

**Attorney General****Case:** *Matter of O-F-A-S-*, 28 I&N Dec. 35 (A.G. 2020)**Date:** July 14, 2020**Adjudicated by:** A.G. William Barr**Tags:** CAT Claims, torture, “acting under color of law,” rogue official

**Question Presented:** What is “the proper approach for determining when public officials who commit torture are ‘acting in an official capacity’ for the purpose of deciding an alien’s eligibility for protection under the CAT”? 36

**Holdings:** “Under color of law” standard is correct and should be used by IJs instead of “rogue official.” Note that lower-level officials are not precluded from being torturers by this standard.

**Rationale:** Multiple meanings of “rogue official” make it confusing. What we mean is “in his/her official capacity.”

**Facts:** 35 Citizen of Guatemala. “Five men wearing police uniforms and wielding high-caliber handguns forced their way into his home, assaulted him, stole his money, and threatened further harm to him and his family.”

**Procedural History:**

- **IJ:** denial of CAT relief—found perpetrators to be “rogue agents.” Respondent didn’t meet his burden to prove that he would be tortured by a public official or another person acting in an official capacity. 35
- **2019 BIA:** dismissed appeal of IJ’s decision. “In doing so, the Board announced a ‘national standard’ for the ‘official capacity’ requirement” [at 717] “a standard it described at times as an ‘under color of law’ inquiry . . . and at others as ‘the rogue official question.’” 36
  - “An act that is motivated by personal objectives is under color of law when an official uses his official authority to fulfill his personal objectives.” BIA at 715.

**Appeals to Statute & Precedent:**

- **8 C.F.R. Sec. 1208.18(a)(1):** CAT relief
- ***Matter of O-F-A-S-*, 27 I&N Dec. 709 (BIA 2019):** “under color of law” often involves misuse of authority: “An act that is motivated by personal objectives is under color of law when an official uses his official authority to fulfill his personal objectives.” At 715. (But they shouldn’t have distinguished between low- and high-level officials. 41)
- ***Matter of Y-L-*, 23 I&N Dec. 270 (A.G. 2002):** “official capacity” = “torture that is inflicted under color of law.” (285) Rejected rogue agents exacting personal vengeance. (Clarified by this opinion, because “rogue agent” became a separate test for some IJs.)

- ***Garcia v. Holder*, 765 F.3d 885, 891 (5th Cir. 2014):** “official capacity” = “under color of law.” “[A]n act is under color of law when it constitutes a misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” (at 891)
- ***United States v. Belfast*, 611 F.3d 783, 808-09 (11th Cir. 2010):** “official capacity” = “under color of law.”
- ***Ramirez-Peyro v. Holder*, 574 F.3d 893, 900 (8th Cir. 2009):** “official capacity” = “under color of law.”
- ***Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001):** earlier than *Y-L*- but same standard: “official capacity” = “under color of law.”
- ***Marmorato v. Holder*, 976 F. App’x 380, 384-85 (5th Cir. 2010):** reversing IJ’s “rogue official” test as an erroneous legal standard.
  - See footnote 1 for other IJ cases with “rogue officials” that were appealed.
- ***Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1139 (7th Cir. 2015):** “rogue official” = not serving the interests of the entire government
- ***Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 191 (1988):** “acts are performed ‘under the color of law’ when the actor misuses power possessed by virtue of law and made possible only because the actor was clothed with the authority of law.” A.G. at 39.

### Discussion:

- “To the extent the Board used ‘rogue official’ as shorthand for someone not acting in an official capacity, it accurately stated the law.” 38
- But this phrase has been interpreted to have multiple meanings:
  - Someone acting outside his/her official capacity
  - Not serving the interests of the entire government
- “Under color of law” = actor misuses power possessed by virtue of law 39
- “This standard does not categorically exclude corrupt, low-level officials from the CAT’s scope. Rather, regardless of rank, a public official acts under color of law when he ‘exercise[s] power “possessed by virtue of . . . law and made possible only because [he] is clothed with the authority of . . . law.”’ 40
- “Whether any particular official’s actions ultimately satisfy this standard is a fact-intensive inquiry that depends on whether the official’s conduct is ‘fairly attributable to the State.’” 40 (quote from *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982))
- “acts of private violence by persons who merely happened to be government officials” – not necessarily “under color of law” / “in an official capacity”: fact-intensive inquiry. 41
- “action ‘under color of law’ often involves *misuse* of authority.” 41
- “By immunizing extrajudicial action by low-level officials from the CAT’s scope, a freestanding ‘rogue official’ rule would appear to disqualify much of what the ‘under color of law’ rule might otherwise qualify as torture.” 41