal laws as well. So while slapping or waterboarding may have been permitted under certain OLC pronouncements at the time, it would violate assault provisions in the U.S. Code, the Uniform Code of Military Justice, or Army Regulation 190-8. **The report does not make this point immediately obvious, however.**
139	305	305	304	**The statement also makes reference to, at Wessells's behest, the Geneva Convention Relative to the Treatment of Prisoners of War and the U.N. Convention Against Torture. But as discussed earlier, these provisions are not made binding on psychologists in these detainee settings.**
140	307	307	306	**For instance, Banks's view was that some stress positions were "safe" and therefore might be properly used as interrogation techniques. (He cited the "push up" stress position to us as an example.) Similar (sic), the PENS report refused to take a position on sleep deprivation despite being asked to do so.**
141	307	307	306-307	**Whatever organizational or personality dynamic led to APA allowing him to play this remarkably expansive role, well beyond the expected duties of APA Ethics Director, the result was a highly permissive APA ethics policy based on strategy and PR, not ethics analysis.**
142	315	315	314	**Behnke separately emailed Koocher and Anton about Halpern's recommendation and again showed that his primary goal was to stay completely aligned with DoD. After citing to Statement Ten of the report on effectiveness, Behnke concluded, "which means that if a technique or method is not effective, PSYCHOLOGISTS SHOULD NOT BE DOING IT."[1411] Behnke then stated he was "concerned about making an absolute empirical statements," especially since the task force "may not have felt entirely comfortable" making such a "clear, blanket, statement."[1412] In other words, because at least some of the DoD members were not ready to agree that torture was effective (e.g., Lefever told the group that his experience with SERE was that waterboarding was often effective at getting U.S. soldiers in the program to reveal accurate information that was supposed to be secret),[1413] Behnke wanted to block this Board member's suggestion.**
143	318	318	318	**This key question was not addressed in the PENS report, despite two of the most influential participants' understanding its importance. As noted earlier, the draft language that referenced "psychological distress" was removed, as was a serious discussion about what kinds of interrogation techniques may be unethical. This exchange adds further support to the idea that Banks,**

				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.
144	320	320	320	Premise to false statement below: 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.**
145	321	321	320	**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.**
146	322	322	322	**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.**
147	323	323	323	**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.**
148	329	329	329	**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.
149	331	331	331	**Also on August 12, Behnke sent a response to the mid-July letter from the PHR regarding their concerns with the PENS report, but only after coordinating and pre-clearing the response with Banks.**
150	336	336	335-336	Premise to false statements below: The document then cited to the casebook project as an [sic] another reason to delay any finding from the Ethics Committee. And it further stated that there were "several provisions in the Ethics Code to sanction psychologists" who engaged in abusive actions, without ever citing any standards in the PENS Report (perhaps the document thought of Standard 3.04, but as discussed before, there is flexibility in how this standard is interpreted). These assurances of deeper analysis in to amending Standard 1.02, however, were hollow. **There is little evidence that Behnke or the Ethics Committee ever took concrete steps to fully address these concerns over the standard until the entire Ethics Code was revised by 2010.** **In fact, Behnke engaged in various delay tactics for years after to obstruct efforts to amend Standard 1.02, discussed in a later section of this report.**
151	340	340	340	**Behnke's discretion comment is revealing. It implies that he asked Banks to keep secret Behnke's practice of pre-clearing issues and statements with Banks (a practice that continued in the years ahead, as discussed in later sections of this report). The message shows an understanding that these kinds of missives to Banks were atypical compared to messages with others —that he was using Banks in a unique way different from other task force members. The joint venture relationship between Banks, a key DoD official, and Behnke is presented plainly here (and amplified more in subsequent years, as discussed below).**
152	341-342	341-342	341-342	**Ultimately, Behnke did virtually nothing to pursue a casebook for years, effectively abandoning an essential element of his (disingenuous) claim that APA's development of ethical guidance on the issue would be a multi-step process. Behnke made the argument to us during his interviews that a casebook was on hold because they lost the subject-matter experts from the PENS Task Force and because the Council began passing resolutions in 2006 that provided more specific guidance for psychologists.[1587] We do not think this is true, since as set out below, Behnke was the lead APA strategist in attempting to manipulate and water down Council resolutions to minimize the effect on DoD. The real reason**

				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.
153	342	342	342	**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.**
154	344	344	344	Premise to false statement below: 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.**
155	346	346	346	**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.**
156	353	353	353	**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.**
157	358-360	358-360	358-360	Premise to false statement below: 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.... DoD paid Behnke for these trainings, although Behnke said that the payments went to APA (less reimbursement to Behnke for travel expenses), and were used by the Ethics Office for educational purposes. **...And in fact, it appears that APA's Board was never made aware of his participation, his status as a DoD contractor, or these payments from DoD to APA.**
158	363	363	363	Premise to false statement below: This single exchange reveals clearly that Behnke viewed Banks as a partner in their joint enterprise of coordinating APA and DoD policy and messaging on interrogations. Behnke both shared a presumably private communication from a high-ranking APA governance member with DoD personnel, and relied on Banks, as an advisor in DoD, to assist him in crafting a mutually acceptable response. **...it is clear from the "Eyes Only" subject line that Behnke purposely concealed his consultation with Banks from Brehm and other APA governance members, keeping secret the strategy of close coordination he intended to pursue.**
159	364	364	364	Premise to false statement below: In May of 2006, the American Psychiatric Association ("ApA") released a position statement on psychiatrists' participation in the interrogation of detainees, concluding that "[n]o psychiatrist should participate directly in the interrogation of persons held in custody by military or civilian investigative or law enforcement authorities."[1701] In yet another instance in which Behnke showed that his primary goal in developing APA messaging was to support DoD's policy goals, Behnke and Kelly sent a description of the statement to Banks and asked if there was "anything on your end you can share in the way of a reaction or what it might mean for conducting business." Banks responded that he thought the ApA's position was "poorly informed on several issues" and "inaccurate in [its] depiction of several facts." Behnke encouraged the group to review the statement itself and then speak again.[1702] It is clear that Behnke was aware that the positions taken by professional associations, including APA, had a direct impact on DoD policy decisions, and that he was motivated to ensure that APA did nothing to interfere with DoD's preferred mode of "conducting business."
160	366	366	366	**It is clear from Behnke's broad outreach to his contacts in DoD that he was concerned about the public backlash to Winkenwerder's comments regarding DoD's preference for using**

				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.
161	366-367	366-367	366-367	Premise to false statement below: 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 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.**
162	368	368	368	**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.**
163	368	368	368	Premise to false statement below: 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.
164	370	370	370	**The points developed by Behnke and Farberman demonstrate that they were highly attuned to the defenses Banks and other military psychologists had been offering for years. Whether APA turned to DoD for assistance or, more rarely, DoD turned to APA, the evidence clearly shows that APA and DoD worked as partners to ensure that they presented a unified public message.**
165	371	371	371	Premise to false statement below: It is clear that during this period, Behnke saw himself, and APA, as teammates with Banks, Dunivin, and DoD. He continually turned to his partners in DoD to closely coordinate strategy and policy in direct opposition to peace and social justice critics, … **…and he shaped APA's message in a way that suited the military's needs.**
166	371-372	371-372	371-372	Premise to false statement below: *C. Manipulation of the August 2006 Council Meeting: June 2006 - August 2006*…. Having reached out to Banks and Dunivin for guidance, Behnke emailed Van Hoorn and Okorodudu on June 22, stating that the "climate may have changed," and suggesting that their original plan for expedited treatment of their resolution now made sense, such that the resolution would go before the Council in August.[1739] Behnke claimed in a later email to them that the "changing climate" referred to "the attention that the Council was giving to this issue and the Board's desire to ensure that Council has the opportunity to discuss this issue when it meets at Convention."[1740] But the emails leading up to this exchange show that, in fact…. **Behnke had become concerned that more aggressive action by Council—including a potential prohibition on psychologists being involved in interrogations at Guantanamo—was become increasingly likely, and that it was strategically important to provide a more moderate alternative that would keep DoD officials happy (by not requiring any change) while appearing sufficiently "pro human rights" so that peace psychologists would also be satisfied. As an additional step in pursuing this strategy, Behnke sought to co-opt the Division 48 proponents by adding representatives from the military psychology division, Division 19, to the team.**
167	374	374	374	**Wanting to maximize the appearance that this was purely a Division 48 resolution, and not one managed and watered down by him, Behnke suggested a response that acknowledged contact with APA staff, but falsely implied that the contact was merely procedural: "The Movers would like to move the Resolution forward as expeditiously as possible, and have asked staff to**

				indicate what mechanisms are available to get the Resolution before Council at the earliest date."1747
168	377	377	377	**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.**
169	377	377	377	**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.**
170	382	382	382	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.
171	384-385	384-385	384-385	Premise to false statement below: 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…. **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 focus was consistent with the post-hoc public relations strategy devised by Banks only days earlier.**
172	385& 386	385 & 386	385 & 386	Premise to false statement below: 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. (p.385) **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. (p.386)**
173	386	386	386	Premise to false statement below: 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.**
174	386	386	386	**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.
175	387	387	387	Premise to false statement below: The next day, Banks wrote to Behnke that he hoped the process had not been "too destructive," to which Behnke responded: "Morgan, you know the enormous respect I have for you and your work. Nothing could diminish that, nor my commitment to continue to support all of your efforts, and the efforts of the great men and women who protect our country and our freedoms."[1821] **This show of support is yet another example of the strong personal friendship between Behnke and Banks that served as a foundation for their joint efforts to shape APA and DoD policy in a mutually reinforcing manner.**
176	388	388	388	**The discussions demonstrate that Behnke was highly attuned to the way that APA's public message could affect military activities, and that he was motivated to ensure that APA did not hinder the military's mission in any way.**
177	389	389	389	**Behnke's discussion with Levine and comments to Levant, Koocher, and Banks demonstrate that he was becoming more defensive and paranoid regarding media criticisms of APA and military psychologists. From this point forward, he increasingly turned to his partners and friends in DoD to craft a unified response to critics and to ensure that the APA and military media strategies aligned in message and theme.**
178	391	391	391	**As Banks's flippant comment regarding safety demonstrates, DoD's "framing" rested on using public safety and the fear of future attacks as a public relations tool. His comments also demonstrate that he spoke not only on behalf of himself, but also as an authoritative voice on how to construe DoD policy. Indeed, it seems likely that Behnke viewed Banks as a critical touchstone in DoD, given Banks's connections to highly-ranked individuals in the medical and operational commands.**
179	392	392	392	**Banks's response shows the close collaboration and joint purpose between APA and DoD on the vital issue of psychologists' involvement in interrogations.**
180	393	393	393	**It is clear that Behnke and Banks were, by this point, acting as a true partnership: not only did Behnke lean on Banks for guidance, but Banks also requested advice and assistance from Behnke in drafting statements and talking points for DoD. Moreover, it is**

				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.
181	393	393	393	Premise to false statement below: 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.**
182	394	394	394	**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.**
183	394	394	394	**At this point, Behnke and Banks began to become more guarded in their conversations, instructing one another to destroy records of their communications.**
184	396	396	396	**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. 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.
185	400	400	400	The concept of listing and restricting specific interrogation techniques is something Behnke had staunchly resisted a year earlier during PENS. In a sharp turnaround, it appears Behnke became comfortable proposing and supporting a resolution prohibiting particular techniques only after the Army adopted a Field Manual restricting certain harsh techniques and Banks pre-cleared his proposed strategy.
186	402	402	402	Banks and Behnke worked together to ensure that the Ethics Committee did not take any positions that undermined the policies adopted by the military.
187	405	405	405	However, it is clear that Behnke ghostwrote a letter in direct opposition to the Altman resolution to pursue his own agenda.
188	424	424	424	Premise to false statement below: On August 13, Behnke emailed Banks the newest draft of the motion, with the message: "If you could look these over that would be great--it's the Board's motion, plus amendments."[2011] Later that day, Behnke sent Banks an email titled "How does this sound" with the following text: "...at detention facilities operated by the United States government where there are extra-judicial proceedings and where no due process of law is afforded..." Banks responded by asking Behnke the best number to reach him, stating "I just finished it, and have some thoughts."[2012] Sidley was not able to find any additional email communications on this point. **However, it is clear that Behnke once again turned to Banks, his trusted partner in DoD, for pre-approval of APA policy.**
189	426	426	426	It seems clear then that, regardless of whether it was publicly announced, James and Behnke, and some portion of Division 38 leadership coordinated prior to Convention to ensure that James would be able to speak as an official representative of Division 38.
190	428	428	428	Premise to false statement below: On January 9, 2008, Behnke consulted with Dunivin and Banks regarding APA's response to a resolution before the California Senate Business and Professions Committee. The Committee was considering significant action that would have deemed psychologists working in BSCT roles as in violation of their professional ethical responsibilities. **Perceiving this proposed action as a disastrous threat to the position that he had worked with DoD to defend for so many years, Behnke immediately turned to his partners in DoD to help craft a response he could use in lobbying on APA's behalf.**
191	429	429	429	Premise to two false statements below: On the same day, a SERE psychologist working with Banks sent three sets of documents to Behnke, including the DoD Directive and Instruction that Banks had referenced, and a number of other policies relating to BSCTs and

				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.**
192	429	429	429	**…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.**
193	429	429	429	**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…**
194	430	430	430	**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).**
195	431	431	431	Premise to false statement below: 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."[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.
196	432 & 433	432 & 433	432 & 433	Premise to false statements below: In the first few days after the Board directed the inclusion of pro and con statements in the circulation of the petition, APA staff rushed into action to both identify an author and shape the substance of the statement. Despite Anton's assurances that he would select the author of the con statement, it was Behnke who, on June 18, reached out to Joel Dvoskin to invite him to write the statement.2046 Although Sidley could not find any record of staff discussions regarding who to select, it appears likely that Dvoskin was chosen because he was viewed as an "incrementalist," based on an address he gave as President of Division 41.[2047] By June 20, Dvoskin had already prepared a draft con statement. After speaking with Dvoskin, Behnke became concerned that he would not present a forceful enough opposition to the petition. In an email to Honaker, Strassburger, Gilfoyle, Farberman, Garrison, and Anderson, Behnke raised a concern regarding the tone of Dvoskin's statement. **Although Behnke's explanation for sidelining Dvoskin's draft statement was based entirely on procedure, it was clear that his real concern was with the "conciliatory" tone and substance of the statement Dvoskin had prepared. Clearly, Dvoskin's endorsement of the "intent behind the petition" would have been unacceptable to Behnke's partners in DoD, who wanted to continue to use psychologists as BSCTs at Guantanamo and elsewhere. Therefore, Behnke conveniently fell back on the Board's instruction that Anton select the con statement writer.** **Had Behnke truly been concerned with the procedural niceties, he would not have asked Dvoskin to work on the statement prior to Board approval in the first place. Internal communications clearly indicate that Behnke regretted the selection he had made because Dvoskin would not provide a vigorous defense of the position.**
197	433	433	433	**Behnke had staked out with his partners in DoD, and that he turned to procedural considerations to provide cover for a second attempt at choosing an author who would strike the right tone in strongly opposing the petition.**
198	434	434	434	**As the Council member intuited, APA staff's handling of the pro and con statements was disingenuous all the way through.**
199	437	437	437	**Behnke's elaborate responses to the con authors' questions belie his earlier promise that the author could "write the statement in whatever manner he/she chooses." Instead, it is apparent that Behnke labored to craft the language himself, to the extent possible, all while studiously assuring that he had gone through the**

				motions of preserving neutrality, in the event that criticisms might later arise.
200	437	437	437	**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.**
201	442	442	442	**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.**
202	444	444	N/A	**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.**
203	446	446	445-446	Premise to false statement below: 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 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.**
204	446	446	445	**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.**
205	446	446	446	**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.**

False Statements

206	448-449 FN 2133	448-449 FN 2133	448 FN 2133	Premise to false statement below: James referenced a *New York Times* article that had recently been published and reported that the review of Guantanamo that President Obama requested had been completed and had concluded that Guantanamo "more than complies with United Nations Standards/guidelines." During his interview with Sidley, Behnke claimed that the term "unlawful" had not been of practical significance because at the time that Council acted, Obama had not yet declared Guantanamo to be lawful. Behnke interview (June 8, 2015). Factually, Behnke was incorrect: As James noted in his email, the *New York Times* reported two days before Council met that Guantanamo was in compliance with the Geneva Conventions. *See* William Glaberson, *Guantanamo Meets Geneva Rules, Pentagon Study Finds*, New York Times (Feb. 20, 2009), *available at* http://www.nytimes.com/2009/02/21/us/21gitmo.html?_r=0. Regardless, Behnke's explanation is disingenuous because, based on his email to Garrison only days before the Council meeting, he clearly understood that military psychologists would interpret the term "unlawful" as placing Guantanamo outside the scope of the report.
207	449	449	449	**Even at this late date [2/2009], as the political climate changed and the DoD's use of psychologists in interrogation roles became less critical, Behnke's "big picture" still focused on the bottom line needs of his partners in DoD.**
208	450	450	449	**Although demands for a revision to Standard 1.02 began immediately after the PENS Task Force issued its report, APA's clear strategy, devised by Behnke, was to delay taking any action to revise the Ethics Code for as long as possible. APA, through Behnke, consistently issued statements that made it appear as though he was giving serious consideration and deep thought to the proposed revisions, but it was not until late 2008, three years later, that the association began to seriously engage with APA members and Council representatives about adding the relevant modifying language.**
209	455	455	454	**Although Sidley has found no documentary evidence proving that Behnke influenced COLI's position, it seems likely that he swayed COLI to take the stance that it did. Behnke engaged in a pattern of using COLI, among other governance committees, to obstruct member-initiated actions that he opposed,[2159] recognizing that COLI as a body was generally risk-averse and staffed by individuals who complied with the APA agenda. Given COLI's generally protective attitude and the strong similarities between COLI's objections to the proposed revisions and those raised by the Ethics Committee in its initial response in September 2005, it seems extremely likely that Behnke influenced both Committees in their stances against the proposed Standard 1.02 revision.**
210	455-456	455-456	454-455	Premise to false statement below: In January 2007, Behnke responded to criticism from Steven Reisner regarding the slow pace of the revision, which Reisner understood had been directed by Council more

				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, 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. **… 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.**
211	455	455	455	**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.**
212	457	457	457	**Behnke's strategy to continuously suppress suggestions for revision was successful in delaying action on this issue for several years.**
213	458	458	457	**In early 2009, the Ethics Committee issued a call for comments from APA members and the public regarding suggested revisions to Standard 1.02. 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.**
214	461	461	460	**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.
215	465	465	464	**Thus, Behnke made education and consultation the primary focus of the Ethics Office; adjudication was relegated to a "tertiary focus."**
216	475	475	474	Nevertheless, there are some who believe that the Ethics Office does play a role in protecting the public by taking disciplinary action against psychologists who engage in unethical behavior. Former Board member Carter told Sidley that her understanding was that the Ethics Office was very much involved in "protecting the public."[2282] **Behnke did not share this view. During his interview, he told Sidley that the role of the Ethics Office is not protection of the public and that protection of the public is a function for state licensing boards.**
217	485	485	484	**The evidence shows that Behnke was reluctant to proceed with charges against Gelles and that he actively looked for ways to avoid sending the case to the full Ethics Committee. It is unclear what motivated Behnke, but the evidence suggests that he may have been influenced by a prominent APA member.**
218	522	522	521	**The complaint alleged that James was the "commander of the Guantanamo Behavioral Science Consultation Teams (BSCTs) from January 2003 to mid-May 2003, during a time when the International Committee of the Red Cross (ICRC) reported the most serious abuses at Guantanamo." Bond stated that under James's "command and supervision," psychologists from the military's SERE program were "instructed to apply their expertise in abusive interrogation techniques conducted by the DoD in Guantanamo." In the complaint, Bond also stated that she was "aware that Colonel James has denied the use of SERE techniques but the facts speak to his knowledge and military command of [BSCTs] who utilized SERE techniques."[2259]**
219	523	523	522	Sidley conducted an analysis of APA's finances to assess whether any payments to APA from relevant parts of the government may have influenced APA's actions relating to the PENS Task Force, revisions to APA's Ethics Code, or its positions on national security interrogations. This analysis began broadly by reviewing summary financial information, before conducting an in-depth analysis of areas of possible interest. As part of this analysis, Sidley collected financial records from APA and interviewed APA Finance Office personnel.

EXHIBIT B

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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.

1.4(c)

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

~~SECRET~~

6. (U) Mission Essential Tasks.

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

(1) (S)

(b)(1) [redacted]

(2) (S)

(b)(1) [redacted]

(a) (U//FOUO)

(b)(3) [redacted]

(b) (S)

(b)(1) [redacted]

(3) (S)

(b)(1) [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)

(b)(3) [redacted]

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)

EXHIBIT C

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

February 4, 2005

Honorable William J. Haynes II
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, D.C. 20101-1600

Re: Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (March 14, 2003) ("March 2003 Memorandum")

Dear Jim:

In December 2003, then-Assistant Attorney General Jack Goldsmith advised you that the March 2003 Memorandum was under review by this Office and should not be relied upon for any purpose. Assistant Attorney General Goldsmith specifically advised, however, that the 24 interrogation techniques approved by the Secretary of Defense for use with al Qaeda and Taliban detainees at Guantanamo Bay Naval Base were authorized for continued use as noted below. I understand that, since that time, the Department of Defense has not relied on the March 2003 Memorandum for any purpose. I also understand that, to the extent that the March 2003 Memorandum was relied on from March 2003 to December 2003, policies based on the substance of that Memorandum have been reviewed and, as appropriate, modified to exclude such reliance. This letter will confirm that this Office has formally withdrawn the March 2003 Memorandum.

The March 2003 Memorandum has been superseded by subsequent legal analyses. The attached Testimony of Patrick F. Philbin before the House Permanent Select Committee on Intelligence, July 14, 2004, reflects a determination by the Department of Justice that the 24 interrogation techniques approved by the Secretary of Defense mentioned above are lawful when used in accordance with the limitations and safeguards specified by the Secretary. This also accurately reflects Assistant Attorney General Goldsmith's oral advice in December 2003. In addition, as I have previously informed you, this Office has recently issued a revised interpretation of the federal criminal prohibition against torture, codified at 18 U.S.C. §§ 2340-2340A, which constitutes the authoritative opinion of this Office as to the requirements of that statute. See Memorandum for Deputy Attorney General James B. Comey from Daniel Levin,

Acting Assistant Attorney General, Office of Legal Counsel, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004) (copy attached).

Please let us know if we can be of further assistance.

Sincerely,

Daniel Levin
Acting Assistant Attorney General

Attachments

Department of Justice

STATEMENT

OF

PATRICK F. PHILBIN
ASSOCIATE DEPUTY ATTORNEY GENERAL

BEFORE THE

PERMANENT SELECT COMMITTEE ON INTELLIGENCE
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

TREATMENT OF DETAINEES IN THE GLOBAL WAR AGAINST TERRORISM

PRESENTED ON

JULY 14, 2004

TESTIMONY OF PATRICK F. PHILBIN
BEFORE THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE
JULY 14, 2004

Mr. Chairman, Ranking Member Harman, and Members of the Committee, it's a privilege to be here today as a representative of the Department of Justice to address the legal standards that govern treatment of detainees in the global war on terrorism.

Let me begin by describing the various statutes, treaties and constitutional provisions that are potentially relevant. Then I'll discuss the application of these legal standards, with particular reference to the 24 interrogation techniques approved by the Secretary of Defense for use with al Qaeda and Taliban detainees held at the Guantanamo Bay Naval Base. As I'll explain, each of these techniques is plainly lawful.

General Criminal Statutes

First, there are a number of general criminal statutes potentially relevant in cases of mistreatment of detained persons. These may include, for example, the general crimes of assault, maiming, and, in cases where a death has resulted, murder and manslaughter. These offenses are federal crimes when committed within the "special maritime and territorial jurisdiction of the United States," which includes Guantanamo in most cases.

Even in locations beyond the reach of the special maritime and territorial jurisdiction, conduct that would constitute a felony under these same criminal statutes can be prosecuted under the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261-3267, when committed by certain persons employed by or accompanying the Armed Forces, which includes employees and contractors of the Department of Defense and their dependents. In addition, of course, members of the Armed Forces are subject at all times to the Uniform Code of Military Justice, which applies everywhere. The UCMJ

also proscribes various potentially relevant offenses, including murder, manslaughter, maiming, assault, cruelty and maltreatment, and dereliction of duty. As you know, a number of military personnel are currently being prosecuted by the Defense Department under the UCMJ in connection with mistreatment of prisoners overseas.

Prohibitions on Torture

Second, let me turn to the treaty and statutory prohibitions on torture. The United States is a party to the U.N. Convention Against Torture, which prohibits official acts of torture and requires the United States to ensure that torture is a crime under U.S. laws when committed anywhere by a U.S. national or by persons who are present in territory under our jurisdiction and who are not extradited.

The Convention defines torture to mean the intentional infliction of "severe pain or suffering" by a person acting in an official capacity. The Senate attached the following understanding to its resolution of advice and consent to the Convention:

> The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30, at 36 (1990). This understanding is part of the United States instrument of ratification and thus controls the scope of U.S. obligations under the treaty. Pursuant to this understanding imposed by the Senate, the offense of torture requires

specific intent, and "severe . . . mental pain or suffering" for purposes of the Convention requires a specific intent to cause prolonged mental harm.

To carry out United States obligations under the Convention Against Torture, Congress enacted the federal torture statute, 18 U.S.C. §§ 2340-2340A, in which Congress defined the crime of torture as: "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." Congress further defined "severe mental pain and suffering" by incorporating the language that the Senate included in the understanding attached to the Convention. Thus, the prohibition on torture that Congress codified in the federal torture statute tracks precisely the prohibition in the Torture Convention, as defined by the U.S. understanding.

Congress also defined a limited territorial reach for the torture statute. Congress limited the prohibition to apply solely "outside the United States," which is defined in the statute to mean outside both the sovereign territory and the special maritime and territorial jurisdiction of the United States. Conduct that occurs within those areas is already generally subject to existing federal and state criminal statutes, which include those I have discussed earlier.

As I have noted, for most cases, the Guantanamo Bay Naval Base is within the special maritime and territorial jurisdiction. The precise interaction of the torture statute and the special maritime and territorial jurisdiction is complex, however, and I do not intend to parse the details here for three reasons. First, any mistreatment amounting to torture committed in Guantanamo would likely violate the UCMJ, if committed by a

member of the Armed Forces, or some other statute that applies within the special maritime and territorial jurisdiction. Second, the Convention Against Torture, which mirrors the torture statute in substance, forbids the United States from taking any official actions at Guantanamo that constitute torture. As the President has made clear, the United States stands by its obligations under the Torture Convention. Third, as explained below, none of the 24 interrogation techniques approved by the Defense Department for use in Guantanamo would even remotely constitute torture, nor would the use of these measures as approved violate other potentially applicable criminal statutes.

Laws of War

Next, I'll discuss the statutory and treaty provisions related to the laws of war. These include the War Crimes Act, 18 U.S.C. § 2441, and the related provisions of the Geneva Conventions. In the War Crimes Act, Congress made it a crime for U.S. nationals, including members of the Armed Forces, to engage in acts that constitute certain grave breaches of the Geneva Conventions and related treaties. Where these treaties do not apply or the alleged acts do not constitute a grave breach as defined by the Conventions, there can be no violation of the War Crimes Act.

The Geneva Conventions protect prisoners of war and many of the other detainees held in Iraq as a result of Operation Iraqi Freedom. Generally speaking, the Geneva Conventions require humane treatment of prisoners, and grave breaches of the Conventions include "wilful killing," "torture or inhuman treatment," and "wilfully causing great suffering or serious injury to body or health." The Department of Defense and the various branches of the Armed Forces have decades of experience with the

Geneva Conventions, including as they relate to the legal standards governing interrogations.

I will address more particularly the al Qaeda and Taliban detainees held at Guantanamo. By their express terms, the Geneva Conventions apply only to armed conflicts between signatory States or Powers that accept and apply the provisions of the Conventions. Al Qaeda is a global terrorist network that does not recognize or respect international law or the customs of war; it is not a State that is or could ever be a Party to the Geneva Conventions. Accordingly, the Geneva Conventions do not apply to members of al Qaeda. Afghanistan, however, is a Party to the Geneva Conventions, and in February 2002 the President determined that the Geneva Convention Relative to the Treatment of Prisoners of War (the Third Geneva Convention) applies to the conflict with the Taliban. The Third Geneva Convention, however, protects only captives who fulfill a number of well-defined requirements for "prisoner of war" status. The President conclusively determined that Taliban forces did not meet the qualifications necessary for "prisoner of war" status under the Third Geneva Convention. The only court to consider this issue, in the case of John Walker Lindh, upheld the President's determination that Taliban detainees do not qualify as prisoners of war under the Third Geneva Convention. *United States v. Lindh*, 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002).

Taliban fighters also do not have "protected person" status under the Geneva Convention Relative to the Treatment of Civilians in Time of War (the Fourth Geneva Convention). "Protected persons" under the Fourth Geneva Convention include certain persons detained by an occupying power in occupied territory and certain persons held by a party to the conflict within its own home territory. The Taliban detainees are neither.

Although the United States has undertaken military operations there, under well-settled legal authorities, the United States is not and has never been an occupying power in Afghanistan for purposes of the laws and customs of war. And Guantanamo is not part of the home territory of the United States.

In any event, the President has ordered that all prisoners held at Guantanamo, including the Taliban, be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions.

Constitutional Protections

Finally, I will address two constitutional provisions that could have potential relevance to the treatment of persons in detention—the Fifth and Eighth Amendments. The Supreme Court has held that the Fifth Amendment does not apply to aliens outside the United States. *See Johnson v. Eisentrager*, 339 U.S. 763, 783-85 (1950). Even if it did apply, however, the Due Process Clause of the Fifth Amendment, in its substantive, as opposed to procedural, aspects, protects against treatment that, in the words of the Supreme Court, "shocks the conscience," meaning (again in the words of the Court) "only the most egregious conduct" or "conduct intended to injure in some way unjustifiable by any government interest." *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 849 (1998).

The Eighth Amendment forbids cruel and unusual punishments. As the term "punishment" implies, the Cruel and Unusual Punishments Clause "was designed to protect those convicted of crimes," *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977), and has no application to the treatment of detainees where there "ha[s] been no formal

adjudication of guilt," *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983). *See Bell v. Wolfish*, 441 U.S. 520, 536 n.16 (1979). In any event, where the Eighth Amendment applies, its protections, too, are roughly comparable to those provided by the Fifth Amendment.

It's appropriate here to mention one aspect of the U.N. Convention Against Torture that I did not discuss earlier. Under Article 16 of the Torture Convention, the United States has agreed to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment." Fearing that this undefined phrase was vague and might be applied in unanticipated ways, the Senate included a reservation to Article 16 when it gave its advice and consent to ratification of the Convention. The Senate defined this phrase to mean only "the cruel, unusual and inhumane treatment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments" to the U.S. Constitution. S. Exec. Rep. No. 101-30, at 36. This reservation is part of the United States instrument of ratification. Thus, to the extent Article 16 may be relevant, it concerns only conduct that would violate these same Amendments.

Application of Legal Standards to Interrogation Practices

Let me now turn to the 24 specific interrogation techniques approved by the Secretary of Defense for military interrogations at Guantanamo. It is readily apparent that each of these techniques, when used according to the safeguards specified by the Secretary, is well within the legal standards I've just described.

Seventeen of the 24 techniques have long been approved for use by the U.S. military on those who have status as prisoners of war under the Geneva Conventions, and these techniques are included in the *Army Field Manual for Intelligence Interrogation*

(1992). The *Army Field Manual* reflects the military's historical practices toward the treatment of prisoners of war in compliance with all requirements of the Geneva Conventions and the UCMJ. Under that long-standing tradition, then, none of these 17 established interrogation techniques, properly used, is contrary to the legal standards and prohibitions discussed earlier.

That leaves seven techniques not already included in the *Army Field Manual.* The *Field Manual* itself expressly contemplates that additional interrogation techniques may be approved for use with prisoners. The seven additional techniques approved by the Secretary for Guantanamo are: (1) placing the detainee in a less comfortable setting, but without any "substantial change in environmental quality"; (2) altering his diet, for example by giving him military MREs, but without depriving him of food or water, harming him medically, or offending him culturally; (3) changing his environment to cause "moderate discomfort," for example by "adjusting the temperature or introducing an unpleasant smell," but with the significant caveat that the interrogator would have to remain with the detainee "at all times" and thus largely subject himself to the same conditions; (4) adjusting his sleep cycle, for example by requiring him to sleep days instead of nights, but without depriving him of sleep; (5) convincing him that he is being held by a country other than the United States; (6) physically isolating him from other detainees, but not for longer than 30 days; and (7) questioning him with a "Mutt and Jeff" team, where one interrogator asks questions in a harsh manner and the other is friendly. The last technique, the "Mutt and Jeff" or "good cop/bad cop" routine, is really just a combination of other techniques already included in the *Army Field Manual.*

The Secretary strictly limited the use of four of the techniques, including two that come from the *Army Field Manual* (supplying rewards/removing privileges and insulting the ego) and two of the additional seven techniques ("Mutt and Jeff" and isolation). None of these four techniques may be used with any detainee unless a determination is first made by a commanding officer that "military necessity requires use" of the technique with that particular detainee, and then not until notice is first given to the Secretary of Defense.

In authorizing these 24 interrogation techniques, the Secretary of Defense reiterated the President's stated policy "that US Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions." In addition, the Secretary specified that all of the approved techniques must be applied in accordance with General Safeguards, under which no technique could be used unless "there is a good basis to believe that the detainee possesses critical intelligence."

Moreover, the General Safeguards require that all interrogators must be "specifically trained for the technique(s)" used and must develop and follow a "specific interrogation plan," which must include "limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel." The Safeguards also require the interrogators to "take into account . . . factors such as . . . a detainee's emotional and physical strengths and weaknesses" and to proceed with a technique only if "the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination)." More generally, the Safeguards specify that the purpose of the interrogations is "to get the most information

from a detainee with the least intrusive method, always applied in a humane and lawful manner with sufficient oversight by trained investigators or interrogators."

The proper use of each of these 24 techniques, in accordance with the General Safeguards, is lawful under any relevant legal standard. None of them, as approved, would amount to a crime under the torture statute or any other potentially relevant criminal statute. And far from "shocking the conscience" or being "unjustifiable by any government interest" within the meaning of the Due Process Clause or Article 16 of the Torture Convention, they are justified by a valid government interest of the highest importance—the collection of critical intelligence potentially vital to the Nation. Finally, they are fully consistent with the historical standards of treatment of detainees followed by the U.S. military. For all these reasons, I have no hesitation in concluding that these interrogation techniques, when properly applied as authorized, are lawful.

That concludes my prepared remarks, Mr. Chairman, and I would be happy to respond to any questions the Committee may have.

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

December 30, 2004

MEMORANDUM FOR JAMES B. COMEY
DEPUTY ATTORNEY GENERAL

Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A

Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law, for example, 18 U.S.C. §§ 2340-2340A; international agreements, exemplified by the United Nations Convention Against Torture (the "CAT")[1]; customary international law[2]; centuries of Anglo-American law[3]; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.[4]

This Office interpreted the federal criminal prohibition against torture—codified at 18 U.S.C. §§ 2340-2340A—in *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002) ("August 2002 Memorandum"). The August 2002 Memorandum also addressed a number of issues beyond interpretation of those statutory provisions, including the President's Commander-in-Chief power, and various defenses that might be asserted to avoid potential liability under sections 2340-2340A. *See id.* at 31-46.

Questions have since been raised, both by this Office and by others, about the

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[1] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. *See also, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

[2] It has been suggested that the prohibition against torture has achieved the status of *jus cogens* (*i.e.*, a peremptory norm) under international law. *See, e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992); *Regina v. Bow Street Metro. Stipendiary Magistrate Ex Parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147, 198; *see also* Restatement (Third) of Foreign Relations Law of the United States § 702 reporters' note 5.

[3] *See generally* John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (1977).

[4] *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167 (July 5, 2004) ("Freedom from torture is an inalienable human right . . . ."); Statement on United Nations International Day in Support of Victims of Torture, 39 Weekly Comp. Pres. Doc. 824 (June 30, 2003) ("Torture anywhere is an affront to human dignity everywhere."); *see also Letter of Transmittal from President Ronald Reagan to the Senate* (May 20, 1988), *in Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Treaty Doc. No. 100-20, at iii (1988) ("Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today.").

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appropriateness and relevance of the non-statutory discussion in the August 2002 Memorandum, and also about various aspects of the statutory analysis, in particular the statement that "severe" pain under the statute was limited to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." *Id.* at 1.[5] We decided to withdraw the August 2002 Memorandum, a decision you announced in June 2004. At that time, you directed this Office to prepare a replacement memorandum. Because of the importance of—and public interest in—these issues, you asked that this memorandum be prepared in a form that could be released to the public so that interested parties could understand our analysis of the statute.

This memorandum supersedes the August 2002 Memorandum in its entirety.[6] Because the discussion in that memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture.[7]

We have also modified in some important respects our analysis of the legal standards applicable under 18 U.S.C. §§ 2340-2340A. For example, we disagree with statements in the August 2002 Memorandum limiting "severe" pain under the statute to "excruciating and agonizing" pain, *id.* at 19, or to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death," *id.* at 1. There are additional areas where we disagree with or modify the analysis in the August 2002 Memorandum, as identified in the discussion below.[8]

The Criminal Division of the Department of Justice has reviewed this memorandum and concurs in the analysis set forth below.

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[5] *See, e.g.*, Anthony Lewis, *Making Torture Legal*, N.Y. Rev. of Books, July 15, 2004; R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos*, Wash. Post, July 4, 2004, at A12; Kathleen Clark & Julie Mertus, *Torturing the Law; the Justice Department's Legal Contortions on Interrogation*, Wash. Post, June 20, 2004, at B3; Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L. Rev. 97 (2004).

[6] This memorandum necessarily discusses the prohibition against torture in sections 2340-2340A in somewhat abstract and general terms. In applying this criminal prohibition to particular circumstances, great care must be taken to avoid approving as lawful any conduct that might constitute torture. In addition, this memorandum does not address the many other sources of law that may apply, depending on the circumstances, to the detention or interrogation of detainees (for example, the Geneva Conventions; the Uniform Code of Military Justice, 10 U.S.C. § 801 et seq.; the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261-3267; and the War Crimes Act, 18 U.S.C. § 2441, among others). Any analysis of particular facts must, of course, ensure that the United States complies with all applicable legal obligations.

[7] *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167-68 (July 5, 2004) ("America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture . . . in all territory under our jurisdiction. . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.").

[8] While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.

I.

Section 2340A provides that "[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life."[9] Section 2340(1) defines "torture" as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."[10]

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[9] Section 2340A provides in full:

> (a) Offense.—Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.
>
> (b) Jurisdiction.—There is jurisdiction over the activity prohibited in subsection (a) if—
> (1) the alleged offender is a national of the United States; or
> (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.
>
> (c) Conspiracy.—A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

18 U.S.C. § 2340A (2000).

[10] Section 2340 provides in full:

> As used in this chapter—
>
> (1) "torture" means an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
>
> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and
>
> (3) "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

18 U.S.C. § 2340 (as amended by Pub. L. No. 108-375, 118 Stat. 1811 (2004)).

In interpreting these provisions, we note that Congress may have adopted a statutory definition of "torture" that differs from certain colloquial uses of the term. *Cf. Cadet v. Bulger*, 377 F.3d 1173, 1194 (11th Cir. 2004) ("[I]n other contexts and under other definitions [the conditions] might be described as torturous. The fact remains, however, that the only relevant definition of 'torture' is the definition contained in [the] CAT. . . ."). We must, of course, give effect to the statute as enacted by Congress.[11]

Congress enacted sections 2340-2340A to carry out the United States' obligations under the CAT. *See* H.R. Conf. Rep. No. 103-482, at 229 (1994). The CAT, among other things, obligates state parties to take effective measures to prevent acts of torture in any territory under their jurisdiction, and requires the United States, as a state party, to ensure that acts of torture, along with attempts and complicity to commit such acts, are crimes under U.S. law. *See* CAT arts. 2, 4-5. Sections 2340-2340A satisfy that requirement with respect to acts committed outside the United States.[12] Conduct constituting "torture" occurring within the United States was—and remains—prohibited by various other federal and state criminal statutes that we do not discuss here.

The CAT defines "torture" so as to require the intentional infliction of "severe pain or suffering, whether physical or mental." Article 1(1) of the CAT provides:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Senate attached the following understanding to its resolution of advice and consent to ratification of the CAT:

> The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain

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[11] Our task is only to offer guidance on the meaning of the statute, not to comment on policy. It is of course open to policymakers to determine that conduct that might not be prohibited by the statute is nevertheless contrary to the interests or policy of the United States.

[12] Congress limited the territorial reach of the federal torture statute, providing that the prohibition applies only to conduct occurring "outside the United States," 18 U.S.C. § 2340A(a), which is currently defined in the statute to mean outside "the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States." *Id.* § 2340(3).

> or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30, at 36 (1990). This understanding was deposited with the U.S. instrument of ratification, *see* 1830 U.N.T.S. 320 (Oct. 21, 1994), and thus defines the scope of the United States' obligations under the treaty. *See Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 32-33 (1987). The criminal prohibition against torture that Congress codified in 18 U.S.C. §§ 2340-2340A generally tracks the prohibition in the CAT, subject to the U.S. understanding.

II.

Under the language adopted by Congress in sections 2340-2340A, to constitute "torture," the conduct in question must have been "specifically intended to inflict severe physical or mental pain or suffering." In the discussion that follows, we will separately consider each of the principal components of this key phrase: (1) the meaning of "severe"; (2) the meaning of "severe physical pain or suffering"; (3) the meaning of "severe mental pain or suffering"; and (4) the meaning of "specifically intended."

(1) The meaning of "severe."

Because the statute does not define "severe," "we construe [the] term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The common understanding of the term "torture" and the context in which the statute was enacted also inform our analysis.

Dictionaries define "severe" (often conjoined with "pain") to mean "extremely violent or intense: *severe pain*." *American Heritage Dictionary of the English Language* 1653 (3d ed. 1992); *see also* XV *Oxford English Dictionary* 101 (2d ed. 1989) ("Of pain, suffering, loss, or the like: Grievous, extreme" and "Of circumstances . . . : Hard to sustain or endure").[13]

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[13] Common dictionary definitions of "torture" further support the statutory concept that the pain or suffering must be severe. *See Black's Law Dictionary* 1528 (8th ed. 2004) (defining "torture" as "[t]he infliction of *intense pain* to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure") (emphasis added); *Webster's Third New International Dictionary of the English Language Unabridged* 2414 (2002) (defining "torture" as "the infliction of *intense pain* (as from burning, crushing, wounding) to punish or coerce someone") (emphasis added); *Oxford American Dictionary and Language Guide* 1064 (1999) (defining "torture" as "the infliction of *severe bodily pain*, esp. as a punishment or a means of persuasion") (emphasis added).

This interpretation is also consistent with the history of torture. *See generally* the descriptions in Lord Hope's lecture, *Torture*, University of Essex/Clifford Chance Lecture 7-8 (Jan. 28, 2004), and in Professor Langbein's book, *Torture and the Law of Proof: Europe and England in the Ancien Régime*. We emphatically are not saying that only such historical techniques—or similar ones—can constitute "torture" under sections 2340-

The statute, moreover, was intended to implement the United States' obligations under the CAT, which, as quoted above, defines as "torture" acts that inflict "severe pain or suffering" on a person. CAT art. 1(1). As the Senate Foreign Relations Committee explained in its report recommending that the Senate consent to ratification of the CAT:

> The [CAT] seeks to define "torture" in a relatively limited fashion, corresponding to the common understanding of torture as an extreme practice which is universally condemned. . . .
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> . . . .
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> . . . The term "torture," in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.

S. Exec. Rep. No. 101-30 at 13-14. *See also* David P. Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, 15 Nova L. Rev. 449, 455 (1991) ("By stressing the extreme nature of torture, . . . [the] definition [of torture in the CAT] describes a relatively limited set of circumstances likely to be illegal under most, if not all, domestic legal systems.").

Further, the CAT distinguishes between torture and "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1." CAT art. 16. The CAT thus treats torture as an "extreme form" of cruel, inhuman, or degrading treatment. *See* S. Exec. Rep. No. 101-30 at 6, 13; *see also* J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 80 (1988) ("*CAT Handbook*") (noting that Article 16 implies "that torture is the *gravest form* of [cruel, inhuman, or degrading] treatment [or] punishment") (emphasis added); Malcolm D. Evans, *Getting to Grips with Torture*, 51 Int'l & Comp. L.Q. 365, 369 (2002) (The CAT "formalises a distinction between torture on the one hand and inhuman and degrading treatment on the other by attributing different legal consequences to them.").[14] The Senate Foreign Relations Committee emphasized

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2340A. But the historical understanding of "torture" is relevant to interpreting Congress's intent. *Cf. Morissette v. United States*, 342 U.S. 246, 263 (1952).

[14] This approach—distinguishing torture from lesser forms of cruel, inhuman, or degrading treatment—is consistent with other international law sources. The CAT's predecessor, the U.N. Torture Declaration, defined torture as "an *aggravated* and deliberate form of cruel, inhuman or degrading treatment or punishment." Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Res. 3452, art. 1(2) (Dec. 9, 1975) (emphasis added); *see also* S. Treaty Doc. No. 100-20 at 2 (The U.N. Torture Declaration was "a point of departure for the drafting of the [CAT]."). Other treaties also distinguish torture from lesser forms of cruel, inhuman, or degrading treatment. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, 213 U.N.T.S. 221 (Nov. 4, 1950) ("European Convention") ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); Evans, *Getting to Grips with Torture*, 51 Int'l & Comp. L.Q. at 370 ("[T]he ECHR organs have adopted . . . a 'vertical' approach . . . , which is seen as comprising three separate elements, each representing a progression of seriousness, in which one moves progressively from forms of ill-treatment which are

this point in its report recommending that the Senate consent to ratification of the CAT. *See* S. Exec. Rep. No. 101-30 at 13 ("'Torture' is thus to be distinguished from lesser forms of cruel, inhuman, or degrading treatment or punishment, which are to be deplored and prevented, but are not so universally and categorically condemned as to warrant the severe legal consequences that the Convention provides in the case of torture. . . . The requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to 'other acts of cruel, inhuman or degrading treatment or punishment *which do not amount to torture* . . . .'"). *See also Cadet*, 377 F.3d at 1194 ("The definition in CAT draws a critical distinction between 'torture' and 'other acts of cruel, inhuman, or degrading punishment or treatment.'").

Representations made to the Senate by Executive Branch officials when the Senate was considering the CAT are also relevant in interpreting the CAT's torture prohibition—which sections 2340-2340A implement. Mark Richard, a Deputy Assistant Attorney General in the Criminal Division, testified that "[t]orture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct." *Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 16 (1990) ("*CAT Hearing*") (prepared statement). The Senate Foreign Relations Committee also understood torture to be limited in just this way. *See* S. Exec. Rep. No. 101-30 at 6 (noting that "[f]or an act to be 'torture,' it must be an extreme form of cruel and inhuman treatment, causing severe pain and suffering, and be intended to cause severe pain and suffering"). Both the Executive Branch and the Senate acknowledged the efforts of the United States during the negotiating process to strengthen the effectiveness of the treaty and to gain wide adherence thereto by focusing the Convention "on torture rather than on other relatively less abhorrent practices." *Letter of Submittal from George P. Shultz, Secretary of State, to President Ronald Reagan* (May 10, 1988), *in* S. Treaty Doc. No. 100-20 at v; *see also* S. Exec. Rep. No. 101-30 at 2-3 ("The United States" helped to focus the Convention "on torture rather than other less abhorrent practices."). Such statements are probative of a treaty's meaning. *See* 11 Op. O.L.C. at 35-36.

'degrading' to those which are 'inhuman' and then to 'torture'. The distinctions between them is [*sic*] based on the severity of suffering involved, with 'torture' at the apex."); Debra Long, Association for the Prevention of Torture, *Guide to Jurisprudence on Torture and Ill-Treatment: Article 3 of the European Convention for the Protection of Human Rights* 13 (2002) (The approach of distinguishing between "torture," "inhuman" acts, and "degrading" acts has "remained the standard approach taken by the European judicial bodies. Within this approach torture has been singled out as carrying a special stigma, which distinguishes it from other forms of ill-treatment."). *See also CAT Handbook* at 115-17 (discussing the European Court of Human Rights ("ECHR") decision in *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978) (concluding that the combined use of wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink constituted inhuman or degrading treatment but not torture under the European Convention)). Cases decided by the ECHR subsequent to *Ireland* have continued to view torture as an aggravated form of inhuman treatment. *See, e.g., Aktas v. Turkey*, No. 24351/94 ¶ 313 (E.C.H.R. 2003); *Akkoc v. Turkey*, Nos. 22947/93 & 22948/93 ¶ 115 (E.C.H.R. 2000); *Kaya v. Turkey*, No. 22535/93 ¶ 117 (E.C.H.R. 2000).

The International Criminal Tribunal for the Former Yugoslavia ("ICTY") likewise considers "torture" as a category of conduct more severe than "inhuman treatment." *See, e.g., Prosecutor v. Delalic*, IT-96-21, Trial Chamber Judgment ¶ 542 (ICTY Nov. 16, 1998) ("[I]nhuman treatment is treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture.").

Although Congress defined "torture" under sections 2340-2340A to require conduct specifically intended to cause "severe" pain or suffering, we do not believe Congress intended to reach only conduct involving "excruciating and agonizing" pain or suffering. Although there is some support for this formulation in the ratification history of the CAT,[15] a proposed express understanding to that effect[16] was "criticized for setting too high a threshold of pain," S. Exec. Rep. No. 101-30 at 9, and was not adopted. We are not aware of any evidence suggesting that the standard was raised in the statute and we do not believe that it was.[17]

Drawing distinctions among gradations of pain (for example, severe, mild, moderate, substantial, extreme, intense, excruciating, or agonizing) is obviously not an easy task, especially given the lack of any precise, objective scientific criteria for measuring pain.[18] We are, however,

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[15] Deputy Assistant Attorney General Mark Richard testified: "[T]he essence of torture" is treatment that inflicts "excruciating and agonizing physical pain." *CAT Hearing* at 16 (prepared statement).

[16] *See* S. Treaty Doc. No. 100-20 at 4-5 ("The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.").

[17] Thus, we do not agree with the statement in the August 2002 Memorandum that "[t]he Reagan administration's understanding that the pain be 'excruciating and agonizing' is in substance not different from the Bush administration's proposal that the pain must be severe." August 2002 Memorandum at 19. Although the terms are concededly imprecise, and whatever the intent of the Reagan Administration's understanding, we believe that in common usage "excruciating and agonizing" pain is understood to be more intense than "severe" pain.

The August 2002 Memorandum also looked to the use of "severe pain" in certain other statutes, and concluded that to satisfy the definition in section 2340, pain "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." *Id.* at 1; *see also id.* at 5-6, 13, 46. We do not agree with those statements. Those other statutes define an "emergency medical condition," for purposes of providing health benefits, as "a condition manifesting itself by acute symptoms of sufficient severity (including severe pain)" such that one could reasonably expect that the absence of immediate medical care might result in death, organ failure or impairment of bodily function. *See, e.g.*, 8 U.S.C. § 1369 (2000); 42 U.S.C. § 1395w-22(d)(3)(B) (2000); *id.* § 1395dd(e) (2000). They do not define "severe pain" even in that very different context (rather, they use it as an indication of an "emergency medical condition"), and they do not state that death, organ failure, or impairment of bodily function cause "severe pain," but rather that "severe pain" may indicate a condition that, if untreated, could cause one of those results. We do not believe that they provide a proper guide for interpreting "severe pain" in the very different context of the prohibition against torture in sections 2340-2340A. *Cf. United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (phrase "wages paid" has different meaning in different parts of Title 26); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997) (term "employee" has different meanings in different parts of Title VII).

[18] Despite extensive efforts to develop objective criteria for measuring pain, there is no clear, objective, consistent measurement. As one publication explains:

> Pain is a complex, subjective, perceptual phenomenon with a number of dimensions—intensity, quality, time course, impact, and personal meaning—that are uniquely experienced by each individual and, thus, can only be assessed indirectly. *Pain is a subjective experience and there is no way to objectively quantify it.* Consequently, assessment of a patient's pain depends on the patient's overt communications, both verbal and behavioral. Given pain's complexity, one must assess not only its somatic (sensory) component but also patients' moods, attitudes, coping efforts, resources, responses of family members, and the impact of pain on their lives.

aided in this task by judicial interpretations of the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note (2000). The TVPA, also enacted to implement the CAT, provides a civil remedy to victims of torture. The TVPA defines "torture" to include:

> any act, directed against an individual in the offender's custody or physical control, by which *severe pain or suffering* (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), *whether physical or mental*, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind . . . .

28 U.S.C. § 1350 note, § 3(b)(1) (emphases added). The emphasized language is similar to section 2340's "severe physical or mental pain or suffering."[19] As the Court of Appeals for the District of Columbia Circuit has explained:

> The severity requirement is crucial to ensuring that the conduct proscribed by the [CAT] and the TVPA is sufficiently extreme and outrageous to warrant the universal condemnation that the term "torture" both connotes and invokes. The drafters of the [CAT], as well as the Reagan Administration that signed it, the Bush Administration that submitted it to Congress, and the Senate that ultimately ratified it, therefore all sought to ensure that "only acts of a certain gravity shall be considered to constitute torture."
>
> The critical issue is the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim. The more intense, lasting, or heinous the agony, the more likely it is to be torture.

Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 92-93 (D.C. Cir. 2002) (citations omitted). That court concluded that a complaint that alleged beatings at the hands of police but that did not provide details concerning "the severity of plaintiffs' alleged beatings, including their frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out," did not suffice "to ensure that [it] satisf[ied] the TVPA's rigorous definition of torture." *Id.* at 93.

In *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230 (D.C. Cir. 2003), the D.C. Circuit again considered the types of acts that constitute torture under the TVPA definition. The plaintiff alleged, among other things, that Libyan authorities had held her incommunicado and threatened to kill her if she tried to leave. *See id.* at 232, 234. The court acknowledged that "these alleged acts certainly reflect a bent toward cruelty on the part of their

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Dennis C. Turk, *Assess the Person, Not Just the Pain*, Pain: Clinical Updates, Sept. 1993 (emphasis added). This lack of clarity further complicates the effort to define "severe" pain or suffering.

[19] Section 3(b)(2) of the TVPA defines "mental pain or suffering" similarly to the way that section 2340(2) defines "severe mental pain or suffering."

perpetrators," but, reversing the district court, went on to hold that "they are not in themselves so unusually cruel or sufficiently extreme and outrageous as to constitute torture within the meaning of the [TVPA]." *Id.* at 234. Cases in which courts have found torture suggest the nature of the extreme conduct that falls within the statutory definition. *See, e.g., Hilao v. Estate of Marcos*, 103 F.3d 789, 790-91, 795 (9th Cir. 1996) (concluding that a course of conduct that included, among other things, severe beatings of plaintiff, repeated threats of death and electric shock, sleep deprivation, extended shackling to a cot (at times with a towel over his nose and mouth and water poured down his nostrils), seven months of confinement in a "suffocatingly hot" and cramped cell, and eight years of solitary or near-solitary confinement, constituted torture); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1332-40, 1345-46 (N.D. Ga. 2002) (concluding that a course of conduct that included, among other things, severe beatings to the genitals, head, and other parts of the body with metal pipes, brass knuckles, batons, a baseball bat, and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim's forehead; hanging the victim and beating him; extreme limitations of food and water; and subjection to games of "Russian roulette," constituted torture); *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22-23 (D.D.C. 2001) (entering default judgment against Iraq where plaintiffs alleged, among other things, threats of "physical torture, such as cutting off . . . fingers, pulling out . . . fingernails," and electric shocks to the testicles); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 64-66 (D.D.C. 1998) (concluding that a course of conduct that included frequent beatings, pistol whipping, threats of imminent death, electric shocks, and attempts to force confessions by playing Russian roulette and pulling the trigger at each denial, constituted torture).

(2) The meaning of "severe physical pain or suffering."

The statute provides a specific definition of "severe mental pain or suffering," *see* 18 U.S.C. § 2340(2), but does not define the term "severe physical pain or suffering." Although we think the meaning of "severe physical pain" is relatively straightforward, the question remains whether Congress intended to prohibit a category of "severe physical suffering" distinct from "severe physical pain." We conclude that under some circumstances "severe physical suffering" may constitute torture even if it does not involve "severe physical pain." Accordingly, to the extent that the August 2002 Memorandum suggested that "severe physical suffering" under the statute could in no circumstances be distinct from "severe physical pain," *id.* at 6 n.3, we do not agree.

We begin with the statutory language. The inclusion of the words "or suffering" in the phrase "severe physical pain or suffering" suggests that the statutory category of physical torture is not limited to "severe physical pain." This is especially so in light of the general principle against interpreting a statute in such a manner as to render words surplusage. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Exactly what is included in the concept of "severe physical suffering," however, is difficult to ascertain. We interpret the phrase in a statutory context where Congress expressly distinguished "physical pain or suffering" from "mental pain or suffering." Consequently, a separate category of "physical suffering" must include something other than any type of "mental

pain or suffering."[20] Moreover, given that Congress precisely defined "mental pain or suffering" in the statute, it is unlikely to have intended to undermine that careful definition by including a broad range of mental sensations in a "physical suffering" component of "physical pain or suffering."[21] Consequently, "physical suffering" must be limited to adverse "physical" rather than adverse "mental" sensations.

The text of the statute and the CAT, and their history, provide little concrete guidance as to what Congress intended separately to include as "severe physical suffering." Indeed, the record consistently refers to "severe physical pain or suffering" (or, more often in the ratification record, "severe physical pain *and* suffering"), apparently without ever disaggregating the concepts of "severe physical pain" and "severe physical suffering" or discussing them as separate categories with separate content. Although there is virtually no legislative history for the statute, throughout the ratification of the CAT—which also uses the disjunctive "pain or suffering" and which the statutory prohibition implements—the references were generally to "pain *and* suffering," with no indication of any difference in meaning. The *Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which appears in S. Treaty Doc. No. 100-20 at 3, for example, repeatedly refers to "pain *and* suffering." *See also* S. Exec. Rep. No. 101-30 at 6 (three uses of "pain and suffering"); *id.* at 13 (eight uses of "pain and suffering"); *id.* at 14 (two uses of "pain and suffering"); *id.* at 35 (one use of "pain and suffering"). Conversely, the phrase "pain or suffering" is used less frequently in the Senate report in discussing (as opposed to quoting) the CAT and the understandings under consideration, *e.g.*, *id.* at 5-6 (one use of "pain or suffering"), *id.* at 14 (two uses of "pain or suffering"); *id.* at 16 (two uses of "pain or suffering"), and, when used, it is with no suggestion that it has any different meaning.

Although we conclude that inclusion of the words "or suffering" in "severe physical pain or suffering" establishes that physical torture is not limited to "severe physical pain," we also

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[20] Common dictionary definitions of "physical" confirm that "physical suffering" does not include mental sensations. *See, e.g., American Heritage Dictionary of the English Language* at 1366 ("Of or relating to the body as distinguished from the mind or spirit"); *Oxford American Dictionary and Language Guide* at 748 ("of or concerning the body (*physical exercise*; *physical education*)").

[21] This is particularly so given that, as Administration witnesses explained, the limiting understanding defining mental pain or suffering was considered necessary to avoid problems of vagueness. *See, e.g., CAT Hearing* at 8, 10 (prepared statement of Abraham Sofaer, Legal Adviser, Department of State: "The Convention's wording . . . is not in all respects as precise as we believe necessary. . . . [B]ecause [the Convention] requires establishment of criminal penalties under our domestic law, we must pay particular attention to the meaning and interpretation of its provisions, especially concerning the standards by which the Convention will be applied as a matter of U.S. law. . . . [W]e prepared a codified proposal which . . . clarifies the definition of mental pain and suffering."); *id.* at 15-16 (prepared statement of Mark Richard: "The basic problem with the Torture Convention—one that permeates all our concerns—is its imprecise definition of torture, especially as that term is applied to actions which result solely in mental anguish. This definitional vagueness makes it very doubtful that the United States can, consistent with Constitutional due process constraints, fulfill its obligation under the Convention to adequately engraft the definition of torture into the domestic criminal law of the United States."); *id.* at 17 (prepared statement of Mark Richard: "Accordingly, the Torture Convention's vague definition concerning the mental suffering aspect of torture cannot be resolved by reference to established principles of international law. In an effort to overcome this unacceptable element of vagueness in Article I of the Convention, we have proposed an understanding which defines severe mental pain constituting torture with sufficient specificity to . . . meet Constitutional due process requirements.").

conclude that Congress did not intend "severe physical pain or suffering" to include a category of "physical suffering" that would be so broad as to negate the limitations on the other categories of torture in the statute. Moreover, the "physical suffering" covered by the statute must be "severe" to be within the statutory prohibition. We conclude that under some circumstances "physical suffering" may be of sufficient intensity and duration to meet the statutory definition of torture even if it does not involve "severe physical pain." To constitute such torture, "*severe* physical suffering" would have to be a condition of some extended duration or persistence as well as intensity. The need to define a category of "severe physical suffering" that is different from "severe physical pain," and that also does not undermine the limited definition Congress provided for torture, along with the requirement that any such physical suffering be "severe," calls for an interpretation under which "severe physical suffering" is reserved for physical distress that is "severe" considering its intensity and duration or persistence, rather than merely mild or transitory.[22] Otherwise, the inclusion of such a category would lead to the kind of uncertainty in interpreting the statute that Congress sought to reduce both through its understanding to the CAT and in sections 2340-2340A.

(3) The meaning of "severe mental pain or suffering."

Section 2340 defines "severe mental pain or suffering" to mean:

> the prolonged mental harm caused by or resulting from—
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality[.]

18 U.S.C. § 2340(2). Torture is defined under the statute to include an act specifically intended to inflict severe mental pain or suffering. *Id.* § 2340(1).

An important preliminary question with respect to this definition is whether the statutory

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[22] Support for concluding that there is an extended temporal element, or at least an element of persistence, in "severe physical suffering" as a category distinct from "severe physical pain" may also be found in the prevalence of concepts of "endurance" of suffering and of suffering as a "state" or "condition" in standard dictionary definitions. *See, e.g., Webster's Third New International Dictionary* at 2284 (defining "suffering" as "the endurance of or submission to affliction, pain, loss"; "a pain endured"); *Random House Dictionary of the English Language* 1901 (2d ed. 1987) ("the state of a person or thing that suffers"); *Funk & Wagnalls New Standard Dictionary of the English Language* 2416 (1946) ("A state of anguish or pain"); *American Heritage Dictionary of the English Language* at 1795 ("The condition of one who suffers").

list of the four "predicate acts" in section 2340(2)(A)-(D) is exclusive. We conclude that Congress intended the list of predicate acts to be exclusive—that is, to constitute the proscribed "severe mental pain or suffering" under the statute, the prolonged mental harm must be caused by acts falling within one of the four statutory categories of predicate acts. We reach this conclusion based on the clear language of the statute, which provides a detailed definition that includes four categories of predicate acts joined by the disjunctive and does not contain a catchall provision or any other language suggesting that additional acts might qualify (for example, language such as "including" or "such acts as").[23] Congress plainly considered very specific predicate acts, and this definition tracks the Senate's understanding concerning mental pain or suffering when giving its advice and consent to ratification of the CAT. The conclusion that the list of predicate acts is exclusive is consistent with both the text of the Senate's understanding, and with the fact that it was adopted out of concern that the CAT's definition of torture did not otherwise meet the requirement for clarity in defining crimes. *See supra* note 21. Adopting an interpretation of the statute that expands the list of predicate acts for "severe mental pain or suffering" would constitute an impermissible rewriting of the statute and would introduce the very imprecision that prompted the Senate to adopt its understanding when giving its advice and consent to ratification of the CAT.

Another question is whether the requirement of "prolonged mental harm" caused by or resulting from one of the enumerated predicate acts is a separate requirement, or whether such "prolonged mental harm" is to be presumed any time one of the predicate acts occurs. Although it is possible to read the statute's reference to "*the* prolonged mental harm caused by or resulting from" the predicate acts as creating a statutory presumption that each of the predicate acts always causes prolonged mental harm, we do not believe that was Congress's intent. As noted, this language closely tracks the understanding that the Senate adopted when it gave its advice and consent to ratification of the CAT:

> in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30 at 36. We do not believe that simply by adding the word "the" before "prolonged harm," Congress intended a material change in the definition of mental pain or

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[23] These four categories of predicate acts "are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). *See also, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.23 (6th ed. 2000). Nor do we see any "contrary indications" that would rebut this inference. *Vonn*, 535 U.S. at 65.

suffering as articulated in the Senate's understanding to the CAT. The legislative history, moreover, confirms that sections 2340-2340A were intended to fulfill—but not go beyond—the United States' obligations under the CAT: "This section provides the necessary legislation to implement the [CAT]. . . . The definition of torture emanates directly from article 1 of the [CAT]. The definition for 'severe mental pain and suffering' incorporates the [above mentioned] understanding." S. Rep. No. 103-107, at 58-59 (1993). This understanding, embodied in the statute, was meant to define the obligation undertaken by the United States. Given this understanding, the legislative history, and the fact that section 2340(2) defines "severe mental pain or suffering" carefully in language very similar to the understanding, we do not believe that Congress intended the definition to create a presumption that any time one of the predicate acts occurs, prolonged mental harm is deemed to result.

Turning to the question of what constitutes "prolonged mental harm caused by or resulting from" a predicate act, we believe that Congress intended this phrase to require mental "harm" that is caused by or that results from a predicate act, and that has some lasting duration. There is little guidance to draw upon in interpreting this phrase.[24] Nevertheless, our interpretation is consistent with the ordinary meaning of the statutory terms. First, the use of the word "harm"—as opposed to simply repeating "pain or suffering"—suggests some mental damage or injury. Ordinary dictionary definitions of "harm," such as "physical or mental *damage: injury*," *Webster's Third New International Dictionary* at 1034 (emphasis added), or "[p]hysical or psychological *injury or damage*," *American Heritage Dictionary of the English Language* at 825 (emphasis added), support this interpretation. Second, to "prolong" means to "lengthen in time" or to "extend in duration," or to "draw out," *Webster's Third New International Dictionary* at 1815, further suggesting that to be "prolonged," the mental damage must extend for some period of time. This damage need not be permanent, but it must continue for a "prolonged" period of time.[25] Finally, under section 2340(2), the "prolonged mental harm" must be "caused by" or "resulting from" one of the enumerated predicate acts.[26]

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[24] The phrase "prolonged mental harm" does not appear in the relevant medical literature or elsewhere in the United States Code. The August 2002 Memorandum concluded that to constitute "prolonged mental harm," there must be "significant psychological harm of significant duration, e.g., lasting for months or even years." *Id.* at 1; *see also id.* at 7. Although we believe that the mental harm must be of some lasting duration to be "prolonged," to the extent that that formulation was intended to suggest that the mental harm would have to last for at least "months or even years," we do not agree.

[25] For example, although we do not suggest that the statute is limited to such cases, development of a mental disorder—such as post-traumatic stress disorder or perhaps chronic depression—could constitute "prolonged mental harm." *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 369-76, 463-68 (4th ed. 2000) ("DSM-IV-TR"). *See also, e.g., Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/59/324, at 14 (2004) ("The most common diagnosis of psychiatric symptoms among torture survivors is said to be post-traumatic stress disorder."); *see also* Metin Basoglu et al., *Torture and Mental Health: A Research Overview, in* Ellen Gerrity et al. eds., *The Mental Health Consequences of Torture* 48-49 (2001) (referring to findings of higher rates of post-traumatic stress disorder in studies involving torture survivors); Murat Parker et al., *Psychological Effects of Torture: An Empirical Study of Tortured and Non-Tortured Non-Political Prisoners, in* Metin Basoglu ed., *Torture and Its Consequences: Current Treatment Approaches* 77 (1992) (referring to findings of post-traumatic stress disorder in torture survivors).

[26] This is not meant to suggest that, if the predicate act or acts continue for an extended period, "prolonged mental harm" cannot occur until after they are completed. Early occurrences of the predicate act could cause mental

Although there are few judicial opinions discussing the question of "prolonged mental harm," those cases that have addressed the issue are consistent with our view. For example, in the TVPA case of *Mehinovic*, the court explained that:

> [The defendant] also caused or participated in the plaintiffs' mental torture. Mental torture consists of "prolonged mental harm caused by or resulting from: the intentional infliction or threatened infliction of severe physical pain or suffering; . . . the threat of imminent death . . . ." As set out above, plaintiffs noted in their testimony that they feared that they would be killed by [the defendant] during the beatings he inflicted or during games of "Russian roulette." *Each plaintiff continues to suffer long-term psychological harm as a result of the ordeals they suffered at the hands of defendant and others.*

198 F. Supp. 2d at 1346 (emphasis added; first ellipsis in original). In reaching its conclusion, the court noted that the plaintiffs were continuing to suffer serious mental harm even ten years after the events in question: One plaintiff "suffers from anxiety, flashbacks, and nightmares and has difficulty sleeping. [He] continues to suffer thinking about what happened to him during this ordeal and has been unable to work as a result of the continuing effects of the torture he endured." *Id.* at 1334. Another plaintiff "suffers from anxiety, sleeps very little, and has frequent nightmares. . . . [He] has found it impossible to return to work." *Id.* at 1336. A third plaintiff "has frequent nightmares. He has had to use medication to help him sleep. His experience has made him feel depressed and reclusive, and he has not been able to work since he escaped from this ordeal." *Id.* at 1337-38. And the fourth plaintiff "has flashbacks and nightmares, suffers from nervousness, angers easily, and has difficulty trusting people. These effects directly impact and interfere with his ability to work." *Id.* at 1340. In each case, these mental effects were continuing years after the infliction of the predicate acts.

And in *Sackie v. Ashcroft*, 270 F. Supp. 2d 596 (E.D. Pa. 2003), the individual had been kidnapped and "forcibly recruited" as a child soldier at the age of 14, and over the next three to four years had been forced to take narcotics and threatened with imminent death. *Id.* at 597-98, 601-02. The court concluded that the resulting mental harm, which continued over this three-to-four-year period, qualified as "prolonged mental harm." *Id.* at 602.

Conversely, in *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003), the court rejected a claim under the TVPA brought by individuals who had been held at gunpoint overnight and repeatedly threatened with death. While recognizing that the plaintiffs had experienced an "ordeal," the court concluded that they had failed to show that their experience caused lasting damage, noting that "there is simply no allegation that Plaintiffs have suffered any prolonged mental harm or physical injury as a result of their alleged intimidation." *Id.* at 1294-95.

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harm that could continue—and become prolonged—during the extended period the predicate acts continued to occur. For example, in *Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 601-02 (E.D. Pa. 2003), the predicate acts continued over a three-to-four-year period, and the court concluded that "prolonged mental harm" had occurred during that time.

(4) The meaning of "specifically intended."

It is well recognized that the term "specific intent" is ambiguous and that the courts do not use it consistently. *See* 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(e), at 355 & n.79 (2d ed. 2003). "Specific intent" is most commonly understood, however, "to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime." *Id.* at 354; *see also Carter v. United States*, 530 U.S. 255, 268 (2000) (explaining that general intent, as opposed to specific intent, requires "that the defendant possessed knowledge [only] with respect to the *actus reus* of the crime"). As one respected treatise explains:

> With crimes which require that the defendant intentionally cause a specific result, what is meant by an "intention" to cause that result? Although the theorists have not always been in agreement . . ., the traditional view is that a person who acts . . . intends a result of his act . . . under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.

1 LaFave, *Substantive Criminal Law*, § 5.2(a), at 341 (footnote omitted).

As noted, the cases are inconsistent. Some suggest that only a conscious desire to produce the proscribed result constitutes specific intent; others suggest that even reasonable foreseeability suffices. In *United States v. Bailey*, 444 U.S. 394 (1980), for example, the Court suggested that, at least "[i]n a general sense," *id.* at 405, "specific intent" requires that one consciously desire the result. *Id.* at 403-05. The Court compared the common law's *mens rea* concepts of specific intent and general intent to the Model Penal Code's *mens rea* concepts of acting purposefully and acting knowingly. *Id.* at 404-05. "[A] person who causes a particular result is said to act purposefully," wrote the Court, "if 'he consciously desires that result, whatever the likelihood of that result happening from his conduct.'" *Id.* at 404 (internal quotation marks omitted). A person "is said to act knowingly," in contrast, "if he is aware 'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.'" *Id.* (internal quotation marks omitted). The Court then stated: "In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent." *Id.* at 405.

In contrast, cases such as *United States v. Neiswender*, 590 F.2d 1269 (4th Cir. 1979), suggest that to prove specific intent it is enough that the defendant simply have "knowledge or notice" that his act "would have likely resulted in" the proscribed outcome. *Id.* at 1273. "Notice," the court held, "is provided by the reasonable foreseeability of the natural and probable consequences of one's acts." *Id.*

We do not believe it is useful to try to define the precise meaning of "specific intent" in section 2340.[27] In light of the President's directive that the United States not engage in torture, it

[27] In the August 2002 Memorandum, this Office concluded that the specific intent element of the statute required that infliction of severe pain or suffering be the defendant's "precise objective" and that it was not enough

would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture. Some observations, however, are appropriate. It is clear that the specific intent element of section 2340 would be met if a defendant performed an act and "consciously desire[d]" that act to inflict severe physical or mental pain or suffering. 1 LaFave, *Substantive Criminal Law* § 5.2(a), at 341. Conversely, if an individual acted in good faith, and only after reasonable investigation establishing that his conduct would not inflict severe physical or mental pain or suffering, it appears unlikely that he would have the specific intent necessary to violate sections 2340-2340A. Such an individual could be said neither consciously to desire the proscribed result, *see, e.g.*, *Bailey*, 444 U.S. at 405, nor to have "knowledge or notice" that his act "would likely have resulted in" the proscribed outcome, *Neiswender*, 590 F.2d at 1273.

Two final points on the issue of specific intent: First, specific intent must be distinguished from motive. There is no exception under the statute permitting torture to be used for a "good reason." Thus, a defendant's motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute. *See Cheek v. United States*, 498 U.S. 192, 200-01 (1991). Second, specific intent to take a given action can be found even if the defendant will take the action only conditionally. *Cf., e.g.*, *Holloway v. United States*, 526 U.S. 1, 11 (1999) ("[A] defendant may not negate a proscribed intent by requiring the victim to comply with a condition the defendant has no right to impose."). *See also id.* at 10-11 & nn. 9-12; Model Penal Code § 2.02(6). Thus, for example, the fact that a victim might have avoided being tortured by cooperating with the perpetrator would not make permissible actions otherwise constituting torture under the statute. Presumably that has frequently been the case with torture, but that fact does not make the practice of torture any less abhorrent or unlawful.[28]

Please let us know if we can be of further assistance.

Daniel Levin
Acting Assistant Attorney General

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that the defendant act with knowledge that such pain "was reasonably likely to result from his actions" (or even that that result "is certain to occur"). *Id.* at 3-4. We do not reiterate that test here.

[28] In the August 2002 Memorandum, this Office indicated that an element of the offense of torture was that the act in question actually result in the infliction of severe physical or mental pain or suffering. *See id.* at 3. That conclusion rested on a comparison of the statute with the CAT, which has a different definition of "torture" that requires the actual infliction of pain or suffering, and we do not believe that the statute requires that the defendant actually inflict (as opposed to act with the specific intent to inflict) severe physical or mental pain or suffering. *Compare* CAT art. 1(1) ("the term 'torture' means any act by which severe pain or suffering, whether physical or mental, *is intentionally inflicted*") (emphasis added) *with* 18 U.S.C. § 2340 ("'torture' means an act . . . *specifically intended to inflict* severe physical or mental pain or suffering") (emphasis added). It is unlikely that any such requirement would make any practical difference, however, since the statute also criminalizes attempts to commit torture. *Id.* § 2340A(a).

Superior Court of the District of Columbia

CIVIL DIVISION- CIVIL ACTIONS BRANCH

INFORMATION SHEET

Stephen Behnke, et. al., Case Number: 2017 CA 005989 B

vs Date: August 28, 2017

David Hoffman, et. al., ☐ One of the defendants is being sued in their official capacity.

Name: *(Please Print)* Louis J. Freeh	Relationship to Lawsuit
Firm Name: Freeh Sporkin & Sullivan, LLP	☒ Attorney for Plaintiff
Telephone No.: (202) 390-5959 Six digit Unified Bar No.: 332924	☐ Self (Pro Se)
	☐ Other:

TYPE OF CASE: ☐ Non-Jury ☐ 6 Person Jury ☒ 12 Person Jury

Demand: Over $10,001.00 (Exact amount determined at trial) Other:

PENDING CASE(S) RELATED TO THE ACTION BEING FILED

Case No.: Judge: Calendar #:

Case No.: Judge: Calendar#:

NATURE OF SUIT: *(Check One Box Only)*

A. CONTRACTS **COLLECTION CASES**

☐ 01 Breach of Contract
☐ 02 Breach of Warranty
☐ 06 Negotiable Instrument
☐ 07 Personal Property
☐ 13 Employment Discrimination
☐ 15 Special Education Fees
☐ 14 Under $25,000 Pltf. Grants Consent
☐ 17 OVER $25,000 Pltf. Grants Consent
☐ 27 Insurance/Subrogation Over $25,000 Pltf. Grants Consent
☐ 07 Insurance/Subrogation Under $25,000 Pltf. Grants Consent
☐ 28 Motion to Confirm Arbitration Award (Collection Cases Only)
☐ 16 Under $25,000 Consent Denied
☐ 18 OVER $25,000 Consent Denied
☐ 26 Insurance/Subrogation Over $25,000 Consent Denied
☐ 34 Insurance/Subrogation Under $25,000 Consent Denied

B. PROPERTY TORTS

☐ 01 Automobile
☐ 02 Conversion
☐ 07 Shoplifting, D.C. Code § 27-102 (a)
☐ 03 Destruction of Private Property
☐ 04 Property Damage
☐ 05 Trespass

C. PERSONAL TORTS

☐ 01 Abuse of Process
☐ 02 Alienation of Affection
☐ 03 Assault and Battery
☐ 04 Automobile- Personal Injury
☐ 05 Deceit (Misrepresentation)
☐ 06 False Accusation
☐ 07 False Arrest
☐ 08 Fraud
☐ 10 Invasion of Privacy
☒ 11 Libel and Slander
☐ 12 Malicious Interference
☐ 13 Malicious Prosecution
☐ 14 Malpractice Legal
☐ 15 Malpractice Medical (Including Wrongful Death)
☐ 16 Negligence- (Not Automobile, Not Malpractice)
☐ 17 Personal Injury- (Not Automobile, Not Malpractice)
☐ 18Wrongful Death (Not Malpractice)
☐ 19 Wrongful Eviction
☐ 20 Friendly Suit
☐ 21 Asbestos
☐ 22 Toxic/Mass Torts
☐ 23 Tobacco
☐ 24 Lead Paint

SEE REVERSE SIDE AND CHECK HERE IF USED

Information Sheet, Continued

C. OTHERS

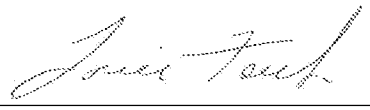
- ☐ 01 Accounting
- ☐ 02 Att. Before Judgment
- ☐ 05 Ejectment
- ☐ 09 Special Writ/Warrants (DC Code § 11-941)
- ☐ 10 Traffic Adjudication
- ☐ 11 Writ of Replevin
- ☐ 12 Enforce Mechanics Lien
- ☐ 16 Declaratory Judgment
- ☐ 17 Merit Personnel Act (OEA) (D.C. Code Title 1, Chapter 6)
- ☐ 18 Product Liability
- ☐ 24 Application to Confirm, Modify, Vacate Arbitration Award (DC Code § 16-4401)
- ☐ 29 Merit Personnel Act (OHR)
- ☐ 31 Housing Code Regulations
- ☐ 32 Qui Tam
- ☐ 33 Whistleblower

II.

- ☐ 03 Change of Name
- ☐ 06 Foreign Judgment/Domestic
- ☐ 08 Foreign Judgment/International
- ☐ 13 Correction of Birth Certificate
- ☐ 14 Correction of Marriage Certificate
- ☐ 15 Libel of Information
- ☐ 19 Enter Administrative Order as Judgment [D.C. Code § 2-1802.03 (h) or 32-151 9 (a)]
- ☐ 20 Master Meter (D.C. Code § 42-3301, et seq.)
- ☐ 21 Petition for Subpoena [Rule 28-I (b)]
- ☐ 22 Release Mechanics Lien
- ☐ 23 Rule 27(a)(1) (Perpetuate Testimony)
- ☐ 24 Petition for Structured Settlement
- ☐ 25 Petition for Liquidation
- ☐ 26 Petition for Civil Asset Forfeiture (Vehicle)
- ☐ 27 Petition for Civil Asset Forfeiture (Currency)
- ☐ 28 Petition for Civil Asset Forfeiture (Other)

D. REAL PROPERTY

- ☐ 09 Real Property-Real Estate
- ☐ 12 Specific Performance
- ☐ 04 Condemnation (Eminent Domain)
- ☐ 10 Mortgage Foreclosure/Judicial Sale
- ☐ 11 Petition for Civil Asset Forfeiture (RP)
- ☐ 08 Quiet Title
- ☐ 25 Liens: Tax / Water Consent Granted
- ☐ 30 Liens: Tax / Water Consent Denied
- ☐ 31 Tax Lien Bid Off Certificate Consent Granted



Attorney's Signature

August 28, 2017

Date

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000, Washington, D.C. 20001
Telephone: (202) 879-1133 • Website: www.dccourts.gov

STEPHEN BEHNKE et al
Vs.
SIDLEY AUSTIN LLP et al

C.A. No. 2017 CA 005989 B

INITIAL ORDER AND ADDENDUM

Pursuant to D.C. Code § 11-906 and District of Columbia Superior Court Rule of Civil Procedure ("Super. Ct. Civ. R.") 40-I, it is hereby **ORDERED** as follows:

(1) Effective this date, this case has assigned to the individual calendar designated below. All future filings in this case shall bear the calendar number and the judge's name beneath the case number in the caption. On filing any motion or paper related thereto, one copy (for the judge) must be delivered to the Clerk along with the original.

(2) Within 60 days of the filing of the complaint, plaintiff must file proof of serving on each defendant: copies of the summons, the complaint, and this Initial Order and Addendum. As to any defendant for whom such proof of service has not been filed, the Complaint will be dismissed without prejudice for want of prosecution unless the time for serving the defendant has been extended as provided in Super. Ct. Civ. R. 4(m).

(3) Within 21 days of service as described above, except as otherwise noted in Super. Ct. Civ. R. 12, each defendant must respond to the complaint by filing an answer or other responsive pleading. As to the defendant who has failed to respond, a default and judgment will be entered unless the time to respond has been extended as provided in Super. Ct. Civ. R. 55(a).

(4) At the time and place noted below, all counsel and unrepresented parties shall appear before the assigned judge at an initial scheduling and settlement conference to discuss the possibilities of settlement and to establish a schedule for the completion of all proceedings, including, normally, either mediation, case evaluation, or arbitration. Counsel shall discuss with their clients **prior** to the conference whether the clients are agreeable to binding or non-binding arbitration. **This order is the only notice that parties and counsel will receive concerning this Conference.**

(5) Upon advice that the date noted below is inconvenient for any party or counsel, the Quality Review Branch (202) 879-1750 may continue the Conference **once**, with the consent of all parties, to either of the two succeeding Fridays. Request must be made not less than seven business days before the scheduling conference date.
No other continuance of the conference will be granted except upon motion for good cause shown.

(6) Parties are responsible for obtaining and complying with all requirements of the General Order for Civil cases, each judge's Supplement to the General Order and the General Mediation Order. Copies of these orders are available in the Courtroom and on the Court's website http://www.dccourts.gov/.

Chief Judge Robert E. Morin

Case Assigned to: Judge TODD E EDELMAN
Date: August 30, 2017
Initial Conference: 9:30 am, Friday, December 01, 2017
Location: Courtroom 212
500 Indiana Avenue N.W.
WASHINGTON, DC 20001

ADDENDUM TO INITIAL ORDER AFFECTING
ALL MEDICAL MALPRACTICE CASES

In accordance with the Medical Malpractice Proceedings Act of 2006, D.C. Code § 16-2801, et seq. (2007 Winter Supp.), "[a]fter an action is filed in the court against a healthcare provider alleging medical malpractice, the court shall require the parties to enter into mediation, without discovery or, if all parties agree[,] with only limited discovery that will not interfere with the completion of mediation within 30 days of the Initial Scheduling and Settlement Conference ("ISSC"), prior to any further litigation in an effort to reach a settlement agreement. The early mediation schedule shall be included in the Scheduling Order following the ISSC. Unless all parties agree, the stay of discovery shall not be more than 30 days after the ISSC." D.C. Code § 16-2821.

To ensure compliance with this legislation, on or before the date of the ISSC, the Court will notify all attorneys and *pro se* parties of the date and time of the early mediation session and the name of the assigned mediator. Information about the early mediation date also is available over the internet at https://www:dccourts.gov/pa/. To facilitate this process, all counsel and *pro se* parties in every medical malpractice case are required to confer, jointly complete and sign an EARLY MEDIATION FORM, which must be filed no later than ten (10) calendar days prior to the ISSC. D.C. Code § 16-2825 Two separate Early Mediation Forms are available. Both forms may be obtained at www.dccourts.gov/medmalmediation. One form is to be used for early mediation with a mediator from the multi-door medical malpractice mediator roster; the second form is to be used for early mediation with a private mediator. Both forms also are available in the Multi-Door Dispute Resolution Office, Suite 2900, 410 E Street, N.W. Plaintiff's counsel is responsible for eFiling the form and is required to e-mail a courtesy copy to earlymedmal@dcsc.gov. *Pro se* Plaintiffs who elect not to eFile may file by hand in the Multi-Door Dispute Resolution Office.

A roster of medical malpractice mediators available through the Court's Multi-Door Dispute Resolution Division, with biographical information about each mediator, can be found at www.dccourts.gov/medmalmediation/mediatorprofiles. All individuals on the roster are judges or lawyers with at least 10 years of significant experience in medical malpractice litigation. D.C. Code § 16-2823(a). If the parties cannot agree on a mediator, the Court will appoint one. D.C. Code § 16-2823(b).

The following persons are required by statute to attend personally the Early Mediation Conference: (1) all parties; (2) for parties that are not individuals, a representative with settlement authority; (3) in cases involving an insurance company, a representative of the company with settlement authority; and (4) attorneys representing each party with primary responsibility for the case. D.C. Code § 16-2824.

No later than ten (10) days after the early mediation session has terminated, Plaintiff must eFile with the Court a report prepared by the mediator, including a private mediator, regarding: (1) attendance; (2) whether a settlement was reached; or, (3) if a settlement was not reached, any agreements to narrow the scope of the dispute, limit discovery, facilitate future settlement, hold another mediation session, or otherwise reduce the cost and time of trial preparation. D.C. Code§ 16-2826. Any Plaintiff who is *pro se* may elect to file the report by hand with the Civil Actions Branch. The forms to be used for early mediation reports are available at www.dccourts.gov/medmalmediation.

Chief Judge Robert E. Morin