Prolonged Mental Harm: The Torturous Reasoning Behind a New Standard for Psychological Abuse

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I. Introduction

On October 17, 2006, President Bush signed into law the Military Commissions Act ("MCA"),[1] a culmination of recent efforts to create lawful military tribunals for trying suspected terrorists in light of the increase in interrogations[2] and detentions[3] abroad since September 11. While the MCA has been attacked for provisions stripping habeas rights and expanding executive power,[4] its further delineation of the U.S. position on torture risks being overlooked. Specifically, the MCA's definition of mental torture does not simply rely on the definition set forth in the Federal Anti-Torture Stat-

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1. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

2. As of mid-2005, the United States had screened over ten thousand individuals as part of the war on terror. U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention,* app. 1 § 22, U.N. Doc. CAT/C/48/Add.3/Rev.1 (Jan. 13, 2006).

3. According to the latest numbers reported to the Committee Against Torture, the United States holds approximately 400 detainees in Afghanistan, approximately 505 at Guantanamo, and 13,000 in Iraq. *See id.* app. ¶¶ 21, 94.

4. *See, e.g.*, Press Release, Physicians for Human Rights, PHR Decries House and Senate Passage of Military Commissions Act (Sept. 26, 2006), *available at* http://www.physiciansforhumanrights.org/library/news-2006-09-26.html; Press Release, Human Rights First, Military Commissions Act of 2006 Defies U.S. Constitution, Violates Fundamental Rights (Sept. 28, 2006), *available at* http://www.humanrightsfirst.org/media/etn/2006/alert/270/; Press Release, Am. Civil Liberties Union [ACLU], President Bush Signs Un-American Military Commissions Act, ACLU Says New Law Undermines Due Process and the Rule of Law (Oct. 17, 2006), *available at* http://www.aclu.org/safefree/detention/27091prs20061017.html; Dahlia Lithwick and Richard Shragger, *Pass the Buck: When Congress Passes Unconstitutional Laws*, Slate Magazine, Oct. 7, 2006, *available at* http://www.slate.com/id/2151048/; Scott Shane and Adam Liptak, *Shifting Power to a President*, N.Y. Times, Sept. 30, 2006, at A1.

ute.[5] Rather, the MCA adopts a problematic interpretation of that statute introduced by a 2004 memorandum from the U.S. Justice Department's Office of Legal Counsel ("OLC").[6]

The 2004 memo, on which this Article will focus, narrows the definition of torture by insisting that "prolonged mental harm" is an independent element required for the crime of mental torture. This reading of the Federal Anti-Torture Statute requires a separate showing of "prolonged mental harm" in every case of alleged mental torture following one of four proscribed acts.[7] According to this requirement, no act, however obviously damaging to the victim by its very nature, is psychological torture per se. The OLC position would require accepting, for instance, that not every case of administering "mind altering substances . . . calculated to disrupt profoundly the senses," and not every "threat of imminent death" would result in prolonged mental harm, and thus are not always acts of torture.[8] The OLC position inverts the absolute prohibition on torture by introducing a "wait and see" approach to psychological torture.[9] This approach, as adopted in the MCA, relies on selective support from U.S. case law, misinterprets customary international law, undermines the purpose of the Convention Against Torture ("CAT"), and ignores standard rules of statutory and treaty interpretation.

Part II of this Article provides background on the Federal Anti-Torture Statute, the 2004 OLC memo and the MCA, and their relevance to the definition of mental torture. Part III refutes the position that existing U.S. case law supports the OLC position and examines customary international law to show that a prolonged mental harm requirement deviates from standard torture jurisprudence. Part IV argues that the OLC position disregards the CAT. Part V demonstrates that the OLC analysis is inherently flawed based on its failure to recognize standard rules of interpretation and the purpose of the Federal Anti-Torture Statute, domestically and within the international community. Part VI concludes that a plain reading of the Federal Anti-Torture Statute should be adopted to uphold the absolute prohibition of torture.

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5. 18 U.S.C. §§ 2340–2340A.

6. Memorandum from Daniel Levin, Acting Asst. Att'y Gen., to James B. Comey, Deputy Att'y Gen., Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004), *available at* http://www.usdoj.gov/olc/18usc23402340a2.htm [hereinafter Levin Memorandum].

7. *See infra* Part II.

8. 18 U.S.C. §§ 2340–2340A.

9. *Id.*

II. An Evolving U.S. Interpretation: Severe Mental Pain as "Prolonged Mental Harm"

A. *The Federal Anti-Torture Statute of 1994*

The Federal Anti-Torture Statute was meant to fulfill U.S. obligations under the CAT, which the United States signed in 1988.[10] Article 1 of the CAT prohibits torture, which it defines as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person."[11] The definition contains no temporal requirement qualifying the type of mental pain or suffering that must be inflicted if a charge of torture is to be brought. Torture applies to any act that causes severe pain or suffering.

When ratifying the CAT, the United States attached its own understanding of the treaty's provisions concerning the definition of torture. It was the first state to do so, and is, to date, the only state to set out such an extensive conditional understanding to the CAT's provisions.[12] In relation to Article

10. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(2), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. [hereinafter CAT].

11. *Id.* art. 1.

12. *See* United Nations, Office of the High Commissioner for Human Rights, Status of Ratifications for the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, http://www.unhchr.ch/html/menu2/6/cat/treaties/conratification.htm (last visited Feb. 25, 2007). Despite potential arguments to the contrary, see, e.g., Nuru v. Gonzales, 404 F.3d 1207, 1217 n.5 (9th Cir. 2005), the most recent Committee Against Torture report calls the statement the United States attached to ratification of the CAT an understanding. *See infra* text accompanying note 89. By way of background, an understanding constitutes an interpretative declaration, indicating a state's opinion on the substance of a treaty rather than an attempt to bypass or derogate from its provisions. *See* the Vienna Convention on the Law of Treaties arts. 2, 19–23, May 23, 1969, 1155 U.N.T.S. 331 (listing the provisions on reservations, their acceptance or rejection, and their effects). If there is no conflict between the U.S. understanding and the definition of torture under Article 1 of the CAT, then there is no reservation. It is an interesting inquiry to raise, however, that the MCA's codification of the OLC's interpretation of prolonged mental harm might change the substantive content of the understanding to suggest something more than mere interpretation. Rather, by reading prolonged mental harm in the understanding as a fully structured *alternative* definition to torture as that in Article 1 of the CAT, the U.S. understanding may "purport to make its acceptance of the provision in question conditional upon acquiescence in that interpretation." Donald McRae, *The Legal Effect of Interpretative Declarations*, 49 Brit. Y.B. Int'l L. 155, 173 (1978).

The ability of a codification of the definition of prolonged mental harm to impact the meaning of an understanding attached to a convention is dubious and beyond the scope of this paper. The implications of such a charge, however, make the proposition worth noting. There are two possible effects of a potentially invalid reservation. The first is that the United States cannot take advantage of the reservation and would be unable to assert the prolonged mental harm requirement. The Human Rights Committee has expressed that this is the favorable view in relation to impermissible reservations to the International Covenant on Civil and Political Rights ("ICCPR"):

> The normal consequence of an unacceptable reservation is not that the ICCPR will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the ICCPR will be operative for the reserving party without the benefit of the reservation.

General Comment Adopted by the Human Rights Comm. under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, ¶ 18, CCPR/C/21/REV.1/ADD.6 (Nov. 11, 1994).

1 of the CAT and its definition of severe mental torture, the Senate provided that:

> The United States understands such actions to refer to *prolonged mental harm* caused or resulting from (1) the intentional infliction or threatened infliction of severe physical pain and suffering; (2) the administration of mind-altering substances or procedures to disrupt the victim's senses; (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.[13]

Congress borrowed heavily from this language when implementing the treaty via the Federal Anti-Torture Statute.[14]

The Federal Anti-Torture Statute was passed in 1994, delayed by a three-year controversy regarding adding a death penalty into the statute.[15] The statute 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."[16] It further defines severe mental pain or suffering as follows:

> "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

The second and more dramatic outcome is that the invalidity of the reservation renders the United States a non-party to the Convention. The United Kingdom adopts such a stance, saying it "believes that the only sound approach is . . . that . . . a State which purports to ratify a human rights treaty subject to a reservation which is fundamentally incompatible with participation in the treaty regime cannot be regarded as having become a party at all—unless it withdraws the reservation." *Observations by the Governments of the United States and the United Kingdom on General Comment No. 24 (52) Relating to Reservations*, 15 Hum. Rts. L. J. 422, 426 (1995).

13. S. Exec. Rep. No. 101-30, at II(1)(a) (1990) (emphasis added).

14. 18 U.S.C. § 2340.

15. *See* Elisa Massimino, *Holding America Accountable*, Am. Prospect, Oct. 1, 2004, at A14.

16. 18 U.S.C. § 2340.

> or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.[17]

This language creates an objective test for mental torture. The statute defines severe mental pain or suffering simply as "the prolonged mental harm caused by or resulting from" the four circumstances listed above in the U.S. understanding. Thus, the four prohibited acts listed are reasonably believed to cause prolonged mental harm, and therefore constitute severe mental pain or suffering (mental torture). The simplified language in the Federal Anti-Torture Statute confirms the list of acts considered to constitute mental torture per the U.S. understanding, but crucially adds the word "the" to create the phrase "the prolonged mental harm." This change signals that the phrase should be read as the result stemming from perpetration of one of the four acts, reinforcing an objective, acts-based test. As the next section will show, the OLC memorandum set about undermining this objective test in favor of a subjective test, one that interprets "prolonged mental harm" as a separate requirement and yields unpredictable results.

B. The 2004 OLC Memorandum

The 2004 memorandum is the OLC's second attempt at interpreting the Federal Anti-Torture Statute. In 2002, the Office of Legal Counsel produced a memorandum for the White House counsel and the general counsel of the Defense Department, which narrowly interpreted the Federal Anti-Torture Statute, including the "prolonged mental harm" language.[18] The memorandum received heavy criticism when the *Washington Post* exposed the document in June 2004, particularly because the leak transpired shortly after the publication of photographs of physical and psychological abuses at Abu Ghraib.[19] Human rights organizations expressed outrage at the Bush Administration's apparent attempt to limit criminal liability for abusive treatment and legitimize acts viewed by many as constituting torture.[20]

Within a few months after the 2002 memorandum was made public, the Office of Legal Counsel issued the 2004 memorandum as a replacement document. The 2004 OLC memo purported to have "modified in some important respects [the] analysis of the legal standards applicable [under the statute]" from that of the 2002 memorandum.[21] While one non-gov-

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17. *Id.* § 2340(2).

18. Memorandum from Jay S. Bybee, Asst. Att'y Gen., to White House Counsel Alberto Gonzales, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug 1, 2002), *available at* http://files.findlaw.com/news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf [hereinafter Bybee Memorandum].

19. Dana Priest, Dana Milbank & R. Jeffrey Smith, *Justice Department Memo Said . . .*, Wash. Post, June 13, 2004, at A3.

20. Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, Wash. Post, June 8, 2004, at A1.

21. Levin Memorandum, *supra* note 6. Specifically, the memo significantly modifies the OLC's interpretation of physical torture by providing a broader definition of severe pain. *Id.* It also backs away

ernmental organization ("NGO") notes that the revised memorandum "reject[s] the August 2002 memo's strained interpretations of torture, and thereby call[s] into question the legality of the U.S. government's interrogation policy over the last two years,"[22] the replacement memo also "argues that under this revised definition of torture, no prior Office of Legal Counsel opinions 'addressing issues involving treatment of detainees . . . would be different.'"[23]

Despite any disputed changes with respect to physical torture, the 2004 memorandum does not retreat from the previously narrow OLC interpretation of mental torture. The memo not only concurs with the 2002 interpretation, requiring demonstrated prolonged mental harm as a necessary component to "severe mental pain or suffering," it greatly expands upon it. For conduct to amount to psychological torture under the statute, the OLC memorandum demands the following four criteria be satisfied: 1) severe mental pain or suffering must be inflicted;[24] 2) the infliction must be intentional;[25] 3) the mental pain or suffering must result from one of the four predicate acts;[26] and crucially, 4) prolonged mental harm must result. While the 2004 memo narrows the definition for mental torture, it has not received the same academic attention as its earlier counterpart.[27]

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from the claim that the President's power as Commander-in-Chief supercedes international treaty obligations and federal congressional authority in enacting criminal statutes. *Id.*

22. Press Release, Human Rights First, New Torture Memo an Improvement but Raises More Questions (Jan. 6, 2005), *available at* http://www.humanrightsfirst.org/media/2005_alerts/etn_0106_levin.htm.

23. *Id.*

24. *See* Levin Memorandum, *supra* note 6. The memo attempts to define severity by examining the meaning of the word torture, but since the statute defines torture as "severe . . . pain or suffering," the memo creates a circular argument.

25. While the 2004 memo arguably retreats from the 2002 position equating intent with motive, it still potentially allows individuals relying on field manuals or other interrogation directives to escape liability by presenting a good faith defense. *See id.* A military memorandum assessing interrogation techniques indicated that "absent medical evidence to the contrary, there is no evidence that prolonged mental harm would result from the use of [certain] strategies." Memorandum from Diane E. Beaver, Staff Judge Advocate, to Commander, Joint Task Force 170, Legal Brief on Proposed Counter Resistance Strategies 6 (Oct. 11, 2002), *available at* http://www.npr.org/documents/2004/dod_prisoners/20040622doc3.pdf. While the military eventually rescinded its approval of some techniques, the reasoning above remains logically intact by the 2004 memo—there can be no specific intent if the interrogation tactic used has no medical record proving it causes prolonged mental harm.

26. The 2004 memo avoids the detailed scrutiny of the four predicate acts of the 2002 memo. *See* Bybee Memorandum, *supra* note 18, at 9–12. Instead, it emphasizes that Congress intended the four predicate acts to be an exclusive list. *See* Levin Memorandum, *supra* note 6. The intense focus on specificity, however, fails to address the open-ended language within the list itself. The statute refers to the use or threat of "mind-altering substances *or other procedures calculated to disrupt profoundly the senses or the personality*." 18 U.S.C.A. § 2340 (2)(B) (West 2000) (emphasis added). Any number of practices—isolation, sensory deprivation, or interrogation practices relying on phobias, religious taboos, or cultural identity—could meet this criteria. Thus, the OLC interpretation presents a deceptively narrow depiction of the elements of torture through its selective focus.

27. In fact, very little discussion focuses specifically on the 2004 OLC memorandum, especially its analysis that severe mental harm or suffering requires the subjective element of "prolonged mental harm." If addressed at all, the inquiry seems limited to whether a certain interrogation method results in prolonged mental harm, such as truth serum. *See, e.g.*, Linda M. Keller, *Is Truth Serum Torture?*, 20

The 2004 memorandum interprets the Federal Anti-Torture Statute language regarding the prolonged mental harm as a separate requirement, involving harm of a "lasting duration," which continues for a "prolonged" period of time.[28] The basis for this interpretation relies on the assertion in the memo that the OLC "do[es] not believe that simply by adding the word 'the' before 'prolonged harm,' Congress intended a material change."[29] As will be discussed in Part V, this ignores standard rules of statutory interpretation. Given the Federal Anti-Torture Statute's purpose of implementing an international treaty banning torture, Congress must demonstrate clear intent to overcome a plain textual reading of the statute.

A separate requirement for prolonged mental harm shifts the inquiry from the act of torture itself to the consequences of the act. This change has grave implications for the absolute prohibition on torture. An interrogator no longer has to avoid the four proscribed acts in the Federal Anti-Torture Statute, but instead may choose a tactic based on his understanding of whether the particular victim might suffer prolonged harm as a result. Rather than reading the statute as an objective test, outlawing acts that would cause prolonged mental harm in a typical person, this change in perspective employs a subjective test for torture, creating a "wait and see" approach based on suppositions about the fortitude of a particular victim. This approach has no way of accounting for the future impact of environmental influences or success or failure of psychological treatment. It opens the door for potential torture, since a testing period might be necessary to judge whether prolonged mental harm results from the application of certain techniques.

C. *The Military Commissions Act of 2006*

Recent efforts in the U.S. Congress to address the issue of detainee treatment fail to back away from the OLC interpretation. The Military Commissions Act of 2006 further undermines the prohibition on torture by adopting the OLC advisory opinion as the controlling interpretation of the Federal Anti-Torture Statute language.

Initially, the MCA adopts similar language to that set forth in the Federal Anti-Torture Statute. Regarding the offense of torture, it says:

AM. U. INT'L L. REV. 521 (2005). This analysis does not challenge the underlying assumption requiring proof of prolonged mental harm, but rather works within the OLC framework to try to prove that specific acts constitute torture. The closest piece challenging the OLC rationale is a critique of the meaning of "severe" as regards physical torture, arguing "[i]n almost all cases when we replace a vague standard with an operationalized rule, the cost of diminishing vagueness is an increase in arbitrariness." Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1699 (2005). Waldron instead champions an absolute prohibition on torture without regard to its severity, citing the prohibition as an archetype in both international and domestic law. While it is beyond the scope of this article to discuss the direct meaning of severe physical torture, this article contends that the OLC's interpretation of "prolonged mental harm" is similarly misguided.

28. *See* Levin Memorandum, *supra* note 6.

29. *Id.*

> Any person subject to this chapter who commits an act 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 for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind, shall be punished . . . as a military commission under this chapter may direct.[30]

Ignoring the new qualifiers regarding intent and motive, the underlying language of severe physical or mental pain or suffering is recognizably standard, based on the CAT and the Federal Anti-Torture Statute.[31] The MCA then goes on to define mental torture by saying: "In this section, the term 'severe mental pain or suffering' has the meaning given that term in section 2340(2) of title 18."[32] This language alone simply adopts the Federal Anti-Torture Statute language, and does not require the concurrent adoption of the OLC interpretation of that language.

The MCA goes on, however, to define a separate crime, that of cruel and inhuman treatment, in relation to torture. Regarding "cruel and inhuman treatment," it says:

> Any person subject to this chapter who commits an act intended to inflict *severe or serious* physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control shall be punished . . . as a military commission under this chapter may direct.[33]

Again, if one ignores other obvious differences (the relaxation of specific intent to intent, the deletion of purpose), this definition of cruel or inhuman treatment is noteworthy because it encompasses *either* "severe or serious" physical or mental pain and suffering. *Severe* mental pain and suffering once again has the meaning of section 2340(2), adopting the language of the Federal Anti-Torture Statute. By contrast:

> "*Serious* mental pain or suffering" has the meaning given the term "severe mental pain or suffering" in section 2340(2) of title 18, except that—
> (I) the term "serious" shall replace the term "severe" where it appears; and
> (II) as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006, the term "serious and non-

30. Military Commissions Act § 950v(b)(11)(A).
31. CAT, *supra* note 10, art. 1; 18 U.S.C.A. § 2340.
32. Military Commissions Act § 950v(b)(11)(B).
33. *Id.* § 950v(b)(12)(A) (emphasis added).

> transitory mental harm (which need not be prolonged)" shall replace the term "prolonged mental harm" where it appears.[34]

The definition of *serious* mental pain and suffering emphasizes that the distinction between serious and severe depends not on the acts themselves, but upon whether or not there is prolonged mental harm. *Serious* harm is non-transitory—but note this can still encompass prolonged harm, since the definition merely says it "need not" be prolonged. *Severe* harm, however, is always prolonged.

This definition establishes the OLC position as the ruling interpretation on severe mental pain and suffering. Instead of focusing on the four predicate acts as the objective inquiry for torture, it forces a separate inquiry of whether prolonged mental harm exists. The MCA directly contrasts mental torture's "prolonged" mental harm and cruel and inhuman treatment's "non-transitory" mental harm. This makes it necessary to examine each individual case to see if it falls under "serious" or "severe," which can only be determined by categorizing the harm's length of time. Only cases that result in "prolonged" rather than "non-transitory" harm are severe enough to potentially be torture, regardless of whether an interrogator has violated one of the four predicate acts in the Federal Anti-Torture Statute. This approach adopts the OLC interpretation that prolonged mental harm is a separate requirement that must be met and creates a subjective test for mental harm under both the crimes of torture and cruel and inhuman treatment.

In some ways, the MCA's definition of mental torture goes even further than the OLC interpretation. It is not just that cruel and inhuman treatment is "serious" and torture is "severe." The definition of cruel and inhuman treatment actually encompasses "serious *or* severe" harm. This blurs the distinction between cruel and inhuman treatment and torture. The Geneva Conventions and international criminal tribunals have always considered cruel and inhuman treatment less severe than torture,[35] traditionally treating torture and cruel and inhuman treatment as a progression on a spectrum of unlawful acts. Actions that cause "severe" harm, creating prolonged mental harm,[36] could formerly only be classified as torture, but under this new Act, they now might only amount to cruel and inhuman treatment. In practice, this could result in downgrading a torture charge to a cruel and inhuman treatment charge. The MCA's provision for conviction

34. *Id.* § 950v(b)(12)(B)(iii) (emphasis added). These definitions are repeated in the MCA's amendment to the War Crimes Offense in Federal Criminal Code. *Id.* § 6(b).

35. *See*, *e.g.*, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res.43/173, U.N. Doc A/RES/43/173 (Dec. 9, 1988). *See also* Levin memorandum, *supra* note 6.

36. In fact, it is difficult to understand where non-transitory might end and prolonged begin. The American Heritage Dictionary defines transitory as "existing or lasting only a short time, short-lived or temporary." THE AMERICAN HERITAGE DICTIONARY (Joseph P. Pickett et al. eds., Houghton Mifflin Company 4th ed. 2000). Non-transitory harm would therefore last more than a short time.

on lesser-included offenses supports the possibility of developing this practice.[37]

The MCA thereby incorporates the OLC interpretation into mainstream discourse by writing the distinction of prolonged mental harm formally into congressional legislation. The adoption of non-transitory harm for a lesser charge forces an individual inquiry into each case to see whether the harm caused is prolonged. Even if the harm is prolonged, under the new Act, it still may not be torture. In either case, the OLC standard for requiring prolonged mental harm in addition to an act of torture is now part of mainstream discourse.

D. *Continued Significance of the U.S. Interpretation*

The OLC interpretation of "prolonged mental harm" as a new additional requirement to mental torture calls into question the U.S. commitment to the absolute prohibition on torture. In the words of one human rights organization,

> This turns the very idea of the prohibition against torture on its head since the purpose of the laws against torture is to prevent interrogators from using it in the first place, rather than waiting to see what impact it may have. There would be little reason for interrogators to worry about being held accountable for engaging in horrific acts of psychological torture.[38]

Continued reports of abuse and torture since the Abu Ghraib scandal and the OLC 2004 replacement memo reinforces this concern and heightens the importance of critically revisiting the OLC interpretation of torture.[39] Documentation details methods of interrogation in Iraq, Afghanistan, and Guantanamo Bay.[40] The types of abuse exposed combine psychological tor-

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37. Military Commissions Act § 950s ("An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.").

38. Press Release, Physicians for Human Rights, New Opinion Will Not Prevent Torture or Cruel, Inhuman or Degrading Treatment, Particularly Severe Mental Pain and Suffering (Jan. 4, 2005), *available at* http://www.physiciansforhumanrights.org/library/statement-2005-01-04.html.

39. *Id. See also* Eric Schmitt & Carolyn Marshall, *Task Force 6-26: Inside Camp Nama; In Secret Unit's 'Black Room,' A Grim Portrait of U.S. Abuse*, N.Y. TIMES, Mar. 19, 2006, at 1. The report indicates the use of psychological tactics, as "jailers often blared rap music or rock 'n' roll at deafening decibels over a loudspeaker to unnerve their subjects." *Id.* at 3. *See also* CTR. FOR CONSTITUTIONAL RIGHTS, THE TIPTON REPORT (2005), *available at* http://www.ccr-ny.org/v2/reports/report.asp?ObjID=UNuPgz9pc0&Content=577 (summarizing allegations from three Guantanamo detainees detailing, among other practices, forced drug injections, loud music, solitary confinement, religious intolerance and abuses, and the prevalence of mental illness).

40. *See*, inter alia, Richard A. Serrano, *Prison Interrogators' Gloves Came Off Before Abu Ghraib*, L.A. TIMES, June 9, 2004, at A1; Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1; Josh White, *Documents Tell of Brutal Improvisation by GIs*, WASH. POST, Aug. 3, 2005, at A1; Eric Lichtblau, *Justice Dept. Opens Inquiry Into Abuse of U.S. Detainees*, N.Y. TIMES, May 20, 2005, at 20.

ture with more common physical abuses. Detainees have reportedly been subjected to prolonged isolation, sleep deprivation, threats inducing fear of death or injury, and severe sexual and cultural humiliation.[41] Methods that may constitute psychological torture have received less attention than their more recognizable physical counterparts. The continued documentation of abuses suggests the 2004 interpretation has negated the absolute ban on torture.

In addition, this new approach threatens to exempt interrogators, especially non-military personnel, from liability, making torture more likely for detainees in U.S. custody abroad. The Federal Anti-Torture Statute provides direct relief in the case of detainee abuses by non-military personnel.[42] Since the Federal Anti-Torture Statute was intended to fulfill U.S. obligations under the CAT to reach outside U.S. jurisdiction,[43] the OLC interpretation directly affects these individuals. While the Uniform Code of Military Justice (UCMJ) and the Army Field Guide arguably provide additional guidelines restricting military personnel from performing torturous acts, intelligence officers and other non-military personnel are bound only by the statute.[44] The U.S. reported to the Committee Against Torture that the CAT "*may* be available to prosecute abuses of detainees by particular members of . . . intelligence and other non-military personnel," as well as military personnel.[45] This statute at present appears to be the only source of legal prohibition on psychological torture of detainees abroad by officials not subject to the UCMJ. Given the United States' commitment to aim at an absolute prohibition on torture, the high standard created by the OLC interpretation directly affects this liability gap in U.S. law. Retracting the OLC position on the prolonged mental harm requirement remedies this problem most efficiently.

III. The Additional Burden of Prolonged Mental Harm Contravenes U.S. Case Law and Customary International Law

The OLC would not undermine U.S. interests or legal precedent by retracting its position that the crime of mental torture requires an independent demonstration of prolonged mental harm. On the contrary, refining its analysis of prolonged mental harm will align the interpretation with U.S. cases as well as customary international law principles.

41. Gretchen Borchelt, Physicians for Human Rights, Break Them Down—Systematic Use of Psychological Torture by U.S. Forces (2005), *available at* http://www.physiciansforhumanrights.org/library/documents/reports/break-them-down-the.pdf (hereinafter PHR Report).

42. 18 U.S.C. §§ 2340–2340B.

43. Levin Memorandum, *supra* note 6.

44. PHR Report, *supra* note 41, at 97.

45. U.N. Comm. Against Torture, *Second Periodic Report to the Committee Against Torture*, ¶ 19, U.N. Doc. CAT/C/48/Add.3 (Jun. 29, 2005).

A. *The OLC Interpretation Relies on Faulty or Over-Simplified Interpretations of U.S. Case Law*

"The prolonged mental harm" language has been on the books as part of statutory law since 1994, originating in the U.S. understanding to the Convention signed in 1991 and ratified in 1994.[46] Despite this fact, the language of prolonged mental harm does not appear in a court decision until after the events of 9/11 and the war on terror began.[47] In 2001, the sole case citing the phrase simply quoted the full definition of torture in the Torture Victim Protection Act of 1991 (TVPA), which creates a civil remedy for torture under the CAT.[48] Due to the lack of case law surrounding the Federal Anti-Torture Statute, the 2004 memo relies on cases using the TVPA to illustrate prolonged mental harm because the "language is similar" in the way both statutes define mental pain or suffering.[49] Since 2002, the phrase has appeared in an additional eighteen cases. Despite the 2004 memo's reliance on three of these cases to support of its claim of a separate requirement, its analysis of at least two of the cases is faulty.

First, the 2004 memo departs from a plain reading of the case in *Sackie v. Ashcroft*,[50] and instead constructs a summary that emphasizes prolonged mental harm even when the court did not. The district court granted a stay of removal, citing the failure of the Board of Immigration to explore the issue of prolonged mental harm after it ruled out physical torture.[51] In its discussion, the court uses only the term "prolonged mental harm" as the alternative to physical torture. This suggests the court meant the formal charge of mental torture when referring to prolonged mental harm—an implication that the two were equatable.[52] The court's use of one term for another undermines the OLC position because it refuses to recognize prolonged mental harm as a separate component, but construes it as equivalent to mental torture.

Even more important, the 2004 memo misrepresents the court's emphasis in its findings. The memo summarizes: "The court concluded that the resulting mental harm, which continued over this three- to four-year period, qualified as 'prolonged mental harm.'"[53] This description miscon-

46. *See* Pub. L. No. 103-236, Title V, Part A, § 506(a).

47. A search for the phrase "prolonged mental harm" in U.S. case law in both Lexis and Westlaw found only nineteen cases, all in federal court, the earliest of which appears in 2001. Last checked October 29, 2006.

48. *See* Simpson v. Socialist People's Libyan Arab Jamahiriya, 180 F. Supp. 2d 78, 88 (D.D.C. 2001).

49. *See* Levin Memorandum, *supra* note 6. The TVPA, however, does not contain the word "the" before the phrase "prolonged mental harm," a difference this paper argues in Part V is important in statutory interpretation of the Federal Anti-Torture Statute.

50. 270 F. Supp. 2d 596 (E.D. Pa 2003).

51. *Id.*

52. *Id.* at 601.

53. Levin Memorandum, *supra* note 6. The memo relies on its interpretation of this case summary to support footnote 26, which says, "Early occurrences of the predicate act could cause mental harm that

strues the actual language the court used. To describe its finding of torture, the court said: "Given Mr. Sackie's undisputed and uncontroverted testimony that he was threatened with imminent death *on numerous occasions*, *frequently* given mind altering substances and suffered cuts to his back and arms, we must find that he has met his burden of proving that he was tortured in his native country."[54] Thus, the actual analysis the court used in its prolonged mental harm inquiry found mental torture by relying on the description of two predicate acts and their rate of occurrence, not the duration of their aftereffects, as the memo portrays. This alternative reading of the case eliminates the importance of prolonged mental harm as a separate requirement.

The 2004 memo also creates an artificial distinction between cases where prolonged mental harm does and does not exist to support the use of prolonged mental harm as an additional requirement. The memo presents the district court opinion in *Villeda Aldana v. Fresh Del Monte Produce, Inc.*[55] as an example where no prolonged mental harm was found, citing a failure to prove any "lasting damage."[56] The case has since been reversed on appeal, however, and the dismissal has been vacated.[57] The Eleventh Circuit detailed the alleged acts of torture and said, "*[F]or many hours* the security force made specific threats."[58] Once again, a court's attempt to include prolonged mental harm analysis focuses weakly on the duration of the acts. An alternative, stronger reading of the case is based on the security force making specific threats, which fulfills one of the predicate acts listed as mental torture. The reversal in *Villeda Aldana* supports an objective test for torture that bans predicate acts and does not subjectively require additional proof of prolonged mental harm.

Furthermore, the analysis the courts apply to reach a result of prolonged mental harm is often cursory and purely formal. In *Villeda Aldana*, the Court of Appeals uses allegations from a separate claim for emotional distress as evidence supporting mental torture: "[the plaintiffs] 'have suffered and will continue to suffer . . . extreme and severe mental anguish and emotional distress.'"[59] Compared to the specific details provided regarding the predicate acts, this vague statement is the only evidence supporting

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could continue—and become prolonged—during the extended period the predicate acts continued to occur." The court's focus on the number of acts rather than duration of time fails to support this claim. *Id.* at 14–15 n.26.

54. *Sackie*, 270 F. Supp. 2d at 602 (emphasis added).

55. 305 F. Supp. 2d 1285 (S.D. Fla. 2003).

56. The memorandum states: "The [district] court rejected a claim . . . 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." Levin Memorandum, *supra* note 6 (quoting *Villeda*, 305 F. Supp. 2d. at 1294–95).

57. Aldana v. Del Monte Fresh Produce, Inc., 416 F.3d 1242 (11th Cir. 2005).

58. *Id.* at 1252 (emphasis added).

59. *Id.*

future distress or prolonged mental harm. *Doe I v. Liu Qi*,[60] a case not mentioned in the memo, contains a similarly purely facial inquiry. In *Doe*, the court cited the requirement that mental torture be "prolonged," but in its description emphasized beatings each day "for 20 days" as support for mental torture.[61] This again focuses on the occurrence of the predicate acts of torture.[62] The court then said, "In addition to the physical brutality, Beijing prison officials also subjected her to mental torture. She was forced to witness the guards' severe mistreatment of a close friend."[63] The statement provides no description of resulting prolonged harm, but the court concludes, "In sum, all four plaintiffs have sufficiently alleged facts establishing the severe pain or suffering requirement for torture."[64] The conclusory tone and cursory analysis of the evidence for mental torture can be contrasted with the court's demand for specificity in the pleadings for physical torture.[65] In both cases, the court finds support for mental torture without a rigorous analysis of the prolonged mental harm claim.

Further weakening the case for prolonged mental harm as a separate requirement, the 2004 memo neglects to mention that attempts to bring the requirement into domestic criminal law have failed. In *State v. White*,[66] an Iowa criminal case refers to the CAT's definition of torture, but does not apply prolonged mental harm analysis to the victim. Rather, a psychiatrist's examination of the victim's reaction during the act of the crime itself supported the claim of mental torture.[67] In *U.S. v. Chanthadara*,[68] the defendant argued that torture as an aggravating sentencing factor should require prolonged harm, citing the Federal Anti-Torture Statute. The court rejected applying prolonged mental harm analysis to torture in other chapters of the U.S. code. *U.S. v. Sampson*[69] also refused to require prolonged mental harm as part of torture under the Drug Kingpin Act. The court's choice to ignore prolonged mental harm is noteworthy because at the same time it did choose to borrow the Federal Anti-Torture Statute's lower standard for intent.[70] This refusal to apply a separate prolonged mental harm component to torture in domestic criminal law further supports that courts are not applying the OLC interpretation of prolonged mental harm in their analysis of torture claims.

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60. 349 F. Supp. 2d 1258 (N.D. Cal. 2004).
61. *Id.* at 1317.
62. *See id.*
63. *Id.* at 1318.
64. *Id.*
65. *Id.* at 1316.
66. 668 N.W.2d 850 (Iowa 2003).
67. *Id.*
68. 230 F.3d 1237, 1262 (10th Cir. 2000).
69. 335 F. Supp. 2d 166 (D. Mass. 2004). The court concluded, "Further, the court agrees with the Tenth Circuit's ruling in United States v. Chanthadara, 230 F.3d 1237, 1262 (10th Cir. 2000), which held that torture under the FDPA need not be 'prolonged.'" *Id.* at 207 n.23.
70. *Id.* at 206–07.

B. *The OLC Interpretation Fails To Comply with International Standards*

In addition to relying on shaky precedent within U.S. case law, the 2004 memo neglects to take into account customary international law regarding mental torture. International law consistently reaffirms the absolute prohibition on torture and is void of any language discussing prolonged mental harm, undermining any justification for the "wait and see" test required by the OLC interpretation.

1. *The Absolute Prohibition in International Treaties*

Many international treaties besides the CAT create the obligation to prohibit torture unconditionally. The Red Cross has warned that current U.S. interrogation techniques in Iraq, particularly solitary confinement, constitute violations of the Geneva Conventions.[71] Commentary to the Geneva Conventions further declares that "torture is not only condemned as a judicial institution; the act of torture is reprehensible in itself."[72]

The International Covenant on Civil and Political Rights ("ICCPR") also specifically prohibits acts that cause mental suffering in Article 7.[73] According to a 2006 United Nations ("U.N.") report by the Economic and Social Council on the United States:

> The interrogation techniques authorized by the Department of Defense, particularly if used simultaneously, amount to degrading treatment in violation of article 7 of the ICCPR . . . . If in individual cases, which were described in interviews, the victim experienced severe pain or suffering, these acts amounted to torture as defined in article 1 of the Convention [Against Torture].[74]

The ICCPR's definition of torture requires only experiencing severe pain or suffering from the acts and does not articulate a requirement of prolonged mental harm.

Other international treaties, to which the United States has elected not to become a party, move beyond mere support for the absolute prohibition

71. *See* INT'L COMM. OF THE RED CROSS [ICRC], REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION (2004). Common Article 3 and Article 17 of the Third Geneva Convention forbid both physical and mental torture in interrogation practices. Geneva Convention Relative to the Treatment of Prisoners of War arts. 3 & 17, *adopted* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. For a complete list of prohibitions on torture in the Geneva Conventions, see ICRC, 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW at 2107 (2005).

72. CLAUDE PILLOUD ET AL., ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1373–74 (1987).

73. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

74. Comm'n on Human Rights, *Situation of Detainees at Guantanamo Bay*, ¶ 87, 62d Sess., U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006).

on torture in focusing on the acts themselves to more active commentary that directly conflicts with the OLC interpretation.[75] Article 2 of the Inter-American Convention Against Torture defines torture as "any act intentionally performed whereby physical or mental pain or suffering is inflicted. . . . *even if {it} do{es} not cause physical pain or mental anguish*."[76] The treaty focuses on the use of methods and unequivocally fails to require mental anguish as part of the definition of torture. This view is incompatible with an additional requirement of prolonged mental harm.

2. *International Case Law: An Evolving Standard for Human Rights*

International judicial bodies have adopted an absolute ban on torture by declaring the above instruments part of customary international law.[77] The decisions by international tribunals adopt not just the treaties' implication of an absolute ban, but move beyond that. In the *Delalic*[78] case, the International Criminal Tribunal for the former Yugoslavia examined the existing definitions of torture and concluded that the CAT, because of its inclusiveness of the definitions from the Inter-American Convention and other treaties, "thus reflects a consensus . . . representative of customary international law."[79] The Trial Chamber thereby endorsed as part of customary law the Inter-American approach that specifically does not require mental anguish.

Similarly, the International Criminal Tribunal for Rwanda ("ICTR") adopted the CAT's definition of torture in *Akayesu* to describe it as a crime against humanity.[80] The tribunal went on to list the essential elements of torture, including the intentional infliction of "severe physical or mental pain or suffering upon the victim."[81] The ICTR found that beatings and interrogations under threat to the victim's life constituted torture, without mention of prolonged mental harm in either the definition of essential ele-

75. The examples cited here are not exhaustive and exclude well-known sources, such as the European Convention for Human Rights or the Rome Statute. For a complete treatment of both international and national prohibitions on torture, see CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 71, at 2106–61.

76. Inter-American Convention to Prevent and Punish Torture art. 2, *opened for signature* Dec. 9, 1985, O.A.S.T.S. No. 67 (emphasis added). To date, the United States has not signed this treaty.

77. The International Criminal Tribunal for the former Yugoslavia ("ICTY") in *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgment, ¶¶ 137–38 (Dec. 10, 1998), ruled that "a general prohibition against torture has evolved in customary international law," citing, for example, the Geneva Conventions' universal ratification and their acceptance as customary law within the International Court of Justice.

78. Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment (Nov. 16, 1998).

79. *Id.* ¶ 459.

80. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 593 (Sept. 2, 1998).

81. *Id.* ¶ 594. The listed purposes are:

(a) to obtain information or a confession from the victim or a third person;
(b) to punish the victim or a third person for an act committed or suspected of having been committed by either of them;
(c) for the purpose of intimidating or coercing the victim or the third person;
(d) for any reason based on discrimination of any kind.

ments for torture or its findings. In the 2003 *Semanza*[82] judgment, the ICTR found the accused guilty of torture as a crime against humanity based on an incident of rape, "noting, in particular, the extreme level of fear occasioned by the circumstances . . . the Chamber finds that the perpetrator inflicted severe mental suffering sufficient to form the material element of torture."[83] These findings emphasize the intent and act itself and do not describe any aftereffects such as prolonged mental harm.

The development of case law in the European Court of Human Rights supports the idea not just of an absolute ban, but an evolving standard for torture that actually lowers the bar over time. While the 1976 case of *Ireland v. United Kingdom* found that the application of certain interrogation tactics only amounted to inhuman and degrading conduct, the court reiterated that the distinction between the latter and the finding of torture was one of intensity, not duration.[84] In 1999, the court in *Selmouni v. France* found mental suffering despite no psychological evaluation of aftereffects, citing that the acts "were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance."[85] The court found that mental violence, including threats and sexual debasement, amounted to mental torture. It emphasized the CAT as a living document:

> The Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in the future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.[86]

This creates the question of whether the techniques used in the *Ireland* case may, under today's standards, constitute torture. Evidence suggests the court is reducing the burden of proof for torture over time.[87] A restrictive prolonged mental harm component is not in keeping with this trend.

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82. Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment (May 15, 2003).
83. *Id.* ¶ 482.
84. Ireland v. United Kingdom, 23 Eur. Ct. H.R. (ser. B) (1976).
85. Selmouni v. France, 1109 Eur. Ct. H.R. (1999).
86. *Id.* ¶ 101.
87. For example, in 2001, the court dropped the intention to humiliate as a requirement for an article 3 violation in *Peers v. Greece*, 33 Eur. H.R. 51, ¶ 61 (2001), which dealt with unsanitary cell conditions. In the more recent case of *Nevmerzhitsky v. Ukraine*, App. No. 54825/00 (2005), the court found a force-feeding procedure was severe enough to constitute torture.

IV. The OLC Interpretation Contravenes the Convention Against Torture

The 2004 memorandum claims to interpret the Federal Anti-Torture Statute in light of its enactment to carry out the "United States' obligations under the [CAT]."[88] The memo's interpretation, however, contravenes the CAT's purpose of strengthening the international prohibition on torture. The CAT prohibits torture in all circumstances and does not require demonstration of prolonged mental harm as a component of mental torture. Indeed, in the Committee Against Torture's report on the United States in May 2006, the interpreting body for the CAT found: "The State party should ensure that acts of psychological torture, prohibited by the Convention, are not limited to 'prolonged mental harm' as set out in the party's understandings . . . but constitute a wider category of acts which cause severe mental suffering, irrespective of their prolongation or its duration."[89] The OLC interpretation reading prolonged mental harm as an additional requirement in the Federal Anti-Torture Statute undermines the underlying purpose of the CAT and should be abandoned.

A. *The Definition of Psychological Torture*

The CAT prohibits both physical and psychological torture, but contains no trace of a prolonged mental harm requirement. Article 1 of the CAT defines torture as:

> [A]ny 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.[90]

The definition envisages no requirement of prolonged mental harm and contains no qualification on the type of mental pain or suffering that must be inflicted for a claim of torture. The text emphasizes the nature of the victim's suffering and the level of pain or suffering caused. Relevant international actors and institutions support this textual interpretation.

The Committee Against Torture ("the Committee"), a body of independent experts charged with the task of monitoring the implementation of the

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88. Levin Memorandum, *supra* note 6.

89. U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States*, ¶ 13, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

90. CAT, *supra* note 10, art. 1.

CAT, provides the most comprehensive examination of the CAT's provisions.[91] The Committee, in its annual reports, examines the measures taken by states to implement the CAT's provisions.[92] It is true that the Committee's examinations affirm that the consequences of psychological torture are damaging to the mental health of the victims.[93] But the Committee does not assert that this is a prerequisite for a claim of torture; instead, it is charged with "determin[ing] a uniform level above which pain or suffering becomes so severe that the infliction of it constitutes torture."[94] In keeping with this charge, the Committee condemns techniques that are torture and does not focus on the aftereffects on an individual.

Examples of such emphasis abound. In 1997, the Committee criticized Israeli interrogation methods, particularly hooding, loud music, sleep deprivation, and threats of harm, including death threats.[95] The Committee unequivocally condemned such techniques and held them to "constitute torture as defined in article 1 of the Convention."[96] The Committee focused on the employment of the techniques, and not the duration of their effects. In the Committee's discussion of practices in the Republic of Korea, the Committee report describes a standard "torture procedure."[97] The use of the phrase "torture procedure" suggests disapproval of systematic practices amounting to torture under Article 1 of the CAT. The condemnation stems from the methods themselves; it is not possible to denounce a technique in total if the aftereffects of its application must be examined in every case. Indeed, the very term "torture procedure" contradicts a requirement to "wait and see" whether or not prolonged mental harm results. Finally, the Committee's evaluation of solitary confinement in Denmark further supports that consideration of future damage, while of concern, is not required to determine an act amounts to torture.[98] The most striking factor consid-

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91. *See* U.N. Comm. Against Torture, http://www.ohchr.org/english/bodies/cat/index.htm (last visited Apr. 1, 2007). The Committee is established by Article 17 of the CAT.

92. *See*, *e.g.*, U.N. Comm. Against Torture, *Report of the Committee Against Torture*, U.N. GAOR Supplement No. 44(A/55/44) (Jan. 1, 2000); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra* note 35.

93. *See*, *e.g.*, U.N. Comm. Against Torture, *Report of the Committee Against Torture*, at Annex VII.A.2. Communication No. 91/1997, ¶ 5.5, U.N. Doc. CAT/C/21/D/91/1997 (Jan. 1, 1999) (discussing psychological aftereffects on one complainant).

94. 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 123 (1988).

95. U.N. Comm. Against Torture, *Report of the Committee Against Torture*, ¶ 257, U.N. GAOR Supplement No. 44(A/52/44) (Sept. 10, 1997). The complete list of techniques considered are as follows: (1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill. *Id.*

96. *Id.* The report goes on to say, "This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case."

97. *Id.* ¶ 56.

98. U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Denmark*, ¶ 25, U.N. Doc. CAT/C/CR/28/1 (Dec. 6, 2002).

ered in that case was the mental pain and suffering a detainee experienced during her solitary confinement.[99] Examinations of the Committee reports, coupled with the clear wording of Article 1 of the CAT, emphasize that the focus of any torture inquiry must be on the inherent characteristics of the method of interrogation.

B. The Purpose of the Convention Against Torture

Beyond creating a conflict with the direct emphasis on the acts themselves in the CAT's definition of torture, the OLC interpretation of prolonged mental harm undermines the purpose of the CAT. The CAT was not drafted with the aim of merely prohibiting torture because torture was already prohibited under customary international law.[100] Rather, as the leading text on the CAT's drafting and progression makes clear, "The principal aim of the *Convention* is to *strengthen* the existing prohibition of such practices by a number of supportive measures."[101] Furthermore, "the primary objective of the *Convention* is to eliminate torture committed by or under the responsibility of public officials."[102] Fundamentally, the CAT is concerned with the prevention of torture. As discussed earlier, the effect of the OLC interpretation of prolonged mental harm creates a "wait and see" test. This result directly contradicts the purpose of the CAT.

The CAT does more than strengthen the absolute prohibition on torture. It works to create responsibility to enforce the prohibition. Article 2 defines the obligations of the parties to the CAT and sets out the fundamental premise that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[103] Article 2 (2) reinforces this, and provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as justification of torture."[104] This underlines the absolute and inalienable right to be free from torture, a right from which there can be no derogation. In addition to endorsement of this position, Article 2 makes effective enforcement of the CAT's provisions a fundamental part of the treaty's object and purpose. The obligation incumbent upon state parties is to take active measures to uphold the absolute prohibition as defined in Article 1.

The OLC interpretation of the Federal Anti-Torture Statute is to be judged against these twin purposes: strengthening the absolute prohibition on torture and employing effective enforcement mechanisms. First, the

99. For an alternative exposition of the woman's plight see PHR Report, *supra* note 41, at 113.

100. *See* discussion *supra* Part III.

101. Burgers & Danelius, *supra* note 94, at 1.

102. *Id.* at 119.

103. CAT, *supra* note 10, art. 2(1).

104. *Id.* art. 2(2).

OLC interpretation would weaken, rather than strengthen, the absolute prohibition by creating a "wait and see" test for torture. The prolonged mental harm requirement makes little sense when viewed in light of the U.S. assertion during the negotiation process that "although conduct resulting in permanent impairment of . . . mental faculties is indicative of torture, it is not an essential element of the offence."[105] Such an assertion is logical: if conduct resulting in permanent impairment was a necessary prerequisite of conduct amounting to torture then no case could ever be brought against an interrogator without showing that the harm inflicted endured throughout the victim's life.

In the case of psychological torture this is virtually impossible. The prohibition on conduct amounting to torture would be inverted if this indefinite "wait and see" approach were observed. The situation is no different, however, when "prolonged mental harm" replaces "permanent impairment." The preliminary question for cases of psychological torture becomes one of whether or not the victim has suffered mental harm of a prolonged duration. If the answer to this is negative then no further inquiry need be conducted. The severity of the mental pain inflicted—the essence of psychological torture—is only a relevant consideration in so far as more severe pain may have a propensity of occasioning lasting mental harm. This is contrary to the CAT's first focus, strengthening the existing prohibition on torture.

Moreover, the prolonged mental harm requirement presents problematic enforcement issues, the second aim of the CAT. If prolonged harm is not understood as something automatically resulting from one of the predicate acts, then it becomes necessary to define what is meant by "prolonged mental harm." Yet even the opinions within the OLC changed over the ambit of prolonged mental harm within the space of just two years.[106] The original 2002 memorandum mandated that prolonged mental harm last "for months or even years."[107] The 2004 memo retreats from this position but offers no clear temporal criterion as a solution.[108] Internationally, usage of the term is non-existent. Nor does the phrase appear in the most prominent discussion of the CAT's negotiation and drafting.[109] Indeed, the 2004 memorandum concedes that there is "little guidance to draw upon in interpreting this phrase."[110] Prolonged mental harm is not a term that is present in "the relevant medical literature or elsewhere in the United States Code."[111]

105. Burgers & Danelius, *supra* note 94, at 44.
106. *Compare* Bybee Memorandum, *supra* note 18, at 1, 7, *with* Levin Memorandum, *supra* note 6.
107. Bybee Memorandum, *supra* note 18, at 1.
108. Levin Memorandum, *supra* note 6.
109. Burgers & Danelius, *supra* note 94.
110. Levin Memorandum, *supra* note 6.
111. *Id.*

In addition to its lack of definable scope, the requirement is inherently unworkable. If prolonged mental harm does not manifest itself until the distant future, it is unclear if this would be sufficient grounds for prosecution. It creates an incentive for prosecutors to wait for as long as possible to maximize the possibility that such harm may develop or become apparent. These barriers to legal redress are anathema to the object and purpose of the CAT. It is impossible to strengthen the absolute prohibition on psychological torture through effective enforcement mechanisms if prosecutors would be encouraged to delay action to wait for prolonged mental harm to develop.[112]

These factors together elucidate that the application of the prolonged mental harm requirement will be a matter of arbitrariness and invention, both as a matter of legal and medical standards. The standard provides little or no guidance for an interrogator or an advising physician as to which methods of interrogation may or may not be permissible. As Burgers and Danelius have argued, the CAT drives at strengthening the prohibition on torture through readily enforceable obligations.[113] These should both be certain in application and be effective.[114] Requiring a showing of prolonged mental harm undermines the absolute prohibition on torture and fails to achieve the enforcement obligations in Article 2.

V. Compliance with Standard Doctrines of Statutory Construction Would Disallow the OLC Interpretation

Congress intended that the Federal Anti-Torture Statute implement, not abrogate, the U.S. obligations under the CAT.[115] The Federal Anti-Torture Statute itself does not compel construing prolonged mental harm as a separate element; rather, the OLC chooses to read it as such.[116] "Although it is possible," the OLC concedes, "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."[117] Contrary to OLC assertion, however, it is not merely possible. Given well-established domestic rules governing the construction of statutes, particu-

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112. Burgers & Danelius, *supra* note 94, at 1.

113. *Id.*

114. *Id.* at 123.

115. *See* S. Rep. No. 103–107, at 58 (July 23, 1993) ("This section provides the necessary legislation to implement the United Nations Convention Against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment.").

116. For a philosophical account of why this meaning was attributed to the statute in the 2002 memorandum, see Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 Geo. J. Legal Ethics 225, 234 (2006).

117. Levin Memorandum, *supra* note 6.

larly in light of international law, the statute does create that presumption. The Federal Anti-Torture Statute can be fairly interpreted to conform to international law and the CAT, and thus avoid conflict, as directed by the Charming Betsy doctrine discussed below. Logically, the statute ought to be so interpreted.

A. *Plain Reading of the Statute Disallows a Separate Prolonged Mental Harm Requirement*

Courts, lawyers, and legal scholars often affirm that a statute's "plain," "natural," or "literal" reading ought to control statutory interpretation, barring compelling reasons to depart from such a reading.[118] The OLC skirts a plain reading of the statute because a plain reading avoids treating any words as superfluous. The OLC fails to demonstrate congressional intent required to overcome the plain reading—the memo says "there is virtually no legislative history for the statute."[119] In addition, the OLC fails to offer policy reasons in support of its position. Thus, the plain or natural reading of the statute clearly imputes significance to "*the* prolonged mental harm" as opposed to "prolonged mental harm."

The OLC assertion that "simply adding [a] word" does not "materially change" the meaning of a statutory clause disregards a well-known principle in favor of a plain or natural meaning of statutory language. Congress may not meditate at length over every word it uses, but as the Ninth Circuit said, "[A] legislature is presumed to have used no superfluous words."[120] The maxim derives from the separation of functions between the legislature and the judiciary. An influential treatise formulates the presumption in the following manner: "No clause, sentence or word shall be construed as superfluous, void or insignificant if the construction can be found which will give force to and preserve all the words of the statute."[121] The 2004 memo itself endorses the maxim.[122] A reasonable reading of the

118. Several formulations of the presumption for a natural reading have been offered by U.S. courts and jurists. According to a recent opinion by Chief Justice William H. Rehnquist, "[o]ur analysis begins with the language of the statute . . . . When interpreting a statute, we must give words their 'ordinary or natural' meaning." Leocal v. Ashcroft, 543 U.S. 1, 8 (2004) (citations omitted). Likewise, Norman Singer states: "[I]n the absence of a specific indication to the contrary, words used in the statute will be given their common, ordinary and accepted meaning, and the plain language of the statute should be afforded its plain meaning." NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:1 (6th ed. 2000). Most judges and lawyers, in stating the presumption for a natural reading, would doubtless concede that words have no intrinsic, immutable meaning, and there is no singular, unambiguous plain meaning of any statutory language. However, it is still possible to discern, among the possible meanings, the one most reasonable readers would select, knowing nothing about the thoughts of the writers. That meaning may be properly called the plain or natural reading.

119. Levin Memorandum, *supra* note 6.

120. Tabor v. Ulloa, 323 F.2d 823 (9th Cir. 1963) (quoting Platt v. Union Pacific R. Co., 99 U.S. 48, 58 (1878)).

121. SINGER, *supra* note 118, § 46:6.

122. "The inclusion of the words '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

Federal Anti-Torture Statute thus requires giving meaning to "the" in the prolonged mental harm phrase of "mental pain or suffering," contrary to the OLC analysis.

The statute strongly suggests that prolonged mental harm inescapably results from each of the four predicate acts, and is not a separate element to be considered when determining an act as torture. Consider the difference between the following sentences:

- Sentence A: "He is responsible for harm resulting from his actions."
- Sentence B: "He is responsible for *the* harm resulting from his actions."

Sentence A connotes conditionality and abstract responsibility—if any harm results from his actions, then he is responsible. Sentence B connotes an affirmation of certain responsibility—he is responsible for the harm that inevitably results (or has already resulted) from his actions. The insertion of the extra word is puzzling and arbitrary unless the drafters of the statute perceived such a difference in connotation between including and omitting the definite article.

It further seems unsound to insist that an identical meaning attaches to two separate definitions of a term, where the statutory language replicated the language of the CAT understanding *but for one word.* The above-mentioned treatise on statutory construction specifically addresses this contingency: "[W]here the legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded."[123] By logical extension, when a term is included, significance should be implied. In the present case, Congress has "carefully employed a term in one place," in the statute, and "excluded it in another," in the understanding to the CAT. Thus, it should not be implied where excluded, nor rendered meaningless where included. Indeed, in this case, congressional inclusion of an extra word in the statute is an even clearer indication that a change in meaning was intended. If Congress intended to codify the Senate's definition of torture, it would have reproduced the Senate's definition exactly. If the Federal Anti-Torture Statute is read naturally, the OLC contention that there is a separate requirement of prolonged mental harm apart from the predicate acts producing that harm becomes untenable.

B. No Demonstrable Congressional Intent Compels an Interpretation Contrary to Natural Reading

To defeat the presumption that the statute should be read naturally requires a far more extensive analysis than the OLC offers. Even if Congress mistakenly used superfluous words and actually intended an inconsistent

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against interpreting a statute in such a manner as to render words surplusage." Levin Memorandum, *supra* note 6, (citing Duncan v. Walker, 533 U.S. 167, 174 (2001)).

123. Singer, *supra* note 118, § 47:24.

structure to its statute, it is firmly established that the natural reading is still presumed to be controlling, unless "demonstrably at odds" with congressional intent.[124] To support the OLC reading, Congress must have intended to make prolonged mental harm of lasting duration a distinct requirement of the crime of torture. Relevant and compelling legislative history must demonstrate this intent. In the absence of relevant legislative history, an authoritative treatise on statutory interpretation declares: "Courts must rely substantially on the language of the statutes in the context of the goals and objectives they seek to achieve, or where the legislative history is ambiguous, a court must look to intrinsic aids."[125] As already addressed, by the OLC's own admission, "there is virtually no legislative history for the statute."[126] This means an interpretation must rely on the language and goals of the Federal Anti-Torture Statute.

Insofar as the OLC offers any arguments as to congressional intent, it relies not on the legislative history nor the goals and objects of the Federal Anti-Torture Statute, but rather on the Senate's understanding to the CAT. The Senate's understanding, the OLC contends, "defines the scope of the United States' obligations under the treaty."[127] The OLC cites in support of its assertions a 1987 OLC memorandum entitled *Relevance of Senate Ratification History to Treaty Interpretation*. That memorandum, however, declares that "the deliberative record that is created when the Senate advises and consents to a treaty cannot be ignored in the interpretative process . . . . Nonetheless, in all but the most unusual case, the ratification record would not be the determinative—or even the primary—source of evidence as to the treaty's meaning under domestic law."[128] The current OLC should abide by this established legal doctrine of the past OLC. The OLC in 1987 does state that the Senate's official understanding, as compared to the Senate's other pronouncements, is relevant to the interpretation of a treaty.[129] The memo does not provide support, however, for the idea that such statements are probative of the intent of both houses of Congress in the treaty-

124. *See* United States v. Ron Pair Enterprises, 489 U.S. 235, 244 (1989) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

125. SINGER, *supra* note 118, § 48.01. While Congress arguably might have indicated intent within the context of the MCA, the OLC interpretation predates the MCA and does not affect the intent of Congress during the passage of the Federal Anti-Torture Statute.

126. Levin Memorandum, *supra* note 6.

127. *Id.* at 5.

128. 11 Op. Off. Legal Counsel 29 (1987).

129. Contrary to supporting the 2004 memorandum's use of hearing and committee reports, the 1987 memo warns that "statements made by Senators, whether individually in hearings and debates or collectively in committee reports, should be accorded little weight unless confirmed by the Executive," and that "profound foreign policy implications would be raised if the United States were to supplement or alter treaty obligations to foreign governments based on statements made by members of the Senate during its consideration of the treaty that were not communicated to those governments in the form of express conditions." *Id.* at 34–35. This seriously calls into question the force of the arguments on the meaning of severity. *See* Levin Memorandum, *supra* note 6.

implementing legislation.[130] Such an assertion is not found in the U.S. legal corpus, nor does it result logically from the OLC's own earlier pronouncements.

C. No Compelling Public Policy Compels an Interpretation Contrary to a Natural Reading

In addition to its lack of congressional intent, the revised OLC memo does not offer a compelling policy reason to overcome a plain meaning interpretation of prolonged mental harm. In fact, it offers a compelling reason in support of an interpretation consistent with the plain meaning of the statute: the Administration's own clear prohibition on torture in a presidential directive.[131] The OLC discards other clear language employed by the Senate in the understanding and replicated perfectly in the statute because it has unacceptable implications for the nation's international obligations, and because it contravenes the President's directive. Most prominently, OLC dispenses with the "specific intent" requirement, which appears in both the understanding and the statute. "In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture."[132] After noting the many meanings of specific intent, the OLC declined to choose among the meanings, as "it 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."[133] Giving effect to the common, strict definition of specific intent would not be appropriate, according to the OLC, "in light of the President's directive that the United States not engage in torture."[134] The President's directive informs the interpretation of the Senate's treaty ratification pronouncement because "substantial weight [is given] to the Executive Branch's current interpretation of the treaty, in recognition of the President's unique role in shaping foreign policy and communicating with foreign governments."[135] If the presidential directive not to engage in torture leads to dispensing with the liability-narrowing specific intent requirement, it should also logically lead to dispensing with the other liability-narrowing requirement of prolonged mental harm.

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130. The OLC carefully characterizes the convention ratification history as "relevant in interpreting the CAT's torture prohibition," rather than determinative or probative. Levin Memorandum, *supra* note 6.

131. *See id.* at 2 n.7, citing *Statement on United Nations International Day in Support of Victims of Torture*, 40 Weekly Comp. Pres. Doc. 1167–68 (2004).

132. 8 C.F.R. § 208.18 (2003).

133. Levin Memorandum, *supra* note 6.

134. *Id.*

135. 11 Op. Off. Legal Counsel 29, 36 (1987).

D. U.S. Rules of Statutory Interpretation in Light of an International Treaty

The OLC treats the Federal Anti-Torture Statute, which implements the international CAT, as if it were any other statute with ambiguous provisions in need of construction. Every statute calls for interpretation; rules of statutory construction and interpretation are many and at times contradictory. Prior to an interpretation of a statute, it is indispensable to identify those rules of statutory construction most fitting for the case at hand. In this case, the Federal Anti-Torture Statute is a treaty-implementing and international law-implementing statute. Firmly established and well-defined doctrines govern the interpretation of such statutes, distinct from other doctrines of statutory construction. In 1804, Chief Justice Marshall authored the holding that remains authoritative to this day: "[A]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[136] What came to be known as the "Charming Betsy" doctrine has been emphatically reaffirmed and cited as authoritative across U.S. jurisdictions.[137] The Charming Betsy doctrine is compelled by the most basic and explicit constitutional provisions: "Statutes and treaties are both the supreme law of the land, and the Constitution sets forth no order of precedence to differentiate between them. U.S. Const. art. VI, cl. 2. Wherever possible, both are to be given effect."[138] The OLC reading of the statute is thus misguided in its disregard for the Charming Betsy doctrine.

As the Restatement on Foreign Relations explains, under the Charming Betsy maxim, when a federal statute that concerns international law or agreement requires interpretation, it ought to be interpreted so as to avoid violating international law.[139] Avoiding violations of international law requires that "acts of Congress should not be construed to conflict with international treaty obligations."[140] The Charming Betsy doctrine does not compel an interpretation of a law that is clearly and without doubt contrary to congressional intent, since Congress is in principle empowered to renounce at least some obligations arising from treaties and international law. In one well-known case, for instance, *United States v. Palestine Liberation Organization*, the district court conceded: "Congress has the power to enact

136. Restatement (Third) Foreign Relations Law of the United States § 114 (citing Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804)).

137. A search for the phrase "Charming Betsy" in U.S. case law in Westlaw found 188 citations in both state and federal courts. Last checked Feb. 14, 2007.

138. United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988).

139. Restatement (Third) Foreign Relations Law of the United States § 114 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."). Only if a conflict between a new statute and an old treaty is unavoidable does the treaty need to yield to the statute. Breard v. Greene, 523 U.S. 371, 376 (1998) ("[A]n Act of Congress . . . is on a full parity with a treaty, and . . . when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.") (citation omitted).

140. Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1441–42 (9th Cir. 1996).

statutes abrogating prior treaties or international obligations entered into by the United States."[141] The court continued, however, that "unless this power is clearly and unequivocally exercised, this court is under a duty to interpret statutes in a manner consonant with existing treaty obligations."[142] Thus a high bar of intent, with no other reasonable interpretation, must be met to abrogate treaty obligations.

Courts have previously affirmed this requirement when interpreting statutes with a similar foreign jurisdictional reach as the Federal Anti-Torture Statute. In *Weinberger v. Rossi*, the Supreme Court declined to rely automatically on the Charming Betsy doctrine when interpreting a federal statute, conceding that it applies "with less force to a statute which by its terms is designed to affect conditions on United States enclaves outside of the territorial limits of this country."[143] Nonetheless, even with this weakened presumption for the international law-affirming interpretation, the *Weinberger* Court did not merely presume congressional intent to the contrary. The Court said "some affirmative expression of congressional intent to abrogate the United States' international obligations is required in order to construe" the statute contrary to these international obligations.[144] The *Weinberger* Court proceeded to conduct a lengthy and exhaustive examination of the congressional record and legislative history before concluding that congressional intent contrary to international law, while certainly plausible, was not sufficiently affirmed.[145]

The Federal Anti-Torture Statute requires the same kind of searching and thorough examination of any purported congressional intent to violate U.S. obligations under the CAT and international law. The OLC did not perform such an examination, offering only their "belief" about congressional intent to support their interpretation.[146] Contrary to violating the treaty, the OLC actually affirms that Congress's intent in passing the Federal Anti-Torture Statute was "to fulfill . . . the United States' obligations under the Convention."[147] The OLC could not plausibly maintain the contrary given the limited legislative history of the statute, and in what little support there is, Congress declares in the Senate reports that "this section provides the necessary legislation to implement the [CAT]."[148] The OLC's disregard for the Charming Betsy maxim is all the more egregious in this situation, since the presumption against congressional abrogation of a treaty "operates with special force . . . where the alleged violation of a treaty is

141. *Palestine Liberation Org.*, 695 F. Supp. at 1465.
142. *Id.*
143. Weinberger v. Rossi, 456 U.S. 25, 32 (1982).
144. *Id.*
145. *Id.* at 32–37.
146. Levin Memorandum, *supra* note 6 ("We do not believe that simply by adding the word 'the' before 'prolonged harm,' Congress intended a material change in the definition . . . .").
147. *Id.* at 14.
148. S. Rep. No. 103–107, at 58 (1993).

found in an act of Congress declared in its title to be an act to execute certain stipulations in that treaty."[149] In other words, where Congress crafted a statute specifically to implement a treaty, any interpretation that brings that statute in conflict with the treaty it is meant to implement, is especially implausible and unreasonable. The OLC interpretation does just this by interpreting the Federal Anti-Torture Statute so as to create a conflict between the statute and the CAT. Settled rules of statutory construction specifically mandate avoiding such a conflict.

VI. Conclusion

The 2004 OLC memorandum at first glance presents a better-reasoned and less radical interpretation than its 2002 counterpart. The reaction against it has been less pronounced. Its failure to rely on standard statutory interpretation, however, as well as its faulty presentation of existing U.S. and international law, makes its requirement of prolonged mental harm a result of flawed analysis.

Congress should rethink its adoption of the OLC position on prolonged mental harm in the MCA. In addition, a judicial challenge could be raised to abolish the prolonged mental harm language in the MCA.[150] Relying on statutory construction principles, a court must find the language on prolonged mental harm in the MCA to be a truism—reading "*the* prolonged mental harm" as harm that automatically follows from the commission of one of the proscribed acts. Based on a plain reading of the statute, a violation of one of the acts listed as causing severe mental pain and suffering should be sufficient to prove mental torture—"the prolonged mental harm" is merely a descriptive term of the harm that results from the perpetration of the listed acts. This does not attempt to void the language in the U.S. understanding or Federal Anti-Torture Statute, but simply reinstates the objective test for mental torture by reemphasizing the prohibited acts as the primary component for determining torture.[151]

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149. 74 Am. Jur. 2d *Treaties* § 16 (citing Chew Heong v. United States, 112 U.S. 536 (1884)).

150. In considering a plain reading of prolonged mental harm, it is important to keep in mind the challenge posed by the MCA's passage into law. Congress codified the OLC interpretation of prolonged mental harm as a separate requirement, despite knowing that it was not a component required or encouraged by international law, and despite advice to the contrary from the Committee Against Torture. Thus, at least as regards the MCA, the court would have to find these facts insufficient proof of congressional intent to violate the original purpose of the CAT and Federal Anti-Torture Statute.

151. Reading the prolonged mental harm as a truism necessarily voids the MCA's language on "non-transitory harm" for cruel and inhuman treatment as well. This outcome makes sense, given that a court should find the MCA definition of cruel and inhuman treatment violates customary international law. It is a well-established principle that cruel and inhuman treatment is a less severe crime than torture when placing the two crimes on a continuum. *See supra* text accompanying note 35. A law that undermines this distinction of accepted customary international law conflicts with the purpose of the CAT. The CAT serves to create an evolving standard always moving towards an absolute prohibition, rather than undermining the distinction between torture and its lesser counterpart, cruel and inhuman

In keeping with the standards of international law and the CAT, the Federal Anti-Torture Statute should require no further proof of mental torture beyond one of the four predicate acts listed. A plain reading of prolonged mental harm should be adopted to ensure the United States does not engage in mental torture as a way of rerouting the problems raised by physical torture. The standard should be that a predicate act causes de jure prolonged mental harm. This objective test would eliminate the interpretation of prolonged mental harm as an additional requirement or the need for a "wait and see" test. Only such an objective test is in keeping with the absolute prohibition on torture because it creates preventative deterrence, rather than focusing on potential aftereffects and consequences. As set forth above, reversion to basic principles of statutory construction and international treaty obligations would reinstate an objective test.

treatment. In light of this fact, it again could be viewed as a moderate course of action by the court to disallow the language conflating cruel and inhuman treatment with torture.