

Cornyn “Immigration Injunction Reform” Amendment

March 2007

Senator Cornyn has offered an amendment to S. 4, the 9/11 Commission bill, which would effectively prevent immigrants, U.S. families, and employers from obtaining relief after they have proven in court that the government has failed to obey immigration law. By imposing arbitrary deadlines and unneeded burdens on any such relief, the Cornyn amendment would also lead federal judges to delay justice in other pending federal civil cases.

We are perplexed about why the significant and untested changes in court procedures required by the amendment would be put forward now, given that none of the reasons advanced on behalf of the amendment remain applicable.¹

Proponents argue that the amendment is needed:

- To get the Department of Homeland Security (DHS) out from under a longstanding federal court injunction, *Orantes-Hernandez v. Gonzalez*, which DHS once argued is frustrating its ability to end the practice of catch and release²...
 - ... but in September 2006, DHS announced that the practice of catch and release has completely ended;
- To enable the expedited removal of Salvadorans that DHS once argued was prohibited by the *Orantes* injunction...
 - ...but DHS now agrees that the *Orantes* injunction does not interfere with the expedited removal of Salvadorans.³ In addition, all briefings regarding the government’s motion to terminate the *Orantes* injunction concluded on December 20, 2006, the case is now under submission, and all that remains is for the court to issue its final decision

¹ The amendment that Senator Cornyn now calls the “Immigration Injunction Reform Act” is nearly identical to one that he and others put forward various times in the last congress, first as the “Fairness in Immigration Litigation Act” (FILA), and later as the “Ending Catch and Release Act.”

² Under catch and release, persons apprehended from countries other than Mexico and Canada were — until recently — released from custody pending the adjudication of their removal cases. The Cornyn Amendment makes absolutely no mention of catch and release, and its provisions would have no direct or indirect impact on the practice one way or the other.

³ Under expedited removal, DHS may deport immigrants without a hearing if they were not lawfully admitted to the U.S. and meet certain other criteria. DHS had told Congress and the press that an injunction in *Orantes-Hernandez v. Gonzalez*, No. CV 82-1107 MMM (VBKx) (C.D.Cal.), prevented it from applying expedited removal to Salvadorans. But on October 11, 2006, the *Orantes* court modified the injunction slightly, and on October 16, the government submitted a memo to the court stating that the modified injunction neither conflicts with nor imposes a burden on the expedited removal of Salvadorans. To quote the government’s memo: “Our concerns have been resolved.”



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The Cornyn amendment would have far reaching effects well beyond *Orantes*. It would change the rules in *all* immigration cases in a manner that would often preclude any meaningful remedy when the government is shown to be in violation of the law or the constitution.

One can understand why DHS or any agency would like to avoid court oversight and accountability when it cuts corners or misapplies immigration law. But in the U.S. legal system that is not a justification for denying legal recourse to victims of government wrongdoing. **To date, there have been no hearings nor evidence presented in any forum suggesting the need for any of the specific provisions in the Cornyn Amendment, or even explaining their impact.**

The problems with the Cornyn amendment include:

- Absurd deadlines, no exceptions. Would place arbitrary and absurdly short deadlines on courts deciding what relief to provide in immigration cases.
 - 90 days to decide whether to grant permanent relief in any case where the court has found preliminary injunctive relief warranted, no matter how complex the case is, and how much hardship plaintiffs might suffer.
 - 15 days to decide whether to stay relief on government’s motion – no time for meaningful discovery.
- No remedy when the government violates rights. Would — as a practical matter — often preclude *any* remedy when the government violates constitutionally guaranteed rights or the requirements of immigration laws, even if plaintiffs would suffer irreparable harm, because the courts would not have time to make a considered determination.
- Not just injunctions. The Cornyn amendment does not just apply to injunctions. Businesses suing to get a dysfunctional agency to follow the law, or lawful permanent residents desperate for a decision on their naturalization applications will also be subject to its requirements.
- Waste of judicial resources. Because relief would be time limited, courts will often be forced to make time on their dockets to re-contest the merits of cases multiple times without regard to whether conditions might have changed. Courts will not be able to decide ordinary, run-of-the-mill immigration cases without following a burdensome and time-consuming script.
- Preempt other worthy cases. Federal courts are currently experiencing an exploding immigration caseload. To meet the Cornyn amendment’s arbitrary deadlines and unnecessary extra court dates, some other pressing civil cases would have to be pushed back even if the immigration case is not at all urgent.
- Punish blameless plaintiffs. Often it’s not the immigrant plaintiff’s fault when immigration litigation is not swiftly decided. Yet under the Cornyn amendment the government could drag its feet or demand excess discovery as a tactic to deny immigrants their date in court regardless of the merits of the case.
- Discourage settlements. Consent decrees would be arbitrarily time-limited regardless of the time they take to implement or the judicial efficiency they would provide.

A small sample of the myriad kinds of cases that would be affected includes:

- Any effort to speed up an unreasonably delayed labor certification or to expedite a long-delayed business visa application.
- Any lawsuit to force DHS to follow its own rules, such as adjudicating employment visa petitions or processing naturalization applications in a timely fashion.
- Any order to follow the law in an immigration case, such as when considering a mother’s visa petition for her daughter.
- Any other “civil action pertaining to the administration or enforcement of the immigration laws of the United States” such as one filed to prevent asylum applicants from being illegally sent back to countries where they face death, torture, or persecution.
- Any pending civil litigation, unrelated to immigration, such as one challenging a municipality’s exercise of eminent domain over a business or home, that is delayed due to the extra attention judges would be required to give to the above cases.

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