

DEFINING “TORTURE”: THE COLLATERAL EFFECT ON IMMIGRATION LAW OF THE ATTORNEY GENERAL’S NARROW INTERPRETATION OF “SPECIFICALLY INTENDED” WHEN APPLIED TO UNITED STATES INTERROGATORS

RENEE C. REDMAN*

I. INTRODUCTION

The George W. Bush administration’s narrow definition of “torture” as applied to the war on terror has had a collateral effect on immigrants facing removal from the United States for reasons having nothing to do with terrorism. At least until June 2004, unbeknownst to the world, the administration employed the very narrow definition of “torture” that was set forth in an August 2002 opinion by the Office of Legal Counsel of the Department of Justice (“OLC”).¹ The OLC is part of the Department of Justice under the authority of the Attorney General.² The 2002 Opinion delineated

* Legal Director, American Civil Liberties Union of Connecticut. The opinions in this article are those of the author and are not necessarily those of the American Civil Liberties Union of Connecticut. The author would like to thank David Sloss and Sarah Loomis Cave for their comments on a draft, and Paul Finkelman for his persistent encouragement.

1. Memorandum from Jay Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB AND THE WAR ON TERROR 115 (Mark Danner ed., 2004), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf> [hereinafter 2002 Opinion].

2. OLC Homepage, <http://www.usdoj.gov/olc/index.html> (last visited Feb. 13, 2007). The Assistant Attorney General in charge of the Office of Legal Counsel assists the Attorney General in his function as legal advisor to the President and all the executive branch agencies. The OLC drafts the legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the executive branch and offices within the Department. Such requests typically deal with legal issues of particular complexity and importance or about which two or more agencies are in disagreement. The OLC also is responsible for providing legal advice to the executive branch on all constitutional questions and reviewing pending legislation for constitutionality. All executive orders and proclamations proposed to be issued by the President are reviewed by the OLC for form and legality, as are various other matters that require the President’s formal approval. *Id.*

the extent to which a United States interrogator could interrogate without being criminally liable for torture under sections 2340-2340A of the United States Criminal Code.³

Congress passed sections 2340-2340A of the U.S. Criminal Code as part of the implementation of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").⁴ Section 2340's definition of torture is almost identical to that in Article 1 of CAT except that it substitutes "specifically intended" for CAT's "intentionally inflicted" language. Article 1 of CAT defines "torture" as, *inter alia*, "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . ."⁵ Section 2340 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 . . ."⁶ The 2002 Opinion narrowly defines "specifically intended" to require a showing of "specific intent" as the term is used in United States criminal law: "intent to accomplish the precise criminal act that one is later charged with."⁷ Thus, it concludes, a United States interrogator would not be guilty of torture unless the "infliction of such pain [was] the defendant's precise objective."⁸ The interrogator's knowledge that pain was a "reasonably likely" result of his or her actions, constitutes only general intent and is insufficient for criminal liability.⁹

A few months before the issuance of the 2002 Opinion, the same narrow interpretation of the phrase "specifically intended"

3. *Id.*

4. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT].

5. *Id.* art. 1.

6. 18 U.S.C. § 2340(1) (2000).

7. 2002 Opinion, *supra* note 1 at 117 (quoting BLACK'S LAW DICTIONARY 814 (7th ed. 1999)).

8. *Id.*

9. *Id.* The administration presumably also relied on this narrow definition while proclaiming that it does not torture. Deputy Solicitor General Paul D. Clement at oral argument stated: "I think that the United States is signatory to conventions that prohibit torture and that sort of thing." Transcript of Oral Argument at 49, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-6696.pdf. See also Michael A. Fletcher, *Bush Defends CIA's Clandestine Prisons: 'We Do Not Torture,' President Says*, WASH. POST, Nov. 8, 2005, at A15 (quoting President Bush as stating, "We do not torture"); Richard W. Stevenson & Joel Brinkley, *More Questions As Rice Asserts Detainee Policy*, N.Y. TIMES, Dec. 8, 2005, at A1 (quoting Secretary of State Condoleezza Rice as stating that "[t]he United States does not permit, tolerate or condone torture under any circumstances.").

had been employed by the Board of Immigration Appeals (the "Board") in a March 2002 ruling holding that the removal¹⁰ of a Haitian citizen for a drug conviction did not violate United States obligations under Article 3 of CAT. The Board is an administrative appellate agency within the Department of Justice ("DOJ") to which the Attorney General delegates much of his immigration authority.¹¹ The Board found that Article 3 of CAT "precludes the United States from returning an alien to a state where there are substantial grounds for believing that he would be subjected to torture."¹² A determination as to whether the deportation of a person to a particular country would violate Article 3 necessarily requires an interpretation of the term "torture" including the proper intent standard.

The Board employed the same interpretation of "specifically intended" as the 2002 Opinion. It required an "'intent to accomplish the precise criminal act that one is later charged with' while [noting that] 'general intent' commonly 'takes the form of recklessness . . . or negligence.'"¹³ Thus, while it acknowledged that the Haitian citizen would be imprisoned in conditions in which he would experience severe pain and suffering, the Board concluded that placing him in such conditions did not amount to torture under CAT because the Haitian authorities lacked "specific intent" to cause that pain and suffering.¹⁴ Although the Haitian authorities knew the conditions were "substandard," they lacked the requisite "specific intent" because they did not create and maintain the conditions with the precise objective of causing severe pain and suffering.¹⁵

The narrow interpretation of "specifically intended" in the 2002 Opinion was renounced by the Attorney General in a second Opinion issued by the OLC dated December 30, 2004.¹⁶ However,

10. Pursuant to legislation passed in 1996, the term "removal" has replaced the terms "deportation" or "exclusion" when referring to the processes whereby aliens are turned or sent away from the United States. See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 410-11 (4th ed. 2005) (commenting that the terms "removal" and "deportation" are used interchangeably).

11. See John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 18 (2005).

12. *In re J-E-*, 23 I. & N. Dec. 291, 294 (2002).

13. *Id.* at 301 (quoting BLACK'S LAW DICTIONARY 813-14 (7th ed. 1999)) (ellipsis in original).

14. *Id.*

15. *Id.*

16. Memorandum from Daniel Levin, Acting Assistant Attorney Gen., to James B. Comey, Deputy Attorney Gen., 1-2 (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/18usc23402340a2.htm> [hereinafter 2004 Opinion].

the Board has continued to employ the renounced interpretation in immigration cases and federal courts have continued to defer to the Board's interpretation.¹⁷

This retention in the immigration context of an otherwise renounced interpretation has had a particularly devastating effect on Haitian citizens facing removal to Haiti due to criminal convictions. Even though the Attorney General renounced the narrow definition of "specifically intended" set forth in the 2002 Opinion, courts continue to defer to it and uphold the removal of Haitian citizens from the United States.¹⁸ Using that interpretation, they persist in finding that the Haitian authorities lack "specific intent" to cause severe pain and suffering despite the fact that the authorities purposely place deportees in prison where they suffer severe pain.¹⁹

This article examines the collateral effect the Attorney General's initial narrow definition of "specifically intended" continues to have on the removal of immigrants who have nothing to do with terrorism. Section II describes CAT, its history and its implementation by the United States. Section III looks at the interpretations of "torture" by federal courts and the Board before December 31, 2004, particularly with regard to claims by Haitians in deportation proceedings. Section IV examines how the 2002 Opinion narrowly defines "torture" relating to conduct of United States personnel in the wars against al Qaeda and the Taliban, and how the 2004 Opinion renounces that definition. Section V examines federal court decisions that were issued subsequent to December 31, 2004, which nonetheless continue to defer to the Board's interpretation.

The last section argues that federal courts are making a tragic mistake in continuing to defer to the Board's narrow interpretation of "torture" even after the White House has renounced the same interpretation as applied to United States personnel.²⁰ While fed-

17. *See, e.g.*, *Theagene v. Gonzales*, 411 F.3d 1107, 1113 (9th Cir. 2005); *Alemu v. Gonzales*, 403 F.3d 572, 574, 576 (8th Cir. 2005); *Auguste v. Ridge*, 395 F.3d 123, 128, 144 (3d Cir. 2005); *Robert v. Ashcroft*, 114 F. App'x 615, 617 (5th Cir. 2004); *Cadet v. Bulger*, 377 F.3d 1173, 1179 (11th Cir. 2004) (deferring to a judgment by the Board that mistreatment in prison of the petitioners returned to Haiti could not amount to torture because Haitian prisons were generally substandard and the mistreatment was not aimed directly at the petitioners); *Settenda v. Ashcroft*, 377 F.3d 89, 96 (1st Cir. 2004); *Bastien v. Dep't of Homeland Sec.*, No. 03-CV-611F, 2005 WL 1140709, at *9 (W.D.N.Y. Apr. 29, 2005) (pending appeal); *Saint Fort v. Ashcroft*, 223 F. Supp. 2d 343, 344 (D. Mass. 2002).

18. *See, e.g.*, *Auguste*, 395 F.3d at 153-54.

19. *See id.*

20. In the author's opinion, regardless of what the policy is named, it is inhumane for the United States government to send human beings to suffer in such

eral courts generally accord *Chevron* deference²¹ to the Board's "reasonable interpretations" of ambiguous immigration statutes,²² they traditionally decline to defer to interpretations of provisions that do not implicate the Board's particular expertise in immigration law.²³ The Attorney General admitted in the 2004 Opinion that the phrase "specifically intended" is ambiguous, and, as will be shown, there are important reasons for concluding that the Board's construction is not permissible. Moreover, neither the phrase "specifically intended" nor the term "torture" is unique to immigration law. Thus, it appears that the Board's interpretation should not be accorded any deference, especially in light of the fact that the Attorney General has renounced that interpretation in the criminal context. However, even if deference is maintained, it should at least be applied to the Attorney General's most recent interpretation as expressed in the 2004 Opinion.

II.

THE CONVENTION AGAINST TORTURE

On December 10, 1984, the United Nations General Assembly unanimously adopted CAT, which subsequently entered into force on June 26, 1987.²⁴ As of February 2007, all 191 members of the

conditions. The tragedy of the Haitians illustrates one consequence of over-reliance on legal definitions. *See generally* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1687 (2005) (stating that, in this day and age, "there is something wrong with trying to pin down the prohibition on torture with a precise legal definition."); Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted*, THE NEW YORKER, Feb. 27, 2006, at 32, 35 (reporting that in the opinion of Alberto Mora, former general counsel of the United States Navy, "there's no moral or practical distinction" between torture and cruelty).

21. *Chevron, U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837 (1984) (holding that agency determinations were accorded deference if Congress had not spoken to the issue and if the agency's determination is neither arbitrary nor capricious).

22. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (quoting *Chevron*, 467 U.S. at 842, and citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448-49 (1987)) (holding that, under *Chevron*, the court should not disturb an agency answer so long as "the agency's answer is based on a permissible construction of the statute").

23. *See, e.g., Francis v. Reno*, 269 F.3d 162, 168 (3d Cir. 2001) (finding Board's interpretation of criminal statute not appropriate); *Sandoval v. Reno*, 166 F.3d 225, 239-40 (3d Cir. 1999) (finding that an issue concerning statute's effective date does not implicate agency expertise); *Bamidele v. INS*, 99 F.3d 557, 561 (3d Cir. 1996) (finding statute of limitations is not within particular expertise of INS). *See also* IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 976-78 (10th ed. 2006) (listing cases where deference was found to be inappropriate).

24. *See Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 211 (3d Cir. 2003).

United Nations and one non-member are parties to CAT.²⁵ Article 1 of the treaty defines “torture” as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind²⁶

The pain or suffering must be “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.”²⁷

Article 2 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 a justification of torture.”²⁸ Article 3 of CAT absolutely prohibits removal or extradition of a person by one state to another where “there are substantial grounds for believing that he would be in danger of being subjected to torture.”²⁹

CAT codifies the pre-existing *jus cogens* of international law³⁰ that torture is to be absolutely prevented.³¹ It is forbidden in al-

25. See OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, *Status of Ratifications of the Principal International Human Rights Treaties* (June 9, 2004), <http://www.unhchr.ch/pdf/report.pdf> (last visited Feb. 13, 2007).

26. CAT, *supra* note 4, art. 1, ¶ 1.

27. *Id.*

28. *Id.* art. 2, ¶ 2.

29. *Id.* art. 3, ¶ 1. Article 3 also states that “[f]or the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.” *Id.* ¶ 2.

30. *Jus cogens* are peremptory norms of general international law “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, 344, 8 I.L.M. 679, 698-99 (entered into force Jan. 27, 1980). Other peremptory norms include absolute prohibitions against genocide and slavery. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 n.6 (1986).

31. See J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE I (1988). See also *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992); *Filartiga v. Pena-Irala*, 630 F.2d 876, 881-84 (2d Cir. 1980) (recognizing that official torture is a violation of international law).

most every country in the world³² and had already been forbidden by prior human rights treaties.³³ The preamble to CAT recognizes the obligations of nations under the United Nations Charter to "promote universal respect for, and observance of, human rights and fundamental freedoms," and recognizes the prohibitions against torture in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.³⁴ The parties to CAT sought "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world."³⁵

The United States signed CAT on April 18, 1988, attaching one declaration.³⁶ The Senate adopted its resolution of advice and consent to ratification on October 27, 1990.³⁷ The Senate resolution included three reservations, four understandings, and two declarations (collectively, "R.U.D.s").³⁸ These included an understanding that "in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering."³⁹ Pursuant to paragraph 2 of Article 27 of CAT, the United States became a full party to the treaty in October 1994 when President

32. See *Nuru v. Gonzales*, 404 F.3d 1207, 1222 n.11 (9th Cir. 2005) (listing examples of laws outlawing torture).

33. See *id.* at 1223 n.12 (listing international conventions prohibiting torture).

34. CAT, *supra* note 4, pmb1.

35. *Id.*

36. The Declaration provided that "[t]he Government of the United States of America reserves the right to communicate, upon ratification, such reservations, interpretive understandings, or declarations as are deemed necessary." See *CAT Declarations and Reservations*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS 7 (2004), www.hri.ca/forthecord1999/documentation/reservations/cat.htm.

37. See 136 CONG. REC. 36625 (1990).

38. See *id.* at S18209. See also *CAT Declarations and Reservations*, *supra* note 36. The Senate has historically attached understandings, reservations and declarations to its consent to ratifications by the President of human rights treaties. See LOUIS B. HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 180-81 (2d ed. 1996). Understandings are distinguished from "reservations," which are conditions imposed by a state upon its adherence to a treaty, modifying or limiting its obligation. See William W. Bishop, Jr., *Reservations to Treaties*, in 103 RECUEIL DES COURS 245, 249-51 (1961).

39. 136 CONG. REC. S18210 (1990). S. Res. § II(1)(a). The declaration stated that "[t]he United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing." *Id.* § III(1).

Clinton deposited the instrument of ratification with the United Nations.⁴⁰

In 1994, Congress implemented CAT by amending the federal criminal code.⁴¹ The United States Criminal Code was amended to provide that

[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.”⁴²

Section 2340 of the Criminal Code adopts the language of the Senate’s understanding and 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.”⁴³

In 1998, Congress enacted the Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”).⁴⁴ Section 2242(a) of FARRA

40. CAT, *supra* note 4, art. 27, ¶ 2 (providing that “[f]or each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.”).

41. See Pub. L. No. 103-236, § 506(a), 108 Stat. 460, 463 (1994); Pub. L. 103-415, § 1(k), 108 Stat. 4299, 4301 (1994); Pub. L. No. 103-429, § 2(2), 108 Stat. 4377 (1994).

42. 18 U.S.C. § 2340A(a) (2000).

43. 18 U.S.C. § 2340 (2000).

44. Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, § 2242(b), 112 Stat. 2, 2681-821, 2681-822 (1998); 8 U.S.C. § 1231(b)(3), Historical and Statutory Notes (2000). There are solid grounds for finding that Article 3 of CAT was self-executing and did not require implementation by Congress. Although a declaration was attached to the ratification stating that Articles 1 through 16 of the Convention are not self-executing, CAT arguably became United States law at that time under the Supremacy Clause. U.S. CONST. art VI, cl. 2 (“[A]ll Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land.”); see David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 46-55 (2002) (arguing that the Supremacy Clause mandates the conversion of primary treaty-based international duties into primary domestic duties, subject to constitutional restraints). At the very least, Article 3 of CAT is self-executing because it sets forth a duty: it provides that “[n]o State Party shall expel, return (*‘refouler’*) or extradite a person.” *Id.* This duty was recognized by the Office of General Counsel (“OGC”) for the Immigration and Naturalization Service (“INS”) before passage of FARRA. In 1997, the OGC issued a memorandum to the INS that provided background on the nature of the country’s obligation under Article 3 so that INS attorneys “may help ensure compliance with that obligation.” Memorandum from Office of Gen-

virtually quotes Article 3 of CAT, providing that it shall be the policy of the United States to not "expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States."⁴⁵ FARRA does not amend the Immigration and Nationality Act. It directs that the "appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3."⁴⁶ It also provides that the terms used in Section 2242 "have the meanings given those terms in the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention."⁴⁷

In February 1999, the Department of State ("DOS") amended the regulations governing extradition procedures⁴⁸ and the Department of Justice ("DOJ") amended the regulatory procedures for asylum and withholding of removal⁴⁹ to include provisions imple-

eral Counsel on Compliance with Article 3 of the Convention Against Torture in the Cases of Removable Aliens to the Regional Counsel, District Counsel, and All Headquarters Attorneys (May 14, 1997) (on file with the NYU Annual Survey of American Law). The memorandum noted that, as the United States was a party to CAT, Article 3 is United States law, regardless of Congressional statute, and concluded that the "INS has a legal duty to ensure compliance with Article 3 in the cases of aliens it may remove from the United States." *Id.* at 3.

45. FARRA, *supra* note 44, § 2242(b).

46. *Id.*

47. *Id.* § 2242(f)(2). The legal effect of the reservations, understandings, declarations, and provisos ("R.U.D.s") on the United States' obligations under CAT is a fascinating topic but not the subject of this article. See also David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 221 (1999) (noting that the executive branch should acknowledge discrepancies between U.S. treaty obligations and domestic law and should take steps to bring the United States into compliance with its treaty obligations).

48. Implementation of Torture Convention in Extradition Cases, 64 Fed. Reg. 9437 (Feb. 26, 1999) (codified at 22 C.F.R. § 95 (2006)).

49. Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478-01 (Feb. 19, 1999) (codified at 8 C.F.R. §§ 3, 103, 208, 235, 238, 240, 241, 253 (2006)). 8 CFR § 208 (2003) sets forth procedures for asylum and withholding of removal. A claimant seeking asylum must show that he or she is "unable or unwilling to return to" the country of the person's nationality or last habitual residence "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (2000). A claimant seeking withholding of removal under Section 1231(b)(3) must show that his or her "life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)

menting CAT. Section 208.18(a)(1) of the DOJ's regulations nearly quotes the definition of torture in Article 1 of CAT, defining torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. . . ."⁵⁰ Section 208.18(a)(5) repeats the Senate's understanding that "[i]n 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."⁵¹ The DOS's regulations are virtually identical on these points.⁵²

Thus, even if CAT was not self executing, as proclaimed by the Senate in its ratification resolution, it became enforceable upon the enactment of FARRA and the amendments to the U.S. Criminal Code. Both statutes reference the Senate's understanding that the act must be "specifically intended."

III.

CONGRESS AND THE COURTS DEFINE "TORTURE"

A. *Congress and the Federal Courts Define Torture*

Even before ratification of CAT, Congress and federal courts had defined "torture."⁵³ The Torture Victim Protection Act of 1991

(2000). The regulations provide that claimants may seek withholding and/or deferral of removal under CAT. *See* 8 C.F.R. § 208.17(a) (2006).

50. 8 C.F.R. § 208.18(a)(1) (2003). The regulation includes references to "his or her" while Article 1 of CAT refers only to "his." Article 1 also ends with a statement that torture "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." That sentence is repeated in a separate subsection of the regulation. *Id.* § 208.18(a)(3).

51. 8 C.F.R. § 208.18(a)(5) (2003) (emphasis added). The change of language from "intentionally inflicted" to "specifically intended" arguably changes Article 1's definition of "torture." During the drafting of CAT, the drafters rejected the United States' proposal that Article 1 require that "the offence of torture includes any act by which extremely severe pain and suffering, whether physical or mental, is deliberately and maliciously inflicted." BURGERS & DANIELIUS, *supra* note 31, at 41. In addition, the Netherlands objected that this understanding "appears to restrict the scope of the definition of torture under article I of the Convention." As such, it rejected and deemed the understanding to have no impact on the obligations of the United States under CAT. *See* Treaties Deposited With the Secretary General: Status as of 31 December 2001, pt. I, ch. IV, § 9B, at 277, U.N. Doc. ST/LEG/SER.E/20, U.N. Sales No. E.02.V.4 (2002).

52. *See* 22 C.F.R. § 95.1(b) (2006) (defining "torture" as "[a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" and stating that "[i]n order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering.>").

53. As recently as 2003, Justice Stevens observed that police questioning of an injured suspect as he was being treated in the hospital was the "functional equivalent of an attempt to obtain an involuntary confession from a prisoner by

("TVPA") provides for civil actions by victims of torture in the hands of foreign governments. Its definition of "torture" is the same as that in Article 1 of CAT: an act "by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual. . . ."⁵⁴

The Foreign Sovereign Immunities Act ("FSIA") suspends the immunity enjoyed by foreign countries where personal injuries were "caused by an act of torture."⁵⁵ It adopts the definition of "torture" found in the TVPA.⁵⁶ In 2001, the District Court for the District of Columbia found that former United States hostages of Iran and Iraq suffered "torture" that was distinct from harm caused by being a hostage, and that therefore, the governments were not immune under the FSIA.⁵⁷

Several of the cases were brought by United States citizens who had been kidnapped in 1985 in Beirut and held hostage by Hezbollah for years, including Terry Anderson,⁵⁸ Father Lawrence M. Jenco,⁵⁹ Joseph Cicippio,⁶⁰ and Thomas Sutherland.⁶¹ In the case brought by Father Lawrence M. Jenco against the Islamic Republic of Iran, the court held that "the deprivation of adequate food, light,

tortuous methods." *Chavez v. Martinez*, 538 U.S. 760, 783 (2003) (Stevens, J., dissenting).

54. Torture Victim Protection Act of 1991 § 3(b), 28 U.S.C. § 1350 (2000); *see also Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1315 (N.D. Cal. 2004) (stating that the TVPA definition mirrors that in CAT and that the court's interpretation and application of torture under CAT therefore informs the interpretation of torture under the TVPA).

55. 28 U.S.C. § 1605(a)(7) (2000).

56. *Id.* § 1605(e)(1) (2000).

57. *See, e.g., Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 45 (D.D.C. 2001), *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 29, 32 n.6 (D.D.C. 2001), *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 25 (D.D.C. 2001).

58. Terry Anderson was an American journalist who was kidnapped in Beirut, Lebanon in 1985 and held hostage for 2,454 days by Hezbollah, a terrorist organization supported by the Islamic Republic of Iran. *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107 (D.D.C. 2000).

59. Father Lawrence Jenco was the Director of the Catholic Relief Service in Beirut, Lebanon, and was kidnapped in 1985 by Hezbollah and held for 564 days. *Jenco*, 154 F. Supp. 2d at 29.

60. David Jacobsen, the CEO of the American University of Beirut Medical Center, Joseph Cicippio, comptroller of the American University and its hospital, and Frank Reed, owner of two private schools in Beirut, were kidnapped by Hezbollah in Beirut in 1985 and held hostage for 532, 1,330, and 1,908 days, respectively. *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998).

61. Professor Thomas Sutherland, Dean of the Faculty of Agricultural and Food Services at the American University of Beirut, was kidnapped in 1985 and held by Hezbollah for 2,354 days. *Sutherland*, 151 F. Supp. 2d at 45.

toilet facilities, and medical care for 564 days amounts to torture within the meaning of section 1605(a)(7).⁶² The court specifically noted that the “pains normally attendant to being a hostage, most notably the loss of liberty and contact with loved ones, although clearly *tortuous* within the common meaning of the term, cannot qualify as torture” under the statutes.⁶³ In the case brought by Thomas Sutherland, the court found that similar treatment for over six years constituted torture.⁶⁴

In another case, four United States citizens had been held hostage by Iraq in Abu Ghraib prison in Baghdad.⁶⁵ The court found that the treatment of those U.S. citizens, which included having loaded guns held to their heads and incarceration in rooms without beds, windows, lights, electricity, water, toilets or adequate access to sanitary facilities, constituted torture.⁶⁶

B. Decisions by the Board of Immigration Appeals: Changes in the Interpretation of “Torture”

Soon after ratification of CAT, and before passage of FARRA, immigration judges and the Board began hearing claims by aliens in removal proceedings that removal to their home countries would violate Article 3 of CAT. Immigration judges and the Board are part of the Executive Office for Immigration Review (“EOIR”) and are under the authority of the Attorney General. The Attorney General delegates many of his duties relating to immigration to EOIR.⁶⁷ Immigration judges are stationed throughout the country and conduct removal proceedings, which are administrative hear-

62. *Jenco*, 154 F. Supp. 2d at 32. From the moment he was abducted, Father Jenco was treated little better than a caged animal. He was chained, beaten, and almost constantly blindfolded. His access to toilet facilities was extremely limited, if permitted at all. He was routinely required to urinate in a cup and maintain the urine in his cell. His food and clothing were spare, as was even the most basic medical care. *Id.* at 29.

63. *Id.* at 32 n.6.

64. *Sutherland*, 151 F. Supp. 2d at 45.

65. *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001). Beginning in 1992, in separate incidents, each male plaintiff was taken into custody by Iraq government employees, and held captive in Iraq. Clinton Hall was held in Iraq for five days. David Daliberti and William Barloon, taken and imprisoned together, were held for 126 days. Kenneth Beaty was held the longest, for 205 days. *Id.* at 21.

66. *Id.* at 25.

67. *See* 8 C.F.R. §§ 1003.0, 1003.1, 1003.10 (2006). Until March 1, 2003, the former INS was also under the authority of the Attorney General. Pursuant to the Homeland Security Act of 2002, as of March 1, 2003, the Department of Homeland Security took over the INS’ immigration and naturalization functions. *See*

ings designed to determine the removability of noncitizens.⁶⁸ The Board is located in Falls Church, Virginia and reviews appeals from decisions of immigration judges.⁶⁹ The Attorney General may refer Board decisions to himself for *de novo* review.⁷⁰

Many of these claims by aliens in removal proceedings were made by Haitian citizens. The claims of Haitian citizens were, and continue to be, based on the undisputed fact that upon arrival in Haiti, Haitian authorities imprison deportees who have criminal convictions.⁷¹ They are imprisoned regardless of the severity of their crimes and regardless of whether they completed their criminal sentences in the United States. The United States State Department admits that "there is no provision for such detention in the law."⁷²

The Haitian authorities have admitted that the purpose of the policy is to punish and intimidate deportees.⁷³ It is the broad con-

The Homeland Security Act, Pub. L. No. 107-296, § 451, 116 Stat. 21935 (2002); *see also* 8 C.F.R. § 1.1 (2005).

68. 8 C.F.R. § 1003.1(d)(1) (2006).

69. *Id.* § 1003.1.

70. *See id.* § 1003.1(h)(i); *In re* J-F-F, 23 I. & N. Dec. 912, 913 (A.G. 2006) (disapproving Board's affirmation of immigration judge and denying CAT claim); *In re* Y-L-, 23 I. & N. Dec. 270, 270 n.1 (A.G. 2002).

71. *See* Auguste v. Ridge, 395 F.3d 123, 129 (3d Cir. 2005) ("Since at least 2000, it has been the policy of the Haitian government to detain deported Haitians, who have incurred a criminal record while residing in the United States and who have already served their sentences, in preventive detention."); *In re* J-E-, 23 I. & N. Dec. 291, 299 (BIA 2002) (finding it undisputed that Haitian will be detained for an indeterminate time upon his deportation to Haiti).

72. U.S. DEP'T OF STATE, 2 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003, at 2493 (2004) (Haiti). A recent State Department report states that prisoners and detainees "continued to suffer from a lack of basic hygiene, malnutrition, poor quality health care, and, in some facilities, 24-hour confinement," and notes that "[m]ost prisons periodically suffered from lack of water." U.S. DEP'T OF STATE, 2 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2004, at 2405 (2005) (Haiti). "The incidence of preventable diseases such as beriberi, AIDS, and tuberculosis increased." *Id.*

73. *See* Claude Adams, *Deported or Dumped?*, SATURDAY NIGHT ONLINE, Oct. 2, 2000, available at http://www.nchr.org/rmp/deported_dumped.htm (reporting Haitian Interior Minister's explanation that "these deportees, they made a choice to commit crimes. We want them to know what it means in Haiti when you get caught for breaking the law."); *see also* Alan Elsner, *U.S. Deportees in Dire Straits in Haitian Prisons: Some convicted of even minor crimes are sent to a country where they've never set foot*, L.A. TIMES, Mar. 24, 2002, at A13 (stating that Haitian authorities claim that "criminal deportees have to be locked up to prevent them from resorting to a life of crime"); Affidavit of Thomas M. Griffin, Esq., in Support of an Omnibus Motion to Administratively Close All Haitian Cases, Filed in Immigration Courts Throughout the Country 4 (Jan. 12, 2006) [hereinafter Griffin Aff.] (on file with the NYU Annual Survey of American Law) (reporting that prisoners told him

sensus of the United States government, Amnesty International and other human rights organizations that, based on independent observations, the testimony of individuals who have been deported to Haiti and articles in internationally-renowned newspapers, criminal deportees are subjected to harsh and life-threatening conditions in Haitian prisons.⁷⁴ These deportees are held for indefinite periods without access to lawyers, the courts or family.⁷⁵ The conditions in these prisons have been compared to those on slave ships.⁷⁶ The deportees have woefully inadequate space,⁷⁷ food,⁷⁸ water⁷⁹ and medical care.⁸⁰ There are no sanitary facilities.⁸¹ Guards and po-

that they are "routinely chastise[d]. . . as being worthless because they are deportees from the United States, not true Haitians"). Mr. Griffin was a member of a group of human rights investigators led by former U.S. Attorney General Ramsey Clark, who investigated the prison conditions of Haitian men who had been deported from the United States. *Id.* The affidavit describes what he saw and learned.

74. See, e.g., INS Resource Information Center, *Haiti: Information on Conditions in Haitian Prisons and Treatment of Criminal Deportees* (2nd Response), (Feb. 12, 2002), <http://uscis.gov/graphics/services/asylum/ric/documentation/HTI02001.htm> (last visited Sept. 25, 2006) [hereinafter *IRI Report*]; U.S. DEP'T OF STATE, 1 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2002, at 2635 (2003) (Haiti).

75. "There is no formal release program or release schedule," and thus deportees remain in prison indefinitely, sometimes for more than one year. Griffin Aff., *supra* note 73, at 2; *IRI Report*, *supra* note 74, at 4; U.S. DEP'T OF STATE, 1 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2002, *supra* note 74, at 2493.

76. *Auguste*, 395 F.3d at 128.

77. In the past, deportees were held in extremely overcrowded cells in which temperatures could reach as high as 105 degrees Fahrenheit during the day. *Id.* at 129. Currently, the men sleep in the structures "so close that they . . . touch each other. Some have thin mats, others sleep on the cement floor. . . . [They] are locked in these structures from 5 p.m. each day until 9 a.m. the next morning." Griffin Aff., *supra* note 73, at 2.

78. Malnutrition and starvation are continual problems. *Auguste*, 395 F.3d at 129; Griffin Aff., *supra* note 73, at 3 (reporting that deportees are "inconsistently fed once or twice per day when large communal bowls of rice, or rice and beans, are brought into the compound."); see also U.S. DEP'T OF STATE, 2 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2001, at 2873 (2002) (Haiti) (reporting that since January 2001, "an average of 5 prisoners have died each month due to various causes, including malnutrition"); AMNESTY INTERNATIONAL, HAITI: UNFINISHED BUSINESS: JUSTICE AND LIBERTIES AT RISK 18 (2000) (reporting that malnutrition among the prison population has in some cases contributed to death in prison).

79. Griffin Aff., *supra* note 73, at 3 (reporting that "there is a trough of water that is used for bathing and for drinking, and for taking water to wash clothes" and that the water is contaminated and poses an extremely high risk to everyone, especially to Americans whose immune systems have not previously been exposed to such contaminants.); see also *IRI Report*, *supra* note 74.

80. There is no medical care or medicine at the prison except for the occasional provision of anti-diarrhea medication. Prisoners suffer from a host of dis-

lice officers frequently beat deportees, often with impunity.⁸² Guards and police officers frequently demand money in exchange for better conditions and/or release.⁸³

Thomas M. Griffin, a lawyer and human rights investigator, entered and inspected the National Penitentiary in Port-au-Prince, including the deportee section, on October 8, 2005.⁸⁴ Among other things, he received and documented reports of beatings, lack of medical care for the sick and dying, a paralyzed deportee who lies in the dark 24 hours a day, as well as a naked psychotic prisoner caged in a miniature cell.⁸⁵ He reported that a special DOJ airplane

eases including tuberculosis, AIDS-related opportunistic infections and Beri-Beri, a life-threatening disease caused by malnutrition. *Auguste*, 395 F.3d at 129; *see also* U.S. DEP'T OF STATE, 2 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2001, *supra* note 78, at 2874; HUMAN RIGHTS WATCH, WORLD REPORT 2003: HAITI 150 (noting high incidence of HIV/AIDS and tuberculosis among prisoners).

81. *Auguste*, 395 F.3d at 129. Prisoners are provided with buckets or plastic bags in which to urinate and defecate. In the past, the bags were often not collected for days and spilled onto the floor. *Id.* *See also IRI Report*, *supra* note 74, at 2 (reporting that "holding cells have no toilets and no sinks" and that "usually those wishing to use a toilet must use a bag to defecate in or they urinate in communal bucket which stays inside the cell"); Griffin Aff., *supra* note 73, at 3 (reporting that currently, when the men are not locked down, they use a waterless, trough-like structure as a toilet. During the daily 16-hour lock-down period, they use plastic bags and throw them out the windows.)

82. *See Auguste*, 395 F.3d at 129 (acknowledging reports of beatings by guards and "isolated allegations of torture by electric shock, as well as instances in which inmates were burned with cigarettes, choked, or were severely boxed on the ears, causing ear damage"). *See also* *Carry v. Holmes*, No. 02-CV-0369Sr, 2003 U.S. Dist. LEXIS 26243, at *5 (W.D.N.Y. July 21, 2003) (finding that deportee frequently witnessed guards and police officers beating prisoners, and at night heard "screams of inmates being beaten and tortured"); *IRI Report*, *supra* note 74, at 1 (reporting an incident in which a Haitian prisoner was beaten to death for complaining about conditions in the National Penitentiary); Yves Colon, *Gates of Hell: Corruption, Poverty Turn Haiti's Prisons into 'Death Traps' for Many Inmates*, HOUSTON CHRON., May 6, 2001, at 30 (reporting that deportees complain of beatings by prison guards).

83. *See Toussaint v. Att'y Gen.*, 455 F.3d 409, 416 (3d Cir. 2006) (stating that "bribery seems to be part of 'the general state of affairs that constitute[s] conditions of confinement' in Haiti" (quoting *Auguste*, 395 F.3d at 137)); Richard Chacon, *Imprisoned by Policy Convicts Deportees by US Languish in Haitian Jails*, BOSTON GLOBE, Oct. 19, 2000, at A1 (reporting that "in Haiti, the US law has taken on a different, and even deadly, twist: Despite having served their sentences in US prisons, most deportees are being led from the airport directly to a Haitian jail, with little or no explanation of why. Many of them say they had been told they would be freed only when they or their families could come up with anywhere from \$1,000 to \$20,000.").

84. Griffin Aff., *supra* note 73, at 1.

85. *Id.* at 4.

transports deportees to Haiti, where they are met by Haitian authorities.⁸⁶ He also learned that others arrive on commercial flights from the United States.⁸⁷

Initially, the Board found that placement of deportees in such conditions constituted torture and violated Article 3 of CAT.⁸⁸ However, in March 2002, the Board, sitting *en banc*, issued a decision holding that removal to such conditions did not constitute “torture” and therefore did not violate the United States’ obligations under CAT.⁸⁹ In *In re J-E-*, over vigorous dissents by six members, the Board denied the request for deferral of removal by a lawful permanent resident with a criminal record, who was then ordered removed to Haiti.⁹⁰

The Board interpreted the regulatory language, “specifically intended,”⁹¹ to require that the Haitian authorities meet the “specific intent” evidentiary standard used in United States criminal law. The Board used the definition of “specific intent” from Black’s Law Dictionary: “‘intent to accomplish the precise criminal act that one is later charged with’ while [noting that] ‘general intent’ commonly ‘takes the form of recklessness . . . or negligence.’”⁹²

The Board acknowledged that the Haitian authorities are intentionally detaining criminal deportees and that they know that the detention facilities are “substandard,” and that there is evidence that many Haitian prisoners are malnourished.⁹³ It found no specific intent to inflict severe pain and suffering, however, because it

86. *Id.*

87. *Id.*

88. *See, e.g.,* Theogene v. Gonzales, 411 F.3d 1107, 1110 n.2 (9th Cir. 2005) (relating that the Haitian citizen was granted CAT relief on October 30, 2001 by the Board and that, a month later, the INS moved for a hearing *en banc*. In determining that motion, the Board relied on *In re J-E-* to conclude that he was not in fact eligible for such relief.); *Saint Fort v. Ashcroft*, 223 F. Supp. 2d 343, 344 (D. Mass. 2002) (same). The author has on file copies of unpublished Board decisions dated September 28, 2001, October 31, 2001 and December 28, 2001 granting CAT claims based on the fact that the deportees would be imprisoned in Haiti. The names of the respondents are not disclosed due to privacy concerns.

89. *In re J-E-*, 23 I. & N. Dec. 291 (2002). At the time, there were 20 members of the Board. In 2002, Attorney General Ashcroft changed the regulations to authorize only 11 positions and eliminated five members. 67 Fed. Reg. 54,893-94 (Aug. 26 2002). *See also* Palmer et al., *supra* note 11, at 18. Many people believe that the five were eliminated for ideological reasons. *See id.* at 31 n.170.

90. *In re J-E-*, 23 I. & N. Dec. at 292.

91. The regulations, 8 C.F.R. § 208.18(a)(5) (2003), require that the act be “specifically intended.”

92. *In re J-E-*, 23 I. & N. Dec. at 301 (quoting BLACK’S LAW DICTIONARY 813-14 (7th ed. 1999)) (ellipsis in original).

93. *Id.* at 293, 301.

found "no evidence that [the Haitian authorities] are intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture."⁹⁴ It found a lack of specific intent because the prison conditions were "substandard" due to budgetary and management problems and the Haitian government was "attempting to improve its prison system."⁹⁵ It found comfort in the fact that then-President Aristide had visited the prison and made judicial reform one of his priorities, and that human-rights groups had been allowed access to the prisons to distribute food and medicine.⁹⁶ Inexplicably, it seemed to have believed that the conditions could not amount to torture if other people were allowed to see them.⁹⁷ Thus, it appears that the Board found no specific intent because it did not find a subjective intent for every element.

The Board did not address the fact that the Haitian prison authorities imprison deportees for the "precise act," *i.e.*, to inflict severe pain and suffering. The deportees are not imprisoned as part of a criminal sentence; they have already served their criminal sentences in the United States. The reason for the imprisonment is to warn and deter deportees from committing crimes in Haiti.⁹⁸ Thus, the Haitian authorities use the inhuman prison conditions as a tool to cause severe pain and suffering, in the same way that a club could be used. This intent to cause pain and suffering exists whether the prison conditions are due to budgetary constraints or not—the conditions still cause pain and suffering and the Haitian authorities still place deportees in those conditions knowing that they will cause pain and suffering.

In re J-E was not challenged in federal court⁹⁹ and is binding on all immigration judges and the Board. The decision had imme-

94. *Id.* at 301.

95. *Id.*

96. *Id.*

97. The Board noted that the Red Cross had free access to the prisons. *Id.*

History has shown that permitting the Red Cross access neither prevents atrocities from taking place nor ensures public disclosure of those atrocities. Examples include the Red Cross' silence in the face of atrocities in German concentration camps during World War II, its failure to publicly reveal atrocities taking place in the former Yugoslavia in 1992, and its public silence regarding the torture taking place in Abu Ghraib prison. See Ed Vulliamy, *Concentration Camps*, in *CRIMES OF WAR* 102, 102-06 (Roy Gutman & David Rieff eds., 1999). See also Peter Slevin, *Red Cross Report Describes Systematic Abuse in Iraq*, *WASH. POST*, May 10, 2004, at ¶4, <http://www.washingtonpost.com/ac2/wp-dyn/A14011-2004May10?> (last visited Feb. 27, 2007).

98. *In re J-E*, 23 I. & N. Dec. at 300.

99. The author does not know why the Board's decision was not challenged in federal court. At the time, federal district courts had jurisdiction to hear habeas

diate impact. The Board applied the decision to categorically dismiss pending appeals from decisions in which immigration judges had granted CAT claims of Haitian citizens.¹⁰⁰ For example, in *Saint Fort v. Ashcroft*, on November 6, 2001, the Immigration Judge had granted deferral of removal to a Haitian under CAT based on imprisonment.¹⁰¹ *In re J-E-* was issued while the government's appeal was pending. The Board relied on the intervening decision to summarily conclude that Saint Fort had presented no evidence that he would be tortured if returned to Haiti and reversed the immigration judge's decision.¹⁰² Saint Fort filed a habeas petition arguing, *inter alia*, that the Board violated his constitutional right to due process by applying *In re J-E-* retroactively to his case. However, the District Court found that *In re J-E-* did not announce a new evidentiary rule, and declined to rule on retroactivity. It did, however, remand the case to the Board for clarification of its statement that Saint Fort had presented no evidence that he would be tortured.¹⁰³

In cases involving Haitians asserting CAT claims based on the Haitian imprisonment policy, federal courts have almost universally continued to accord deference to the Board's (*i.e.*, the Attorney General's) interpretation of Article 3 as set forth in *In re J-E-*.¹⁰⁴

challenges from Board rulings on issues of law. Section 106 of the REAL ID Act later eliminated district court habeas jurisdiction over final orders of removal in such cases and provided that a petition for review to a Circuit Court of Appeals is the "sole and exclusive means for judicial review of any cause or claim under" CAT, with a few exceptions. REAL ID Act, Pub. L. No. 109-13, § 106(a)(1)(B), 119 Stat. 231 (2005).

100. *See, e.g.*, *Theogene v. Gonzales*, 411 F.3d 1107, 1112-13 (9th Cir. 2005) (finding that application of *In re J-E-* to pending appeal by Haitian citizen did not violate right to due process); *Saint Fort v. Ashcroft*, 223 F. Supp. 2d 343, 344 (D. Mass. 2002) (same).

101. 223 F. Supp. 2d at 344.

102. *Id.*

103. *Id.* at 346. The district court later granted the government's motion to reconsider and found that it did not have jurisdiction to hear Saint Fort's CAT claim under FARRA. The First Circuit Court of Appeals found that the district court did have habeas jurisdiction but that *In re J-E-* could be applied retroactively to Saint Fort. *Saint Fort v. Ashcroft*, 329 F.3d 191, 202, 204 (1st Cir. 2003).

104. *See, e.g.*, *Toussaint v. Att'y Gen.*, 455 F.3d 409, 416 (3d Cir. 2006) (deferring to *In re J-E-*); *Auguste v. Ridge*, 395 F.3d 123, 154 (3d Cir. 2005) (deferring to *In re J-E-*); *Theogene*, 411 F.3d at 1113 (deferring to *In re J-E-*); *Robert v. Ashcroft*, 114 F. App'x 615, 617 (5th Cir. 2004) (finding plaintiff's claim "foreclosed by [*In re J-E-*]"); *Cadet v. Bulger*, 377 F.3d 1173, 1193 (11th Cir. 2004) (deferring to *In re J-E-*'s conclusion that "Haiti's indefinite detention of criminal deportees by itself does not constitute 'torture' as defined under CAT"); *Elien v. Ashcroft*, 364 F.3d 392, 398-99 (1st Cir. 2004); *Bastien v. Dep't of Homeland Sec.*, No. 03-CV-611F, 2005 WL 1140709 (W.D.N.Y. Apr. 29, 2005) (pending appeal).

Federal courts have deferred to the Board's interpretation requiring that the Haitian authorities act with "specific intent." *In re J-E* has also been cited as support for the blanket proposition that prison conditions cannot constitute "torture." For example, in *Settenda v. Ashcroft*, the First Circuit Court of Appeals found that "as in *In re J-E*," the prison conditions in Uganda were the result of poverty and the government was working with non-governmental organizations and human rights organizations to improve the prison system.¹⁰⁵ The First Circuit also found comfort in the fact that the Red Cross was permitted access.¹⁰⁶

Similarly, the Eighth Circuit Court of Appeals relied on *In re J-E* to dismiss a CAT claim by an Ethiopian woman who had been raped by her boss, who then had her arrested and released only after she had contracted typhoid fever resulting in significant loss of vision.¹⁰⁷ The court stated categorically that "[s]ubstandard prison conditions are not a basis for CAT relief unless they are intentionally and deliberately created and maintain[ed] . . . in order to inflict torture."¹⁰⁸

However, not all courts accepted the Board's interpretation of "specifically intended." In a 2003 case involving a Nigerian citizen facing imprisonment if deported, the District of Connecticut disagreed with the Immigration Judge's conclusion that prison conditions which included lack of food, water, sanitation and medical care did not amount to torture.¹⁰⁹ It dismissed the Immigration Judge's rationale that because "Nigeria is a very poor country . . . it may not have the resources to maintain an adequate prison system."¹¹⁰ In the court's words, "[a]dequate' is the complete antithesis of the extreme form of cruel, unusual or inhumane treatment" that the Nigerian would suffer.¹¹¹

In 2003, in the case of a woman from the Congo, the Third Circuit Court of Appeals did not address *In re J-E* specifically but opined that "the Convention simply excludes severe pain or suffering that is the unintended consequence of an intentional act."¹¹²

105. *Settenda v. Ashcroft*, 377 F.3d 89, 96 (1st Cir. 2004).

106. *Id.*

107. *Alemu v. Gonzales*, 403 F.3d 572, 574-75 (8th Cir. 2005).

108. *Id.* at 576 (internal quotations omitted) (alterations in original).

109. *Bankhole v. INS*, 306 F. Supp. 2d 185, 187-88 (D. Conn. 2003).

110. *Id.* at 188.

111. *Id.* See also *Khouzam v. Ashcroft*, 361 F.3d 161, 169-70 (2d Cir. 2004) (stating that if *In re J-E* stood for the proposition that any acts perpetrated against a person fleeing prosecution of a crime is a lawful sanction, it would have to disapprove).

112. *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003).

In *Zubeda v. Ashcroft*, it stated that “specifically intended” in 8 C.F.R. § 208.18(a)(5) distinguishes between “suffering that is the accidental result of an intended act, and suffering that is purposefully inflicted or the foreseeable consequence of deliberate conduct,” which is “not the same as requiring a specific intent to inflict suffering.”¹¹³ Thus, CAT does not require that the authorities “actually intend to cause the threatened result.”¹¹⁴ The court noted that requiring an applicant to establish the specific intent of the authorities could “impose insurmountable obstacles to affording the very protections the community of nations sought to guarantee under the Convention Against Torture.”¹¹⁵

Several federal courts and the Board concluded that *Zubeda* had overruled *In re J-E*. In November 2004, the Board found that, “[u]nder *Zubeda*, Haitian officials subjecting [a deportee] to prison for a lengthy period, knowing he has no family help, will generally intend the consequences likely to flow from the conditions they tolerate in their prisons.”¹¹⁶ The Eighth Circuit also agreed with *Zubeda* and stated that “[t]his intent requirement is satisfied if prolonged mental pain or suffering either is purposely inflicted or is the foreseeable consequence of a deliberate act.”¹¹⁷ A Magistrate Judge in the Western District of New York recommended that the removal of a Haitian be deferred under CAT, noting that the “appropriate question is not whether Haiti subjects detainees to indefinite detention with the specific intent to torture them, but whether Haitian officials intentionally . . . inflict pain and suffering upon the detainees for purpose of, *inter alia*, punishing or intimidating them.”¹¹⁸

Throughout this period, the Attorney General urged that the same narrow interpretation of “torture” be used when applied to United States interrogators in Afghanistan and Iraq. The interpretation, set forth in an OLC Opinion, also required a showing of “specific intent” on the part of the interrogators before they could

113. *Id.*

114. *Id.* at 474.

115. *Id.*

116. *In re Dorcelly*, No. A42-146-817, United States Department of Justice Executive Office for Immigration Review, B.I.A. (Nov. 16, 2005) (on file with the NYU Annual Survey of American Law).

117. *Habtemicael v. Ashcroft*, 360 F.3d 820, 827 (8th Cir. 2004) (citing *Zubeda*, 333 F.3d at 473).

118. *Carry v. Holmes*, No. 02-CV-0369Sr, 2003 U.S. Dist. LEXIS 26243, at *36 (W.D.N.Y. July 21, 2003). *See also* *Purveegiin v. Gonzalez*, 448 F.3d 684, 693 n.12 (3d Cir. 2006) (relating that the immigration judge had correctly forecast the court’s discussion in *Zubeda*).

be found criminally liable for torture. Eventually, a December 31, 2004 opinion announced that the interpretation, as applied to United States interrogators, had been renounced by the DOJ in June 2004. However, the DOJ continued to urge the prior interpretation in immigration cases.

IV.

THE "TORTURE" OPINIONS: THE ATTORNEY GENERAL INTERPRETS "TORTURE" AS IT APPLIES TO UNITED STATES INTERROGATORS

On August 1, 2002, the Office of Legal Counsel to the Department of Justice ("OLC") issued an internal opinion to Alberto Gonzales, then-Counsel to President Bush, in which it interpreted the standards of conduct under CAT as implemented in the United States Criminal Code.¹¹⁹ In January 2002, Mr. Gonzales had written a now infamous memorandum to President Bush stating his opinion that the war on terror was a "new paradigm [that] renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions . . ."¹²⁰ He announced that the "OLC's interpretation of this legal issue is definitive" and noted that the Attorney General is charged with interpreting domestic and international law for the Executive Branch and that he delegates that authority to the OLC.¹²¹ In urging the President to declare that the Geneva Convention III on the treatment of prisoners of war did not apply to the Taliban and al Qaeda, he noted that such a declaration would "reduce[] the threat of domestic criminal prosecution under the War Crimes Act."¹²² Such a declaration, he opined, would provide a "solid defense to any future prosecution" of United States personnel regarding treatment of Taliban prisoners.¹²³

119. 2002 Opinion, *supra* note 1, at 117.

120. Memorandum from Alberto R. Gonzales to George W. Bush, President of the United States (Jan. 25, 2002) in MARK DANNER, *supra* note 1, at 83, 84.

121. *Id.*

122. *Id.* at 85.

123. 2002 Opinion, *supra* note 1, at 84-85. President Bush took the advice and issued an executive order declaring that Common Article 3 of Geneva did not apply to al Qaeda and Taliban prisoners. Memorandum from George W. Bush, President of the United States, to Richard Cheney, Vice President, et al. (Feb. 7, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf>. In June 2006, the United States Supreme Court held that Common Article 3 of the Geneva Conventions does apply to prisoners captured in the conflict with al Qaeda. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2796 (2006).

The August 2002 OLC Opinion expanded on the general prosecution-avoidance theme.¹²⁴ It ignored international law and explained how United States interrogators could avoid criminal liability. The Opinion directly addressed the application of CAT with regard to conduct of interrogations outside the United States in connection with the war on terror. It basically attempted to define which acts United States forces could commit in the war on terror without being held criminally liable.¹²⁵ In doing so, it set forth a definition of “torture” so narrow that it has been noted that many of the atrocities of which security forces under Saddam Hussein are accused would not qualify as torture.¹²⁶

The 2002 OLC Opinion set forth the same interpretation of “specifically intended” as had the Board, another agency under the authority of the Attorney General, in *In re J-E*: that to constitute torture, the severe pain and suffering must be inflicted with “specific intent” as defined by United States criminal law. Relying on *United States v. Carter* and Black’s Law Dictionary, it stated that a defendant must “expressly intend to achieve the forbidden act.”¹²⁷ It concluded that to be found guilty, the alleged torturer would have to act with the express “purpose to disobey the law” and thus,

124. Although then-Assistant Attorney General Jay S. Bybee signed the 2002 Opinion, it was apparently largely drafted by then-Deputy Assistant Attorney General John Yoo, a young former law professor and former clerk to Justice Clarence Thomas. See Tim Golden, *A Junior Aide Had a Big Role in Terror Policy*, N.Y. TIMES, Dec. 23, 2005, at A1 (stating that Professor Yoo wrote the opinion with Judge Bybee). It has been reported that David Addington, Vice President Cheney’s Chief of Staff, was also a drafter of the 2002 Opinion. See Mayer, *supra* note 20, at 36. Judge Bybee currently sits on the Ninth Circuit Court of Appeals.

125. See generally 2004 Opinion, *supra* note 16; see also Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT’L L. 641, 645-47 (2005) (noting that “the Opinion essentially asks, ‘how close can we get to torturing people without crossing the line?’”).

126. Koh, *supra* note 125, at 647-48. Dean Koh notes that before the Bush administration invaded Iraq, it “pointed out that [Saddam Hussein’s] security forces used such ‘torture techniques [as] branding, electric shocks administered to the genitals and other areas, beating, pulling out of fingernails, burning with hot irons and blowtorches, suspension from rotating ceiling fans, dripping acid on the skin, rape, breaking of limbs, denial of food and water, extended solitary confinement in dark and extremely small compartments, and threats to rape or otherwise harm family members and relatives.’” *Id.* (quoting Saddam Hussein’s Repression of the Iraqi People, available at <http://www.whitehouse.gov/infocus/iraq/decade/sect4.html>) (emphasis and alteration added by Dean Koh).

127. As did the Board in *In re J-E*, 23 I. & N. Dec. 291, 294 (2002), the OLC quoted the definition of “specific intent” from Black’s Law Dictionary: “the intent to accomplish the precise criminal act that one is later charged with.” 2002 Opinion, *supra* note 1, at 117.

the "infliction of [severe pain or suffering] must be the defendant's precise objective."¹²⁸ It opined that therefore, it was not enough that the interrogator act with knowledge that such pain was "reasonably likely to result from his actions" (or even that that result is "certain to occur").¹²⁹

Dean Harold Koh, the Dean of Yale Law School and former Attorney-Advisor at the OLC, has stated that this is "perhaps the most clearly erroneous legal opinion" he has ever read.¹³⁰ One reason is that the Opinion's authors failed to consider the legal and historical context of CAT and its implementation, and instead addressed the definition of "torture" from only the view of United States criminal law.¹³¹

The 2002 Opinion became public in the midst of the Abu Ghraib scandals during the spring of 2004.¹³² On December 30, 2004, as the Senate Judiciary Committee was preparing to hold hearings on the nomination of Alberto Gonzalez for the position of Attorney General, the OLC issued a second opinion.¹³³ The 2004 Opinion acknowledged that the 2002 Opinion had been withdrawn in June 2004 and stated that the new opinion superseded the prior one.¹³⁴ It stated that the OLC no longer found it useful to parse the precise definition of "specific intent" as used in section 2340 and acknowledged that, even under United States criminal law, the

128. *Id.*

129. *Id.* at 117-18.

130. Koh, *supra* note 125, at 647. Alberto Mora, then-General Counsel of the United States Navy, has also written that he found that the opinion was "profoundly in error." See Memorandum from Alberto J. Mora to Inspector General, Department of the Navy (July 7, 2004), available at <http://www.newyorker.com/images/pdfs/moramemo.pdf>.

131. See Koh, *supra* note 125, at 647 (noting that the Opinion was apparently transmitted to the Defense Department where its key conclusions found their way into a Defense Department Working Group Report); see also U.S. Dep't of Def. Working Group, Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations (Apr. 4, 2003), in DANNER, *supra* note 1, 187, 192-93 (stating that the lawfulness of any particular interrogation technique will "depend in significant part on procedural protections that demonstrate a legitimate purpose and that there was no *intent* to inflict significant mental or physical pain . . .").

132. See Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, at 42 (reporting on torture of prisoners in Abu Ghraib by United States personnel); John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26 (reporting the existence of the 2002 Opinion).

133. See, e.g., R. Jeffrey Smith & Dan Eggen, *Justice Expands 'Torture' Definition: Earlier Policy Drew Criticism*, WASH. POST, Dec. 31, 2004, at A1; Neil A. Lewis, *U.S. Spells Out New Definition Curbing Torture*, N.Y. TIMES, Jan. 1, 2005, at A1.

134. 2004 Opinion, *supra* note 16, at 2.

term has been found to have various meanings.¹³⁵ It then opined that the “specific intent” element “would be met if a defendant performed an act and ‘consciously desire[d]’ that act to inflict severe physical or mental pain or suffering.”¹³⁶

V.
FEDERAL COURTS CONTINUE TO DEFER TO THE
ATTORNEY GENERAL’S RENOUNCED DEFINITION
OF TORTURE

Even though the Attorney General renounced his prior narrow definition of torture, he continued to rule through the Board that *In re J-E*’s narrow interpretations of “specifically intended” and “torture” apply in deportation proceedings of immigrants who have nothing to do with the war on terror. Federal courts continue to defer to that interpretation despite the fact that the Administration has renounced the same interpretation in the criminal context.¹³⁷ One example is the Third Circuit’s decision in *Auguste v. Ridge*.¹³⁸

In November 2004, about one month before the Bush administration made public the OLC’s 2004 Opinion renouncing its prior narrow definition of torture, the Third Circuit heard oral argument in *Auguste v. Ridge*.¹³⁹ The case involved a Haitian citizen ordered removed for a conviction of attempted criminal sale of a controlled substance. It was undisputed that despite the Board’s belief that the prison conditions in Haiti were improving, three years after *In re J-E* was decided, the Haitian authorities were still imprisoning deportees and the prison conditions were, if anything, worse than they had been in 2002.¹⁴⁰

The Third Circuit issued its opinion in *Auguste* on January 20, 2005, less than a month *after* the 2004 OLC Opinion was made public. However, even though the court acknowledged that the conditions in Haitian prisons were “reminiscent of a slave ship,” it deferred to the Attorney General’s interpretation of “specifically in-

135. *Id.* at 16.

136. *Id.* at 17 (alteration in original).

137. See, e.g., *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005); *Francois v. Gonzales*, 448 F.3d 645 (3d Cir. 2006) (denying Haitian CAT claim based on *Auguste*); *Thelemaque v. Ashcroft*, 363 F. Supp. 2d 198 (D. Conn. 2005) (appeal pending).

138. 395 F.3d 123 (3d Cir. 2005). The author was lead counsel on behalf of the petitioner, Napoleon Bonaparte Auguste.

139. *Id.* Oral argument took place on November 1, 2004. *Id.* at 123.

140. *Id.* at 129.

tended" as set forth in *In re JE* and the 2002 Opinion and found that the Haitian authorities lacked such intent.¹⁴¹

The court in *Auguste* distinguished the interpretation of the country's CAT obligations under domestic law from that under international law, finding that "[t]he issue we must resolve then is what the controlling standard for relief under the Convention is in the domestic context."¹⁴² Its basis for this distinction between domestic and international contexts apparently lay in its conclusion that the "specific intent standard" was "clearly stated in the ratification record of the United States," in which both the President and Senate agreed on the understanding that "intentionally inflicted" meant "specifically intended."¹⁴³ The court noted that "as CAT gains increased attention in light of recent events abroad, we are confident that the debate on this question will continue."¹⁴⁴ However, similar to the authors of the OLC's 2002 Opinion, the court declined to consider the language and international legislative history of CAT in interpreting the statute.¹⁴⁵

The *Auguste* Court then deferred to the Board of Immigration Appeal's interpretation of "specifically intended" in the regulation. It relied on two principles of deference: (1) that the Board's interpretation and application of immigration law should be accorded deference under *Chevron* and (2) that the court "owes deference to the agency's interpretation to the extent that the CAT involves issues of immigration law which may implicate questions of foreign relations."¹⁴⁶

Under *Chevron*, courts defer to the Board's interpretation of statutes in which Congress has explicitly or implicitly left a gap to be filled by the agency, unless the interpretation is irrational or clearly in error.¹⁴⁷ Thus, courts must first determine whether Con-

141. *Id.* at 129, 143-46, 153-54.

142. *Id.* at 139. "[T]here is no doubt that the applicable standard to be applied for CAT claims in the domestic context is the specific intent standard, which was adopted verbatim by the Department of Justice in 8 CFR § 208.18(a)(5), from the understanding accompanying ratification." *Id.* at 143-44.

143. *Id.* at 140.

144. *Id.* at 143 n.20.

145. *Id.* at 142. The *Auguste* court declined to decide whether FARRA changed CAT's intent standard from "intentionally inflicted" to "specifically intended" or whether the terms are consistent. *See id.* at 143 n.20. It concluded that such a determination was not necessary because the President and Senate agreed on the R.U.D.s and they therefore modified CAT for purposes of United States domestic law. *Id.* at 142-43.

146. *Id.* at 144-45.

147. *Chevron, U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 843-44 (1984); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

gress has spoken to the issue. If Congressional intent is clear, the agency must follow it. If it is ambiguous, the court must determine whether the agency's interpretation is based on a permissible construction of the statute. Courts defer to the agency's construction on matters where the agency's particular expertise is implicated. Thus, deference is not accorded when the issue is not unique to immigration law, and therefore does not implicate the particular expertise of the Board. Examples where deference has not been accorded the Board include interpretations of the criminal code,¹⁴⁸ a statute's effective date,¹⁴⁹ and a statute of limitations.¹⁵⁰

Courts have historically found deference to be particularly appropriate in the immigration context on the grounds that immigration is a political function that implicates foreign relations.¹⁵¹ Thus, the *Auguste* Court's second ground for according deference was its belief that it owed deference to the Board's interpretation of the "specific intent standard" to the "extent that the CAT involves issues of immigration law which may implicate questions of foreign relations."¹⁵²

The *Auguste* Court stated that "the [Board]'s interpretation and application of immigration law are subject to *Chevron* deference" and found that the principle applied to the Board's interpretation of FARRA, the regulations and the Senate understanding.¹⁵³ In a footnote, it noted that the law is unsettled as to whether the interpretation of a treaty by an administrative agency should be accorded deference.¹⁵⁴ However, it declined to resolve the issue. While noting that "there is no ambiguity in the Convention for which we would need to afford the [Board] any deference in the first place," it decided that the Board was interpreting FARRA and the implementing regulations, and not CAT.¹⁵⁵

148. *Francis v. Reno*, 269 F.3d 162, 168 (3d Cir. 2001) (involving 18 U.S.C. § 16).

149. *Sandoval v. Reno*, 166 F.3d 225, 239-40 (3d Cir. 1999).

150. *Bamidele v. INS*, 99 F.3d 557, 561 (3d Cir. 1996).

151. *See Aguirre-Aguirre*, 526 U.S. at 425.

152. *Auguste v. Ridge*, 395 F.3d 123, 144-45 (3d Cir. 2005). Whether Courts should defer to the Executive's interpretations of treaties as "political questions" is debatable and not the subject of this article. For a discussion of this issue, see Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 701 (2000) (suggesting that consideration of the proper judicial deference to the Executive's interpretation of treaties under the *Chevron* doctrine "may . . . provide a basis for imposing limitations on deference").

153. *Auguste*, 395 F.3d at 144-45.

154. *Auguste*, 395 F.3d at 144 n.22 (citing Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000)).

155. *Id.* at 145 n.22.

The *Auguste* Court concluded that the Board's interpretation of the language "specifically intended," in accordance with "its ordinary meaning in American law" was reasonable.¹⁵⁶ It noted that "[t]he specific intent standard is a term of art that is well-known in American jurisprudence."¹⁵⁷ The court found that "for an act to constitute torture [under CAT], there must be a showing that the actor had the intent to commit the act as well as the intent to achieve the consequences of the act."¹⁵⁸ "[I]f the actor intended the act but did not intend the consequences of the act, *i.e.*, the infliction of the severe pain and suffering, although such pain and suffering may be a foreseeable consequence, the specific intent standard would not be satisfied."¹⁵⁹

Using that definition, the Third Circuit deferred to the Board's interpretation and found that the Haitian authorities lacked the intention to achieve the consequences of their actions. It echoed *In re J-E*'s reasoning that the prison conditions, which it acknowledged would inflict severe pain and suffering, "result from Haiti's economic and social ills, not from any intent to inflict severe pain and suffering on detainees by, for instance, creating or maintaining the deplorable prison conditions."¹⁶⁰ The *Auguste* Court found that the mere fact that the Haitian authorities know that severe pain and suffering "may result" does not support a finding that they have specific intent.¹⁶¹

The court seems to have fundamentally believed that prison conditions could not constitute torture. In a footnote, it stated that the acts listed in the record of the ratification of CAT support its analysis of the specific intent requirement in the regulation: "The term 'torture' in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain."¹⁶² It seems to have required evidence that the deportee would be targeted by the Haitian authorities and subjected to similar acts.

Thus, the court deferred to the Board's interpretation of "specific intent" as set forth in the OLC's 2002 Opinion that had already

156. *Id.* at 144-45.

157. *Id.* at 145.

158. *Id.* at 145-46.

159. *Id.* at 146.

160. *Id.* at 153.

161. *Id.* at 153-54.

162. *Id.* at 154 n.28 (quoting S. EXEC. REP. NO. 101-30, at 14).

been renounced, and found that the Haitian authorities did not have such intent. The Third Circuit reasoned that although the authorities knew that the conditions caused severe pain and suffering, and although they imprison deportees in those conditions in an effort to deter them from committing crimes in Haiti, they did not create those conditions with the specific intent to inflict such pain.¹⁶³ It declined to consider that the Haitian authorities used the inhumane prison conditions, regardless of how they were created, as a tool of torture in the same way that application of electric current to sensitive parts of the body is used.

If the court had applied the interpretations of “specifically intended” as set forth in the 2004 Opinion, it likely would have reached a different result. The Haitian authorities undoubtedly place deportees in prison pursuant to a “conscious desire to produce the proscribed result,” i.e., severe pain and suffering.¹⁶⁴ They admittedly have at least “knowledge or notice” that the act “‘would likely . . . result[] in’ the proscribed outcome.”¹⁶⁵ Their subjective reason for creating or allowing such conditions to persist would be irrelevant.

Other courts have continued to defer to the interpretation in *In re J-E* as well. For example, in June 2005, the Third Circuit relied on *Auguste* to deny the CAT claim of a Nigerian citizen based on prison conditions.¹⁶⁶ The court found the Nigerian’s claim, if properly before the court, would be “foreclosed by *Auguste v. Ridge*, in which we held that indefinite detention in deplorable prison conditions does not rise to the level of ‘torture,’ absent a showing of specific intent to inflict pain and suffering.”¹⁶⁷ The District of Connecticut agreed with *Auguste* that “an alien seeking CAT relief based solely on indefinite detention in the deplorable prison conditions of Haiti must show that the Haitian authorities specifically intended to inflict cruel and inhuman treatment on returnees by deliberately maintaining such conditions.”¹⁶⁸ The court felt that its “conclusion [was] bolstered by the fact that all other courts facing CAT claims by Haitian aliens ha[d] upheld the basic reasoning of *In re J-E*”¹⁶⁹

163. *Id.* at 154.

164. 2004 Opinion, *supra* note 16, at 17; *see also Auguste*, 395 F.3d at 154.

165. 2004 Opinion, *supra* note 16, at 17 (quoting *United States v. Neiswender*, 590 F.2d 1269, 1273 (4th Cir. 1979)).

166. *See Verissimo v. INS*, 134 F. App’x 521, 523 n.3 (3d Cir. 2005) (*per curiam*).

167. *Id.* (internal citation omitted).

168. *Thelemaque*, 363 F. Supp. 2d at 215 (appeal pending).

169. *Id.* at 217.

VI. CONCLUSION

These decisions are disturbing because they mean that the administration holds United States interrogators to a lower standard than the standard it and the courts apply to actions by foreign governments. They also demonstrate the dangers of according deference to Board interpretations of terms that are not unique to immigration law.

There are ample grounds to conclude that the phrase "specifically intended" is ambiguous. The ambiguity is demonstrated by the fact that the Attorney General renounced the Board's interpretation in the 2004 Opinion, which acknowledged that the meaning of the phrase "specifically intended" in section 2340(1) of the United States Criminal Code is not clear.¹⁷⁰ In addition, there are at least five other uses of the phrases "specifically intended" or "specifically intends" in the United States Code which add to, rather than clear up, the ambiguity.¹⁷¹

170. 2004 Opinion, *supra* note 16.

171. None of the other uses require "specific intent" and none are elements of a violation. Four uses of "specifically intend" clearly do not require specific intent. These sections use "specifically" as an adverb that modifies "intend." They modify the intent of Congress, an educational institution, and the United States government. *See* 2 U.S.C. § 658b(d)(3) (2000) (Duties of Congressional committees) ("[I]f the bill or joint resolution would make [a] reduction . . . , [the Committee Report shall contain] a statement of how the committee specifically intends the States to implement the reduction . . ."); 19 U.S.C. § 1675(d)(1) (2000) (Administrative review of [antidumping] determinations) ("The administering authority shall not revoke . . . a countervailing duty order . . . on the basis of any export taxes, duties or other charges . . . which are specifically intended to offset the countervailable subsidy received."); 20 U.S.C. § 1232g(a)(1)(C)(ii) (2000) (Family educational and privacy rights) ("[C]onfidential letters and statements of recommendation . . . if such letters or statements are not used for purposes other than those for which they were specifically intended[, shall not be made available to students]."); 20 U.S.C. § 1232g(a)(1)(D) (Family educational privacy rights) ("A student . . . may waive his right of access to confidential statements . . . , except that such waiver shall apply to recommendations only if . . . (ii) such recommendations are used solely for the purpose for which they were specifically intended."). One use is found in the short title of a section on punitive damages; the operative language to which it refers uses "specific intent." The statute dealing with punitive damages in Y2K Actions provides that "No cap if injury specifically intended: Paragraph (1) does not apply if the plaintiff establishes by clear and convincing evidence that the defendant acted with specific intent to injure the plaintiff." 15 U.S.C. § 6604(b)(3) (2001) (punitive damages in Y2K actions). Thus, it seems that where Congress intended to require a showing of specific intent, it used that phrase. For example, the statute implementing the Genocide Convention defines genocide as "Whoever [commits a prohibited act] with the specific intent to destroy, in whole or substantial part, a national, ethnic, racial, or religious group as

Moreover, neither the phrase “specifically intended” nor the term “torture” is unique to immigration law. Not only is the phrase “specifically intended” employed in at least five other places in the United States Code, it is not found in the Immigration and Nationality Act.¹⁷² The term “torture” is defined in CAT, FARRA and the criminal code.¹⁷³ It is also used in the Torture Victim Protection Act of 1991 which relies on the language of CAT and requires that the act be “intentionally inflicted.”¹⁷⁴ Thus, neither term is unique to immigration law, and the Board does not have particular expertise in their construction and interpretation.

Even if the Board were found to have particular expertise in interpreting the phrase “specifically intended” or the term “torture,” deference should not continue to be accorded those interpretations as the Attorney General has renounced them in the OLC’s 2004 Opinion. Thus, in the end, courts are not deferring to the Attorney General’s interpretation because the Attorney General has repudiated that interpretation.

The continued deference to the Board’s interpretation not only affects immigrants facing deportation to conditions such as those in Haiti, but also affects all cases in which the term “torture” is implicated. For example, a person seeking to prevent his extradition to another country based on a danger of being subjected to torture must prove the criminal intent of the foreign authorities to cause him severe pain and suffering.¹⁷⁵ Otherwise, regardless of

such . . . shall be punished as provided in subsection (b).” 18 U.S.C. § 1091(a) (2000). The Uniform Code of Military Justice defines Attempts as “An act, done with specific intent to commit an offense under this chapter.” 10 U.S.C. § 880(a) (2000). This list was put together by the Allard K. Lowenstein International Human Rights Clinic at Yale Law School and is from the Clinic’s Brief of *Amicus Curiae* filed in *Guillaume v. Ashcroft*. Brief of Allard K. Lowenstein International Human Rights Clinic as Amicus Curiae Supporting of Petitioner Guillaume, *Guillaume v. Ashcroft*, No. 05-5099-AG (2d Cir. Mar. 30, 2006) (on file with the NYU Annual Survey of American Law).

172. 8 U.S.C. §§ 1101-1537 (2000).

173. The statute directing that regulations be promulgated implementing the United States’ obligations under Article 3 of CAT did not amend the Immigration and Nationality Act. See FARRA, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-821, 2681-822 (1998), reprinted in 8 U.S.C. § 1231, Historical and Statutory Notes (2000).

174. Torture Victim Protection Act of 1991 § 3(b), 28 U.S.C. § 1350 (2000).

175. The Third Circuit recently found that an Albanian citizen’s claim that his extradition would violate CAT was not ripe for review as the Department of State had not yet made the decision to extradite. See *Hoxha v. Levi*, 465 F.3d 554, 564-65 (3d Cir. 2006). At least two other courts have stated that habeas review is available after the Secretary of State mandates extradition that appears to violate CAT. *Prasoprat v. Benov*, 421 F.3d 1009, 1016 n.5 (9th Cir. 2005) (citation omit-

2007]

DEFINING "TORTURE"

495

how much pain and suffering he fears, the treatment would not constitute "torture." Presumably, a claimant under the TPVA would also have to prove that his or her foreign torturer had "specific intent" to cause the pain and suffering.

ted) (noting that the "rule of non-inquiry does not prevent an extraditee who fears torture upon surrender to the requesting government from petitioning for habeas corpus review of the Secretary of State's decision to extradite him"); *see Mironescu v. Costner*, 345 F. Supp. 2d 538, 550 (M.D.N.C. 2004).

