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Torture by Acquiescence: Immigration Policy and the Judicial Filter

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INTRODUCTION

Various reasons might motivate one to immigrate to the United States. Immigrants may want a better life for their family, their political views may conflict with those in their homeland, or they may be in pursuit of the good old-fashioned American Dream. Whatever the reason may be, once an illegal alien is in the United States, he or she might try to stay by any means necessary.

One of those possible means is to seek relief under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture" or "Convention").[1] Under Article 3 of the Convention the United States will 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."[2] To obtain such relief under the Convention, the torture 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."[3] The controversy addressed in this article is over the interpretation of the term '*acquiescence*.'

When President Reagan signed the Convention in 1988, "the United States interpreted *acquiescence* to torture to 'require that the [home government] public official, prior to the activity constituting torture, have knowledge of such activity.'"[4] However, this did not sit well with the Senate

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[1] United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

[2] Zheng v. Ashcroft, 332 F.3d 1186, 1188 (9th Cir. 2003).

[3] *Id.* (emphasis added).

[4] *Id.* at 1192 (emphasis added).

Foreign Relations Committee. They believed it created the impression that the United States was not serious in its commitment to end torture worldwide.[5]

In January 1990, the Bush Sr. Administration submitted a "revised list of proposed United States conditions on the Convention."[6] The Bush Administration did so to eliminate the problem that the U.S. seemed insincere to its commitment to end torture.[7]

> Under one of the new conditions the United States no longer required a public official to have *actual knowledge* of torture to *acquiesce* to torture, rather the asylum applicant need only prove that the [home government] public official have *actual knowledge* or *willful blindness* of the torture to fall within the definition of the term *acquiescence.*"[8]

This definition of '*acquiescence*' has been changing under the jurisdiction of the U.S. Board of Immigration Appeals (BIA), and the appellate courts. The most notable change in the courts comes from the shift from '*willful blindness*' to '*willful acceptance*' of torture when defining *acquiescence*. The Senate did not intend to require that government officials are '*willfully accepting*' of torturous activities.[9]

This shift was at play in the case of Zheng v. Ashcroft. The BIA wanted Zheng, a Chinese national, to prove more than *willful blindness* to torture by Chinese public officials before agreeing to grant his application to remain in the United States. They required him to demonstrate that Chinese government officials would be *willfully accepting of* such torture. Thus, as will be described herein, what may appear to be a minor change in semantics had a significant impact on the outcome of Zheng's case.

Looser interpretations of *acquiescence* by some courts have allowed aliens to request asylum under the Convention and to prevail. Arguably, the Convention is being abused, and the opinion in *Zheng* shows that the BIA has been attempting to compensate by reading the Convention very narrowly. However the 9th Circuit Court of Appeals overturned the BIA's decision in

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[5] See *id.* at 1192-93.

[6] *Id.* at 1192.

[7] See *id.* at 1192-93.

[8] *Id.* at 1193 (emphasis added).

[9] *Id.* at 1195.

Zheng v. Ashcroft as an abuse of judicial power. The 9th Circuit seemed more concerned with respect for the intent of Congress rather than overall immigration policy.[10]

This article will demonstrate the differing interpretations of the Convention and the concept of *acquiescence* to torture, by taking a closer look at the Zheng case and other case precedents. Taking the issue a step further, this article will illustrate that the interpretation of the term *acquiescence* to torture and the scope of the Convention Against Torture are being narrowed by the BIA. The appellate courts are less inclined to allow this. The Convention was not intended to include only *willful 'acceptance'* of torture as stated by the BIA in Zheng v. Ashcroft. The shift from willful blindness to willful acceptance is contrary to legislative history. Therefore, the 9th Circuit's decision to reverse the BIA's ruling and allow Mr. Zheng protection under the Convention may have negative policy implications, but is consistent with legislative intent and should therefore be followed by other courts.

BACKGROUND

Li Chen Zheng was born on February 19, 1983, in the Fujian Province of the People' s Republic of China. In the early 1990s, his father left China to come to the United States. In 1997, Zheng' s mother left China to come to the United States. She later moved to Guam.

On April 9, 1999, Zheng left China at the age of 16 to come to the United States.[11] Zheng said he left China because he was in a ' very low position.' His parents had violated China' s birth control policy. Under China' s policy, if the first born is a boy the parents cannot have a second child. Zheng' s parents had two daughters after he was born.[12]

Zheng paid to be smuggled into the United States along with approximately 150 Chinese nationals by smugglers known as "snakeheads" or "seamen." Zheng was apprehended by a U.S. Marshall when trying to enter

[10] See *id.* at 1194-97.

[11] *Id.* at 1189.

[12] *Id.*

Guam.[13] Zheng lived on Tinian Island until June 1999 while under the custody of the United States Marshall.[14]

While on Tinian Island, Zheng was a material witness against the smugglers and reported the names of the snakeheads who tortured him and other Chinese citizens. On the same evening Zheng reported the names of his smugglers, he received a death threat from a snakehead. On June 17, 1999, Zheng was transferred to a juvenile detention center in Guam. In March 2000, he was flown to Los Angeles, California, and a month later he first appeared before the Immigration Judge in Los Angeles for removal proceedings.[15]

Zheng testified before the Immigration Judge numerous times. On May 10, 2000, Zheng testified he was afraid to return to China because he believed the smugglers would hurt him since he had been testifying against them. Zheng also stated that because his family had violated the one child policy, the Chinese government would not allow him to further his studies. He believed he would be rejected from any school to which he might apply. From this testimony the Immigration Judge completed an asylum application for Zheng.[16]

On May 31, 2000, Zheng once again appeared before the Immigration Judge. Zheng testified concerning the ' very low position' of his family because his parents violated the birth control policy. If returned to China, Zheng stated the government would not allow him to go to school. Zheng also stated that before leaving by boat for the United States, he was beaten by the snakehead who watched over him and the other Chinese nationals. Zheng was afraid of being sent back to China because he believed the snakeheads would kill him in retaliation for his testimony against them. Zheng also testified that the Chinese government would not protect him from the snakeheads because the snakeheads were connected with Chinese government officials.[17]

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[13] *Id.* at 1189.

[14] *Id.*

[15] *Id.* at 1190.

[16] *Id.*

[17] See *id.* at 1190-92. As an example of the collusion between the government officials and the snakeheads, Zheng testified that he saw the snakeheads give three cartons of cigarettes to the police at the harbor before they were allowed to board the boat. Testimony in previous cases from Chinese citizens also established that the smugglers indeed torture the smugglees and have connections with government officials. This notion is affirmed through Congressional and State Department reports. Wu Ming He and Qing He were Chinese immigrants also

Before stating her decision, the Immigration Judge found that Zheng testified credibly and consistently throughout his entire hearing. However, the immigration judge ruled that Zheng "'failed to establish the standard for asylum … and failed to establish the standard for withholding of deportation.'"[18] Then, after ruling that Zheng was ineligible for standard political asylum, the Immigration Judge granted Zheng relief under the Convention Against Torture and allowed him to stay in the United States.[19]

Zheng did not appeal the denial of asylum; however the INS appealed the portion of the Immigration Judge's ruling that granted Zheng withholding of removal to China under the Convention Against Torture. On review, the BIA (Board of Immigration Appeals) vacated the Immigration Judge's decision for relief under the Convention because the BIA believed Zheng failed to show that Chinese officials would *acquiesce* to the torture inflicted by

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smuggled into the United States by snakeheads. Wu Ming stated in his declaration that: 'It is my personal knowledge that alien smugglers have connections with local government officials. I saw with my own eyes at least four times alien smugglers feasting and patronizing night clubs with local police officers in Fujian." Qing stated in his declaration that: 'I was smuggled into the United States from the Fujian Province of China on a boat. On my way to Guam, I saw with my own very eyes one of my fellow smugglees being tortured by the smugglers." In passing the Torture Victim Protection Act (TVPA), Congress found, in relevant part, that 'trafficking often is aided by official corruption in countries of origin … enforcement against traffickers is also hindered by official indifference, by corruption, and sometimes even by active official participation in trafficking." In addition, Congress found that traffickers often resort to violence and torture, or threats of violence and torture, to keep their victims in line.

[18] See *id.* at 1191-92.

[19] *Id.* at 1191. Seeking relief under the Convention Against Torture marks a departure from the standard political asylum process in two important respects. First, it allows persons who fear being tortured abroad to file a claim for withholding of removal ('withholding') based on a ground not limited only to five circumstances under which applicants for asylum may qualify for relief-- i.e., fear of persecution on account of race, religion, nationality, political opinion, or membership in a social group. The claimant need only demonstrate that removal will likely result in his or her being tortured by or with the "*acquiescence*" of government officials and that the torture will be committed for any reason. Second, for aliens who are statutorily barred from the relief of withholding of removal (i.e., those who have been convicted of serious crimes or have persecuted others), a new category of relief, deferral of removal (DR) is created. A person's eligibility for withholding or DR under the Convention Against Torture will be determined by an immigration judge during removal/deportation proceedings. If the Immigration Judge finds that the applicant likely faces torture if removed and is not statutorily barred from withholding, the alien will be granted the relief. If the applicant is barred from receiving withholding, the immigration judge will grant him or her DR.

the smugglers. The BIA wanted Zheng to prove more than *willful blindness* to torture by Chinese public officials. They stated that in order to prevail under the Convention Zheng would need to demonstrate that the Chinese government officials were *willfully accepting* of the smugglers' torturous activities. [20]

LEGAL STANDARD

The General Legal Standard

The 1990 U.S. revision of the Convention Against Torture no longer requires a public official to have specific *knowledge* of torture to *acquiesce* to torture.[21] The Senate Foreign Relations Committee stated that 'the purpose [of our revision] is to make it clear that both *actual knowledge* and *willful blindness* fall within the definition of the term *acquiescence*."[22]

This distinction is best demonstrated in the figure that follows. The Senate's definition of *acquiescence* to torture is very broad, including several forms of evidence, as depicted in the shaded portion of the figure. Each rectangular box represents a narrowing subset of the Senate' s definition of *acquiescence* to torture. The *willfully accepting* shaded region is the most rigid and narrow interpretation of acquiescence, and -- taken alone -- would not include evidence falling within the broader *willfully blind or ignoring* region.

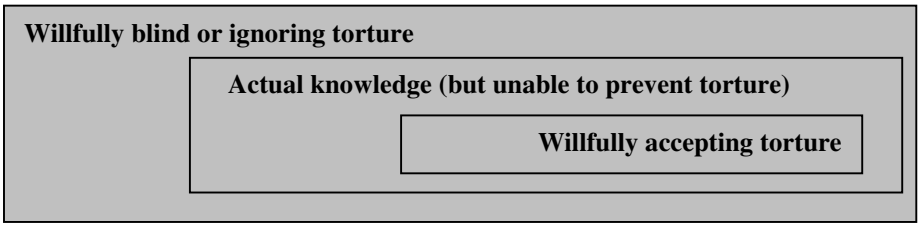


FIGURE 1: Senate definition of home government "acquiescence" to torture could be said to include evidence in any of these categories or subcategories.

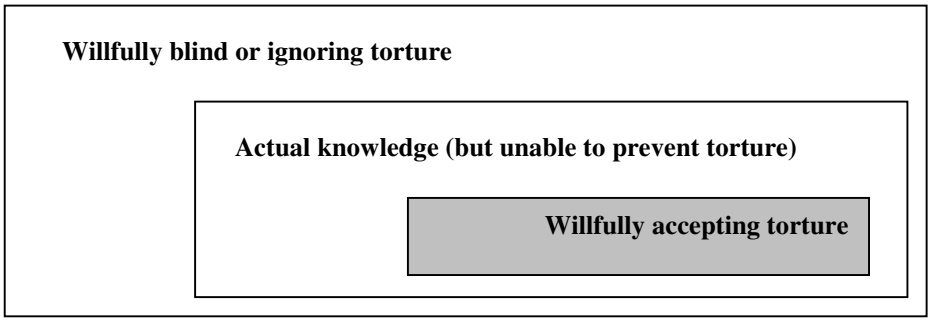
[20] *Id.* at 1194.

[21] See *id.* at 1192-93. This revision is only applied in the United States. The Convention Against Torture was finally enacted into American law by the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA). This obligated the U.S. to observe the Convention Against Torture Act and any claims brought forth to seek relief under Article 3 thereof.

[22] *Id.* at 1195 (emphasis added).

Despite the Senate's language, the BIA held that to prove Chinese government acquiescence to torture, Zheng must prove that the torture inflicted by the snakeheads would be carried out with the *willful acceptance* of the Chinese government officials, and the BIA refused to accept only evidence that the Chinese government was *willfully blind* to the snakeheads' torture. Nowhere in the Congressional language do we find reference to limiting *acquiescence* to cases where the foreign government *willfully accepts* torture by third parties.[23] Therefore, contrary to Figure 1, the gray shaded region of Figure 2 reflects the BIA's narrow interpretation of acquiescence and displays their deviance from the Senate's intent.

FIGURE 2: Zheng case; BIA definition of home government "acquiescence" to torture only includes the narrow subcategory of behavior shaded here.



Application of Legal Standard by Ninth Circuit in Zheng v. Ashcroft

In the Zheng v. Ashcroft appellate decision, the 9th Circuit Court of Appeals ruled that the Convention does not require the government to *knowingly acquiesce* to such torture. Contrary to the BIA's ruling, the 9th Circuit held that the Convention does not require that Zheng specifically prove that Chinese government officials would be *willfully accepting* of the torture inflicted on Zheng by the smugglers.[24] Thus, the 9th Circuit's ruling reversed the BIA's decision in keeping with the intent of the Senate as previously demonstrated in Figure 1.

[23] *Id.* at 1196.

[24] *Id.* at 1194.

In overturning the BIA's application of the Convention, the 9th Circuit stated that:

> [T]he Senate did not in its understandings of the Convention modify the terms *awareness* and *acquiescence* with the adjective *'knowing'* as the INS does in their briefs to the BIA and this court. Nor did the Senate require *willful acceptance.*"[25]

The 9th Circuit believed the BIA misconstrued and ignored the clear Congressional intent. The Court continued:

> The BIA's interpretation and application of *acquiescence* impermissibly requires more than *awareness* and instead requires that a government be *willfully accepting* of a third party's torturous activities. There is nothing in the understandings to the Convention approved by the Senate, or the INS's regulations implementing the Convention, to suggest that anything more than *awareness* is required. Yet, the BIA ignored the Senate's clear intent and constructed its own interpretation of acquiescence, an interpretation that requires more than *awareness*, includes *willfully accepting* of, and seemingly excludes *willful blindness*.[26]

In Zheng's case, the 9th Circuit found that his testimony regarding the snakeheads' torture and the willful blindness (if not actual knowledge) of this torture by Chinese public officials was sufficient to support Zheng's request for relief under the Convention. Recall that the Immigration Judge found Zheng had testified credibly regarding these events.

First, Zheng had testified against the snakeheads by providing all of their names to the United States authorities and reported that the snakeheads tortured him and the other Chinese nationals being smuggled. Zheng stated that he would be tortured and killed if he were returned to China. Zheng believed that Chinese government officials would not protect him from the snakeheads because the snakeheads had connections to public officials.

[25] *Id.* at 1195 (emphasis added).

[26] *Id.* at 1196 (emphasis added).

Secondly, Zheng presented testimony from two other Chinese nationals, Wu Ming He and Qing He, who had been smuggled into Guam with him. Zheng relied on the congressional findings in the Trafficking Victims Protection Act to show that trafficking is often aided by official corruption in countries of origin and that traffickers often resort to violence and torture, or threats of torture, to keep their victims silent.

Finally, Zheng provided evidence of the snakeheads' collusion with government officials when he testified he saw the snakeheads give three cartons of cigarettes to the police at the harbor before they were allowed to board the boat. In addition, after Zheng had testified in the smugglers' trial, a snakehead threatened to take Zheng's life. By combining this testimony, the 9th Circuit felt that Zheng had laid out a sufficient case for Chinese governmental *acquiescence* to third party torture under the Senate's implementation of the Convention.

Application of Legal Standard in Other Cases

In the case of *In re S-V-*, a Colombian citizen sought U.S. protection under Article 3 of the Convention Against Torture as well as withholding of removal under Section 241(b)(3) of the Immigration and Nationality Act [INA]. S-V- argued that he would be in danger from nongovernmental guerrilla, narcotrafficking, and paramilitary groups due to his wealth and the family he had in the United States. S-V- also claimed he would be tortured and kidnapped if returned to Colombia.[27]

Section 241(b)(3)(B)(ii) of the INA states that, "an alien is ineligible for withholding of removal if the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States."[28] If the U.S. aggregate imprisonment is of at least 5 years it shall be considered a serious crime.[29] While in the United States, S-V- was convicted of grand theft, resisting arrest without violence, and driving while his license was suspended. He was also convicted of robbery, yet received only 4 years of imprisonment.

[27] In re S-V-, I.&N. Dec. Interim Decision. United States Department of Justice. Executive Office for Immigration Review. Board of Immigration Appeals (BIA) May 9, 2000.

[28] *Id.* at 1308.

[29] *Id.*

Due to the fact that in this particular instance the aggregate term of imprisonment was 4 years, S-V-' s case was examined further. The BIA stated there might be instances where a crime against property will be considered serious. Since S-V- deprived a person of property through force, violence, assault, or use of intimidation, the conviction was deemed to be a particularly serious crime. Therefore the BIA rejected his claim for withholding of removal under the INA.[30]

S-V- was also denied relief under Article 3 of the Convention. The BIA stated that S-V- "must do more than show that the [Colombian] officials are *aware* of the activity constituting torture but are powerless to stop it. S-V- must demonstrate that Colombian officials are *willfully accepting* of the guerrillas' torturous activities."[31] Therefore, the BIA concluded that "a government's inability to control a group ought not to lead to the conclusion that the government acquiesced to the group's activities."[32] Given the evidence of the case, the BIA believed the general conditions of violence presented by S-V- did not establish that an individual in his circumstances would be subjected to torture if he returned to Colombia.[33] Similar to its position in the Zheng case, the BIA insisted on proof of a very narrow sub-category of behavior before considering relief under the Convention.

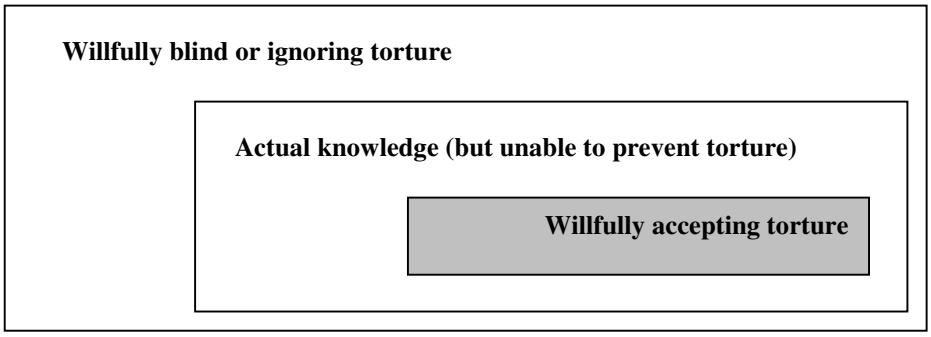


FIGURE 3: S-V- case; BIA definition of home government "acquiescence" to torture only includes the narrow subcategory of behavior shaded here.

[30] *Id.* at 1307-9.

[31] *Id.* at 1312 (emphasis added).

[32] *Id.*

[33] *Id.* at 1311.

In the case of *In re Y-L, A-G, R-S-R,* all of the asylum applicants were convicted of drug related felonies in the United States. Y-L- was convicted of trafficking cocaine and resisting an officer with violence. Y-L- was only sentenced to 25 months but the drug offense was a first degree felony under Florida law, punishable by up to 30 years in prison. A-G- was convicted on three felony counts involving large quantities of cocaine: two counts of distribution of cocaine, and one count of conspiracy to distribute cocaine. A-G- received concurrent sentences of one year and a day on each count. R-S-R- pled guilty in federal court in the District of Puerto Rico to one felony count of conspiracy to possess cocaine with the intent to distribute. R-S-R- received 24 months of prison time. The respondents all resisted deportation and petitioned for withholding under the INA and Article 3 of the Convention Against Torture, claiming their lives would be in danger if they were returned to their respective countries.[34]

The Immigration Judge denied all relief to these parties, but the BIA on appeal ordered that the applicants' removal from the United States be withheld under the provisions of Section 241 of the INA. The BIA believed the aggravated drug felonies did not constitute particularly serious crimes. The BIA's conclusion was based on the fact that Y-L-, A-G-, and R-S-R- cooperated with federal authorities in collateral investigations, had limited criminal history records, and were sentenced at the low-end of the applicable sentencing guideline ranges.[35] The BIA did not address claims for relief for Y-L-, A-G-, R-S-R- under the Convention Against Torture, deeming the issue moot in light of its decision to grant them withholding of removal pursuant to section 241(b)(3) of the INA.[36]

The Attorney General did however address the claims for relief under the Convention. The Attorney General stated to secure relief under the Convention, "Y-L-, A-G-, and R-S-R- must demonstrate that, if removed to their country of origin, it is more likely than not they would be tortured by, or

[34] In re Y-L, A-G, R-S-R-, I.&N. 3464, 270, 271(AG 2002) Attorney General.

[35] *Id.* at 272. Notably, Y-L, A-G, and R-S-R- committed worse crimes than S-V- from the previous case mentioned. Y-L- had 84 grams of cocaine and resisted arrest with violence against a police officer. A-G- was convicted of 3 felony counts and 1330 grams of cocaine were attributed to him. That is enough cocaine to supply over 100,000 doses. R-S-R- pled guilty to a conspiracy to produce cocaine in Puerto Rico and transport it in multi-kilogram quantities for subsequent distribution in New York. *Id.* at 277-78.

[36] *Id.* at 279.

with the acquiescence of, government officials acting under color of law."[37] The Attorney General cited the BIA's ruling from *In re S-V-* and stated that Y-L-, A-G-, and R-S-R- had to demonstrate that government officials in their home countries would be *willfully accepting* of torturous activities. Thus, the Attorney General followed the BIA's lead from the *S-V-* case and would have denied Y-L-, A-G-, R-S-R- relief under the Convention as portrayed in the following figure.[38]

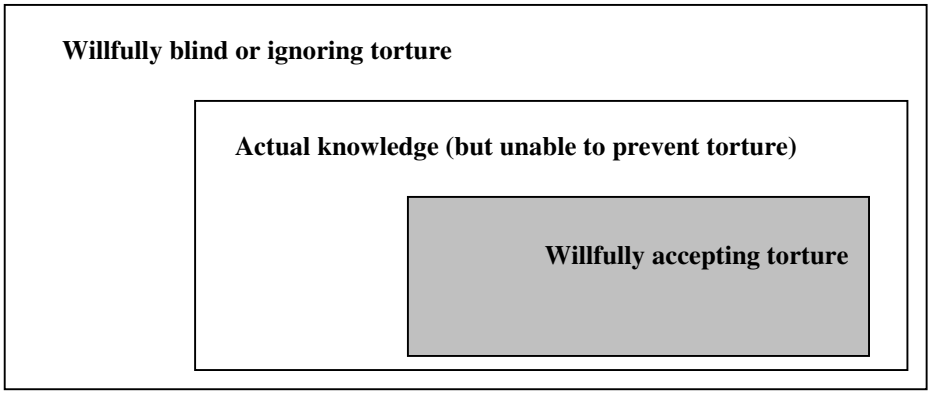


FIGURE 4: Y-L, A-G, R-S-R case; Attorney General would have used BIA' narrow definition of home government "acquiescence" to torture, which only includes the narrow subcategory of behavior shaded here.

The previously referenced cases illustrated how the BIA and Attorney General narrow the interpretation of *acquiescence*, even though this narrow interpretation may not be consistent with the Congressional intent. In the following example, a different interpretation of the term acquiescence arises from the 6th Circuit.

In *Ali v. Reno*, the 6th Circuit Court of Appeal seems to keep the Congressional scope of the Convention in place. Zainab Ali was a native and citizen of Iraq, petitioning for asylum and relief under the Convention Against Torture. Ali's father was a member of the opposition Al-Da'Wa party in Iraq. The family fled to Syria for ten years. A short visit took the family back to Iraq to visit Ali's ailing grandmother. The Iraqi government found out and

[37] *Id.*

[38] *Id.* at 280-85.

pursued the family in a high-speed car chase, but the family escaped. Danish authorities accepted the family into Denmark as refugees. The family was issued passports, residence permits, and Ali's family continues to live in Denmark.[39]

Ali herself then came to the United States and stayed while her visa expired. Ali eventually went back to Denmark because she thought her father was ill. Her passport was confiscated and her refugee status taken away. She was then rejected asylum in Denmark.

The report of Ali's father's illness was false and had been fabricated by her family in order to persuade her to leave her husband. Ali was abused by her father and three brothers when she refused to leave her husband. The police arrested the assailants and questioned Ali. Ali asked the Danish authorities not to punish her family members, but to merely keep them away from her. After receiving a death threat, Ali fled to the United States with a false Danish passport.[40]

The BIA found that the Danish government's inability to control the activities of Ali's family members did not constitute *acquiescence* to the family's torture and that the Danish authorities did not *willfully ignore* the actions of her family members.[41] On review, the 6th Circuit Court of Appeals stated that:

> The record shows that the Danish police arrested the assailants, incarcerated them during the investigation of Ali's charges, and offered to warn Ali's father and brothers not to harm her. The Board characterized the Danish police's actions as an inability to control the activities of Ali's family members but it appears that this inability stems from Ali's refusal to allow punishment of her brothers. Based on the record before them, the Court concluded that the Board's determination is not manifestly contrary to law.[42]

[39] Ali v. Reno, 237 F.3d 591, (6th Cir. 2001).

[40] See *id.* at 592-93.

[41] *Id.* at 597.

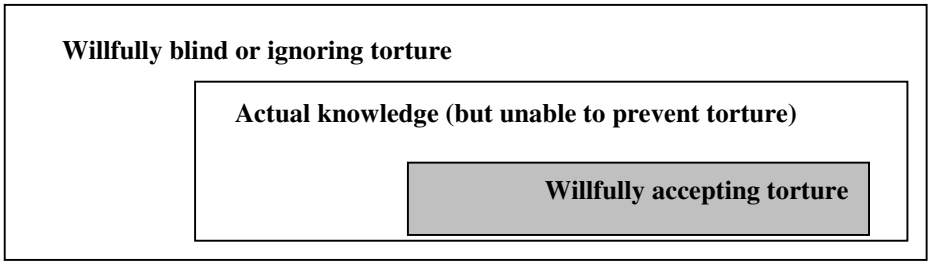
[42] *Id.* at 598.

Thus, although the BIA may have inappropriately used a narrow definition of *acquiescence* to torture, in this case the BIA's ruling was affirmed under a broader reading of the Convention as well.

These pertinent cases demonstrate that different interpretations of *acquiescence* and the Convention are being used. The BIA narrows the interpretations of the Convention and acquiescence to torture while the appellate courts keep the Congressional intent of the Convention intact. Ultimately the BIA is guilty of straying away from the Senate's clear intent. The BIA is also somewhat guilty of inconsistency with their interpretations of the Convention and the term *acquiescence*. A more in-depth analysis of these cases will shed light as to where and why the variations in interpretations occur and how the Convention is being abused.

ANALYSIS

The previously mentioned cases demonstrate how different interpretations of acquiescence and the Convention are being used by the courts. In the case of *In re S-V*, acquiescence was interpreted to mean that the applicant had to demonstrate that Colombian officials are willfully accepting of the guerrillas' torturous activities. The shift in interpretation from willful blindness to willful acceptance by the BIA is seen here just as it was demonstrated in Zheng v. Ashcroft. The interpretation shift from willful blindness to willful acceptance is also seen in the case of In re Y-L-, A-G-, R-S-R- by the Attorney General and the BIA. This narrow interpretation of the Convention can be best portrayed in the gray shaded region of the following figure:



It is evident that the interpretation of acquiescence was continually narrowed by the BIA and followed erroneously.

The case of *In re S-V-* demonstrates how the BIA misinterprets the interpretation of the term acquiescence and the Convention. It also exemplifies how the Convention is being abused. The BIA stated that under Article 3 of the Convention, *acquiescence* to torture requires that the public official, prior to the activity constituting torture, have *awareness* of such activity. However, the Senate Foreign Relations Committee stated *actual knowledge* and *willful blindness* both fall under the definition of the term acquiescence.

It would seem the BIA felt that interpretation to be overly broad and created its own definition. The BIA stated that to demonstrate *acquiescence*, 'the respondent must do more than show that the officials are *aware* of activity constituting torture but are powerless to stop it."[43] Therefore the respondent must have demonstrated that Colombian officials were *willfully accepting* of the guerrillas' torturous activities.

The BIA stated 'that a government's inability to control a group ought not to lead to the conclusion that the government acquiesced to the group's activities."[44] This narrow interpretation is different from the Senate's intent, and the BIA's abuse of the Convention is clearly seen here. Under the INA this alien did not qualify for withholding of removal, but he was still able to remain in the United States under Article 3 of the Convention Against Torture. There is an important difference between the INA and the Convention:

> Several categories of individuals, including persons who assisted in Nazi persecution or engaged in genocide, persons who have persecuted others, person who have been convicted of particularly serious crimes, persons who are believed to have committed serious non-political crimes before arriving in the United States, and persons who pose a danger to the security of the United States are ineligible for withholding of removal under the Immigration and Nationality Act. Article 3 of the Convention Against Torture however does not exclude such persons from its scope.[45]

[43] In re S-V-, I.&N. DEC. 3430 at 1312 (emphasis added).

[44] *Id.*

[45] The Convention Against Torture Act: Hearing on Immigration Relief Under the Convention Against Torture for Serious Criminals and Human Rights Violators Before the Subcomm. on Immigration, Border Security, and Claims of the Comm. on the Judiciary House of Representatives, 108th Cong., 25 (2003).

Therefore, 'the Convention — whether intended or not — has created an entirely new vehicle for aliens to try to delay deportation. Torture claims now operate as another 'bite at the apple' after asylum and withholding remedies have been exhausted."[46] Aliens who did not qualify for standard U.S. political asylum under the INA now get another chance under the Convention Against Torture. By narrowing the scope of relief available under the Convention, the BIA is likely working to close to this immigration loophole as much as possible.

This same strategy was used in the case of *In re Y-L, A-G, R-S-R-,* where the BIA instructed petitioners to demonstrate that government officials were *willfully accepting* of torturous activities. This interpretation of acquiescence was also illustrated by the BIA in Zheng's case. The BIA was narrow in its interpretations of the Convention and the term acquiescence.

What is more disconcerting is that the BIA's "creative" approach to interpreting the law is still not enough to combat all forms of immigration abuse. Even under the BIA' s approach, the applicants in *In re S-V-, S-V-* were ultimately denied relief by the BIA under the INA and the Convention, but the applicants in *Y-L-, A-G-, R-S-R-* were allowed to stay under the INA. Therefore, the BIA did not address claims for relief for Y-L-, A-G-, R-S-R- under the Convention Against Torture, deeming the issue moot in light of its decision to grant them withholding of removal pursuant to section 241(b)(3) of the INA.[47] In the end, how is it that S-V- was convicted of robbery, grand theft, resisting arrest without violence, and driving while his license was suspended and therefore deported, yet Y-L-, A-G- and R-S-R-, the parties responsible for a particularly serious drug crime, were not?

This is unfathomable, especially when Congress recognized that drug trafficking felonies justify the harshest legal consequences. Both the courts and the BIA have long recognized that drug trafficking felonies equate to particularly serious crimes:

> In *Mahini v. INS*, the 9th Circuit Court of Appeals upheld the BIA's determination that an alien's conviction for possession of heroin with intent to distribute, and aiding and abetting the

[46] *Id.*

[47] Y-L, A-G, R-S-R-, I.&N. DEC. 3464 at 279.

> distribution of heroin constitutes a particularly serious crime within the meaning of the Immigration and Nationality Act. The court reached that conclusion notwithstanding the fact that the alien had been sentenced to only 13 months of imprisonment.[48]

Under this view, the BIA's definition of particularly "serious crimes" in the case of *In re Y-L-, A-G-, R-S-R-* was inconsistent with the result achieved in the case of *In re S-V-*. By shifting the focus of immigration decisions to torture in an applicant's home country, important aspects of the applicant's criminal behavior in the United States can be ignored.

The respondents Y-L-, A-G-, and R-S-R- could have been denied relief under the Convention by citing the 9th Circuit standard used in *Zheng v. Ashcroft,* which preserves the integrity of the Senate's intent as portrayed in Figure 1. The respondents' torture claims were particularly weak. However, in arguing that these applicants should have been denied relief under the Convention, the Attorney General used the wrong interpretation of acquiescence, mistakenly looking for willful acceptance as the requirement to obtain relief under the Convention, by citing *In re S-V-*.

The best way to characterize the Attorney General's position is a quote from John Milton: "And out of good still to find means of evil."[49] The Attorney General made the correct decision in arguing to deny these applicants relief under the Convention, but used the wrong case precedent to do so. This could be detrimental to those who have legitimate claims under the Convention but are turned away because the *willful acceptance* standard might be used rather than the more appropriate *willful b*lindness standard. The precedent to be followed should be that of the 9th Circuit in *Zheng v. Ashcroft*.

Perhaps in one regard the BIA was consistent. In the case *of In re S-V-,* the BIA concluded that "a government's inability to control a group ought not to lead to the conclusion that the government acquiesced to the group's activities."[50] The BIA said that Article 3 does not extend protection to a person fearing entities that his home government is unable to control. 'The United Nations Committee Against Torture stated that Article 3 does not

[48] See *id.* at 274-75.

[49] JOHN MILTON, PARADISE LOST (1667).

[50] S-V-, I. &N. DEC. 3430 at 1312.

provide protection in cases where pain or suffering is inflicted by a nongovernmental entity that is not acting by or at the instigation, consent, or acquiescence of a public official."[51] Therefore, the BIA's ruling in *Ali v. Reno* is consistent with this view.

In *Ali v. Reno,* it was decided that the Danish government's inability to control the activities of Ali's family members did not constitute *acquiescence* to torture and that the Danish authorities did not *willfully ignore* the actions of her family members. It was also decided that domestic violence might be basis for relief under the Convention.[52] The fact that the 6th Circuit did not rule out domestic violence broadens the protection that the Convention has to offer.

The BIA and 6th Circuit did not go wrong, however, in interpreting the term acquiescence. *Willfully ignoring* was never a part of the Senate's language, but it can be thought of as the same as *willful blindness*. Interchanging synonymous words does not change the intent of the Congress. This is better displayed by the gray shaded region in the following figure:

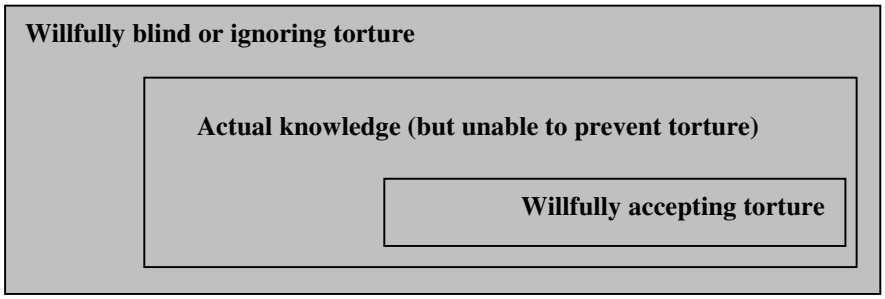


FIGURE 6: Ali case; 6th Circuit Court of Appeal definition of home government "acquiescence" to torture includes evidence in any of these categories or subcategories.

[51] *Id.*

[52] Ali, 237 F.3d at 598. In this author' s view, it is worrisome that the 6th Circuit in *Ali v. Reno* does not rule out the possibility that domestic violence of the sort alleged in the Ali case could be a reasonable basis for relief under the Convention Against Torture. This broadens the scope of the Convention. It is even stated under Article 3 that protection is not granted where pain or suffering is inflicted by a nongovernmental entity that is not acting by or at the instigation, consent, or "*acquiescence*" of a public official. Therefore, it would be erroneous to give relief under the Convention Against Torture to a victim of domestic violence where it was inflicted by a nongovernmental entity not acting by or at the instigation, consent, or "*acquiescence*" of a public official as the 6th Circuit proposes it might do in the future.

Willful blindness and *willfully ignoring* are similar in interpretations, but the narrower term *willful acceptance* as used by the BIA in other cases is not. Willful acceptance narrows the intent of the Congress while willful blindness and willfully ignoring keeps the Senate's intent intact. The Senate's intent however is that both *actual knowledge* of torture and *willful blindness* to torture fall within the definition of the term acquiescence.

Ultimately, even if the INS and BIA have beneficial immigration policy as a goal, the Convention Against Torture is being abused. The following statistics may help to explain the BIA's motivation:

> From March 1999 through August 2002, the Justice Department adjudicated 53,741 alien applications for relief under the Convention Against Torture. Only 1,741 aliens were granted Convention Against Torture relief by immigration judges during those 3 ½ years. 683 criminal aliens received such relief from immigration judges—aliens who have been barred from asylum and withholding of removal. Since the 2001 *Zadvydas v. Davis* decision stating aliens whose countries will not take them back cannot be detained indefinitely, the Department of Homeland Security, or DHS, has decided that it must eventually release these aliens back into the streets. DHS statistics indicated that approximately 500 criminal aliens have been released into American communities because of *Zadvydas*. Between fiscal year 1999 and 2002, some 45,000 criminal aliens were released from INS or DHS custody.[53]

It is apparent that too many claims are being brought to the courts in the hope of finding relief under the Convention. We see the weakness of the Convention even in *Zheng v. Ashcroft*. It is a bit disturbing that an alien who hired smugglers to bring himself into the United States ultimately obtains relief from the Convention because he feared torture from the very same smugglers he hired for their services. However, the interpretation and application of the term *acquiescence* and the Convention Against Torture by the 9th Circuit in *Zheng v. Ashcroft* were in line with the Senate's intent and should be the

[53] The Convention Against Torture Act: Hearing on Immigration Relief Under the Convention Against Torture for Serious Criminals and Human Rights Violators before the Subcomm. on Immigration, Border Security, and Claims of the Comm. on the Judiciary House of Representatives, 108th Cong. 5-6 (2003).

standard to follow because the law was correctly applied. Any loopholes created by the Senate must be cured by legislative revision to United States Immigration law, rather than illegitimate judicial attempts to circumvent the Senate's specific wording.

CONCLUSION

For reasons of public policy, one might argue that the language of the Convention Against Torture needs to be revised and made more stringent.[54] The Convention Against Torture was not created to provide another opportunity for immigration relief when attempts have failed under the INA.[55] This unintended outcome was evident when the Convention Against Torture allowed the applicants in the case of *In re S-V-* and *In re Y-L-, A-G-, R-S-R-* to file for relief after attempts failed under the limitations of the INA.

The Convention was not created to allow applicants to avoid past bad behavior. Such behavior includes human rights abuses, serious criminal activity, persecution, violations of religious freedom, offenses against humanity, terrorism, genocide and torture. The applicants in the case of *In re S-V-* and *In re Y-L, A-G-, R-S-R-* were found guilty of such behavior. These applicants were deemed to have committed particularly serious crimes, and were therefore denied relief by the BIA and the Attorney General under the Convention. However, nowhere in the Congressional language implementing the Convention do we find justification for this limitation of the Convention.

To obtain relief under the Convention, the Senate's intent was that the foreign government must be willfully blind to third-party torture *or* ignore third-party torture with actual knowledge but the inability to prevent it. The intent of the Senate was preserved in *Ali v. Reno* and *Zheng v. Ashcroft*. In *Ali v. Re*no, it was decided by the 6th Circuit that the BIA correctly denied Ali relief under the Convention because the Danish government's inability to control the activities of Ali's family members did not constitute acquiescence to torture and that the Danish authorities did not willfully ignore the actions of the family members. In the case of *Zheng v. Ashcroft*, the 9th Circuit ruled that

[54] A possible remedy to make the Convention more stringent is denying the applicants relief if they have committed particularly serious crimes, as done under the INA.

[55] The original purpose of the Convention Against Torture was to modify each nation's criminal law to end torture worldwide and to provide a legal recourse for those who have suffered torture at the hands of state actors.

'the Convention does not require the Chinese government to *knowingly acquiesce* to such torture. Contrary to the BIA's ruling, the 9th Circuit held that the Convention does not require that Zheng specifically prove that Chinese government officials would be *willfully accepting* of the torture inflicted on Zheng by the smugglers.[56]

The rulings on this subject illustrate how the BIA narrowed the interpretation of *acquiescence*. This is inappropriate. The scope of the Convention Against Torture must be limited by Congress rather than by a judicial attempt to avoid the intended interpretation of the term *acquiescence*. For the time being, the interpretation of the Convention's breadth should be the one used in *Zheng v. Ashcroft*. Any other course of action by the courts would exceed the scope of the judiciary, which is just as damaging to our democratic society, in the long run, as unpopular immigration policy.

[56] Zheng v. Ashcroft, 332 F.3d at 1194 (emphasis added).