

The *Orantes* Injunction and Expedited Removal

July 2006

■ Summary

- The *Orantes* injunction corrected systematic abuses that prevented detained Salvadorans from exercising their constitutional and statutory rights to apply for asylum, retain counsel, prepare their legal cases, and have their asylum cases heard.
- The *Orantes* injunction does not prevent the expedited removal of Salvadorans.
- The *Orantes* injunction does not in any way prevent DHS from ending the practice of “catch and release.”
- At the government’s request, a federal court is now reviewing the facts to determine whether the injunction is still needed.
- The Dept. of Homeland Security’s (DHS’s) legislative proposal purportedly to deal with the *Orantes* injunction is not narrowly tailored. It would apply arbitrary and unrealistic deadlines and require duplicative court actions in all immigration law cases where the government is found to have violated the Constitution or the law.

■ Background

DHS has proposed to impose arbitrary and unrealistic time limits on the relief that courts can provide when the government is found to have violated the Constitution or other law in an immigration case. The only justification put forward for this change is DHS’s annoyance with the result in a single case, known as the *Orantes* injunction.

DHS Secretary Chertoff claims that the injunction in this case prevents the expedited removal of Salvadorans and interferes with DHS’s efforts to end the policy of “catch and release” for detained non-U.S. citizens. These claims are not accurate. Neither of the policies that Secretary Chertoff is concerned about is required by the *Orantes* injunction, which merely directs the government to advise individuals of their rights and prevents practices that make it difficult or impossible for asylum-seekers in detention to obtain counsel.

The injunction in *Orantes* was imposed only after the evidence in a full trial showed that, with respect to Salvadorans, the government was systematically disobeying the law designed to protect persons fleeing persecution in their homelands. DHS is now in court trying to get the *Orantes* injunction lifted, arguing that the law and facts have changed since the injunction was ordered. That is as it should be; such claims should be litigated in a court of law, not in Congress.

The DHS-sponsored legislation is not limited to *Orantes*. It would frustrate meaningful relief in *any* marginally complex case involving immigration law. To date, no explanation has been put forward for the specific time limits it would impose. The legislation admits no exceptions for complex cases or for cases where court action is necessary to prevent severe hardship. There have been no hearings or studies to determine the impact that the arbitrary time limits would have



NATIONAL
IMMIGRATION
LAW CENTER
www.nilc.org

LOS ANGELES (Headquarters)

3435 Wilshire Boulevard
Suite 2850
Los Angeles, CA 90010
213 639-3900
213 639-3911 fax

WASHINGTON, DC

1101 14th Street, NW
Suite 410
Washington, DC 20005
202 216-0261
202 216-0266 fax

OAKLAND, CA

405 14th Street
Suite 1400
Oakland, CA 94612
510 663-8282
510 663-2028 fax

on immigration cases or on other civil cases that could be crowded out of the docket by courts forced to give priority to immigration issues first as a result of the new timetables.

■ What is the *Orantes* injunction?

The permanent injunction in *Orantes-Hernandez v. Gonzalez*, No. CV 82-1107 MMM (VBKx) (C.D.Cal.), prohibits DHS from coercing or otherwise improperly encouraging Salvadorans detained by immigration authorities to waive their rights. In *Orantes*, following a trial that lasted over a year, the court found that immigration authorities engaged in systematic practices of coercing and otherwise discouraging Salvadorans from applying for asylum, and encouraging them to abandon claims for asylum and to waive their rights and accept return to El Salvador. These practices included pressuring Salvadorans to accept voluntary departure during their arrest and processing, telling them that asylum was not available, and limiting their access to counsel and information about their rights at detention centers. Based on these findings, the court issued a permanent injunction to end these coercive practices and ensure that the constitutional and statutory rights of class members to apply for asylum, retain counsel, prepare their legal cases, and have immigration court hearings were protected.¹ The injunction also establishes basic minimum standards for the treatment of Salvadorans while in immigration detention.

In November 2005, DHS filed a motion to dissolve the injunction in the case, and that motion is currently proceeding in federal district court in Los Angeles. There is nothing in the injunction that bars the government from applying expedited removal to Salvadorans or that requires the government to release Salvadorans from detention pending removal.

■ The *Orantes* injunction does nothing to prevent the Border Patrol from ending the practice known as “Catch and Release.”

“Catch and release” refers to a practice of the Border Patrol of releasing apprehended noncitizens charged with being removable, rather than continuing to hold them in detention pending the resolution of their immigration cases. DHS has promised Congress to end this practice and has recently placed some of the blame for its failure to do so on the *Orantes* injunction.

The *Orantes* injunction does not require the Border Patrol to release *any* apprehended noncitizen and therefore does not mandate or otherwise further “catch and release.” DHS makes its own decisions regarding whether to detain or release detained noncitizens based on its own detention priorities, requirements for mandatory detention of certain noncitizens, and limitations of bed space at detention facilities. The *Orantes* injunction does not tell the government in any way how to weigh these various concerns and decide which noncitizens to release if the DHS lacks bed space for all detained noncitizens.

■ The *Orantes* injunction does not prevent DHS from placing Salvadorans into Expedited Removal and returning them to their country of origin as soon as circumstances allow.

Although Secretary Chertoff and others have claimed in press releases that the *Orantes* injunction prevents DHS from placing Salvadorans into expedited removal, this claim is simply untrue.

The government has been applying expedited removal at ports of entry to Salvadorans for years.

¹ *Orantes-Hernandez v. Meese*, 685 F.Supp. 1488 (C.D.Cal. 1988), *aff’d sub nom Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

DHS's choice not to apply expedited removal to Salvadorans at locations other than ports of entry is extraordinary because *no one* in the case claims that expedited removal is precluded by the injunction. In seeking to dissolve the injunction, DHS told the court:

The Government does not concede that application of Expedited Removal to Salvadorans would violate the Court's injunction. Nevertheless, in the Secretary's discretion, the Government has, to this date, refrained from applying Expedited Removal to Salvadorans apprehended between ports of entry so as to avoid any appearance of violating the injunction.²

Plaintiffs in the case have consistently represented to the court that they do *not* claim that the injunction prohibits the use of expedited removal against class members, but on the contrary take the position that there is no conflict between the injunction and expedited removal.

In seeking to dissolve the injunction, DHS has argued that two of its provisions — the “transfer” provision and the advisal of rights — conflict with expedited removal. However, neither of these arguments have merit.

¶ The transfer provision does not limit DHS's ability to apply expedited removal to Salvadorans.

The injunction's transfer provision applies to class members who have been apprehended by DHS and who are not represented by legal counsel. The provision bars DHS from transferring these class members outside of the district where they were apprehended for a seven-day period, to allow them to obtain counsel in the district where they are most likely to reside or have family members. After the seven-day period, the transfer provision imposes no restriction whatsoever on DHS.

DHS has argued that the transfer provision could be interpreted to limit the ability of DHS to apply expedited removal to Salvadorans by preventing the agency from removing them from the country for the first seven days following their apprehension. The plaintiffs in the case have pointed out in court that the term “transfer,” as used in the injunction, refers to the movement of a detained class member from one detention location or facility to another and is completely distinct from “deportation” or “removal.” The transfer provision provides a remedy for the specific practice of moving class members to isolated detention centers far from their communities, where they are unlikely to be able to secure counsel. The provision does not bar the legal return of class members to El Salvador within the first seven days of apprehension. Therefore, this provision does not prevent the application of expedited removal to Salvadorans.

The only apparent explanation for DHS's insistence on interpreting the transfer provision as barring its ability to apply expedited removal to Salvadorans is to use this as a justification for dissolving the injunction. But even were DHS correct in claiming that the transfer provision bars it from removing class members from the country for seven days following their apprehension, it would have no practical impact on the agency's ability to apply expedited removal to Salvadorans. It typically takes DHS from 26 to 32 days to accomplish the removal of noncitizens by means of expedited removal,³ such that removal occurs long after the first seven days following apprehension.

² DHS Memorandum of Points and Authorities in Support of Motion to Dissolve Permanent Injunction, filed Nov. 17, 2005, at 23 n.10.

³ Testimony of David Aguilar, Chief of U.S. Border Patrol, before the House Appropriations Committee Hearing on Customs and Border Protection and Detention and Removal Operations, July 12, 2005.

¶ **The injunction’s advisal of rights does not limit DHS’s ability to apply expedited removal to Salvadorans.**

The other provision of the injunction that DHS contends conflicts with expedited removal is the requirement that class members be provided with a written advisal of their rights at the time they are interviewed by immigration authorities. The advisal was developed before the establishment of expedited removal, and the plaintiffs in the litigation have stated to the court that the advisal should be modified to better reflect the rights and procedures applicable in the expedited removal context. However, the fact that simple changes to the advisal would better serve the purpose of informing class members of their rights in expedited removal is not a reason for dissolving the injunction, but rather a reason for modifying the advisal. The provision of the advisal to Salvadorans in expedited removal does not pose any kind of obstacle to placing Salvadorans in expedited removal proceedings, nor would it slow the process in any meaningful way.

In sum, the *Orantes* injunction poses no obstacle whatsoever to the application of expedited removal to Salvadorans.

■ **The *Orantes* injunction remains necessary today.**

The *Orantes* injunction ensures that detained Salvadorans are able to exercise their constitutional and statutory rights to apply for asylum, retain counsel, prepare their legal cases, and have their asylum cases heard. Without it, the treatment of Salvadorans would deteriorate to unacceptable levels.

We know this because nationals of countries not covered by the injunction are currently being subjected to the types of abusive practices in expedited removal that led a federal court to order the injunction in the first place. A February 2005 study of expedited removal produced at the request of Congress by the United States Commission on International Religious Freedom (USCIRF), a bipartisan federal agency, found that immigration officers conducting expedited removal interviews routinely short-cut required procedures that were designed to ensure that noncitizens in the expedited removal process with valid asylum claims are identified and permitted to pursue those claims. For example:

- Although officers are required to inform noncitizens placed in expedited removal that U.S. law provides protection for those fleeing persecution, at one office only one in ten noncitizens were so advised;
- Although officers are required to ask noncitizens why they left their home country and whether they fear return, officers at interviews observed by USCIRF routinely failed to do so; moreover,
- Even at observed interviews, officers engaged in “aggressive or hostile interview techniques, sarcasm and ridicule of aliens, and verbal threats or accusations.”

In short, the USCIRF study indicates that the statutory and regulatory procedures intended to ensure that noncitizens who have valid claims for asylum or protection against torture are identified in expedited removal proceedings and permitted to pursue those claims are not being followed.⁴

⁴ The USCIRF study, “Report on Asylum Seekers in Expedited Removal,” is available on the USCIRF website, www.uscirf.gov.

If congressional action in this area is warranted at all, it is action to ensure that the rights of legitimate asylum-seekers are protected in the context of expedited removal, not action to eviscerate the protections enjoyed by the one group that currently is provided a modicum of recourse when those rights are violated.

FOR MORE INFORMATION, CONTACT

Josh Bernstein, NILC director of federal policy | bernstein@nilc-dc.org | 202.216.0261