



PERSONNEL AND
READINESS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

JAN - 8 2016

Barry S. Anton, Ph.D., ABPP, President
Norman B. Anderson, Ph.D., Chief Executive Officer
American Psychological Association
750 First Street, NE
Washington, DC 20002-4242

Dear Dr. Anton and Dr. Anderson:

Thank you for your letter of October 28, 2015, advising the Department of Defense (DoD) of the policy recently adopted by the American Psychological Association (APA) Council of Representatives prohibiting psychologists from participating in national security interrogations or working at the Guantanamo Bay detention facility unless the psychologist only treats military personnel or works directly for the persons being detained or for an independent third party to protect human rights.

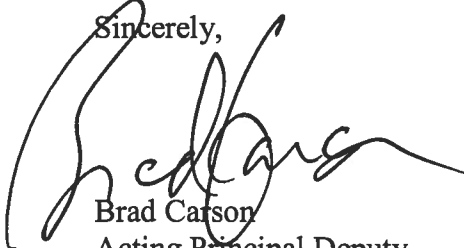
The United States Armed Forces strive to uphold the highest standards of medical professional ethics while protecting the Nation's security. Accordingly, the DoD in general, and the Military Health System (MHS) in particular, have a high regard for the professional associations that carry out vital leadership roles for the Nation's health care system. Specific to the psychology profession, the MHS relies heavily on approximately 2,000 military and civilian psychologists for many priority programs vital to the health and wellbeing of the members of the Armed Forces and their families, such as behavioral health care, post-traumatic stress, suicide prevention, substance abuse treatment, resiliency, domestic violence prevention, and special needs children. These programs cannot be successful without the strong support of the civilian psychology community, particularly with respect to training, professional standards, and licensure, all of which are essential to the recruitment and retention of highly qualified psychologists needed by the United States Armed Forces.

Licensing uncertainty as a result of the policy adopted by the APA, however, could adversely affect the recruitment and retention of highly qualified psychologists needed by the MHS and United States Armed Forces. To relieve the anxiety of current military psychologists and those considering military service that has been generated by the policy adopted by APA's Council of Representatives, DoD is reviewing its procedures to determine if there are ways to clarify the separation of psychological care of detainees, which care is required by law and ethical duty, and any activities relating to national security intelligence interrogations. For the same reason, we request confirmation that the APA's views regarding the presence of psychologists at Guantanamo, other than those providing care to U.S. military personnel, are a matter of policy, not an ethical mandate, and are not intended to put psychologists providing patient care to detainees at professional risk.

We value the historical relationship between the Armed Forces and the American psychology community. We see the timeless ethical values of the psychology profession to "do

no harm” and to do public service as mutually reinforcing. In this spirit, we hope for a meaningful opportunity to engage with the APA in its further work on this subject. Attached are comments we hope you will find constructive as this work proceeds.

Sincerely,



Brad Carson
Acting Principal Deputy

Attachments:
As stated

DEPARTMENT OF DEFENSE COMMENTS ON AMERICAN PSYCHOLOGICAL
ASSOCIATION RESOLUTION

Psychologist Support of Interrogations

The first part of the American Psychological Association (APA) resolution addresses psychologist support of national security interrogations. Referencing the APA Ethics Code mandate to “take care to do no harm,” the APA resolution states that “psychologists shall not conduct, supervise, be in the presence of, or otherwise assist any national security interrogations for any military or intelligence entities.” The resolution further states that the “prohibition does not apply to domestic law enforcement interrogations or domestic detention settings where detainees are afforded all the protections of the United States Constitution,” including that statements made cannot be a basis for punishment in court proceedings if they had no Miranda warning nor opportunity to consult with counsel. It also provides that psychologists “may provide consultation with regard to policy pertaining to information gathering methods which are humane” if they do not violate other parts of the resolution and “are not related to any specific national security interrogation or detention conditions.” We respectfully ask that in further deliberations, APA consider the following points.

First, although the Department of Defense (DoD) understands the desire of the American psychology profession to make a strong statement regarding reports about the role of former military psychologists more than a dozen years ago, the issue now is to apply the lessons learned to guide future conduct. The context of future conflicts – whether a traditional international armed conflict like World War II or the Korean War, a defense of the homeland against international terrorist organizations like al-Qaeda or the Islamic State in Iraq and the Levant, or something entirely unpredictable – is today unknown. A code governing psychologists’ ethics in future national security roles needs to fit all such contexts. We respectfully suggest that a blanket prohibition on participation by psychologists in national security interrogations does not.

Second, like the APA code, DoD policy on medical program support for detainee operations also takes care to ensure that psychologists employed by the Department “do no harm.” The governing DoD policy provides that all DoD health care personnel “have a duty in all matters affecting the physical and mental health of detainees to perform, encourage, and support, directly and indirectly, actions to uphold the humane treatment of detainees and to ensure” that no detainee “shall be subject to cruel, inhuman, or degrading treatment or punishment, in accordance with and as defined in U.S. law.”¹ It further dictates that psychologists serving as behavioral science consultants “shall not support interrogations that are not in accordance with applicable law,”² and requires that any psychologist who “observes or suspects a possible violation of applicable standards . . . for the

¹ Department of Defense Instruction 2310.08E, “Medical Program Support for Detainee Operations,” June 6, 2006, para. 4.1.1.

² DoD Instruction 2310.08E, para. E2.1.6.

protection of detainees shall report those circumstances” to the chain of command and, when appropriate, to the medical chain of authority.³

Third, consistent with the APA resolution, DoD policy requires that medical personnel “shall not be used to supervise, conduct, or direct interrogations,”⁴ and that DoD psychologists serving as behavioral science consultants “may provide training for interrogators in listening and communications techniques and skills and on results of studies and assessments concerning safe and effective interrogation methods.”⁵ Somewhat analogous to a domestic law enforcement function, for which the APA resolution provides an exception, DoD policy also allows behavioral science consultants to “advise command authorities responsible for determinations of release or continued detention of detainees of assessments concerning the likelihood that a detainee will, if released, engage in terrorist, illegal, combatant, or similar activities.”⁶

Fourth, in establishing a dividing line between permissible and impermissible consultant by psychologists on interrogations, both DoD policy and the APA resolution adopt legal reference points. DoD policy allows psychologists serving as behavioral science consultants to “make psychological assessments of the character, personality, social interactions, and other behavioral characteristics of detainees, including interrogation subjects, and, based on such assessments, advise authorized personnel performing lawful interrogations and other lawful detainee operations.”⁷ They “may provide advice concerning interrogations of detainees when the interrogations are fully in accordance with applicable law and properly issued interrogation instructions.”⁸ The applicable law includes a statutory prohibition on interrogation methods not authorized by and listed in Army Field Manual 2-22.3.⁹ The APA resolution recognizes the permissibility of some of these activities, but only in domestic contexts where Miranda warnings and advice of counsel are included. Implicitly, the “no harm” psychologists must “take care to do” is the use of statements in court obtained without the benefit of Miranda warnings and advice of counsel. The main difference in how the APA resolution and DoD policy draw the line between permissible and impermissible involvement in interrogations is that the APA resolution relies on courtroom rules of evidence, whereas DoD policy relies on “applicable” law, which in any armed conflict or other battlefield or military operations setting does not include Miranda warnings, assistance of counsel, or statements taken for purposes of courtroom evidence. Rather, military interrogations are for military intelligence purposes – to gain an understanding of the enemy’s capabilities, intentions, or activities that could do harm to U.S. forces and interests, and potentially the U.S. homeland. DoD suggests that future ethical standards grounded on the timeless medical ethics principle “to do no harm” should relate to the physical or mental well-being of the interrogation subject, rather than courtroom evidence rules.

³ DoD Instruction 2310.08E, para. 4.5.

⁴ DoD Instruction 2310.08E, para. 4.9.

⁵ DoD Instruction 2310.08E, para E2.1.3.

⁶ DoD Instruction 2310.08E, para E2.1.5.

⁷ DoD Instruction 2310.08E, para E2.1.

⁸ DoD Instruction 2310.08E, para E2.1.1.

⁹ Detainee Treatment Act of 2005, 10 U.S.C. 801 note; Army Field Manual 2-22.3, “Human Intelligence Collector Operations,” September 6, 2006.

Fifth, we note the statement in APA's Member Letter of August 14, 2015:

While this new Council resolution invokes Ethical Principle A to "take care to do no harm," it does not amend the Ethics Code and is not enforceable as a result. However, Council's implementation plan for the new policy requests that the Ethics Committee consider a course of action to render the prohibition against national security interrogations enforceable under the Ethics Code.

As the APA proceeds with development of an enforceable standard under the Ethics Code with respect to national security interrogations, we ask for consideration of the above points.

Psychological Health Care of Detainees

The second part of the APA resolution states: "Furthermore, based on current reports of the UN Committee Against Torture and the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, it is also a violation of APA policy for psychologists to work at the Guantánamo Bay detention facility. . ." other than to provide patient care to U.S. military personnel. We respectfully ask that in its further deliberations, the APA consider several points relevant to this statement.

First, this part of the resolution is not presented as one premised on a principle of medical ethics, but rather a legal interpretation and policy preference. We respect the APA's policy views, whether or not they agree with those of the U.S. Government, but believe it is important to acknowledge the distinction between professional ethical standards and policy views. This is of critical importance as the APA proceeds with consideration of standards "enforceable under the Ethics Code."

Second, we note that the Special Rapporteur's views are based on a legal interpretation that differs from that of the U.S. Supreme Court. The Special Rapporteur's position is: "Indefinite detention until the end of hostilities is, of course, permissible under the law of armed conflict. But all detentions that take place away from the field of battle should be covered by the international law of human rights – which prohibits prolonged arbitrary detention – even if they are carried out under a rhetorical 'war on terror.'"¹⁰ The U.S. Supreme Court has held in relation to the post-9/11 conflict that the U.S. Government may lawfully require the detention of individuals who fought against the United States for the duration of the particular conflict in which they were captured,¹¹ but must give them the right of *habeas corpus* review to ensure that their detention is not arbitrary.¹² Under the U.S. Constitution, the Supreme Court provides

¹⁰ Statement of the United Nations Special Rapporteur on torture at the Expert Meeting on the situation of detainee held at the U.S. Naval Base at Guantanamo Bay, Inter-American Commission on Human Rights, 3 October 2013.

¹¹ Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

¹² Boumediene v. Bush, 553 U.S. 723 (2008).

conclusive interpretations of law. Under the United Nations Charter, binding U.N. obligations are established by the U.N. Security Council,¹³ and not by a special rapporteur.

Third, a condemnation of U.S. Government psychologists engaged exclusively in patient care of detainees would be a startling departure from the positions of the American Psychiatric Association¹⁴ and American Medical Association¹⁵, which have adopted policies that clearly distinguish between a physician's role as a provider of patient care versus a role relating to support of interrogations – the former clearly not being the subject of disapproval.

Fourth, just as the APA's 2005 Psychological Ethics and National Security report was focused not on patient care but on interrogation-related activities, its subsequent rescission – which now appears to be well understood by DoD components – should not indiscriminately repudiate involvement in patient care.

Fifth, withdrawing all government psychologists from patient care at Guantanamo would represent an abandonment by the psychology profession of the obligations of the U.S. Government under international and U.S. law, and itself raises serious concerns about professional ethics. Specifically, Common Article 3 of the Geneva Conventions requires that wounded or sick detainees are to be cared for by the detaining party. Further, the Detainee Treatment Act of 2005¹⁶ incorporates standards of the Eighth Amendment to the U.S. Constitution, including an adequate response to medical and psychological care needs of prisoners. We respectfully ask that the APA consider the adverse professional impact on Military Health System psychologists if the APA Ethics Code, generally relied upon by State psychology licensing boards, prohibits a category of patient care required by international and domestic law.

¹³ Charter of the United Nations, Article 25.

¹⁴ American Psychiatric Association Position Statement: "Psychiatric Participation in Interrogation of Detainees," May 2006.

¹⁵ AMA Policies of the House of Delegates, H-140.870, "Physician Participation in Interrogation."

¹⁶ 10 U.S.C. 801 note.