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# Reporting Abuse as a Prerequisite for Asylum: The Ninth Circuit's Examination of *Ornelas-Chavez v. Gonzalez*

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# Reporting Abuse as a Prerequisite for Asylum: The Ninth Circuit's Examination of Ornelas-Chavez v. Gonzalez

## **Cover Page Footnote**

International Law; Commercial Law; Law

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Ninth Circuit’s Examination of *Ornelas-Chavez v.  
Gonzales***

I.	Introduction .....	147
II.	Statement of the Case .....	148
	A. Facts .....	148
	B. Immigration Judge .....	149
	C. Board of Immigration Appeals .....	150
	D. Court of Appeals for the Ninth Circuit .....	151
III.	Background Law.....	152
	A. Protection Under the Convention Against Torture .....	152
	B. Reporting of Incidents to the Authorities.....	153
IV.	Analysis .....	155
V.	Conclusion .....	160

**TABLE OF CONTENTS**

**I. Introduction**

The case of *Ornelas-Chavez v. Gonzales*<sup>1</sup> concerns a homosexual Mexican man who fled to the United States to escape the excessive abuse he faced at the hands of family, “friends,” and public officials in Mexico.<sup>2</sup> Francisco Ornelas-Chavez arrived in the United States in 1998.<sup>3</sup> In July 2003, the Immigration Courts tried to remove him.<sup>4</sup>

The Immigration Courts proceeded on the premise that because he had not reported his abuse to the Mexican authorities,<sup>5</sup> he could not show that the government acquiesced or had

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<sup>1</sup> *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir. 2006).

<sup>2</sup> *Id.* at 1054.

<sup>3</sup> *Id.* at 1054-55.

<sup>4</sup> *Id.* at 1055.

<sup>5</sup> These were, coincidentally, the same authorities who were known for not only abusing, but going so far as to murder homosexual men.

knowledge of his abuse and torture, a finding that would be necessary in order to qualify for protection under the Convention Against Torture.<sup>6</sup> On review, the United States Court of Appeals for the Ninth Circuit created a rule that the Immigration Courts cannot require an individual to report incidents of abuse to the authorities to qualify for protection under the Convention Against Torture and that a finding of government acquiescence to torture can be found from other evidence.<sup>7</sup>

This Note will explore the facts and holdings of *Ornelas-Chavez* in Part II. Part III will examine the background law in this area, and Part IV will provide an analysis of the court's opinion. Finally, Part V will conclude that while this extension seems very logical on a public policy basis, it will need to be tightened in the near future or risk being an open door to a slippery slope in the United States' immigration decisions.

## II. Statement of the Case

### A. Facts

Francisco Ornelas-Chavez's abuse started at a very young age.<sup>8</sup> He was born a male but preferred to express a female identity in both his dress and relationship decisions.<sup>9</sup> It was because of this female identity that his family began abusing him.<sup>10</sup> He was severely beaten by both his father and mother.<sup>11</sup> His father even permitted a friend to drug and rape Ornelas-Chavez in order to humiliate him.<sup>12</sup> From age six until age twelve, Ornelas-Chavez was repeatedly raped by two of his cousins.<sup>13</sup> From age seven until age nine he was also raped by a worker on his grandfather's plantation.<sup>14</sup>

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<sup>6</sup> *Ornelas-Chavez*, 458 F.3d at 1058. Background information on the Convention Against Torture can be found in Part III.

<sup>7</sup> *Id.* at 1060.

<sup>8</sup> *Id.* at 1054.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Ornelas-Chavez*, 458 F.3d at 1054.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

Not only was Ornelas-Chavez abused by his family, but there were several instances of abuse that occurred at the hands of public officials as well. For instance, he reported the beatings from his family to his second grade teacher, who told him that only “fags” wore women’s clothes and failed to report his abuse to the proper authorities.<sup>15</sup> When he was sixteen, his father asked the local police chief to arrest and detain Ornelas-Chavez “to teach [him] to behave.”<sup>16</sup>

Later in his life, Ornelas-Chavez began working at the state prison as a correctional officer, where his co-workers continuously threatened and beat him.<sup>17</sup> When Ornelas-Chavez complained to his supervisor, he was told to quit.<sup>18</sup> Ornelas-Chavez did quit but returned two years later because he thought conditions might have changed.<sup>19</sup> Upon his return, several co-workers tried to suffocate him, and when he reported this incident, he was again told to quit.<sup>20</sup>

Ornelas-Chavez feared reporting incidents of his own abuse because two of his homosexual acquaintances had been murdered by police and left “with sticks inserted in their rectums.”<sup>21</sup> He lived in fear in Mexicali with his aunt for five years, until his father found him and beat him once again.<sup>22</sup> Finally, in 1998, Ornelas-Chavez fled to the United States.<sup>23</sup> In 2003, the United States began removal proceedings against him because he had not properly entered the country.<sup>24</sup>

### B. Immigration Judge

The Immigration Judge was the first to hear Ornelas-Chavez’s arguments to be granted asylum and allowed to remain in the

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Ornelas-Chavez*, 458 F.3d at 1053.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 1055.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Ornelas-Chavez*, 458 F.3d at 1055.

United States.<sup>25</sup> The Immigration Judge found that Ornelas-Chavez “failed to show exceptional circumstances for filing his application for asylum later than one year after entering the United States.”<sup>26</sup> The Immigration Judge also found that he had failed to show evidence of past torture, mental or physical intentionally inflicted severe pain, or suffering sanctioned by a public official.<sup>27</sup> Because of those findings, the Immigration Judge denied Ornelas-Chavez’s petition for withholding of removal.<sup>28</sup>

### C. Board of Immigration Appeals

Ornelas-Chavez appealed the Immigration Judge’s decision to the Board of Immigration Appeals.<sup>29</sup> The Board of Immigration Appeals affirmed the Immigration Judge’s decision, finding that the only incident involving public officials was when his father had him locked up.<sup>30</sup> The Board of Immigration Appeals also found that because other incidents were not reported to the Mexican authorities, those incidents could not count as occurring at the acquiescence of public officials, as is necessary to qualify for withholding of removal.<sup>31</sup>

Further, the Board of Immigration Appeals found that though Ornelas-Chavez was able to clearly document the unfortunate conditions of homosexual men in Mexico in general, that documentation did not demonstrate that the government was unwilling or unable to control those who harmed Ornelas-Chavez

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<sup>25</sup> *Id.* at 1053.

<sup>26</sup> *Id.* at 1055. A applicant for asylum must show “by clear and convincing evidence that the application has been filed within one year after the date of [his or her] arrival in the U.S.” 8 U.S.C. § 1158(a) (2) (B) (2000). There are two exceptions to this deadline, however: 1) “changed circumstances which materially affect the applicant’s eligibility for asylum” or 2) “extraordinary circumstances.” REGINA GERMAIN, A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 86 (2003) (quoting 8 U.S.C. § 1158(a) (2) (D)). Ornelas-Chavez would have had to show that there were “events or factors directly related to the failure to meet the one-year deadline” in order to demonstrate “extraordinary circumstances” and be excluded from the one-year deadline for filing. *Id.* at 86 (quoting 8 C.F.R. § 208.4(a) (5)).

<sup>27</sup> *Ornelas-Chavez*, 458 F.3d at 1055.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

specifically.<sup>32</sup> The Board of Immigration Appeals also affirmed the Convention Against Torture decision by the Immigration Judge in a one-sentence holding with no reasoning.<sup>33</sup>

*D. Court of Appeals for the Ninth Circuit*

Ornelas-Chavez then appealed his case to the Ninth Circuit Court of Appeals.<sup>34</sup> The Ninth Circuit found that the Board of Immigration Appeals applied an improper standard under both the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRARA)<sup>35</sup> and the Convention Against Torture.<sup>36</sup> However, because the Board of Immigration Appeals did not state whether it conducted *de novo* review, and there was a complete lack of analysis in the opinion, the Ninth Circuit reviewed the Immigration Judge's decision assuming that the Board of Immigration Appeals gave significant weight to the Immigration Judge's decision.<sup>37</sup>

The Immigration Judge found that Ornelas-Chavez did not establish that the government sanctioned his torture.<sup>38</sup> The Ninth Circuit held that this standard was too high.<sup>39</sup> The court noted a line of cases that implicitly prohibit the court from requiring the reporting of torture to public officials for public policy reasons.<sup>40</sup> It is too high of a standard to require the victim to have reported the abuse or torture to the government;<sup>41</sup> therefore, the Ninth Circuit remanded for a decision under the proper standard, where all of Ornelas-Chavez's evidence of his abuse and torture, and even evidence not reported to the government, shall be evaluated

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<sup>32</sup> *Id.*

<sup>33</sup> *Ornelas-Chavez*, 458 F.3d at 1055.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1056 (citing 8 U.S.C. § 1231(b) (3) (2006)).

<sup>36</sup> *Id.* (citing 8 C.F.R. § 208.16(b) (1) (I) (2006)).

<sup>37</sup> *See Kozulin v. INS*, 218 F.3d 1112, 1115 (9th Cir. 2000).

<sup>38</sup> *Ornelas-Chavez*, 458 F.3d at 1058.

<sup>39</sup> *Id.* The Court of Appeals begins its decision by noting that in *Zheng v. Ashcroft*, the court held that the government does not need to have actual knowledge of the torture. *Id.* (citing 332 F.3d 1186, 1194 (9th Cir. 2003)).

<sup>40</sup> *Ornelas-Chavez*, 458 F.3d at 1060.

<sup>41</sup> *See infra* Part III.

to determine if the government demonstrated “willful blindness.”<sup>42</sup>

### III. Background Law

#### A. *Protection Under the Convention Against Torture*

In 1975, the Convention Against Torture was proposed by the United Nations in order to “make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.”<sup>43</sup> The Convention Against Torture required that participating states legislate “to prevent acts of torture in any territory in its jurisdiction.”<sup>44</sup> Further, it mandated that “[n]o State shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>45</sup> The United States implemented the Convention Against Torture in its Code of Federal Regulations.<sup>46</sup>

To qualify for protection under the Convention Against Torture, one must have suffered torture by a public official.<sup>47</sup> In the case where the torture was not actually at the hands of a public official, however, an individual can still qualify for protection if the public official was aware of the activity, but did not intervene.<sup>48</sup> In analyzing the Convention Against Torture, the courts have expanded this awareness by public officials and ruled that the officials do not need actual knowledge of the torture.<sup>49</sup> Nor is it necessary for the public official to have physical control over the applicant during the abuse and torture.<sup>50</sup> Essentially, the

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<sup>42</sup> *Ornelas-Chavez*, 458 F.3d at 1060-61.

<sup>43</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46/Annex (Dec. 10, 1984).

<sup>44</sup> Convention Against Torture, *supra* note 43, art. 2.

<sup>45</sup> Convention Against Torture, *supra* note 43, art. 3.

<sup>46</sup> 8 C.F.R. § 208.18 (2006).

<sup>47</sup> 8 C.F.R. § 208.18(a) (1) (2006).

<sup>48</sup> 8 C.F.R. § 208.18 (a) (7) (2006). This statute clearly fulfills the mission of the Convention Against Torture to prevent torture, not just torture specifically inflicted by public officials. The mission would not be met if individuals could be tortured by private individuals not punished by the government, for the human right against torture extends beyond abuse simply from public officials.

<sup>49</sup> See *Zheng v. Ashcroft*, 332 F.3d 1186, 1194 (9th Cir. 2003).

<sup>50</sup> See *Azanor v. Ashcroft*, 364 F.3d 1013, 1020 (9th Cir. 2004).



language of the Code of Federal Regulations seems to indicate that the public officials may have constructive knowledge of and control over whomever is inflicting the torture.<sup>51</sup> However, the courts have followed the public policy rationale and the reasoning behind the Convention Against Torture and found that there are often instances where the torture is not directly coming from government officials or being specifically ignored by government officials, but to protect human dignity, that individual should not be removed from the United States.<sup>52</sup> In these circumstances it remains likely that the torture will resume when he returns to his home country.<sup>53</sup>

### *B. Reporting of Incidents to the Authorities*

The case law concerning the reporting of torture and abuse to authorities developed under the withholding of a removal statute which requires a showing of "past persecution."<sup>54</sup> Because the requirements are similar, an analysis of protection under the Convention Against Torture applies the same logic that developed from these cases.<sup>55</sup> There are four cases that develop the idea of requiring an individual to report incidents of torture to government authorities.

*Baballah v. Ashcroft*<sup>56</sup> concerned an Israeli who was "repeatedly threatened and attacked . . . on account of his ethnicity and religion" for over ten years.<sup>57</sup> In this case, the court held that because the abuse was at the hands of government actors, it was not necessary to discuss whether the events were reported to the government.<sup>58</sup> In its opinion, the Ninth Circuit noted that "[o]nly when non-governmental actors are responsible for persecution do we consider whether an applicant reported the incidents to police, because in such cases a report of this nature may show

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<sup>51</sup> See generally 8 C.F.R. § 208.18 (2006).

<sup>52</sup> See *infra* Part IV.

<sup>53</sup> *Id.*

<sup>54</sup> 8 U.S.C. § 1231(b) (3) (2006).

<sup>55</sup> See *Ornelas-Chavez*, 458 F.3d at 1060.

<sup>56</sup> 367 F.3d 1067 (9th Cir. 2003).

<sup>57</sup> *Id.* at 1070.

<sup>58</sup> *Id.* at 1078.

governmental inability to control the actors.”<sup>59</sup> This statement could be interpreted to mean that the courts ought to consider whether one reported the incidents, but it does not explicitly say that reporting of abuse was mandatory. It does, however, raise the question of how important reporting to the authorities is in situations where the torture is not directly from the government officials.

*Reyes-Reyes v. Ashcroft*<sup>60</sup> has similar facts to those in *Ornelas-Chavez*, concerning a male, Latin American petitioner with a female identity.<sup>61</sup> The Ninth Circuit in *Reyes-Reyes* did not expressly rule on the issue of whether it is necessary for an individual to report non-governmental abuse to allow a petition for withholding of removal,<sup>62</sup> but it did specifically note that “the imposition of such a bright line rule would indeed be troubling.”<sup>63</sup> While the court in *Reyes-Reyes* did not have to rule on the *per se* rule imposed by the Immigration Judge because it could remand on other grounds, it seemed to disapprove of any *per se* reporting requirement.<sup>64</sup>

In *Castro-Perez v. Gonzales*,<sup>65</sup> the Ninth Circuit denied a Honduran woman’s petition for withholding of removal specifically because she did not report being raped by her boyfriend to the authorities.<sup>66</sup> Her reasons for not reporting the rape are what differentiate, in part, her petition from the petition in *Reyes-Reyes*.<sup>67</sup> She refrained from reporting, not out of fear of persecution from the government as in *Reyes*, but because she thought the authorities would not investigate, and she feared retaliation from her father.<sup>68</sup> These reasons simply did not compel

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<sup>59</sup> *Id.*

<sup>60</sup> 384 F.3d 782 (9th Cir. 2004).

<sup>61</sup> *Reyes-Reyes*, 384 F.3d at 785.

<sup>62</sup> Specifically, the case concerns lack of reporting when there is precedent documenting police abuse towards Latin American men with female sexual identities. *See id.* at 789 n. 3.

<sup>63</sup> *Id.*

<sup>64</sup> *See id.* at 789.

<sup>65</sup> 409 F.3d 1069 (9th Cir. 2005).

<sup>66</sup> *Id.* at 1070-71.

<sup>67</sup> *Id.* at 1072.

<sup>68</sup> *Id.*

a finding that the government bore any responsibility for her abuse.<sup>69</sup>

In *Boer-Sedano v. Gonzales*,<sup>70</sup> the petitioner suffered persecution at the hands of government officials because he was a homosexual. The Ninth Circuit found that the reporting requirement was only to be considered in the context of torture at the hands of non-governmental actors, but noted that the petitioner's fear of the police was well-founded, and it was reasonable for him not to report the abuse he suffered.<sup>71</sup> While this case does not rule that reporting of abuse cannot be required, the dicta leans in the direction of not requiring reporting in its discussion of the reasonableness of petitioner's fear of the police.<sup>72</sup>

The background law in the area of the Convention Against Torture and the reporting of abuse to government officials is not explicit in whether one who is tortured must report the abuse for the state action element to be satisfied.<sup>73</sup> The facts of these cases allowed the Ninth Circuit to rule under other theories, but in its explanations the court does tend to lean against a *per se* rule of requiring individuals tortured by non-government officials to report the torture to qualify for withholding of removal and because similar logic can apply, for protection under the Convention Against Torture.

#### IV. Analysis

The Convention Against Torture was written to protect human dignity and create a safe-haven for tortured individuals in the countries of the United Nations.<sup>74</sup> The United Nations felt that it was important to avoid sending people back to countries where they would surely be tortured.<sup>75</sup> Of course, while the language of

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<sup>69</sup> *Id.*

<sup>70</sup> 418 F.3d 1082 (9th Cir. 2005).

<sup>71</sup> *Id.* at 1088.

<sup>72</sup> *See id.* at 1090.

<sup>73</sup> *See generally* GERMAIN, *supra* note 26.

<sup>74</sup> Convention Against Torture, *supra* note 43, art. 1.

<sup>75</sup> *See generally id.* at 2 (“No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”); MARY ROBINSON, *Foreword to CONCLUSIONS AND RECOMMENDATIONS OF THE UN COMMITTEE AGAINST TORTURE* xiii (Leif Holmstrom ed., Martinus Nijhoff 2000) (setting out the goals of the Convention

the Convention Against Torture is very noble in providing for punishment of torturers and protection for those subject to torture, there should be limitations in its implementation. Because of the prevalence of abuse and injury in other countries, especially third world countries, the line should be drawn and only allow people to avoid removal if it is the government of their home country or an entity they cannot escape that tortured them and is likely to continue the torture if they return.<sup>76</sup>

The United States' courts have struggled with analyzing withholding of removal cases.<sup>77</sup> In theory, it seems fair that the government should have the opportunity to know about the abuse before being deemed to have acquiesced to it.<sup>78</sup> In practice, this standard is too high due to the corruption that pervades many governments.

When implementing the Convention Against Torture in the United States, the legislature struggled with this issue of what qualifies a foreign government for acquiescence to the torture of its citizens.<sup>79</sup> When President Reagan proposed conditions for the United States to adopt, one of them was "an understanding that the United States interpreted the term *acquiescence* to 're-quire[] that the public official, prior to the activity constituting torture, have *knowledge* of such activity.'"<sup>80</sup> The Senate Foreign Relations Committee did not agree with this definition of acquiescence and accordingly said it "created the impression that the United States

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Against Torture in a collection of suggestions concerning its implementation from various countries).

<sup>76</sup> See *infra* Part V.

<sup>77</sup> See *e.g.*, *Boer-Sedano*, 418 F.3d at 1088 (examining whether the petitioner's fear of the police was well-founded and a reasonable justification for his failure to report his torture); *Castro-Perez*, 409 F.3d at 782 (determining that a fear that the police would not investigate a few incidents does not compel a finding that the government is responsible for the abuse); *Reyes-Reyes*, 384 F.3d at 789 n. 3 (commenting in a note that a *per se* rule would be "troubling," but remanding this case for other reasons and avoiding that issue); *Baballah*, 367 F.3d at 1067 (finding that there is no need to report incidents of abuse when the incidents occur at the hands of public officials).

<sup>78</sup> "[W]hether the petitioner has reported the incidents to the authorities is clearly relevant to, even if not dispositive of, the ultimate question of whether the government was 'unwilling or unable to control' the persecutors." *Ornelas-Chavez*, 458 F.3d at 1062 (O'Scannlain, J., dissenting) (citing *Baballah*, 367 F.3d at 1078).

<sup>79</sup> See generally GERMAIN, *supra* note 26.

<sup>80</sup> *Zheng*, 332 F.3d at 1192 (citing S. Exec. Rep. 101-30, at 15).

was not serious in its commitment to end torture worldwide.”<sup>81</sup> Several years later, in 1990, the Bush administration proposed that the public official only needed awareness of the torture, instead of knowledge.<sup>82</sup> It was with this amended language that the Convention Against Torture was ratified in the United States.<sup>83</sup>

What seemed to be clear legislative language when it was drafted has not been easy to implement in the Immigration Courts.<sup>84</sup> As cases arise, the courts are pressured to both take torture seriously and avoid an excess of grants of withholding of removal.<sup>85</sup> Perhaps this conundrum is the reason behind the vague holdings in the four cases described above analyzing this area of what constitutes awareness of a foreign government.

*Baballah* appeared to lean in the direction of demanding reporting of incidents to authorities when the torture is from a non-governmental official.<sup>86</sup> The court successfully avoided holding either way on this issue, because *Baballah* concerned torture at the hands of public officials.<sup>87</sup> The court specifically notes that “in such cases a report of this nature may show governmental inability to control the actors.”<sup>88</sup> Fortunately for Ornelas-Chavez, *Baballah* did not have similar facts and so the court’s comments on what is needed to show government awareness is inapplicable to a case of torture at the hands of a non-governmental official.<sup>89</sup>

In *Reyes-Reyes*, the court again dodged a bullet by specifically saying it was declining to decide on the *per se* rule requiring reporting of incidents that had been used by the Immigration Judge.<sup>90</sup> Interestingly, the court wrote a footnote about the trouble this type of bright line rule would cause and detailed the abuse of homosexuals at the hands of the police.<sup>91</sup> The political pressures

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<sup>81</sup> *Id.* at 1193.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *See, e.g. Ornelas-Chavez*, 458 F.3d 1052.

<sup>85</sup> *Id.*

<sup>86</sup> *Baballah*, 367 F.3d at 1078.

<sup>87</sup> *Id.* at 1070-71.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1078.

<sup>90</sup> *Reyes-Reyes*, 384 F.3d at 789.

<sup>91</sup> *See id.* at 789 n.3.

surrounding the courts in these decisions are quite evident in *Reyes-Reyes*. When given a great opportunity to rule on these facts, the court finds its reasoning elsewhere and merely writes a note on the issue.

The *Castro-Perez* court had unfortunate but simple facts to address, and while the decision may make for bad law further down the road, it was appropriate and reasonable under the specific facts. The court was approached with a case in which an individual was harmed at the hands of a private citizen and did not report the incident. But the facts are not analogous to *Ornelas-Chavez* and similar cases where it is clear the government would not ignore the abuse but further it. *Castro-Perez* held that because the petitioner did not report being raped to the police, the evidence “[did] not compel a finding that the Honduran government is unwilling or unable to control rape in that country.”<sup>92</sup> Thankfully, *Ornelas-Chavez* has now been decided and limits the holding of *Castro-Perez* to its particular facts, where an individual is injured once or twice at the hands of a private citizen and does not report the incident simply because she feels it would not be investigated.<sup>93</sup>

Finally, in *Boer-Sedano*, while it was unnecessary to the analysis, the court actually examined the reasonableness behind the petitioner’s failure to report.<sup>94</sup> The torture in *Boer-Sedano* was at the hands of a public official, and the Ninth Circuit cited *Baballah* when stating that the Immigration Judge did not need to address whether the incident was reported.<sup>95</sup> However, the Ninth Circuit did not stop its analysis there; it continued on to discuss that the petitioner in *Boer-Sedano* had every right not to report the abuse because he was afraid that reporting it would simply perpetuate his torture.<sup>96</sup> As repeated in *Ornelas-Chavez*, the *Boer-Sedano* court notes that there are instances where it is only logical for a tortured individual to refrain from reporting that torture to the

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<sup>92</sup> *Castro-Perez*, 409 F.3d at 1072.

<sup>93</sup> Without *Ornelas-Chavez*, it could be argued that the court implemented a reporting requirement and without that reporting of the incident, the government cannot be found to have awareness of the abuse and torture.

<sup>94</sup> *Boer-Sedano*, 418 F.3d at 1088.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

authorities.<sup>97</sup>

*Ornelas-Chavez* states that these four cases implicitly rule that the courts cannot require petitioners to report incidents to the authorities and that the court in *Ornelas-Chavez* is simply making explicit what was already implicit.<sup>98</sup> This is not accurate. *Baballah* says the court should look at whether the incident was reported when a non-governmental actor is responsible.<sup>99</sup> *Reyes-Reyes* declined to rule on this issue and found its reasoning elsewhere only commenting on the reporting requirement in a note.<sup>100</sup> *Castro-Perez* specifically holds that the petitioner should have reported the incidents to show acquiescence of the government.<sup>101</sup> And finally, *Boer-Sedano* discusses the reasonableness behind the petitioner's failure to report, but does so in a way that suggests it would be unreasonable to require the petitioner to report to the authorities because it was the authorities who were torturing him.<sup>102</sup> Accordingly, it does not seem to be much of a stretch from these cases to require an individual to report his torture to the appropriate authorities to show government acquiescence.

The language of the Convention Against Torture requires that the government have awareness of the torture for the petitioner to qualify for protection.<sup>103</sup> This is a reasonable restriction on the Convention Against Torture because it is not the responsibility of the United States government to protect individuals until their own government has failed to do so.

The first expansion of the definition of awareness occurred in *Zheng*.<sup>104</sup> There, the court discussed the legislative history of the Convention Against Torture focusing on the change from "knowledge" to "awareness."<sup>105</sup> Because of this change, the *Zheng* court held that "willful blindness" constitutes

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<sup>97</sup> *Id.* at 1088.

<sup>98</sup> *Ornelas-Chavez*, 458 F.3d at 1057-58.

<sup>99</sup> *Baballah*, 367 F.3d at 1078.

<sup>100</sup> *Reyes-Reyes*, 384 F.3d at 789.

<sup>101</sup> *Castro-Perez*, 409 F.3d at 1072.

<sup>102</sup> *Boer-Sedano*, 418 at 1088.

<sup>103</sup> 8 C.F.R. 208.18(a) (7) (2006).

<sup>104</sup> *Zheng*, 332 F.3d at 1193.

<sup>105</sup> *See id.* at 1195.

“awareness.”<sup>106</sup> Therefore, after *Zheng*, the government no longer has to have actual knowledge of the torture. Arguably, this could be a proper interpretation of the legislative language and history. However, it is expanding protection under the Convention Against Torture from what it originally may have included.

The next leap occurs here in *Ornelas-Chavez*. The cases leading up to *Ornelas-Chavez* suggested that a problem may arise when an individual is afraid to report his torture by a private party to the authorities.<sup>107</sup> It seems unfair to charge the government with awareness of incidents that have not been directly reported to them. Yet, *Zheng* is analogous. Considering the corruption in the foreign nations these petitioners are fleeing from, it is entirely possible that the government has awareness of the torture in general but refuses to do anything about it.<sup>108</sup> To require individuals to report torture would undermine the purpose behind the Convention Against Torture. It seems unlikely that one would report the incidents despite the possible persecution from the government, simply to comply with the requirements necessary for protection under the Convention Against Torture.<sup>109</sup> Effectively, tortured petitioners would consistently be removed to their countries of origin because they tried to protect themselves from further abuse by avoiding contact with their governments.

On the other side, however, these foreign governments should be given the chance to stop torture by non-governmental authorities before they are charged with acquiescence to it.<sup>110</sup> Without requiring reporting, it is entirely possible that while the government is aware of persecution in general, it is not able to

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<sup>106</sup> See *id.* at 1194-95.

<sup>107</sup> *Ornelas-Chavez*, 458 F.3d at 1057.

<sup>108</sup> See *e.g.*, *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1089 (9th Cir. 2003) (discussing the widespread abuse of homosexuals by the general public and police).

<sup>109</sup> See *Reyes-Reyes*, 384 F.3d at 789 n. 3 (stating that rape victims in El Salvador tend to not report these crimes because of a lack of response from authorities).

<sup>110</sup> This argument is somewhat discussed in Judge O’Scannlain’s dissent in *Ornelas-Chavez*. See *Ornelas-Chavez*, 458 F.3d at 1061-70 (O’Scannlain, J., dissenting). O’Scannlain noted that the evidence presented by *Ornelas-Chavez* did not show that the court “would not have acted to curb the persecution he alleges took place.” *Id.* at 1062. O’Scannlain discusses that general mistreatment of a particular group (homosexuals in this case) throughout a country is not evidence of acquiescence by public officials. See *id.* at 1062.



punish particular individuals because it does not know specifically who is inflicting the torture.<sup>111</sup> It does not appear that the Convention Against Torture was meant to reach these types of situations where the government has simply not been given the chance to address the actions of private individuals.<sup>112</sup>

The courts are left to strike a balance. Under the Convention Against Torture, the United States does not want to deport individuals who are likely to face torture in their home countries upon their return.<sup>113</sup> The United States also, however, does not want to open its doors and withhold removal for individuals who never gave their own governments a chance to protect them.<sup>114</sup> Nor does the United States want to require tortured individuals to risk further abuse by reporting incidents to a government likely to inflict more torture upon them.<sup>115</sup>

*Ornelas-Chavez* extends the Convention Against Torture to protect individuals who suffered torture at the hands of private parties and did not report the incidents for fear of further persecution from the government.<sup>116</sup> While the Ninth Circuit strikes down a *per se* rule requiring individuals to report incidents, it does not (and procedurally cannot) analyze the facts in *Ornelas-Chavez*'s case. In essence, the appellate court has expanded the coverage of the Convention Against Torture beyond perhaps what it was meant to include but leaves an incredible amount of wiggle room by not discussing to what facts the rule should apply.

The problem remains: of when a petitioner is reasonable in not reporting incidents of torture for fear of further persecution. This determination is procedurally left to the Board of Immigration Appeals.<sup>117</sup> Clearly, the *Castro-Perez* case is binding in instances where the abuse happens at the hands of one individual and the

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<sup>111</sup> See *id.* at 1061-62.

<sup>112</sup> *Id.*

<sup>113</sup> See *supra* Part III: Background Law, Protection Under the Convention Against Torture.

<sup>114</sup> There is a growing concern in the United States about excessive immigration. While the majority of the argument surrounds illegal immigration, there is debate about when people from other nations should be allowed to move here permanently.

<sup>115</sup> This is a public policy concern.

<sup>116</sup> *Ornelas-Chavez*, 458 F.3d 1052.

<sup>117</sup> See *id.* at 25.

petitioner does not report the incident simply because she feels the police will not investigate and her father will get upset.<sup>118</sup> Any other fact pattern, however, must be evaluated by the Immigration Judge or the Board of Immigration Appeals.<sup>119</sup> In essence, the holding in *Ornelas-Chavez* has no teeth.

The Board of Immigration Appeals has leaned towards preferring petitioners to report incidents of torture to the authorities to demonstrate government acquiescence.<sup>120</sup> This preference can be inferred from its decision in *Ornelas-Chavez*, where it applied too high of a standard and specifically refused to consider those incidents that occurred at the hands of private individuals and went unreported.<sup>121</sup> There is nothing in the Ninth Circuit's decision in *Ornelas-Chavez* that requires the Board of Immigration Appeals to refrain from harshly evaluating the facts of the case. Under this holding, it would be too easy for a court to reach the same result without expressly saying it did not look at unreported incidents. In fact, the decision almost seems to say that while the court cannot always require reporting of incidents, it can in certain undefined circumstances.<sup>122</sup>

Further, upon review, it is not clear that the Ninth Circuit would find the Board of Immigration Appeals' evaluation of the facts to be too harsh. In past cases, the Ninth Circuit has skirted around the issue of a *per se* rule of reporting.<sup>123</sup> In some of the cases, the court leaned towards requiring reporting.<sup>124</sup> Especially when the facts are as politically unpopular as they are in *Ornelas-Chavez*, where the petitioner was a homosexual man who entered the United States illegally, it is possible that the Ninth Circuit would uphold a harsh evaluation of the facts leading to a denial of the petitioner's claim for protection under the Convention Against Torture for political reasons.<sup>125</sup>

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<sup>118</sup> See *Castro-Perez*, 409 F.3d 1069.

<sup>119</sup> See *Ornelas-Chavez*, 458 F.3d at 1058 (noting that it is not the Court of Appeals' duty to review the evidence independently).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1055.

<sup>122</sup> See *id.* at 1057.

<sup>123</sup> See *supra* Part III: Background Law.

<sup>124</sup> *Id.*

<sup>125</sup> It seems plausible that the four decisions discussed in this note were decided as

While this holding arguably has no teeth, as discussed above, conversely it may be opening the door to a slippery slope. Under the Convention Against Torture, there is an interest in giving the foreign governments the opportunity to address their own issues of torture at the hands of private individuals.<sup>126</sup> If read broadly, *Ornelas-Chavez* could stand for the proposition that it is likely that foreign governments have constructive knowledge of torture in general, and should therefore be found to have general awareness of and acquiesced to torture, even without specific awareness of it.

It is clear that there would likely be an incredible boom in the population of immigrants if every individual who was a victim of abuse in his home country because he is part of a politically unpopular group often targeted and not protected by their government could escape to the United States and claim protection under the Convention Against Torture. Particularly with individuals becoming more open about homosexuality, they are more likely to suffer abuse in their home countries and flee to the United States. If *Ornelas-Chavez* is read broadly, the Immigration Judges have to grant these immigrants protection under the Convention Against Torture, even if they never sought protection from their own government.<sup>127</sup>

Further, the question remains, without proper reporting to the authorities, what evidence is there that the abuse actually occurred? Presumably, when an individual reports an incident to the police, there is some sort of record kept. Furthermore, if petitioners are more open with their governments, they are likely to have been more open with other individuals who could be witnesses that the abuse or torture actually happened. Without requiring official proof of events and acquiescence by the government, the door is open to various false claims and an overwhelming number of petitioners eligible for protection under the Convention Against Torture.

The *Ornelas-Chavez* case eliminates the use of a *per se* rule

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they were for political reasons. As unpopular as homosexuality is in Mexico, it is not always overtly accepted in the United States either.

<sup>126</sup> See *supra* Part III: Background Law, Protection Under the Convention Against Torture.

<sup>127</sup> This is especially important as the times are changing and more foreign governments, much like the United States, are becoming more outwardly accepting of homosexuality. Whether they are in fact accepting of homosexuality is unclear.

requiring reporting of incidents of torture.<sup>128</sup> On one hand, the case has no teeth and may not result in any difference in findings by the Immigration Judges and Board of Immigration Appeals. On the other hand, the decision creates a slippery slope.

## V. Conclusion

The *Ornelas-Chavez* decision was inevitable due to the public policy of not requiring tortured individuals to report incidents in order to protect them from the possibility of further torture by their own governments. However, this holding needs to be tightened. It seems quite likely that this is not the end of the Ninth Circuit's discussion in this area.

It is not clear how much evidence of abuse and torture, or how much evidence of governmental persecution, needs to be presented to qualify for protection under the Convention Against Torture. The facts in this case are extreme and deal with a hot political topic in the United States. Two courts have unpublished opinions ruling the same way,<sup>129</sup> also in cases dealing with homosexual men, and it will be interesting to see if other circuits follow suit or if the holding in *Ornelas-Chavez* gets tightened to give it some teeth and avoid the slippery slope problem.

In conclusion, perhaps the Convention Against Torture was not meant to be stretched so far as to cover cases where the torture is at the hands of private individuals. The European cases concerning the Convention Against Torture seem to emphasize the importance of state action in granting protection to petitioners.<sup>130</sup> The United States courts and legislature are extremely vulnerable to political influences as demonstrated by the language change in the implementation of the Convention Against Torture.<sup>131</sup> Perhaps the case of *Ornelas-Chavez* was meant to be a political move of the Ninth Circuit to demonstrate that the United States is accepting of homosexuals and will not stand for their torture in other

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<sup>128</sup> *Ornelas-Chavez*, 458 F.3d at 1058.

<sup>129</sup> See *Morett v. Gonzales*, No. 05-5450, 2006 U.S. App. LEXIS 18152 (6th Cir. July 13, 2006); *Safadi v. Gonzales*, No. 03-4592, 148 Fed. Appx. 372 (6th Cir. Aug. 9, 2005).

<sup>130</sup> See *Alan v. Switzerland (Communication 21/95)*, U.N. Committee Against Torture, 1 BHRC 598 (May 8, 1996).

<sup>131</sup> See 8 C.F.R. § 208.18 (2006)..

countries. Alternatively, this may be an attempt for the United States to be the country that grants protection in torture cases to further demonstrate that the United States is serious about stopping torture throughout the world. Whatever the motivations behind this decision, it remains in need of tightening to give it teeth and prevent the creation of a slippery slope.

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