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PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-11424

D. C. Docket No. 00-00206-CV-KMM

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT JUNE 1 2000 THOMAS K. KAHN CLERK

ELIAN GONZALEZ, a minor, by and through
LAZARO GONZALEZ, as next friend, or,
alternatively, as temporary legal custodian,

Plaintiffs-Appellants,

versus

JANET RENO, Attorney General of the United States;
DORIS MEISSNER, Commissioner, United States
Immigration and Naturalization Service;
ROBERT WALLIS, District Director,
United States Immigration and Naturalization Service;
UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE; and UNITED
STATES DEPARTMENT OF JUSTICE,

Defendants-Appellees,

JUAN MIGUEL GONZALEZ,

Intervenor.

Appeal from the United States District Court
for the Southern District of Florida

(June 1, 2000)

Before EDMONDSON, DUBINA and WILSON, Circuit Judges.

EDMONDSON, Circuit Judge:

This case, at first sight, seems to be about little more than a child and his father. But, for this Court, the case is mainly about the separation of powers under our constitutional system of government: a statute enacted by Congress, the permissible scope of executive discretion under that statute, and the limits on judicial review of the exercise of that executive discretion.

Elian Gonzalez (“Plaintiff”), a six-year-old Cuban child, arrived in the United States alone. His father in Cuba demanded that Plaintiff be returned to Cuba. Plaintiff, however, asked to stay in the United States; and asylum applications were submitted on his behalf. The Immigration and Naturalization Service (“INS”) -- after, among other things, consulting with Plaintiff’s father and considering Plaintiff’s age -- decided that Plaintiff’s asylum applications were legally void and refused to consider their merit.

Plaintiff then filed this suit in federal district court, seeking on several grounds to compel the INS to consider and to determine the merit of his asylum applications. The district court dismissed Plaintiff’s suit. Gonzalez ex rel.

Gonzalez v. Reno, 86 F. Supp.2d 1167, 1194 (S.D. Fla. 2000). Plaintiff appeals,¹ and we affirm.

I.

In December 1993, Plaintiff was born in Cuba to Juan Miguel Gonzalez and Elizabeth Gonzalez. When Plaintiff was about three years old, Juan Miguel and Elizabeth separated. Elizabeth retained custody of Plaintiff after the separation. Juan Miguel, however, continued to have regular and significant contact with his son. Plaintiff, in fact, attended school in the district where his father lived and often stayed at Juan Miguel's home.

In November 1999, Elizabeth decided to leave Cuba and to take her son to the United States. In the pre-dawn hours of 22 November, Plaintiff and Elizabeth, along with twelve other Cuban nationals, left Cuba aboard a small boat. The next day, the boat capsized in strong winds and rough seas off the coast of Florida. Eleven of the passengers, including Elizabeth, died. Plaintiff, clinging to an inner tube, endured and survived.

¹Several defendant-appellees are involved in this appeal. All these defendants are part of the executive branch of our government. For the sake of simplicity, we refer to the defendants collectively as the "INS."

Two days later, Plaintiff was rescued at sea by Florida fishermen and was taken to a hospital in Miami for medical treatment. While Plaintiff was receiving medical treatment, the INS was contacted by Plaintiff's great-uncle: Miami resident Lazaro Gonzalez. INS officials decided, upon Plaintiff's release from the hospital, not to remove Plaintiff immediately to Cuba. Instead, the INS deferred Plaintiff's immigration inspection and paroled Plaintiff into Lazaro's custody and care.

Soon thereafter, Lazaro filed an application for asylum on Plaintiff's behalf with the INS. This application was followed shortly by a second application signed by Plaintiff himself. A third asylum application was filed by Lazaro on Plaintiff's behalf in January 2000, after a state court awarded temporary custody of Plaintiff to Lazaro.² The applications were prepared by a Miami lawyer.

The three applications were substantially identical in content. The applications stated that Plaintiff "is afraid to return to Cuba." The applications claimed that Plaintiff had a well-founded fear of persecution because many members of Plaintiff's family had been persecuted by the Castro government in Cuba. In particular, according to the applications, Plaintiff's stepfather had been imprisoned for several months because of opposition to the Cuban government. Two of Plaintiff's great-uncles also had been

² A Florida state court since has dismissed Lazaro's petition for custody of Plaintiff. See In re the Matter of Lazaro Gonzalez, No. 00-00479-FC-28 (Fla. 11th Cir. Ct. 2000).

imprisoned for their political acts. Plaintiff's mother had also been harassed and intimidated by communist authorities in Cuba. The applications also alleged that, if Plaintiff were returned to Cuba, he would be used as a propaganda tool for the Castro government and would be subjected to involuntary indoctrination in the tenets of communism.

Plaintiff's father, however, apparently did not agree that Plaintiff should remain in the United States. Soon after Plaintiff was rescued at sea, Juan Miguel sent to Cuban officials a letter, asking for Plaintiff's return to Cuba. The Cuban government forwarded this letter to the INS.

Because of the conflicting requests about whether Plaintiff should remain in the United States, INS officials interviewed both Juan Miguel and Lazaro. An INS official, on 13 December, met with Juan Miguel at his home in Cuba. At that meeting, Juan Miguel made this comment:

[Plaintiff], at the age of six, cannot make a decision on his own I'm very grateful that he received immediate medical assistance, but he should be returned to me and my family As for him to get asylum, I am not allowing him to stay or claim any type of petition; he should be returned immediately to me.

Juan Miguel denied that Lazaro was authorized to seek asylum for Plaintiff; Juan Miguel also refused to consent to any lawyer representing Plaintiff. Juan Miguel

assured the INS official that his desire for Plaintiff's return to Cuba was genuine and was not coerced by the Cuban government.

One week later, INS officials in Miami met with Lazaro, Marisleysis Gonzalez (Plaintiff's cousin), and several lawyers representing Plaintiff. At that meeting, the parties discussed Juan Miguel's request. Lazaro contended that Juan Miguel's request for Plaintiff's return to Cuba was coerced by the Cuban government.³ INS officials also inquired about the legal basis for Plaintiff's asylum applications; Lazaro replied this way: "During the time he's been here, everything he has, if he goes back, it's all changed. His activities here are different from those that he would have over there." Plaintiff's lawyers told the INS again of the persecution of Plaintiff's relatives in Cuba because of their political opposition to the Castro government.

On 31 December, an INS official again met with Juan Miguel in Cuba to investigate further Lazaro's claim that Juan Miguel's request had been coerced.⁴ At that meeting, Juan Miguel repeated that he desired Plaintiff's return to Cuba. Juan

³ As proof of this contention, Lazaro told INS officials that, before Plaintiff was discovered at sea, Juan Miguel telephoned Lazaro and asked Lazaro to take care of Plaintiff if Plaintiff made it to the United States. Lazaro stated that, after Plaintiff's rescue, Juan Miguel's demeanor had changed noticeably and that, according to Juan Miguel's neighbors in Cuba, Juan Miguel was "[g]etting extra protection" from Cuban authorities.

⁴ To reduce third parties' opportunities to eavesdrop upon the meeting, this interview was held at the residence of a United Nations official near Havana. Also, some of the interview was conducted in writing to prevent eavesdropping.

Miguel also reasserted that he was under no undue influence from any individual or government. The INS official -- taking Juan Miguel's demeanor into account -- determined that Juan Miguel, in fact, genuinely desired his son's return to Cuba.

The INS Commissioner, on 5 January 2000, rejected Plaintiff's asylum applications as legally void. The Commissioner -- concluding that six-year-old children lack the capacity to file personally for asylum against the wishes of their parents -- determined that Plaintiff could not file his own asylum applications. Instead, according to the Commissioner, Plaintiff needed an adult representative to file for asylum on his behalf. The Commissioner -- citing the custom that parents generally speak for their children and finding that no circumstance in this case warranted a departure from that custom -- concluded that the asylum applications submitted by Plaintiff and Lazaro were legally void and required no further consideration. Plaintiff asked the Attorney General to overrule the Commissioner's decision; the Attorney General declined to do so.

Plaintiff then, by and through Lazaro as his next friend, filed a complaint in federal district court seeking to compel the INS to consider the merits of his asylum applications. In his complaint, Plaintiff alleged, among other things, that the refusal to consider his applications violated 8 U.S.C. § 1158 and the Fifth Amendment Due

Process Clause. The district court rejected both claims and dismissed Plaintiff's complaint. Plaintiff appeals.⁵

II.

On appeal, Plaintiff argues that the district court erred (1) by dismissing Plaintiff's claim under 8 U.S.C. § 1158, (2) by dismissing Plaintiff's due process claim, and (3) by failing to appoint a guardian ad litem to represent Plaintiff's interests.⁶ We have reviewed carefully the record and the briefs filed by all parties. We conclude that Plaintiff's due process claim lacks merit and does not warrant extended discussion. See Jean v. Nelson, 727 F.2d 957, 968 (11th Cir. 1984) (en banc) ("Aliens seeking

⁵ During the pendency of this appeal, the INS revoked Plaintiff's parole and removed Plaintiff from Lazaro's custody. The INS then paroled Plaintiff into the custody of Juan Miguel, who had traveled to the United States to reclaim his son. After Juan Miguel came to the United States, we permitted Juan Miguel to intervene in this case.

To ensure that Plaintiff would not be returned to Cuba, depriving Plaintiff of a day in court and depriving this Court of jurisdiction over Plaintiff's appeal, we enjoined Plaintiff's removal from the United States pending appeal. Considering that we affirm the judgment of the district court, the injunction will dissolve (without a further order) when the Court's mandate is issued.

⁶ The INS contended in district court that the district court lacked subject-matter jurisdiction over Plaintiff's suit. The district court, however, rejected this argument and concluded that subject-matter jurisdiction did exist. The INS has not renewed its jurisdictional contention on appeal.

We, however, are mindful of our own jurisdictional limits. So, we have considered our subject-matter jurisdiction over this appeal. We conclude that this Court does have subject-matter jurisdiction over Plaintiff's appeal.

admission to the United States . . . have no constitutional rights with regard to their applications”), aff’d on other grounds, 105 S. Ct. 2992 (1985). Plaintiff’s guardian ad litem claim, because Plaintiff was ably represented in district court by his next friend, also lacks merit and similarly does not warrant extended discussion. See Fed. R. Civ. P. 17(c) (providing for appointment of guardian ad litem in discretion of district court); see also Roberts v. Ohio Cas. Ins. Co., 256 F.2d 35, 39 (5th Cir. 1958) (noting that guardian ad litem may be unnecessary where child already represented adequately by next friend). We, accordingly, affirm the district court’s dismissal of the constitutional claim and the district court’s refusal to appoint a guardian ad litem.⁷ We now turn, however, to a more difficult question: the district court’s dismissal of Plaintiff’s statutory claim.

III.

⁷ Also before this Court is a recently filed motion of Intervenor, Juan Miguel Gonzalez, to remove Lazaro Gonzalez as Plaintiff’s next friend and to substitute Plaintiff’s father as next friend. Notwithstanding that much has happened since Lazaro brought this suit as Plaintiff’s next friend, Lazaro (aided by a troop of seasoned lawyers) has completely and steadfastly pressed Plaintiff’s claimed rights in the district court and in this Court. We see no powerful reason to make a change at this point. We, therefore, deny Intervenor’s motion to remove Lazaro and to substitute Intervenor as next friend for the purposes of this litigation.

Plaintiff contends that the district court erred in rejecting his statutory claim based on 8 U.S.C. § 1158. Section 1158 provides that “[a]ny alien . . . may apply for asylum.” 8 U.S.C. § 1158(a)(1). Plaintiff says that, because he is “[a]ny alien,” he may apply for asylum. Plaintiff insists that, by the applications signed and submitted by himself and Lazaro, he , in fact, did apply for asylum within the meaning of section 1158. In addition, Plaintiff argues that the summary rejection by the INS of his applications as invalid violated the intent of Congress as set out in the statute.

The INS responds that section 1158 is silent about the validity of asylum applications filed on behalf of a six-year-old child, by the child himself and a non-parental relative, against the wishes of the child’s parent. The INS argues that, because the statute does not spell out how a young child files for asylum, the INS was free to adopt a policy requiring, in these circumstances, that any asylum claim on Plaintiff’s behalf be filed by Plaintiff’s father. As such, the INS urges that the rejection of Plaintiff’s purported asylum applications as legally void was lawful. According to the INS, because the applications had no legal effect, Plaintiff never applied at all within the meaning of the statute.

Guided by well-established principles of statutory construction, judicial restraint, and deference to executive agencies, we accept that the rejection by the INS of Plaintiff’s applications as invalid did not violate section 1158.

A.

Our consideration of Plaintiff's statutory claim must begin with an examination of the scope of the statute itself. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S. Ct. 2778, 2781 (1984); see also INS v. Aguirre-Aguirre, 119 S. Ct. 1439, 1445 (1999) (instructing that analysis set out in Chevron is applicable to immigration statutes); Jaramillo v. INS, 1 F.3d 1149, 1153 (11th Cir. 1993) (en banc) (same). In Chevron, the Supreme Court explained: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 104 S. Ct. at 2781. We turn, therefore, to the plain language of the statute.

Section 1158 provides, in pertinent part:

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1158(a)(1) (emphasis added). Section 1158 is neither vague nor ambiguous. The statute means exactly what it says: "[a]ny alien . . . may apply for asylum." See

Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952, 1956 (1998) (observing that statute is not ambiguous just because it is broad and that statute may apply to circumstances not envisioned by Congress). That “[a]ny alien” includes Plaintiff seems apparent.⁸ See 8 U.S.C. § 1101(a)(3) (defining “alien” as “any person not a citizen or national of the United States”); see also Merritt v. Dillard Paper Co., 120 F.3d 1181, 1186 (11th Cir. 1997) (noting that word “any” has “an expansive meaning”). Section 1158, therefore, plainly would permit Plaintiff to apply for asylum.

When an alien does apply for asylum within the meaning of the statute, the INS -- according to the statute itself and INS regulations -- must consider the merits of the alien’s asylum claim. See 8 U.S.C. § 1158(d)(1) (“The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a) of this section.”) (emphasis added); 8 C.F.R. § 208.9(a) (requiring INS to “adjudicate the claim of each asylum applicant whose application is complete”). The important legal question in this case, therefore, is not whether Plaintiff may apply for asylum; that a six-year-old is eligible to apply for asylum is clear. The ultimate inquiry, instead, is whether a six-year-old child has applied for asylum within the meaning of the statute when he, or a non-parental relative on his behalf, signs and submits a purported application against the express wishes of the child’s parent.

⁸ The INS concedes that Plaintiff is eligible to apply for asylum pursuant to section 1158.

About this question, more important than what Congress said in section 1158 is what Congress left unsaid. In reading statutes, we consider not only the words Congress used, but the spaces between those words. Section 1158 is silent on the precise question at issue in this case. Although section 1158 gives “[a]ny alien” the right to “apply for asylum,” the statute does not command how an alien applies for asylum. The statute includes no definition of the term “apply.” The statute does not set out procedures for the proper filing of an asylum application. Furthermore, the statute does not identify the necessary contents of a valid asylum application. In short, although the statute requires the existence of some application procedure so that aliens may apply for asylum, section 1158 says nothing about the particulars of that procedure. See 8 U.S.C. § 1158.

B.

Because the statute is silent on the issue, Congress has left a gap in the statutory scheme.⁹ From that gap springs executive discretion.¹⁰ As a matter of law, it is not for

⁹ That Congress left a gap in the statutory scheme does not mean that Congress has done something wrong. Whether Congress could or should legislate with sufficient detail to address every conceivable set of circumstances that might arise is highly debatable. See generally Loving v. United States, 116 S. Ct. 1737, 1744 (1996) (“To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers’ design of a workable

the courts, but for the executive agency charged with enforcing the statute (here, the INS), to choose how to fill such gaps.¹¹ See Chevron, 104 S. Ct. at 2793. Moreover, the authority of the executive branch to fill gaps is especially great in the context of

National Government.”). Congress may properly commit something to the discretion of the other branches of government.

¹⁰ This case is about the discretion of the executive branch to make policy, not about ministerial enforcement of the “law” by executive officials. It has been suggested that the precise policy adopted by the INS in this case was required by “law.” That characterization of this case, however, is inaccurate. As we have explained, when the INS made its pertinent policy, the preexisting law said nothing about the validity of Plaintiff’s asylum applications.

Instead, Congress just provided that “[a]ny alien” may apply for asylum and left the details of the application process to the discretion of the INS. See Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1140 (9th Cir. 1988) (en banc) (Hug, J., dissenting) (explaining that sometimes “Congress enacts quite general provisions, with the specifics to be filled in by the agency”). The INS, in its discretion, decided to require six-year-old children – who arrive unaccompanied in the United States from Cuba – to act in immigration matters only through (absent special circumstances) their parents in Cuba. The INS could have shaped its policy in a different fashion, perhaps allowing relatives (for example, those within the fourth degree of relationship) in the United States to act for such children. But it did not, and we cannot. That choice was the sole prerogative of the executive branch. According to the principles set out in Chevron, we can only disturb that choice if it is unreasonable. See Chevron, 104 S. Ct. at 2793; see also Mistretta v. United States, 109 S. Ct. 647, 678 (1989) (Scalia, J., dissenting) (explaining discretionary authority of executive branch in administering statutory scheme).

¹¹ When a statute is ambiguous or silent on the pertinent issue, it ordinarily is for the judicial branch to construe the statute. See generally Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). But the ordinary rule does not always apply: where Congress has indicated that gaps in the statutory scheme should be filled in by officers of the executive branch (a political branch accountable to the people and fit for making policy judgments), then the gaps should not be filled in by federal judges. Where Congress has committed the enforcement of a statute to a particular executive agency, Congress has sufficiently indicated its intent that statutory gaps be filled by the executive agency. And the Supreme Court has directed that, for such statutes, if “Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute Rather, if the statute is silent . . . the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” Chevron, 104 S. Ct. at 2782.

immigration policy.¹² See Aguirre-Aguirre, 119 S. Ct. at 1445. Our proper review of the exercise by the executive branch of its discretion to fill gaps, therefore, must be very limited. See Pauley v. Bethenergy Mines, Inc., 111 S. Ct. 2524, 2534 (1991).

That the courts owe some deference to executive policy does not mean that the executive branch has unbridled discretion in creating and in implementing policy. Executive agencies must comply with the procedural requirements imposed by statute. See Morton v. Ruiz, 94 S. Ct. 1055, 1073 (1974). Agencies must respect their own procedural rules and regulations. See id. at 1074; see also Hall v. Schweiker, 660 F.2d 116, 119 (5th Cir. 1981). And the policy selected by the agency must be a reasonable one in the light of the statutory scheme. Chevron, 104 S. Ct. at 2782. To this end, the courts retain the authority to check agency policymaking for procedural compliance and for arbitrariness. But the courts cannot properly reexamine the wisdom of an agency-

¹² The authority of the executive branch in immigration matters stems from the primacy of the President and other executive officials (such as the INS) in matters touching upon foreign affairs. See Aguirre-Aguirre, 119 S. Ct. at 1445. Respect for the authority of the executive branch in foreign affairs is a well-established theme in our law. See United States v. Curtiss-Wright Export Corp., 57 S. Ct. 216, 221 (1936) (recognizing “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations”). And the judicial respect for executive authority in matters touching upon foreign relations is even greater where the presidential power has been affirmed in an act of Congress. See Youngstown Sheet & Tube Co. v. Sawyer, 72 S. Ct. 863, 870 (1952) (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”); see also United States v. Frade, 709 F.2d 1387, 1402 (11th Cir. 1983) (same).

promulgated policy.¹³ See SEC v. Chenery Corp., 67 S. Ct. 1575, 1582 (1947) (“The wisdom of the principle adopted is none of our concern.”).

In this case, because the law -- particularly section 1158 -- is silent about the validity of Plaintiff’s purported asylum applications, it fell to the INS to make a discretionary policy choice. The INS, exercising its gap-filling discretion, determined these things: (1) six-year-old children lack the capacity to sign and to submit personally an application for asylum; (2) instead, six-year-old children must be represented by an adult in immigration matters; (3) absent special circumstances, the only proper adult to represent a six-year-old child is the child’s parent, even when the parent is not in this country; and, (4) that the parent lives in a communist-totalitarian state (such as Cuba),¹⁴ in and of itself, does not constitute a special circumstance requiring the selection of a non-parental representative. Our duty is to decide whether

¹³ The Supreme Court has instructed us with these words:
[F]ederal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: “Our Constitution vests such responsibilities in the political branches.”

Chevron, 104 S. Ct. at 2793 (citation omitted).

¹⁴ See U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000) (noting that “Cuba is a totalitarian state,” where Communist Party “exercises control over all aspects of Cuban life”).

this policy might be a reasonable one in the light of the statutory scheme. See Chevron, 104 S. Ct. at 2782.

But we first address Plaintiff's contention that the "policy" relied on by the INS in this case is really no policy at all but is, in reality, just a litigating position. An after-the-fact rationalization of agency action -- an explanation developed for the sole purpose of defending in court the agency's acts -- is usually entitled to no deference from the courts. Bradberry v. Director, Office of Workers' Comp. Programs, 117 F.3d 1361, 1366 (11th Cir. 1997). But we are unable to say that the position of the INS here is just an after-the-fact rationalization.

The INS policy toward Plaintiff's application was not created by INS lawyers during litigation, but instead was developed in the course of administrative proceedings before litigation commenced.¹⁵ Cf. IAL Aircraft Holding, Inc. v. FAA, 206 F.3d 1042, 1046 & n.5 (11th Cir. 2000). While the policy announced by the INS may not harmonize perfectly with earlier INS interpretative guidelines (which are not law),¹⁶ the

¹⁵ The INS policy on unaccompanied six-year-old children purporting to file for asylum against their parents' wishes was set out in these writings: (1) a memorandum, dated 3 January 2000, from the INS General Counsel to the INS Commissioner; (2) two letters, dated 5 January, from an INS district director to Plaintiff's lawyers and Lazaro, letters explaining the decision of the INS Commissioner; and (3) a letter, dated 12 January, from the Attorney General to Plaintiff's lawyers and Lazaro.

¹⁶ The INS Guidelines "do not have the force and effect of law." Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1511 (11th Cir. 1992).

parties have cited, and we have found, no statutory provision, no regulatory authority, and no prior agency adjudication that “flatly contradicts” the policy. Cf. General Elec. Co. v. Gilbert, 97 S. Ct. 401, 411 (1976); see also Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856, 2866 (1983) (noting that agencies have latitude to “adapt their rules and policies to the demands of changing circumstances”). That the INS policy was developed in the course of an informal adjudication, rather than during formal rulemaking, may affect the degree of deference appropriate but does not render the policy altogether unworthy of deference. See Chenery, 67 S. Ct. at 1580; see also Cook v. Wiley, 208 F.3d 1314, 1319-20 (11th Cir. 2000) (explaining that executive policies not “subjected to the heightened scrutiny of [formal] rulemaking” are nonetheless entitled to “some deference”); Bigby v. INS, 21 F.3d 1059, 1063-64 (11th Cir. 1994) (finding Chevron deference appropriate even though agency policy had not been adopted as regulation); U.S. Mosaic Tile Co. v. NLRB, 935 F.2d 1249, 1255 n.6 (11th Cir. 1991) (“Although the agency action in Chevron involved a legislative regulation, the deference standards set forth in that case are now applied to most agency actions, including administrative adjudications . . .”). And that the INS policy may not be a longstanding one likewise affects only the degree of

deference required.¹⁷ See Chenery, 67 S. Ct. at 1580. The INS policy, therefore, is entitled to, at least, some deference under Chevron; and that deference, when we take account of the implications of the policy for foreign affairs, becomes considerable.

We accept that the INS policy at issue here comes within the range of reasonable choices. First, we cannot say that the foundation of the policy -- the INS determination that six-year-old children necessarily lack sufficient capacity to assert, on their own, an asylum claim -- is unreasonable.¹⁸ See Polovchak v. Meese, 774 F.2d 731, 736-37

¹⁷ The INS claims that the approach taken in Plaintiff's case is the INS's longstanding position on young, unaccompanied aliens. The INS, however, points to no evidence in the record showing that the INS, in the past, has taken this approach. But, even assuming that Plaintiff's case triggered the making of this policy to fit cases like Plaintiff's peculiar circumstances, deference to the INS policy would still be due if the policy is a reasonable one. See Chenery, 67 S. Ct. at 1580 ("[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule.").

¹⁸ In other words, we do not think that the INS, as a matter of law, must individually assess each child's mental capacity; we cannot say that looking at capacity instead of age for young children is required. Instead, we recognize that absolute line drawing -- although necessarily sacrificing accuracy and flexibility for certainty and efficiency -- is an acceptable approach. See Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2567-68 (1976). And, as long as the approach taken by the INS is a reasonable one, we need not decide what the best approach would be.

We, however, do not mean to suggest that the course taken by the INS is the only permissible approach. Although the INS is not required to let six-year-old children speak for themselves about asylum, neither is the INS required to ignore the expressed statements of young children. Even young children can be capable of having an accurate impression of the facts about which they might speak. To obtain asylum, we doubt that it is essential for a child to be able to debate the merits of Marxism-Leninism against the merits of Western-style democracy. Some reasonable people could conclude that it should be sufficient for a child to be able to speak about his fears and to recount the facts that support his fears about returning to another country. Not infrequently, the law does permit six-year-old children (and even younger children) to speak and, in fact, does give their words great effect. See, e.g., Pocatello v. United States, 394 F.2d 115,

(7th Cir. 1985) (presuming that twelve-year-old child was “near the lower end of an age range in which a minor may be mature enough to assert” an asylum claim against the wishes of his parents). Because six-year-old children must have some means of applying for asylum, see 8 U.S.C. § 1158(a)(1), and because the INS has decided that the children cannot apply personally, the next element of the INS policy -- that a six-year-old child must be represented by some adult in applying for asylum -- necessarily is reasonable.

The INS determination that ordinarily a parent (even one outside of this country)¹⁹ -- and, more important, *only* a parent -- can act for his six-year-old child (who is in this country) in immigration matters also comes within the range of reasonable choices. In making that determination, INS officials seem to have taken account of the relevant, competing policy interests: the interest of a child in asserting

116-17 (9th Cir. 1968) (affirming district court’s admission of five-year-old’s testimony); Miller v. State, 391 So.2d 1102, 1106 (Ala. Crim. App. 1980) (affirming decision of trial court to permit four-year-old to testify); Baker v. State, 674 So.2d 199, 200 (Fla. Dist. Ct. App. 1996) (affirming trial court decision admitting testimony and statements of six-year-old victim).

¹⁹We conclude that the approach taken by the INS about out-of-the-country representatives was a reasonable one. Other approaches might have been available. The INS might have selected a policy giving more weight to the fact that the parent of a child in the United States remained outside of this country’s jurisdiction. For example, maybe the INS could have required that the adult representative -- purporting to act in immigration matters (either by applying for asylum on behalf of the child or in effect vetoing an application for asylum) for a child in this country -- be present in this country himself at the pertinent time. See, e.g., Cozine v. Bonnick, 245 S.W.2d 935, 937 (Ky. 1952) (requiring that next friend, purporting to represent child in court, be resident of state). But what else might have been done is not decisive for us.

a non-frivolous asylum claim; the interest of a parent in raising his child as he sees fit; and the interest of the public in the prompt but fair disposition of asylum claims. The INS policy -- by presuming that the parent is the sole, appropriate representative for a child -- gives paramount consideration to the primary role of parents in the upbringing of their children. But we cannot conclude that the policy's stress on the parent-child relationship is unreasonable.²⁰ See Ginsberg v. New York, 88 S. Ct. 1274, 1280 (1968) (“[T]he parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”).

²⁰ We do not suggest that recognizing the parent-child relationship to the exclusion of other familial relationships is the only reasonable approach. The parent-child relationship is obviously an important one. See Wisconsin v. Yoder, 92 S. Ct. 1526, 1541-42 (1972); Pierce v. Society of Sisters, 45 S. Ct. 571, 573 (1925); see also In re Custody of Smith, 969 P.2d 21, 27-28 (Wash. 1998), cert. granted sub nom. Troxel v. Granville, 120 S. Ct. 11 (1999). Still, although the common practice in the courts of this country seems to be that a parent will be appointed to act as next friend for a child, a parent is not usually entitled to be the next friend of his child as a matter of absolute right. See Fong Sik Leung v. Dulles, 226 F.2d 74, 82 (9th Cir. 1955) (“[No] parent [] may claim to be a guardian ad litem of his minor child as a matter of right.”). Especially because the best interests of a child and the best interests of even a loving parent can clash, parental authority over children – even where the parent is not generally “unfit” – is not without limits in this country. See, e.g., In the Matter of Sampson, 323 N.Y.S.2d 253, 255 (N.Y. App. Div. 1971) (affirming order requiring disfigured child to undergo risky cosmetic surgery against genuine wishes of child’s only parent: the state contended surgery would have “a beneficial effect” upon child); Crommelin-Monnier v. Monnier, 638 So.2d 912, 916 (Ala. Civ. App. 1994) (requiring appointment of guardian ad litem where custodial parent sought to remove child to foreign country). In addition, the law in the United States frequently treats more distant familial relationships as important. See, e.g., Kan. Stat. Ann. § 38-1541 (permitting any person related within the fourth degree to child to move to intervene in “child in need of care” proceedings); Ala. Code § 12-16-150(4) (allowing challenge for cause where potential juror is related within ninth degree to party); O.C.G.A. § 15-12-135(a) (disqualifying persons related within the sixth degree to interested parties from jury service).

Critically important, the INS policy does not neglect completely the independent and separate interest that a child may have, apart from his parents, in applying for asylum. See Polovochak, 774 F.2d at 736-37. Instead, according to the INS policy, special circumstances may exist that render a parent an inappropriate representative for the child.²¹ Where such circumstances do exist, the INS policy appears to permit other persons, besides a parent, to speak for the child in immigration matters. So, to some extent, the policy does protect a child's own right to apply for asylum under section 1158 despite the contrary wishes of his parents.

We are not untroubled by the degree of obedience that the INS policy appears to give to the wishes of parents, especially parents who are outside this country's jurisdiction. Because Congress has decided that "[a]ny alien" (including six-year-old children) may apply for asylum, 8 U.S.C. § 1158(a)(1), Congress has charged the INS -- when it promulgates policy and fills gaps in the statutory scheme -- with facilitation, not hindrance, of that legislative goal. See Shoemaker v. Bowen, 853 F.2d 858, 861 (11th Cir. 1988) (noting that Chevron does not provide agency with license to

²¹ Under the INS policy, a substantial conflict of interest between the parent and the child may require or allow another adult to speak for the child on immigration matters. In considering whether a substantial conflict of interest exists, the INS considers the potential merits of a child's asylum claim. If the child would have an exceedingly strong case for asylum, the parent's unwillingness to seek asylum on that child's behalf may indicate, under the INS policy, that the parent is not representing adequately the child's interests.

“frustrate[] the underlying congressional policy”). We recognize that, in some instances, the INS policy of deferring to parents -- especially those residing outside of this country -- might hinder some six-year-olds with non-frivolous asylum claims and prevent them from invoking their statutory right to seek asylum. But, considering the well-established principles of judicial deference to executive agencies, we cannot disturb the INS policy in this case just because it might be imperfect. See Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 100 S. Ct. 2844, 2875 (1980) (Burger, C.J., concurring) (noting that agency policy may be valid although policy does not perfectly accomplish legislative goals). And we cannot invalidate the policy -- one with international-relations implications -- selected by the INS merely because we personally might have chosen another. See Chevron, 104 S. Ct. at 2793; see also Jaramillo, 1 F.3d at 1152-53. Because we cannot say that this element of the INS policy -- that, ordinarily, a parent, and only a parent, can act for a six-year-old child in immigration matters -- is unreasonable, we defer to the INS policy.

The final aspect of the INS policy also worries us some. According to the INS policy, that a parent lives in a communist-totalitarian state is no special circumstance, sufficient in and of itself, to justify the consideration of a six-year-old child's asylum claim (presented by a relative in this country) against the wishes of the non-resident parent. We acknowledge, as a widely-accepted truth, that Cuba does violate human

rights and fundamental freedoms and does not guarantee the rule of law to people living in Cuba.²² See generally U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000) (“[The Cuban Government] continue[s] systematically to violate fundamental civil and political rights of its citizens.”). Persons living in such a totalitarian state may be unable to assert freely their own legal rights, much less the legal rights of others. Moreover, some reasonable people might say that a child in the United States inherently has a substantial conflict of interest with a parent residing in a totalitarian state when that parent -- even when he is not coerced -- demands that the child leave this country to return to a country with little respect for human rights and basic freedoms.

Nonetheless, we cannot properly conclude that the INS policy is totally unreasonable in this respect. The INS policy does take some account of the possibility of government coercion: where special circumstances -- such as definite coercion directed at an individual parent -- exist, a non-parental representative may be necessary

²² According to the United States Department of State, the human rights record of the Cuban government is “poor.” Cuban citizens who oppose or criticize the government routinely are “harass[ed], threaten[ed], arbitrarily arrest[ed], detain[ed], imprison[ed], and defame[d].” Cuba regularly denies citizens “the freedoms of speech, press, assembly, and association,” and restricts the free exercise of religion. The Cuban constitution provides that “legally recognized civil liberties can be denied to anyone who actively opposes the ‘decision of the Cuban people to build socialism.’” See U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000); see also UNHCHR Res. 2000/25, U.N. Comm. on Human Rights, 56th Sess., U.N. Doc. E/CN.4/2000/L.11 (2000) (expressing concern about “the continued violation of human rights and fundamental freedoms in Cuba”).

to speak for the child. In addition and more important, in no context is the executive branch entitled to more deference than in the context of foreign affairs. See generally United States v. Curtiss-Wright Export Corp., 57 S. Ct. 216, 221 (1936). This aspect of the INS policy seems to implicate the conduct of foreign affairs more than any other. Something even close to a per se rule -- that, for immigration purposes, no parent living in a totalitarian state has sufficient liberty to represent and to serve the true, best interests of his own child in the United States -- likely would have significant consequences for the President's conduct of our Nation's international affairs: such a rule would focus not on the qualities of the particular parent, but on the qualities of the government of the parent's country. As we understand the legal precedents, they, in effect, direct that a court of law defer especially to this international-relations aspect of the INS policy.

We are obliged to accept that the INS policy, on its face, does not contradict and does not violate section 1158, although section 1158 does not require the approach that the INS has chosen to take.

C.

We now examine the INS's application of its facially reasonable policy to Plaintiff in this case. Although based on a policy permissible under Chevron, if the ultimate decision of the INS -- to treat Plaintiff's asylum applications as invalid -- was "arbitrary, capricious, [or] an abuse of discretion," the decision is unlawful.²³ See 5 U.S.C. § 706(2)(A); see also INS v. Yueh-Shaio-Yang, 117 S. Ct. 350, 353 (1996); Citizens to Preserve Overton Park, Inc. v. Volpe, 91 S. Ct. 814, 822 (1971). But whatever we personally might think about the decisions made by the Government, we cannot properly conclude that the INS acted arbitrarily or abused its discretion here.

The application signed and submitted by Plaintiff himself, insofar as the INS has decided that six-year-old children cannot file for asylum themselves, necessarily was a nullity under the INS policy. As we have explained, the INS's per se rule -- prohibiting six-year-old children from personally filing asylum applications against their parents' wishes -- is entitled to deference under the law. The INS, therefore, did not act arbitrarily or abuse its discretion in rejecting Plaintiff's own purported asylum application as void.

²³ The INS asks us to apply the "facially legitimate and bona fide reason" standard of review set out in Kleindienst v. Mandel, 92 S. Ct. 2576, 2585 (1972), instead of the more stringent "arbitrary, capricious, or an abuse of discretion" standard. We think that the Kleindienst standard is not the correct standard to apply in this case. But we do note that, even if the Kleindienst standard were applied, the result in this case would remain the same.

Plaintiff contends that, even if the INS policy is facially reasonable under Chevron, the INS decision to reject the applications submitted by Lazaro was arbitrary. Plaintiff asserts that two special circumstances -- the alleged coercion of Juan Miguel by the Cuban government and the objective basis of Plaintiff's asylum claim -- bear negatively upon Juan Miguel's fitness to represent Plaintiff in immigration matters. The INS, according to Plaintiff, was therefore required to recognize some other adult representative -- namely, Lazaro -- to act on Plaintiff's behalf. We, however, conclude that the INS adequately considered these circumstances in reaching its ultimate decision.

The INS first determined that Juan Miguel, in fact, was not operating under coercion from the Cuban government or that, even if he was, his honest and sincere desires were aligned with those of the Cuban government. That determination was not clearly wrong and was no abuse of discretion. An INS official, on two occasions, interviewed Juan Miguel in person in Cuba. Aware of the possibility that Juan Miguel might be under some kind of coercion, the INS official took steps to ensure that Juan Miguel could express freely his genuine wishes about Plaintiff's asylum claim. The INS official, after meeting with Juan Miguel face-to-face, concluded -- based upon her observations of his demeanor -- that Juan Miguel's statement was not the result of

duress or coercion. We, therefore, cannot say that the INS's rejection of Plaintiff's contention about coercion was arbitrary.

The INS also preliminarily assessed the objective basis of Plaintiff's asylum claim and concluded that his claim for asylum probably lacked merit.²⁴ Again, we cannot conclude that the INS's determination was arbitrary or an abuse of discretion. In making this assessment, the INS considered the information contained in the asylum applications and information provided to the INS by Plaintiff's lawyers. In addition, the INS interviewed Lazaro and inquired about the basis for Plaintiff's asylum claim.²⁵

The essence of Plaintiff's asylum claim was that, if he is returned to Cuba: (1) he will not enjoy the freedom that he has in the United States; (2) he might be forced to undergo "re-education" and indoctrination in communist theory; and (3) he might be used by the Cuban government for propaganda purposes. No one should doubt that,

²⁴ We do not decide, as the INS advocates, that this summary and preliminary assessment of the merits of Plaintiff's asylum claim was a "consideration" of Plaintiff's purported asylum application within the meaning of the statute. But we do accept that this rough look at the potential merits was a legitimate part of deciding whether Plaintiff's father had a substantial conflict of interest with Plaintiff about asylum that would disqualify the father from representing Plaintiff.

²⁵ That the INS, in making a preliminary assessment of the strength of Plaintiff's asylum claim, never interviewed Plaintiff has worried us. But the INS did speak with persons representing Plaintiff -- Lazaro, Marisleysis, and Plaintiff's lawyers -- on more than one occasion about the nature of his asylum claim.

if Plaintiff returns to Cuba, he will be without the degree of liberty that people enjoy in the United States. Also, we admit that re-education, communist indoctrination, and political manipulation of Plaintiff for propaganda purposes, upon a return to Cuba, are not beyond the realm of possibility.

Nonetheless, we cannot say that the INS's assessment of Plaintiff's asylum claim -- that it probably lacked merit -- was arbitrary. To make a meritorious asylum claim, an asylum applicant must show that he has a "well-founded fear of persecution" in his native land. See 8 U.S.C. § 1101(a)(42). Congress largely has left the task of defining with precision the phrase "well-founded fear of persecution" to the INS. See Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1296 (11th Cir. 1990) (stating that, where statutory term is ambiguous, agency properly defined term through adjudications); see also Singh v. INS, 134 F.3d 962, 967 (9th Cir. 1998) (noting that statutes do not define "persecution" or specify acts constituting "persecution").

Plaintiff points to no earlier INS adjudications or judicial decisions where a person, in circumstances similar to Plaintiff's, was found to have established a "well-founded fear of persecution." Political conditions "which affect the populace as a whole or in large part are generally insufficient to establish [persecution]." See Mitev v. INS, 67 F.3d 1325, 1330 (7th Cir. 1995). We cannot say that the INS had to treat education and indoctrination as synonymous with "persecution." See Ghaly v. INS, 58

F.3d 1425, 1431 (9th Cir. 1995) (explaining that “persecution is an extreme concept that does not include every sort of treatment our society regards as offensive”); see also Mikhailevitch v. INS, 146 F.3d 384, 390 (6th Cir. 1998) (stating that “persecution” “requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty”); Bradica v. INS, 128 F.3d 1009, 1012 (7th Cir. 1997) (“[M]ere harassment does not amount to persecution.”); Ira J. Kurzban, Kurzban’s Immigration Law Sourcebook, 254-61 (6th ed. 1998) (citing cases discussing meaning of “persecution”). Not all exceptional treatment is persecution. The INS’s estimate of the purported applications -- as applications that were not strong on their merits -- is not clearly inaccurate.²⁶

We have not the slightest illusion about the INS’s choices: the choices -- about policy and about application of the policy -- that the INS made in this case are choices about which reasonable people can disagree. Still, the choices were not unreasonable,

²⁶ We do not know for certain that, if Plaintiff’s asylum applications were accepted and fully adjudicated, Plaintiff necessarily would fail to establish his eligibility for asylum. Depending on how the record was developed, we expect that a reasonable adjudicator might find that Plaintiff’s fears were “well-founded.” We also think that some reasonable adjudicator might regard things like involuntary and forcible “re-education” as persecution. But these issues are not questions that we, in the first instance, are to answer. The ultimate merits of an asylum petition are not before this Court at all. Instead, they are matters that would be committed to the discretion of the INS. The INS (and the courts) never have suggested that an asylum applicant in like circumstances was eligible for asylum. We cannot say that the INS’s assessment of the likelihood of success of the applications in this case was arbitrary.

not capricious and not arbitrary, but were reasoned and reasonable. The INS's considerable discretion was not abused.

CONCLUSION

As policymakers, it is the duty of the Congress and of the executive branch to exercise political will. Although courts should not be unquestioning, we should respect the other branches' policymaking powers. The judicial power is a limited power. It is the duty of the judicial branch not to exercise political will, but only to render judicial judgment under the law.

When the INS was confronted with Plaintiff's purported asylum applications, the immigration law of the United States provided the INS with no clear answer. The INS accordingly developed a policy to deal with the extraordinary circumstances of asylum applications filed on behalf of a six-year-old child, by the child himself and a non-parental relative, against the express wishes of the child's parents (or sole parent). The INS then applied this new policy to Plaintiff's purported asylum applications and rejected them as nullities.

Because the preexisting law compelled no particular policy, the INS was entitled to make a policy decision. The policy decision that the INS made was within the

outside border of reasonable choices. And the INS did not abuse its discretion or act arbitrarily in applying the policy and rejecting Plaintiff's purported asylum applications. The Court neither approves nor disapproves the INS's decision to reject the asylum applications filed on Plaintiff's behalf, but the INS decision did not contradict 8 U.S.C. § 1158.

The judgment of the district court is AFFIRMED²⁷.

²⁷NOTICE OF SHORTENED TIME: We order that, if petitions for rehearing or suggestions for rehearing en banc are to be filed, they must be filed within 14 days of this date. Expect no extensions.

St. Louis Post-Dispatch

April 26, 2000, Wednesday, FIVE STAR LIFT EDITION

SECTION: NEWS, Pg. A7

LENGTH: 726 words

HEADLINE: LAW EXPERTS ARE DIVIDED OVER THE LEGALITY OF SEARCH WARRANT IN RAID

BYLINE: William H. Freivogel; Of The Post-Dispatch

BODY:

The government's seizure of Elian Gonzalez was legal because agents had a search warrant entitling them to enter the home and seize the child, say legal experts at St. Louis University and Washington University law schools.

But the controversy concerning the raid took on new life Tuesday evening when Harvard University Law Professor Laurence H. Tribe said he was not backing down from his criticism of the raid, despite a rebuke from the White House press secretary and a dinner hour discussion with unhappy White House officials.

Tribe, a leading liberal constitutional expert, wrote in a commentary in The New York Times on Tuesday that the raid violated the Fourth Amendment's prohibition of unreasonable seizures.

Joe Lockhart, the White House press secretary, accused Tribe of speaking "without the facts and without looking at the search warrant."

But after a telephone conversation with the White House on Tuesday evening, Tribe told the Post-Dispatch that he felt even more strongly that he was right. "Now that I've seen the search warrant affidavit and the warrant, I see they persuaded a magistrate to engage in a charade," he said.

Tribe argued in his newspaper commentary that the search warrant "was not a warrant to seize the child."

Roger Goldman at St. Louis University and Richard Kuhns at Washington University disagreed. They said a search warrant issued by a judge is the proper legal instrument for the government to use when it is seizing a person at the home of a third party. In this case, the third party was Lazaro Gonzalez, Elian's great-uncle.

Goldman and Kuhns cited a U.S. Supreme Court case of 1981, *Steagald vs. U.S.* The court ruled that an arrest warrant alone did not authorize authorities to enter a third party's home to make an arrest. Instead, a search warrant is required.

But Tribe said *Steagald* applied "only if the person seized was suspected of having committed a crime or being an illegal alien." Tribe maintained that Elian was neither.

The Immigration and Naturalization Service claimed Elian was an illegal alien in its written application to a federal judge last week for the search warrant for Lazaro Gonzalez's home.

The immigration service said it had "paroled" Elian to the temporary custody of Lazaro Gonzalez last November, when he was rescued from the sea. Parole is considered an act of "sovereign generosity" that allows an alien temporary residence.

On April 12, the immigration service revoked Elian's parole, ending Lazaro Gonzalez's legal custody of the boy. The agency ordered the great-uncle to turn over Elian the following day. When he didn't, the agency argued, his retention of the boy became "unlawful" and Elian became an illegal alien.

A federal rule of criminal procedure, Rule 41, permits the government to obtain a search warrant to seize a person who is being "unlawfully restrained" - which was Elian's status once his great-uncle no longer had a legal right to keep him, the immigration service said.

On April 21, the day before the raid, the immigration service issued an administrative arrest warrant for Elian, because it considered him an illegal alien. To comply with the *Steagald* decision, the government also applied for a search warrant from a federal magistrate in Miami. The search warrant specifically said that the "person or property" to be seized was "the person of Elian Gonzalez . . . a native and citizen of Cuba . . . being unlawfully restrained and the subject of an (immigration service) administrative warrant of arrest."

Stephen Legomsky, an expert on immigration law at Washington University, said the agency appeared to have two justifications under immigration law for seizing the boy.

First, the immigration service "has custody over a minor, noncitizen child in the United States without documentation. They can relinquish custody to a private party, as they did with the great-uncle. But once that private custody terminates, the (immigration service) can take the boy back in its own custody."

In addition, once the agency revoked Elian's parole status, the boy was an illegal alien and subject to being seized, he said.

But Tribe countered that the government could no longer consider Elian an illegal alien after last week's federal appeals court decision keeping his asylum applications alive.

LANGUAGE: English

LOAD-DATE: April 26, 2000

12 of 29 DOCUMENTS

HEADLINE: Warrant at a glance

BODY:

The text of the warrant authorizing the Immigration and Naturalization Service's seizure of Elian Gonzalez:

In the Matter of the Search of residence of Lazaro Gonzalez, located at 2319 N.W. 2nd Street, Miami, Miami-Dade County, Florida

To: Mary A Rodriguez, U.S. Immig. and Natz. Service and any Authorized Officer of the United States

Affidavit(s) having been made before me by Mary A. Rodriguez, who has reason to believe that on the premises known as the residence of Lazaro Gonzalez, located at 2319 N.W. 2nd Street, Miami, Miami-Dade County, Florida, in the Southern District of Florida there is now concealed a certain person or property, namely the person of Elian Gonzalez, date of birth December 6, 1993, a native and citizen of Cuba.

I am satisfied that the affidavit(s) and any record testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

You are hereby commanded to search on or before 5-1-0 (not to exceed 10 days) the person or place named for the person or property specified, serving this warrant and making the search (at any time in the day or night as I find reasonable, cause has been established) and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to U.S. Magistrate Judge Dube as required by law.

21 April 7:20 p.m. at Miami, Florida

[signed] U.S. Magistrate Judge Robert L. Dube

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Elian ruling sides with Washington over U.S. relatives

But boy's return to Cuba not automatic

March 21, 2000

Web posted at: 10:52 a.m. EST (1552 GMT)

From staff and wire reports

MIAMI (CNN) -- In a ruling Tuesday that sides with the U.S. government in the Elian Gonzalez custody case, a federal judge in Miami threw out a political asylum lawsuit filed by the 6-year-old boy's U.S. relatives who want him to stay in the United States.

The decision, however, does not mean the boy automatically will be returned to his native Cuba.

In a 50-page decision which also was posted on the Internet -- at <http://www.netside.net/usdcfls/> -- U.S. District Judge Michael Moore dismissed a lawsuit filed by Elian's great-uncle, Lazaro Gonzalez.

The reaction from Elian's Miami relatives was swift.

"Unbelievable. That's very disappointing," said Roger Bernstein, attorney for the boy's great uncle, Lazaro Gonzalez, with whom Elian has stayed since his rescue at sea in November.

There was no immediate word on whether an appeal is planned, but Elian's Miami relatives have said in the past that they would appeal the case as far as they could.

Decision up to Reno

Moore said the decision on whether to grant asylum to the youngster is up to Attorney General Janet Reno.

Reno is on record favoring a January decision by the U.S. Immigration and Naturalization Service that Elian be returned to his father in Cuba, a ruling also backed by President Clinton. The INS order was put on hold pending the court fight.

Reno, as head of the federal government's Justice Department, oversees the INS.

Moore heard arguments in the custody battle at a hearing held 12 days ago. "Determination to grant



Elian walks to school with his great-uncle, Lazaro Gonzalez, on Tuesday

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Background on
Elian's case from
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hearing held 12 days ago. "Determination to grant asylum is a matter within the discretion of the attorney general," the judge wrote after considering the matter.

Lazaro Gonzalez brought the lawsuit claiming the INS had denied Elian his rights by not granting him an asylum hearing.

The INS had ruled that Elian's father was the only person who could speak for the boy in immigration matters. The father, Juan Miguel Gonzalez, requested that his son be returned to Cuba.

In addition, government lawyers said, INS officials conducted a thorough investigation, which was reviewed by Reno, and found no basis for an asylum claim.

Elian's fate has been debated since he was found clinging to an inner tube off Florida on November 25. His mother and 10 others drowned when their boat capsized during an attempt to reach the United States.

Elian was one of three survivors.

Correspondent Mark Potter and The Associated Press contributed to this report.

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**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

Case No. 00-206-CIV-MOORE

ELIAN GONZALEZ, a minor, by and
through LAZARO GONZALEZ, as
next friend, or, alternatively, as
temporary legal custodian,

Plaintiff,

vs.

ORDER

JANET RENO, Attorney General of the
United States; DORIS MEISSNER,
Commissioner, United States Immigration
and Naturalization Service; ROBERT
WALLIS, District Director, United States
Immigration and Naturalization Service;
UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE; and
UNITED STATES DEPARTMENT OF
JUSTICE,

Defendants.

THIS CAUSE came before the Court upon Defendants' Motion To Dismiss or Alternative
Motion for Summary Judgment (DE # 22, filed January 26, 2000).¹

UPON CONSIDERATION of the Motion and the pertinent portions of the record, and after a
hearing on March 9, 2000, at which the parties presented oral argument, the Court enters this Order,
which is outlined below as follows.

¹This case was originally randomly assigned by computer to Senior United States District Judge James L. King. Following Senior Judge King's recusal, the case was randomly reassigned by computer to Senior United States District Judge William M. Hoeveler. When Senior Judge Hoeveler became seriously ill and required hospitalization, the case was randomly reassigned to the undersigned.

The Order is presented in four parts. In Part I of the Order, the Court sets forth the factual background leading to the filing of the Complaint in this case. Part II concerns this Court's subject matter jurisdiction over Defendants' claims, as well as the related issues of Plaintiff's standing to bring suit, real party in interest, capacity, and next friend status. In Part III, the Court addresses the merits of each count set forth in the Complaint. Part IV provides a conclusion.

I. BACKGROUND

The facts of this case are presented here in summary fashion. On November 25, 1999, the United States Coast Guard intercepted two fishermen who had rescued five-year-old Elian Gonzalez ("Plaintiff")² from the Atlantic Ocean off the southeastern coast of Florida. The Coast Guard transported the boy, whose mother perished during the voyage from Cuba to the United States, to a local hospital. Later that day, the United States Immigration and Naturalization Service ("INS") granted Plaintiff a temporary deferral of his inspection and placed him in the care of his paternal great uncle, Lazaro Gonzalez, who resides in Miami, Florida.

On November 27, 1999, Plaintiff's father, Juan Gonzalez,³ sent a letter to the Cuban government requesting that his son be returned to him in Cuba. The letter stated that Plaintiff, who was

²Although the Complaint was filed in the name of Elian Gonzalez, "a minor, by and through Lazaro Gonzalez, as next friend, or, alternatively, as temporary legal custodian," the submissions on Elian's behalf refer to "Plaintiffs," and Defendants note that there are "two plaintiffs." Clearly, in an action filed "in the name of" a minor, and without the assertion of an independent claim by the "next friend," there is only one plaintiff.

³The parties employ various names for Plaintiff's father: Juan Gonzalez, Juan Gonzalez-Quintana, Juan Manuel Gonzalez-Quintana, Juan Miguel Gonzales-Quintana and Juan Miguel Gonzalez-Quintana. For consistency, the Court refers to him as Juan Gonzalez.

born and had been raised in Cuba, “was taken out of [Cuba] in an illegal manner and without [Juan Gonzalez’s] consent.” Letter from Juan Gonzalez to Felipe Perez Roque, Minister of Foreign Relations of 11/27/99, Defendants’ Notice of Filing Record and Exhibits, at 110 (English translation). The request was forwarded to the United States interests section in Havana that same day, and then to the INS. In a letter to Juan Gonzalez dated December 8, 1999, Robert Wallis, INS District Director, outlined the documentation required by the INS in order to release Plaintiff to his father’s custody.

Two days later, an application for asylum for Plaintiff was submitted to the INS, signed by Lazaro Gonzalez. The alleged grounds for asylum were membership in a particular social group and/or political opinion.⁴ Shortly thereafter, another application—identical to the first—was submitted with Plaintiff’s own printed name. On January 10, 2000, a Florida state court granted Lazaro Gonzalez “limited legal authority . . . to assert and protect such rights as the child may have under United States immigration law.”⁵ Lazaro Gonzalez then filed another asylum application on Plaintiff’s behalf.

In the interim, an INS official conducted two interviews with Juan Gonzalez in Havana and

⁴There are only five permitted grounds for the granting of asylum: race, religion, nationality, membership in a particular group, and political opinion. See 8 U.S.C. § 1158(b)(1) (“The Attorney General may grant asylum to an alien . . . if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.”). 8 U.S.C. § 1101(a)(42)(A) provides, in pertinent part, that the term “refugee” means “any person . . . who is unable or unwilling to return to . . . [his home country] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” This provision conforms to international guidelines. See INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987) (“[O]ne of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.”).

⁵See Temporary Protective Order, Gonzalez v. Gonzalez-Quintana, 00-00479 FC 29 (Fla. Cir. Ct. Jan. 10, 2000) (granting “Petitioner’s Verified Emergency Ex-Parte Petition for Interim Order”).

obtained documentation of his request that Plaintiff be returned home to Cuba. During the first of those interviews, on December 13, 1999, Juan Gonzalez read from a handwritten statement and asked that any application for admission to the United States on his son's behalf be withdrawn. Silma L. Dimmel, Officer-in-Charge for the INS in Havana, conducted the interview in Spanish at Juan Gonzalez's home. Report of Interview with Juan Gonzalez, Defendants' Notice of Filing Record and Exhibits, at 48.

When asked for his preference regarding Plaintiff, Juan Gonzalez stated the following:

Elian, at the age of six, cannot make a decision on his own. . . . I'm very grateful that he received immediate medical assistance, but he should be returned to me and my family. As for him to get asylum, I am not allowing him to stay or claim any type of petition; he should be returned immediately to me.

Id. at 50.

During the interview, Juan Gonzalez also stated that Plaintiff "practically lived with me since he attended school closer to my residence [than to the residence of Plaintiff's mother]," and Plaintiff's paternal grandmother had cared for the boy while the parents worked. Juan Gonzalez asserted that he had been unaware that Plaintiff's mother was taking Plaintiff to the United States. He also stated that he wanted no claim or petition raised on Plaintiff's behalf, that Plaintiff's paternal relatives living in Miami have "no rights over Elian," and that he did "not want any law firm to represent Elian." Juan Gonzalez also expressed concern that Lazaro Gonzalez is "under pressure" and "unable to back off because of the circumstances of what could happen." Id. at 49-54.

In order to address concerns that the oral discussion might be monitored by external sources, the INS official provided Juan Gonzalez with a short written list of questions and possible answers for him to complete. His answers indicated that he felt he could "speak freely" and that it was his desire

that Plaintiff “should return to Cuba.” Id. at 57.

On December 20, 1999, officials from an INS District Office met with Lazaro Gonzalez, his daughter who resides in his home, and several attorneys. One of the INS officials present, Jorge L. Roig, Port Director for the INS at the Port of Miami, spoke directly with Lazaro Gonzalez and prepared a report of the interview (which was not recorded). According to Lazaro Gonzalez, Juan Gonzalez said that “if the boy made it to this country safe and sound that we should protect him by whatever means available.” Declaration of Jorge L. Roig, Defendants’ Notice of Filing Record and Exhibits, at 221. He also asserted that Juan Gonzalez is “under pressure” from the Cuban government, and that “whoever knows about the Castro system, knows this is how it works there.” Id. When asked about any specific or objective reason to believe that Plaintiff would be harmed if he returned to Cuba, Lazaro Gonzalez stated that “everything he has, if he goes back, it’s all changed,” and that Plaintiff’s “activities here are different from those that he would have over there.” Id. at 222.

Subsequent to the meeting, attorney Roger Bernstein sent a letter to the General Counsel of the INS, claiming that in light of the “endemic and gross violations of human rights which exist in Cuba,” Juan Gonzalez is not able to express his true wishes regarding Plaintiff “without dire repercussions to his person and family.” Letter from Roger Bernstein to Owen Cooper, General Counsel, INS of 12/27/99, Defendants’ Notice of Filing Record and Exhibits, at 225-26. Mr. Bernstein offered to provide written affidavits to support his assertions that Juan Gonzalez’s movements are restricted, that his “tone drastically changed” in conversations with Lazaro Gonzalez, and that the Cuban government had “harassed” Plaintiff’s mother. Id.

On December 31, 1999, the INS official in Havana again met with Juan Gonzalez—this time to

“clarify some of the answers provided” during the first interview. Declaration of Silma L. Dimmel, Defendants’ Notice of Filing Record and Exhibits, at 229. During this meeting, which took place at the private residence of a United Nations official, Juan Gonzalez completed another written questionnaire, indicating that his actions were not restricted and that he did not want Plaintiff to stay in the United States. Id. at 231 (English translation). He expressed offense that the INS was “questioning my paternity over others that have no rights. . . . [and] giving more rights to others . . . although they have no authority over Elian.” Id. at 241.

The General Counsel for the INS prepared a Memorandum, dated January 3, 2000, which cited pertinent cases from the United States, as well as provisions of Cuban law, and expressly considered the following question: “May Plaintiff apply for asylum in direct opposition to the expressed wishes of his father?” Memorandum from Bo Cooper, General Counsel for Doris Meissner, Commissioner of 1/3/00, Defendants’ Notice of Filing Record and Exhibits, at 7-17. The Memorandum addressed Florida law on the competency of a minor to enter into a contract and noted that the INS “generally assumes that someone under the age of 14 will not make representation or other immigration decisions without the assistance of a parent or legal guardian.” Id.

In light of the attorneys’ concerns regarding the voluntariness of Juan Gonzalez’s statements, and a “general understanding of the practices of the Castro regime,” the General Counsel found it “essential that the INS closely examine the voluntariness of the father’s statements.” Id. The General Counsel concluded that “the father is able to represent adequately the child’s immigration interests,” and that if Juan Gonzalez were to come to the United States, the INS “would be required to recognize Elian’s father’s interests . . . [and] would necessarily change the custody arrangement we sought with

his uncle in his absence.” Id. The Memorandum also noted that while there are no age-based restrictions on applying for asylum, the INS need not process applications “if they reflect that the purported applicants are so young that they necessarily lack the capacity to understand what they are applying for or, failing that, that the applications do not present an objective basis for ignoring the parents’ wishes.” Id. The General Counsel concluded that Plaintiff “lacks the capacity to raise an asylum claim.” Id.

The INS sent a letter to Roger Bernstein and Spencer Eig, two attorneys purporting to represent Plaintiff, reporting the decision of the Commissioner:

After carefully considering all relevant factors, we have determined that there is no conflict of interest between Mr. Gonzalez-Quintana and his son, or any other reason, that would warrant our declining to recognize the authority of this father to speak on behalf of his son in immigration matters.

...

You and your associates have submitted several Forms G-28, Notice of Entry and Appearance as Attorney, for Elian. . . . After careful consideration, we have determined that we cannot recognize any of the Forms G-28 as authorizing you to represent Elian in immigration matters. Although the INS has placed Elian in the physical care of Lazaro Gonzalez, such placement does not confer upon Lazaro Gonzalez the authority to act on behalf of Elian in immigration matters or authorize representation in direct opposition to the express wishes of the child’s custodial parent. Further, we do not believe that Elian Gonzalez, who recently turned six years old, has the legal capacity on his own to authorize you to represent him. Finally, Mr. Gonzalez-Quintana has expressly declined to authorize you or your firms to represent Elian. Therefore, the INS cannot recognize you as Elian’s representatives.

...

[W]e have determined that Elian does not have the capacity to apply for

asylum without the assistance of his parent. Further, neither the applications you have submitted nor any other information available indicates that Elian would be at risk of harm in Cuba such that his interests might so diverge from those of his father that his father could not adequately represent him in this matter. Therefore, given Mr. Gonzalez-Quintana's decision not to assert Elian's right to apply for asylum, we cannot accept the asylum applications you have submitted on Elian's behalf.

Mr. Gonzalez-Quintana has also repeatedly requested that Elian be returned immediately to his custody in Cuba. We consider this to be a request to withdraw Elian's application for admission to the United States, made by Elian's custodial parent with authority to speak for Elian in immigration matters. Therefore, we have granted Mr. Gonzalez-Quintana's request to withdraw Elian's application for admission to the United States.

Letter from Michael A. Pearson, Executive Associate Commissioner for Field Operations, to Roger Bernstein and Spencer Eig of 1/5/00, Defendants' Notice of Filing Record and Exhibits, at 5-6.

On January 6, 2000, James J. Burzynski, Director of the INS's Texas Service Center, sent a letter to Roger Bernstein, which indicated that the asylum applications that had been filed on Plaintiff's behalf were being returned, pursuant to the reasons articulated in the January 5, 2000 letter from Michael Pearson. Attached to the letter were the actual applications that had been filed, as well as a copy of the letter from Michael Pearson. Letter from James J. Burzynski, Director, TSC, to Roger Bernstein of 1/6/00, Complaint Ex. A.

The attorneys who claimed to represent Plaintiff in his asylum applications sought reconsideration of the Commissioner's decision to reject the applications, which had been articulated in the letters from Michael Pearson and James Burzynski. On January 12, 2000, Attorney General Janet Reno issued her decision upholding the INS's determination. Her letter is reproduced here, in pertinent

part:

While I am always open to considering new information that might arise, I am not currently aware of any basis for reversing Commissioner Meissner's decision that Juan Gonzalez—Elian's father—has the sole authority to speak for his son on immigration matters.

. . . .

As a general matter, when dealing with a child this young, the immigration law, like other areas of law, looks to the wishes of the surviving parent. . . . Commissioner Meissner has determined that, under applicable law, Elian is too young to make legal decisions for himself, and that his father has the legal authority to speak for him in immigration matters.

Commissioner Meissner reached her decision through a careful and thorough process. All of the available information was considered, including the reports from two lengthy and private interviews with Elian's father, Juan Gonzalez, and the report from the December 20 meeting with Elian's great uncle and cousin and each of you. Commissioner Meissner also carefully considered the allegation that Juan Gonzalez was under some form of coercion, and is confident, based on her representative's direct contact with Juan Gonzalez, the father's very close relationship with Elian, and the other evidence provided, that the father has expressed his true wishes in asking that his son be returned to him.

The INS does not rule out the possibility of a case in which an asylum application would be accepted from a young child against the wishes of a parent. . . . The INS reviewed the asylum application you sought to file on Elian's behalf, considered all other relevant available information, and found no objective basis for overriding the father's wishes for his son. In particular, the INS found no credible information indicating that the child would be at risk of torture or persecution if returned to his father, and thus concluded that it had no reason to question the father's decision not to assert an asylum claim.

. . . .

Nothing in the field guidance [referring to citations from the INS

Inspector's Field Manual] suggests that a father's wishes regarding his six-year-old child should be overridden. On the contrary, in a related provision you do not cite, the Field Manual makes it clear that the first responsibility of the INS when confronted with an unaccompanied minor is to attempt to remedy the situation by finding the child's parent or legal guardian, even if that person is outside the United States. . . .

If Elian is not competent to "indicate[] a fear of persecution or intention to apply for asylum," then someone would have to decide in his behalf whether to do so. That someone, under universally accepted legal norms, is his father. And his father has stated, in no uncertain terms, that he does not wish for Elian to make an asylum claim. As noted above, the INS considered relevant information, including the statements of Elian's Miami relatives and information in the asylum application, and determined that there is no objective basis for a valid asylum claim. Consequently, it found no conflict between Elian and his father. Under these circumstances, the appropriate course of action was to honor the desires of the father regarding Elian's applications for admission and asylum. It is not appropriate to commence removal proceedings against this six-year-old boy.

Letter from Attorney General Janet Reno to Spencer Eig, Roger Bernstein, and Linda Osberg-Braun of 1/12/00, Defendants' Notice of Filing Record and Exhibits, at 25-28.

In a subsequent letter, the INS reaffirmed the agency's position with respect to the applications for asylum filed on behalf of Plaintiff, including the application filed on January 12, 2000:

The new application, filed yesterday, is accompanied by a letter from you acknowledging that the information contained in this latest submission is the same as what you submitted last month. Thus, the only new factors in this case are Lazaro Gonzalez's signature on the new application and the Florida circuit judge's temporary protective order. The Commissioner has concluded that nothing in that order alters her determination that Juan Gonzalez has sole legal authority to speak for Elian on immigration matters, and that determination is ultimately one of federal immigration law. Thus, INS has determined that neither you nor Lazaro Gonzalez represents Elian before the INS. Accordingly, INS cannot accept the enclosed asylum application and I am returning it to you.

Letter from James Burzynski, Director, Texas Service, to Roger Bernstein of 1/13/00, Defendants'

Notice of Filing Record and Exhibits, at 317-18.

Finally, on January 19, 2000, Plaintiff filed this lawsuit, alleging that the INS lacked the authority to reject the asylum applications and was required—by federal statutes and regulations—to accept and adjudicate those applications. Defendants urge this Court to dismiss the action or, alternatively, to grant summary judgment. Defendants attack the Complaint on various grounds, each of which is addressed below. Having carefully studied this matter, and mindful of the limits on this Court's authority, the Court concludes that Defendants' Motion To Dismiss or Alternative Motion for Summary Judgment must be granted.

II. JURISDICTION AND STANDING

Summary of Part II

The discussion in Part II of this Order is set forth in summary form as follows. To begin, the Court is satisfied that it has limited subject matter jurisdiction to consider the Complaint. The Court further concludes that Plaintiff has standing to bring the Complaint, and is a real party in interest for the purposes of the instant action. The Court does not find that Plaintiff has the requisite capacity to sue in federal court; however, the Court holds that Lazaro Gonzalez is a sufficient next friend exclusively for the purposes of bringing the instant action on Plaintiff's behalf.

Plaintiff's Status

For immigration purposes, Plaintiff is an unaccompanied minor alien who "arrived" in the United

States because he was “brought to the United States after having been interdicted in international or United States waters.” 8 U.S.C. § 1225(a)(1). An alien who arrives in the United States is deemed to be an applicant for admission. See id. Plaintiff has not been placed in removal proceedings, but rather has been temporarily “paroled” into the United States, and the INS has deferred his inspection.⁶ That deferral of processing for removal, originally issued on November 25, 1999, was extended until January 21, 2000, and reportedly has been extended indefinitely.⁷

Although three applications were filed seeking asylum for Plaintiff—all of which were filed outside of the context of removal proceedings, each was returned by the INS without adjudication. Therefore, Plaintiff, now six years old, is an unaccompanied, unadmitted alien,⁸ subject to removal from the United States at the end of his period of temporary parole.

A. Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction, deriving their authority from both constitutional and legislative sources. See U.S. Const. art. III, § II; 28 U.S.C. § 1331; Keene Corp. v. United

⁶The decision to grant parole in lieu of detention pending removal is a matter within the discretion of the INS. See 8 U.S.C. § 1182(d)(5); 8 C.F.R. § 235.2(e).

⁷Defendants’ counsel stated at the March 9, 2000 hearing that the deferral has been extended indefinitely.

⁸In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, 3009-546 (1996) (“IIRIRA”), and in doing so, made sweeping changes to the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. (“INA”), including the addition of new immigration terminology. For the purposes of this Order, the Court uses the term “unadmitted alien” as synonymous with “excludable alien,” which shall refer to any alien who has reached the border of this country, but has not been admitted. See also Bertrand v. Sava, 684 F.2d 204, 205 n.1 (2d Cir. 1982).

States, 508 U.S. 200 (1993). It is exclusively the power of Congress to restrict the jurisdiction of federal courts to adjudicate certain kinds of cases. See Keene Corp., 508 U.S., at 207; see also United Gas Pipe Line Co. v. Whitman, 595 F.2d 323, 330 (5th Cir. 1979) (noting that only Congress may retract or expand the limits of federal judicial power).⁹

In addition, federal courts will not infer congressional intent to restrict their jurisdiction. See Block v. Community Nutrition Inst., 467 U.S. 340 (1984). The presumption in favor of judicial review may be rebutted only by a showing of “clear and convincing evidence” that Congress intended to preclude review. See Board of Governors of the Fed. Reserve Sys. v. McCorp. Fin., Inc., 502 U.S. 32, 44 (1991). This is not a strict evidentiary burden, but rather one that may be met where a “congressional intent to preclude judicial review is ‘fairly discernible in the statutory scheme.’” Block, 467 U.S. at 351 (quoting Data Processing Serv. v. Camp, 397 U.S. 150, 156 (1970)). In the event that there is “substantial doubt” as to congressional intent, the presumption in favor of judicial review controls. See id.

In applying these jurisdictional tenets to the case at bar, the Court looks first to the statutes that form the basis of Plaintiff’s Complaint. See 8 U.S.C. §§ 1103, 1158. These statutes grant the Attorney General broad authority both to implement this nation’s immigration laws and to exercise her discretionary authority over the grant of asylum. What is not included within either of the statutory provisions is a clear statement of congressional intent regarding judicial review of the processing of asylum applications by the INS. However, regarding section 1158(a), it is clear that the Attorney

⁹Decisions of the Fifth Circuit rendered on or before September 30, 1981 are binding on the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981).

General’s decision to permit an alien to apply for asylum relief itself is subject to review. See 8 U.S.C. § 1252(b)(4)(D) (providing that the decision whether to “grant relief under section 1158(a)” is “conclusive unless manifestly contrary to law and an abuse of discretion”).

Plaintiff asserts that 28 U.S.C. § 1331, 28 U.S.C. § 1346, 28 U.S.C. § 1361, and 28 U.S.C. § 2201 provide this Court with subject matter jurisdiction over his claim that the INS must accept and adjudicate his applications for asylum pursuant to applicable constitutional, statutory, and regulatory provisions. Defendants assert that this Court lacks jurisdiction over the challenged agency action because such action is firmly committed to administrative discretion—similar to the agency’s decision to commence removal proceedings. See 8 U.S.C. § 1252(g). Because the Attorney General’s decision not to commence removal proceedings is unreviewable under section 1252(g), Defendants suggest that this Court lacks subject matter jurisdiction over this case.

In support of their position that there is no basis for judicial review over the action at issue, Defendants direct the Court’s attention to Heckler v. Chaney, 470 U.S. 821 (1985), in which the Supreme Court found that agency decisions not to institute enforcement proceedings generally are not subject to judicial review under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 101 et seq. In so holding, the Court declared that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” See id. at 831.

In contrast to Chaney, the INS decision in the instant case—affirmed by the Attorney General—involved not a matter of enforcement, but rather the refusal to accept an asylum application. Accordingly, the Court rejects Defendants’ contention that Chaney is controlling in the instant context.

Defendants also rely on 8 U.S.C. § 1252(g), which bars judicial review of “any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien.” 8 U.S.C. § 1252(g).¹⁰ Plaintiff correctly argues that § 1252(g) is simply inapplicable, as he is not seeking the initiation of removal proceedings, but rather seeks simply for the INS to accept and consider his affirmative application for asylum.

Indeed, the Supreme Court in Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999), declined to read the restriction on judicial review found in section 1252(g) as broadly as has been urged by the INS. In American-Arab, which involved allegations that the INS had unfairly targeted individuals for deportation proceedings, the Supreme Court concluded that judicial review was unavailable because the challenged action constituted one of the three discrete actions that was specified in 1252(g) (exempting from review decisions of the Attorney General to “commence proceedings, adjudicate cases, or execute removal orders”). The Supreme Court resisted a reading of section 1252(g) that would extend the application of the section, noting as follows:

It is also implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings. Not because Congress is too unpoetic to use synecdoche, but because that literary device is incompatible with the need for precision in legislative drafting. We are

¹⁰The Court infers from their argument that Defendants support an interpretation of this language that precludes not only decisions or actions to “commence proceedings, adjudicate cases, or execute removal orders,” but decisions or actions *not* to do all of the above, as well. The Court finds this interpretation to be a proper one. See also Alvidres-Reyes v. Reno, 180 F.3d 199, 205 (7th Cir. 1999) (“[T]he Attorney General’s executive discretion to decide or act to commence proceedings always has been considered inherently to include the ability to choose not to do so.”).

aware of no other instance in the United States Code in which language such as this has been used to impose a general jurisdictional limitation . .

Id. at 943. Based on the decision in American-Arab, this Court declines to read section 1252(g) as broadly as Defendants desire.

Defendants further argue that this case involves not only an application for asylum but also an application for admission to the United States, and that the INS decision to permit withdrawal of an application for admission is not subject to review by this Court. Although, as an arriving alien, Plaintiff is deemed to be an applicant for admission, see 8 U.S.C. § 1225(a)(1), Plaintiff asserts that this issue is not dispositive because the application for asylum is filed under a separate statutory provision, see 8 U.S.C. § 1158, with procedures independent of those related to applications for admission.

As to the application for admission, which was deemed to have been filed by Plaintiff through his mere presence as an arriving alien in this country, Defendants argue that 8 U.S.C. § 1252(a)(2)(B) bars review of any claim that the request to withdraw Plaintiff's application for admission was improperly granted:

Notwithstanding any other provision of law, no court shall have jurisdiction to review (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of [asylum] relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2)(B)(ii). Specifically, Defendants point to 8 U.S.C. § 1225(a)(4), which provides that with respect to the withdrawal of applications for admission, "[a]n alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application

for admission and depart immediately from the United States.” 8 U.S.C. § 1225(a)(4). Thus, Defendants argue, the discretionary decision to prevent withdrawal of an application for admission may not be reviewed.

Plaintiff most strenuously urges that the INS decision not to accept the application for asylum filed under 8 U.S.C. § 1158 is the basis for his Complaint—not any purported withdrawal of the application for admission. And, as 8 U.S.C. § 1252(a)(2)(B)(ii) specifically exempts certain decisions under 8 U.S.C. § 1158(a) from the general elimination of judicial review, Plaintiff argues that this Court clearly has subject matter jurisdiction—or, at a minimum, the Court’s subject matter jurisdiction is not eliminated by 8 U.S.C. § 1252(a)(2)(B)(ii). While the Defendants raise a compelling point regarding this Court’s subject matter jurisdiction over an INS decision permitting withdrawal of an application for admission, it is clear that INS decisions regarding an application for asylum are governed by a different standard.¹¹

It also would appear that the provision relating to 8 U.S.C. § 1158(a) within 8 U.S.C. §

¹¹On another note, pursuant to 8 U.S.C. § 1158(d)(7), it appears that Congress did not intend to create, under subsection (d), “any substantive or procedural right or benefit that is legally enforceable.” 8 U.S.C. § 1158(d)(7). However, the Court does not find that this language precludes judicial review over claims under subsection (a). The Court recognizes that this creates an apparent anomaly in Congress’s decision to permit judicial review on the one hand, while foreclosing private rights of action on the other hand, within the same section. But such anomalies in the area of immigration law are by no means unusual.

As observed in a recent decision of the Eleventh Circuit, “this is immigration law where the issues are seldom simple and the answers are far from clear.” Alanis-Bustamante v. Reno, 201 F.3d 1303 (11th Cir. 2000). Notably, this view of immigration law is hardly a recent phenomenon. See Kwon v. INS, 646 F.2d 909, 919 (5th Cir. May 1981) (“Whatever guidance the regulations furnish to those cognoscenti familiar with INS procedures, this court, despite many years of legal experience, finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon.”).

1252(a)(2)(B)(ii) can be read to exclude only 8 U.S.C. § 1158(a)(1) (“Any alien . . . may apply for asylum”) from the preclusion of judicial review, as decisions under 8 U.S.C. § 1158(a)(2) (excepting certain categories of aliens from the provisions of (a)(1)—for example, those who have previously unsuccessfully applied for asylum) expressly have been excluded from judicial review by 8 U.S.C. § 1158(a)(3). See 8 U.S.C. § 1158(a)(3) (“No court shall have jurisdiction to review any determination by the Attorney General under paragraph (2).”). Thus, clearly the only remaining portion of section 1158(a) that could be subject to judicial review by this Court is subsection (a)(1). The Court further observes that “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion.” Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972) (per curiam)).¹²

Because of the parties’ dispute regarding legislative intent and the absence of compelling evidence before the Court as to judicial review of the action challenged in this case, the Court conducted an inquiry into the relevant legislative history. This review, which included a study of the significant changes in immigration law enacted in 1996,¹³ does not compel a finding that the Court is without jurisdiction over this matter.

¹²Similarly, in 8 U.S.C. § 1158(b)(2)(D), Congress expressly excludes from review determinations of the Attorney General under section 1158(b)(2)(A)(v) (exempting terrorists from the class of persons to whom asylum may be granted). As noted above, this “disparate inclusion” by Congress suggests that there is no ban on judicial review as to other portions of section 1158(b).

¹³See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, 3009-546 (1996) (“IIRIRA”); Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214 (1996) (“AEDPA”).

Upon review of the pertinent statutes, the applicable legislative history, and controlling case law, the Court finds that there is “substantial doubt” that Congress intended to establish a jurisdictional barrier to judicial review of the administrative decision at issue in the instant case, and the Court declines to strain in order to find any such intent. Accordingly, the Court concludes that Defendants’ Motion must be denied as to subject matter jurisdiction.¹⁴

B. Proper Plaintiff

1. Introduction

Having established its limited subject matter jurisdiction in the instant case, the Court now turns to the question of whether Plaintiff may bring this suit “by and through Lazaro Gonzalez as next friend, or alternatively as temporary legal custodian of Elian Gonzalez.” See caption to Plaintiff’s Complaint. Resolution of this issue first requires that Plaintiff has standing under Article III. Once it is determined that Plaintiff has standing, the Court must then evaluate Lazaro’s status as next friend, or alternatively as

¹⁴ As an aside, the Court observes that there exists no final agency order in this case, or other decision of the type envisioned by 8 U.S.C. § 1252(a)(2)(B), which provides:

Notwithstanding any other provision of law, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229(b), 1229(c), or 1255 of this title, or

(ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2)(B). The existence of such an order would trigger review by the Eleventh Circuit and consequently preclude this Court’s jurisdiction over the instant case. See 8 U.S.C. § 1252(b)(2) (“The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings.”).

temporary legal custodian. For the reasons discussed below, the Court concludes that Plaintiff has standing, that Lazaro is an appropriate next friend,¹⁵ and that this matter should proceed to a disposition of Defendants' Motion.

At the outset, the Court must dispose of a weakness in Defendants' position on the issue of the proper plaintiff in this case. Defendants have cast their argument as an answer to the following question: Who speaks for Plaintiff in agency immigration proceedings? It is clear, however, that the issue of capacity to initiate proceedings before an administrative agency is distinct from standing and related concepts in the context of a claim brought in federal court. Defendants urge the Court to recognize these two separate concepts as indistinguishable, and this represents a fundamental flaw in the premise of their argument on standing and capacity to sue in federal court.

2. Plaintiff's Article III Standing

The federal judiciary's power to hear cases is constitutionally confined to "cases" and "controversies," U.S. Const. art. III, § 2, which impose certain limits on the federal courts. As the Eleventh Circuit has held, "One of the most important of these constitutionally-based limits is the requirement that a litigant have 'standing' to invoke the power of a federal court." Malowney v. Federal Collection Deposit Group, 193 F.3d 1342, 1346 (11th Cir. 1999). Article III's standing requirement is intended, *inter alia*, to preserve the separation of powers, conserve judicial resources, improve judicial decisionmaking, and foster fairness for those who do not want their rights litigated by someone other

¹⁵Because the Court holds that Lazaro is a proper next friend, it does not reach the argument that Plaintiff brings this suit by Lazaro as temporary legal custodian. Note the Florida State Court Family Division's findings and conclusions that Lazaro Gonzalez is Plaintiff's temporary legal custodian. See Temporary Protective Order, Gonzalez v. Gonzalez-Quintana, 00-00479 FC 29 (Fla. Cir. Ct. Jan. 10, 2000).

than themselves. See Erwin Chemerinsky, Federal Jurisdiction 57-59 (3d ed. 1999).

A plaintiff asserts Article III standing to sue in federal court by alleging an “irreducible constitutional minimum” of three elements: (1) an “injury in fact”—in other words, “an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical,’””; (2) a causal connection between plaintiff’s alleged injury and defendant’s alleged behavior; and (3) a likelihood that the alleged injury will be redressed by a decision in plaintiff’s favor. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)) (citations omitted).

A plaintiff’s age is not determinative of standing;¹⁶ children possess certain personal rights that are enforceable in federal court. See Travelers Indemnity Co. v. Bengtson, 231 F.2d 263, 265 (5th Cir. 1956). This is not to say, however, that children necessarily have the *capacity* to sue on their own behalf. See Fed. R. Civ. P. 17(b). Rule 17(c) of the Federal Rules of Civil Procedure provides mechanisms by which a child who has standing, but who is too young to have capacity to sue, can bring suit through a representative. In this case, the six-year-old Plaintiff alleges that he wants the INS to process applications seeking political asylum for him in the United States despite his father’s protestations. To that end, Plaintiff brings this suit by and through a purported next friend, pursuant to Rule 17(c). To be clear, Plaintiff’s standing is a distinct inquiry from that of Lazaro Gonzalez’s capacity

¹⁶This principle is evident in the immigration context. For example, in Reno v. Flores, 507 U.S. 292 (1993), the Supreme Court did not explicitly address the standing of “a class of alien *juveniles*” Id. at 294 (emphasis added). Nevertheless, the Court must have been satisfied that the juveniles had standing, as it proceeded to evaluate their facial challenge to INS regulations, as well as due process claims related to the custody of juvenile aliens pending deportation.

to act as Plaintiff's next friend.¹⁷

Plaintiff alleges that Defendants did not evaluate his applications for asylum under the required INS procedures—in violation of his constitutional, as well as statutory and regulatory rights to due process. In Count I, Plaintiff asserts a constitutional right to due process. In Counts II-IV, he claims statutory and regulatory rights to due process. Thus, Plaintiff's alleged injury in fact relates not to the ultimate denial of asylum, but rather to the procedures employed by Defendants in failing to reach the question of whether Plaintiff's requests for asylum should be granted or denied.

Defendants argue that Plaintiff has no injury in fact because the INS determined that the ability to submit and have adjudicated an application for asylum belongs to Plaintiff's father alone. Because the father withdrew Plaintiff's application, Defendants reason that no asylum application exists upon which Plaintiff can premise his claim of due process violations.

After a thorough analysis of the arguments and the pleadings, the Court concludes that Plaintiff has asserted an injury in fact. However, the Court's analysis does not end here. As the Supreme Court has clearly announced, when a suit challenges

the legality of government action or inaction, the nature and extent of facts . . . [necessary] to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action at issue). If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

¹⁷ Although the propriety of a next friend's representation may be referred to as that next friend's "standing," see, e.g., Ford v. Haley, 195 F.3d 603, 624 (11th Cir. 1999); Lonchar v. Zant, 978 F.2d 637, 640, 641 (11th Cir. 1992), for the sake of clarity, this portion of the Order will refer only to the Plaintiff in terms of "standing"—as opposed to the next friend's "ability" or "capacity" to represent Plaintiff in federal court litigation. See also Glickstein v. Sun Bank/Miami, N.A., 922 F.2d 666, 670 (11th Cir. 1991) ("[T]he doctrine of [a representative's] capacity is often incorrectly considered under the rubric of a standing claim.").

Lujan, 504 U.S. at 561-62. The named Defendants are governmental actors whose “action or inaction” regarding Plaintiff’s alleged claim for asylum forms the core of the instant case. Most certainly, Plaintiff himself was the “object” of that alleged governmental in/action, in that the INS’s behavior pertaining to Plaintiff’s asylum affects Plaintiff’s very own asylum status. This conclusion virtually requires a finding of standing, because it creates the supposition of a causal connection between Plaintiff’s claim and the government’s in/action, as well as the assumption that this Court has the power to redress the alleged deprivation. See id.

By contrast, Defendants argue against a finding of standing on the grounds that the INS determination that Juan Gonzalez alone speaks for Plaintiff in immigration matters forecloses Plaintiff’s ability to suffer any injuries related to the INS’s decision. But it is precisely the propriety of the INS’s determination on Plaintiff’s asylum claim that Plaintiff challenges in the instant case before this Court.

Defendants’ argument against standing is a paradigmatic catch-22, which is insupportable for two reasons. First, the federal courts are charged with determining a plaintiff’s standing to sue in federal court. In other words, the substantive agency decision that is at the heart of this federal case cannot, in and of itself, resolve the Court’s independent duty to answer the question of whether Plaintiff has suffered an injury in fact. Second, Defendants’ argument improperly treats as interchangeable the merits of the underlying INS determination and the challenge to that decision in this Court. To close the courthouse doors to a plaintiff seeking to bring a federal challenge to the very governmental decision invoked to keep him out of federal court violates common sense and this Court’s duty to do justice, and is tantamount to an argument that this Court should abdicate its independent duty to determine standing.

Satisfied that Plaintiff makes a colorable showing of an injury in fact, the Court reaches the

second and third prongs of the standing test. The causal connection between the alleged deprivation of Plaintiff's due process and Defendants' inaction in processing his asylum applications is abundantly clear: But for Defendants' alleged violation of their own procedures for processing asylum applications, Plaintiff could not claim injury to his alleged right that the procedures be followed. Moreover, the writ of mandamus that Plaintiff seeks in Count V could be used to redress Plaintiff's alleged deprivation—should Plaintiff demonstrate the requisite elements for issuance of this remedy. See In re Loudermilch, 158 F.3d 1143 (11th Cir. 1998) (granting writ of mandamus), reh'g en banc denied, 168 F.3d 508 (11th Cir. 1999). Accordingly, the Court finds that Plaintiff has satisfied the three-prong test for standing to sue Defendants in this action.

3. Real Party In Interest—Fed. R. Civ. P. 17(a)

The concepts of a plaintiff's standing to sue and his status as the real party in interest are interrelated, yet conceptually distinct. As discussed earlier, standing is a constitutional requirement that asks “whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” Allen v. Wright, 468 U.S. 737, 750-51 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)). A “real party in interest” is the party in whose name a federal civil action “shall be prosecuted . . .” Fed. R. Civ. P. 17(a). Furthermore, a real party in interest must be “the party who, by the substantive law, has the right sought to be enforced,” Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250, 257 (5th Cir. 1980), and who “possesses a significant interest in the action to entitle him to be heard on the merits.” 6A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1542,

at 58 (supp. 1999).¹⁸

One line of cases acknowledges the similarity between the standing and real party in interest inquiries, and advances the idea that “once a party is found to have standing to raise a constitutional point, that ruling disposes of any real party in interest objections as well.” Apter v. Richardson, 510 F.2d 351, 353 (7th Cir. 1975); see also Swanson v. Bixler, 750 F.2d 810, 814 (10th Cir. 1984) (noting that a party without standing cannot be a real party in interest). However, another line of reasoning requires a named plaintiff to demonstrate that he is a real party in interest—regardless of the fact that he has satisfied the Article III constitutional requirements for standing. See 4 Moore’s Federal Practice, § 17.10[1] (Matthew Bender 3d ed.) (stating that not every party with standing is a real party in interest, although real parties in interest usually have standing). Adopting the more rigorous requirement, the Court finds that Plaintiff not only has standing, but is a real party in interest.

The long-standing American common law rule that “the parent stands in court [on his child’s behalf] as the real party in interest upon his natural right of parent,” Lehman v. Lycoming County Children’s Servs. Agency, 458 U.S. 502, 524 (1982) (Blackmun, J., dissenting) (quoting Learned Hand, Habeas Corpus Proceedings for the Release of Infants, 56 Cent. L.J. 385, 389 (1903)), is not without exception. Indeed, concerns for a child’s well-being in light of his parents’ “own wrongdoing

¹⁸In this way, the real party in interest examination is similar to the Article III standing question. The notable distinctions are somewhat academic, but include the following: (1) standing requires a glance at the merits in order to establish injury in fact; but cf. Lenhard v. Wolff, 443 U.S. 1306, 1310 (1979) (asserting that standing does not involve the merits of the case in any fashion); (2) standing cannot be waived; and (3) a court may challenge a plaintiff’s standing *sua sponte*. See 6A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1542, at 330-33 (2d ed. 1990).

or unfitness” militate against the rule. See id. Furthermore, American jurisprudence has long held that minor children may be real parties in interest when they possess rights reserved to them. See Martin v. Barbour, 140 U.S. 634, 647 (1891). A real party in interest need not even have the ability to “realize that [his] fate is involved in these proceedings.” Gardner v. Alabama, 385 F.2d 804, 806 (5th Cir. 1967), cert. denied, 389 U.S. 1046 (1968) (conferring real party in interest status upon, among others, “innocent babies and children who are too immature” to realize that suit was brought on their behalf).

At the outset, the Court observes that the instant case was brought in Plaintiff’s name. Moreover, the Court finds that Plaintiff, despite his tender age, possesses a “significant interest” in requiring the INS to follow its own procedures once asylum applications have been presented to the INS. This conclusion is based on the fact that a decision on one’s asylum claim likely has enduring consequences.¹⁹ Thus, the Court finds that Plaintiff is a real party in interest for the narrow purpose of proceeding with this lawsuit to determine whether or not Defendants violated Plaintiff’s rights to procedural due process.

4. Capacity To Sue—Fed. R. Civ. P. 17(b)

The fact that Plaintiff has standing and is a real party in interest begs the next question: Does Plaintiff possess the requisite capacity to sue? The phrase “capacity to sue” refers to “a party’s

¹⁹The Court rejects Defendants’ claim that the INS’s determination that Plaintiff’s father retains the sole authority to decide whether Plaintiff may apply for asylum guides the analysis of the Rule 17(a) determination. The Court also observes that because Plaintiff’s father is not a party to this litigation, and has filed no motion to intervene, the Court is not confronted with the question of whether Juan Gonzalez, too, could be a real party in interest in this case. See generally Fed. R. Civ. P. 19 (providing rules regarding joinder of parties).

personal right to litigate in a federal court.” Glickstein v. Sun Bank/Miami, N.A., 922 F.2d 666, 670 (11th Cir. 1991) (quoting 6A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1542, at 327 (2d ed. 1990)). As distinct from the standing and real party in interest analyses, capacity doctrine speaks to a party’s “legal qualification, *such as legal age*, that determines one’s ability to sue or be sued” Black’s Law Dictionary 199 (7th ed. 1999) (emphasis added). Rule 17(b) of the Federal Rules of Civil Procedure sets forth the road map to resolving this issue: “The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual’s domicile.” Fed. R. Civ. P. 17(b).

In the context of establishing citizenship for diversity purposes under 28 U.S.C. § 1332, a “domicile” is defined as the place where a person takes up residence with the intention to remain in that place. See Mas v. Perry, 489 F.2d 1396, 1399 (5th Cir. 1974). The Eleventh Circuit has imported this concept of domicile into the immigration law context. See Melian v. INS, 987 F.2d 1521, 1524 (11th Cir. 1993).

The Court need not decide whether Plaintiff was and is a domiciliary of Cuba or Florida, for under the laws of either jurisdiction, Plaintiff lacks capacity to bring suit for the purposes of Rule 17(b). Cuba’s Family Code²⁰ clearly provides that children “are under the *patria potestas* of their parents,” id. art. 82, which bestows upon parents the right and duty of “representing their children in every judicial action . . . in which they are involve[d]” Id. art. 85(5). More specifically, Cuban law

²⁰See Código de familia. Ley 1,289 of 14 Feb 1975 in *Gaceta oficial* 15 Feb 1975. Translated in *Family code*. [Havana], Ministry of Justice, 1975.

explicitly provides that six-year-old children lack capacity to bring lawsuits. See id. arts. 29.1, 31(a). Therefore, because Plaintiff was six years old at the filing of this action, Cuban law considers Plaintiff without capacity to bring this lawsuit himself.

Similarly, in Florida, children do not have capacity to sue at age six. Under Florida law, a “minor” is any person under age eighteen. See Fla. Stat. Ann. § 1.01(13) (West 1999). As a general rule, minors are bound by a statutory “disability of nonage,” see, e.g., Fla. Stat. Ann. § 743.07(1) (West 2000), which curtails certain rights. See 25 Fl. Jur. 2d Fam. L. § 254 (1992). One result of this disability is incapacity to sue. See, e.g., Kingsley v. Kingsley, 623 So. 2d 780 (Fla. 5th DCA 1993) (holding that a minor did not have capacity to sue for termination of his parents’ parental rights). Thus, under the law of either Cuba or Florida—the only jurisdictions that Plaintiff would appear to claim as his domicile—Plaintiff does not have capacity to sue.

5. Lazaro Gonzalez as Next Friend—Fed. R. Civ. P. 17(c)

Rule 17(c) of the Federal Rules of Civil Procedure anticipates this situation, providing several alternatives by which a plaintiff lacking capacity to sue under Rule 17(b) may initiate and pursue a federal civil suit. See Fed. R. Civ. P. 17(c). Rule 17(c) provides as follows:

Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Fed. R. Civ. P. 17(c).

In the case at bar, Lazaro Gonzalez is the self-appointed “next friend,” by and through whom Plaintiff filed his Complaint, and Lazaro Gonzalez therefore has the burden to establish the propriety of proceeding as Plaintiff’s next friend in this action. See Ford v. Haley, 195 F.3d 603, 624 (11th Cir. 1999). The ability to function as a next friend is not “‘granted automatically to whomever seeks to pursue an action on behalf of another.’” Lonchar v. Zant, 978 F.2d 637, 640 (11th Cir. 1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 163 (1990)). Instead, a would-be next friend, such as Lazaro Gonzalez, must satisfy specific criteria, which the Supreme Court enunciated first in the area of habeas corpus law, see Whitmore, 495 U.S. 149, but which have been extended more recently to general federal civil litigation, see T.W. v. Brophy, 954 F. Supp. 1306, 1309 (E.D. Wis. 1996).

In the Eleventh Circuit, a next friend: (1) must “prove that the real party in interest cannot pursue his own cause due to some disability . . . and (2) must show some relationship or other evidence that demonstrates the next friend is truly dedicated to the interests of the real party in interest.” Ford v. Haley, 195 F.3d at 624. The Court’s Rule 17(b) analysis above illustrates the satisfaction of the first prong of the next friend test. Lazaro Gonzalez’s satisfaction of the second requirement, however, requires additional consideration.

Typically, the next friend who sues on behalf of a minor is that minor’s parent. See Nancy J. Moore, Conflicts of Interests in the Representation of Children, 64 Fordham L. Rev. 1819, 1855 (1996). Furthermore, when a parent brings an action on behalf of a child, and it is evident that the interests of each are the same, no need exists for someone other than the parent to represent the child’s

interests under Rule 17(c). See Croce v. Bromley Corp., 623 F.2d 1084, 1093 (5th Cir. 1980) (ruling that the district court did not commit reversible error by failing to appoint a guardian ad litem for a child whose mother/legal guardian brought an action on the child's behalf).

The participation of a non-parent next friend should give the Court some pause, but may be appropriate in certain circumstances. Chief Justice Marshall recognized the existence of such circumstances, and provided the following brief commentary that is as applicable to the instant case as it was to litigation during his time:

It is not error, but it is calculated to awaken attention that, in this case, though the infants, as the record shows, had parents living; a person not appearing from his name, or shown on the record to be connected with them, was appointed their guardian ad litem.²¹

Bank of the United States v. Ritchie, 33 U.S. 128, 144 (1834).

In the instant case, the father did not participate in filing the action. Quite to the contrary, it appears that the interests of Juan Gonzalez and those asserted in the Complaint are sharply at odds with one another. The question for the Court is whether Lazaro Gonzalez is “truly dedicated” to Plaintiff's interests.²²

In Developmental Disabilities Advocacy Ctr., Inc. v. Melton, 689 F.2d 281, 285 (1st Cir.

²¹Rule 17(c) equates a next friend with a guardian ad litem in terms of their respective duties to represent the interests of an infant or incompetent person. See also 4 Moore's Federal Practice, § 17.10[3][c] (Matthew Bender 3d ed.) (noting that next friends and guardians ad litem are both nominal representatives—as compared to general guardians, who have more vested interests).

²²Defendants argue that Lazaro Gonzalez cannot function as a next friend because he would displace the rights of Juan Gonzalez as Plaintiff's legal representative under Rule 17(c). Yet the assumption that Juan Gonzalez is Plaintiff's legal guardian does not foreclose Lazaro Gonzalez's next friend status.

1982), the First Circuit recognized that even when a plaintiff has a duly appointed guardian and Rule 17(c) “would appear to preclude suit by a next friend,” Rule 17(c) actually mandates that the Court utilize its discretion to override the duly appointed guardian’s position if necessary “for the protection of the infant or incompetent person.” See id.; Fed. R. Civ. P. 17(c). This idea was supported in Chrissy F. v. Mississippi Dept. of Public Welfare, 883 F.2d 25 (5th Cir. 1989), in which the Fifth Circuit found that the interests of a plaintiff, who sued Mississippi officials for ignoring her complaints that her father had sexually abused her, were diametrically opposed to those of her custody-seeking father. The court noted that Rule 17(c) values a parent’s rights to represent a child, but when the complaint “shows” a conflict of interest between the two, Rule 17(c) calls for the appointment of another representative who can better protect the plaintiff’s interests. Id. at 27.

By no means does the Court suggest any similarities between the father in Chrissy F. and Juan Gonzalez. However, the reasoning of that case is applicable here, in that Plaintiff’s Complaint “shows” a potential conflict of interest between Plaintiff’s claim and the father’s opposing view, as expressed by Defendants. While Lazaro Gonzalez is not Plaintiff’s father, neither is he a stranger who has thrust himself into this lawsuit.²³ Lazaro Gonzalez has illustrated his dedication to Plaintiff’s interests in several ways: He has embraced the responsibility of prosecuting the instant case; he has cared for Plaintiff in his own home for more than two months; and he demonstrated sufficient interest in the child such that the

²³ While Defendants strenuously object to Lazaro as next friend under Rule 17(c), they do not challenge Lazaro’s legal capacity to represent Plaintiff under Rule 17(b).

INS²⁴ itself placed Plaintiff in his hands on November 25, 1999.²⁵

In Johns v. Department of Justice, 624 F.2d 522 (5th Cir. 1980), the Fifth Circuit addressed a situation in which a one-day-old child was taken from her birth mother in Mexico and brought to the United States, where she lived with an American couple—the Johns. After the INS ordered the child to be deported to Mexico, the Johns sought an injunction against deportation and a writ of habeas corpus in district court. The district court dismissed the case with prejudice, and the Johns appealed. See id. at 523. In remanding the case to the district court for the appointment of a guardian ad litem, the Fifth Circuit found that neither the birth mother nor the Johns necessarily represented the interests of the child. See id. at 523-24.

Under different circumstances, the Court can envision other representatives for Plaintiff's interests in this litigation. However, Lazaro Gonzalez has shown that he has at heart Plaintiff's interests as an unadmitted alien applying for asylum. Accordingly, Lazaro Gonzalez is a proper next friend.

²⁴To the extent that it is asserted that the INS should assume the role of next friend in the instant litigation, the Court observes that although the INS has maintained custody over Plaintiff in the absence of his father, the INS would be prohibited from representing Plaintiff in the instant case, as the INS is an opposing party to this litigation. See, e.g., Rule 1.7, ABA Model Rules of Professional Conduct.

²⁵The Court observes that while the INS placed Plaintiff with Lazaro Gonzalez, it has since indicated its opinion that “such placement does not confer upon Lazaro Gonzalez the authority to act on behalf of Elian in immigration matters or authorize representation in direct opposition to the express wishes of [Juan Gonzalez].” Letter from Michael A. Pearson, Executive Associate Commissioner for Field Operations, to Roger Bernstein and Spencer Eig of 1/5/00, Defendants’ Notice of Filing Record and Exhibits, at 5-6.

The Court declines comment on the Florida state court case that found Lazaro to be a suitable temporary legal custodian for Plaintiff. See Temporary Protective Order, Gonzalez v. Gonzalez-Quintana, 00-00479 FC 29 (Fla. Cir. Ct. Jan. 10, 2000). Nevertheless, this finding supports the Court’s conclusion that Lazaro is a proper next friend in the instant case.

Last, but certainly not least, to the extent that Plaintiff's father feels prejudiced by the Court's holding that Lazaro Gonzalez is an appropriate next friend, the father may move to challenge this finding. See Garrick v. Weaver, 888 F.2d 687, 693 (10th Cir. 1989) (recognizing the right to request removal of a next friend and/or to have the Court appoint another representative to protect plaintiff's interests).

6. Proper Plaintiff Conclusion

In conclusion, the Court finds that Plaintiff has standing to bring the instant case, and that Plaintiff is the real party in interest in this litigation. However, due to his young age, Plaintiff does not have capacity to sue. Thus, he needs someone to represent his interests, and the Court is satisfied that Lazaro Gonzalez represents Plaintiff's interests sufficiently under the next friend test. The Court next turns to Defendants' attack on the specific allegations of the Complaint.

III. ANALYSIS OF THE COMPLAINT

Summary of Part III

Having found limited subject matter jurisdiction to consider the Complaint, and following its determinations as to the issues of standing and next friend, the Court turns to the particular claims set forth within the Complaint, as well as the arguments relating to them.

As to Count I, the Court finds that Plaintiff has failed to state a claim for violations of constitutional due process. In its analysis of Count II, the Court concludes that the Attorney General acted within her discretion in determining, as a matter of law, both that Plaintiff's father is solely authorized to act on behalf of his son with respect to any decision to apply or not to apply for asylum,

and that Plaintiff's applications for asylum need not be considered by the INS without the father's authorization. In light of its findings with regard to Count II, the Court determines that Plaintiff's claims under Counts III, IV, and V are without merit. Accordingly, the Complaint must be dismissed in its entirety.

A. Count I: Constitutional Due Process²⁶

Under Count I of the Complaint, Plaintiff seeks relief for violations of constitutionally protected due process rights. Specifically, he charges that Defendants denied him due process by depriving him of the right to petition for asylum, declining to adjudicate his petitions for asylum and withholding of removal, and refusing to recognize his right to counsel. In their Motion, Defendants assert that Plaintiff's claim must be denied as a matter of law, and the Court agrees.

The procedural component of the Fifth Amendment's Due Process Clause protects against the deprivation of life, liberty, or property without "due process of law." U.S. Const. amd. V. The necessary first step in evaluating any procedural due process claim is determining whether a constitutionally protected interest has been implicated. See Economic Dev. Corp. v. Stierheim, 782 F.2d 952, 954-55 (11th Cir. 1986) ("In assessing a claim based on an alleged denial of procedural due process a court must first decide whether the complaining party has been deprived of a constitutionally protected liberty or property interest. Absent such a deprivation, there can be no denial of due process."). However, "expectation does not equate with liberty or property, and a constitutionally

²⁶For the purposes of the Court's analysis under Count I, the Court considers Defendants' Motion To Dismiss.

protected interest cannot arise from relief that the executive exercises unfettered discretion to award.” Tefel v. Reno, 180 F.3d 1286, 1300 (11th Cir. 1999) (citing Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981)). In Tefel, the Eleventh Circuit confirmed its prior holding in Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986), “that the failure to receive discretionary relief in the immigration context does not deprive an alien of a constitutionally protected liberty interest.” Tefel, 180 F.3d at 130 (citing Garcia-Mir, 788 F.2d 1446).

Plaintiff is an unadmitted alien, and as such, is treated as being “on the threshold of initial entry” into the United States. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212, 215 (1953). Plaintiff claims that because he has been paroled, he is entitled to the same constitutional protections as all persons in the territorial jurisdiction of the United States. However, this argument was expressly rejected in Jean v. Nelson, 727 F.2d 957, 969 (11th Cir. 1984) (quoting Leng May Ma v. Barber, 357 U.S. 185, 188 (1958) (“The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien’s status.”)).

Moreover, in Jean v. Nelson, the Eleventh Circuit specifically held that excludable (or unadmitted)²⁷ aliens seeking parole pending determination of their claims for admission “are not within the protection of the Fifth Amendment.” Jean, 727 F.2d at 968; see also Landon v. Plasencia, 459 U.S. 21, 32 (1982) (“[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application . . .”). Additionally, the asylum provisions established by Congress do not create any constitutionally protected interests. See Jean, 727 F.2d at

²⁷See supra note 8.

984 (“Excludable aliens cannot challenge the decisions of executive officials with regard to their applications for admission, asylum, or parole on the basis of the rights guaranteed by the United States Constitution.”).

Accordingly, in light of Plaintiff’s status as an unadmitted alien, no set of facts will support Plaintiff’s claim for a denial of constitutional due process under Count I, and this Count must be dismissed.

B. Count II: Violations of 8 U.S.C. § 1103(a) and 8 U.S.C. § 1158(a)²⁸

Count II of Plaintiff’s Complaint alleges a violation of 8 U.S.C. § 1103(a) and 8 U.S.C. § 1158(a). As to Count II, Defendants’ Motion hinges on the following narrow question: Did the Attorney General have the authority to determine that, in light of the express contrary wishes of Plaintiff’s father, an application filed by someone else on six-year-old Plaintiff’s behalf did not require adjudication on its merits? After careful consideration, the Court finds that the Attorney General’s determination is controlling, conclusive, not manifestly contrary to law, and not an abuse of her congressionally delegated discretion.

1. Analysis of Applicable Statutory Provisions

As a starting point for its analysis, the Court looks to 8 U.S.C. § 1103(a), which provides the following general statement about decisions of the Attorney General on questions of law:

²⁸For the purposes of the Court’s analysis under Count II, the Court considers Defendants’ Motion for Summary Judgment. Plaintiff objects to consideration of the Motion for Summary Judgment on the basis of a need for discovery; however, the Court finds that no discovery is required in order to rule on the Motion, which is ripe for adjudication.

(1) The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: Provided, however, [t]hat *determination and ruling by the Attorney General with respect to all questions of law shall be controlling.*

8 U.S.C. § 1103(a)(1) (emphasis added).²⁹

Under 8 U.S.C. § 1158(a), Congress provides some guidance on the issue of who may apply for asylum:

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1158(a)(1).

While section 1158(a) provides for authority to apply for asylum, it fails to set forth a standard of review. For direction, the Court looks to 8 U.S.C. § 1252(b)(4)(D), which provides as follows:

Except as provided in paragraph (5)(B)—

...

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

²⁹Section 1103(a) does not speak directly to review of the Attorney General's decisions in the asylum context; however, this provision does quite clearly provide a general grant of deference to decisions on "questions of law." 8 U.S.C. § 1103(a)(1). The Court observes, however, that section 1103(a) does not state explicitly that judicial review over decisions under section 1103(a) shall be precluded.

8 U.S.C. § 1252(b)(4)(D). This “manifestly contrary to the law and an abuse of discretion” standard provides strong support for the proposition that Congress did not intend to provide for much second-guessing of administrative decisions under section 1158(a).

2. Analysis of the Attorney General’s Actions³⁰

Before evaluating the actions taken by the Attorney General with regard to Plaintiff’s applications for asylum, the Court must properly characterize the Attorney General’s decision at issue. On January 5, 2000, attorneys purporting to represent Plaintiff wrote to the Attorney General, asking that she determine whether the INS had properly followed its procedures in dealing with Plaintiff’s applications.

Faced with an unprecedented set of circumstances—including a six-year-old child who had recently lost his mother, a father who had indicated (prior to his son’s application for asylum) that he opposed any potential application for admission or asylum, the fact that the INS had conducted two in-person interviews with the father and had found no evidence of abuse, and principles of international standards that support the presumption that a parent speaks for his or her child³¹—the Attorney

³⁰ Under 8 U.S.C. § 1103(a)(1), primary responsibility for enforcing and administering immigration law is vested in the Attorney General. See 8 U.S.C. § 1103. Pursuant to this authority, the Attorney General has delegated her ability to enforce immigration law to the Commissioner of the INS, who “may redelegate any such authority to any other officer or employee of the [INS].” 8 C.F.R. § 2.1.

While there are multiple defendants in this action, it is clear that the decision of the Attorney General, which was issued upon Plaintiff’s request for review of the INS’s decision, is controlling. The Court notes that Plaintiff did not include a copy of the Attorney General’s January 12, 2000 letter with his Complaint; however, the letter was attached as Exhibit K to Plaintiff’s Motion for Preliminary and Permanent Injunctive Relief.

³¹The Court again observes that Juan Gonzalez has filed no motion to intervene, or other challenge to the ability of Lazaro Gonzalez to speak for Plaintiff in the context of the above-captioned action.

General found that the INS Commissioner had correctly concluded that the wishes of Juan Gonzalez properly had been granted.³²

In her decision, the Attorney General concluded that Plaintiff is not competent to demonstrate an “intention to apply for asylum,” and that “under universally accepted legal norms,” Plaintiff’s father should speak for Plaintiff. Letter from Attorney General Janet Reno to Spencer Eig, Roger Bernstein, and Linda Osberg-Braun of 1/12/00, Defendants’ Notice of Filing Record and Exhibits, at 25-28.

The Attorney General’s finding of incompetency on the part of Plaintiff, much like a federal court’s determination of a prospective witness’s capacity or competency to testify, is a threshold matter in need of resolution prior to the processing of Plaintiff’s application. And like such determinations in federal court, the Attorney General’s finding as to Plaintiff’s competency is best characterized as a question of law.

Under the facts alleged, and based on the nature of the issue of capacity to apply for asylum considered by the Attorney General—specifically its character as a question of law—the Attorney General’s decision is controlling, see 8 U.S.C. § 1103(a), and thus dispositive of Count II.

3. Deference Analysis

As an alternative basis for addressing Plaintiff’s claims under Count II, the Court considers Defendants’ arguments relating to judicial deference to administrative decisionmaking.

a. Presumption of Deference to Administrative Decisionmaking

The Administrative Procedure Act (“APA”), 5 U.S.C. §§ 101 et seq., defines the role of

³²Clearly, the circumstances at issue differ significantly from those at issue in Reno v. Catholic Social Servs., Inc., 509 U.S. 43 (1993), in which a “front-desking” practice prohibited access to judicial review.

administrative agencies in the relationship among the three branches of government and the American citizenry. In doing so, the APA provides administrative agencies with broad discretion to establish policies and regulations, while imposing few limitations on that authority.

This broad discretion is extended by the manner in which federal courts assess the propriety of administrative decisionmaking. Under the applicable standards of review, courts give great deference to agency decisions. For example, pursuant to the APA, in the absence of congressional intent indicating otherwise, courts hold agency findings and decisions unlawful only if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Legal Environmental Assistance Foundation, Inc. v. EPA, 118 F.3d 1467, 1473 (11th Cir. 1997) (quoting 5 U.S.C. § 706(2)(A)).

In the event that courts reviewing an agency interpretation are presented with a statute that is “silent or ambiguous” with regard to intent, or there is otherwise a “gap left, implicitly or explicitly, by Congress,” courts must ask whether the agency action at issue is based upon a permissible interpretation of the statute. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (citing Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

In Chevron, the Supreme Court set forth the following two-step analysis for judicial determinations regarding the propriety of agency action:

If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a *permissible construction* of the statute.

Chevron, 467 U.S. at 842-43 (1984) (citations omitted) (emphasis added). The Supreme Court further noted that “[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.” Id.³³

The Supreme Court consistently has recognized, however, that the unique aspects of immigration law require a special approach. It is firmly established that immigration matters are within the plenary control of Congress. See U.S. Const. art. I, § 8, cl. 4 (“The Congress shall have Power . . . To establish an uniform Rule of Naturalization . . .”); see also Fiallo v. Bell, 430 U.S. 787, 792 (1977) (“[O]ver no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”) (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

In the exercise of its plenary control, as evidenced in 8 U.S.C. § 1103 and other statutory provisions, Congress has made “sweeping . . . delegations of authority” to the Attorney General in the context of immigration matters. Jean v. Nelson, 727 F.2d 957, 965 (11th Cir. 1984); see, e.g., United States v. Shaughnessy, 353 U.S. 72, 78 (1957) (holding that where Congress fails to specify standards to guide the Attorney General’s discretion in immigration, the Attorney General may rely on any

³³In their Motion, Defendants direct the Court’s attention to the case of Kleindienst v. Mandel, 408 U.S. 753 (1972), asserting that Kleindienst provides the applicable standard of review. In Kleindienst, the Supreme Court upheld the Attorney General’s discretion to deny a waiver to allow an entry visa to a Marxist professor from Belgium who had violated the restrictions on his visa during an earlier visit. See id. Specifically, the Court held that when Congress delegates discretionary authority in the context of constitutional challenges, and “the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion.” Id. at 770.

Upon a review of the facts of the case, the Court finds that because the standard set forth in Kleindienst applies when a plaintiff asserts a *constitutional* challenge to agency action, the standard is inapplicable to the Court’s analysis of Count II of the Complaint.

reasonable factors).

The Supreme Court has acknowledged this broad exercise of congressional authority, “recogniz[ing] that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations.” INS v. Aguirre-Aguirre, 119 S. Ct. 1439, 1445 (1999). The Court has further observed that “[t]he judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of [certain] diplomatic repercussions.” Id.; see also Hampton v. Mow Sun Wong, 426 U.S. 88, 101-02 n.21 (1976) (“[T]he power over aliens is of a political character and therefore subject only to narrow judicial review.”).

b. “Silence or Ambiguity of 8 U.S.C. § 1158(a)”

Under Chevron, where a statute is “silent or ambiguous,” actions by the Attorney General are to be reviewed for a determination of whether the agency’s judgment call was based upon a “permissible construction of the statute.” 467 U.S. at 842-43. As the Eleventh Circuit has noted in Herman v. NationsBank Trust Co., 126 F.3d 1354 (11th Cir. 1997):

Under Chevron a court is not to search for what in the court’s view is the best possible construction of the statute Realizing that administrators and judges might well disagree about the wisdom of a policy behind an agency’s construction of a statutory provision, the Supreme Court admonished courts not to forget to whom the authority and responsibility for such policy making is entrusted.

Id. at 1363 (quoting Jaramillo v. INS, 1 F.3d 1149, 1152 (11th Cir. 1993) (en banc)).

Plaintiff asserts that the language of section 1158(a) is clear and unambiguous, thus precluding an analysis under Chevron. However, upon a closer examination of section 1158(a), in the context of

other pertinent statutory provisions,³⁴ the Court is unconvinced that Plaintiff's narrow reading is an appropriate construction of the statutory language. Rather, for the reasons discussed below, the Court agrees with Defendants' argument that 8 U.S.C. § 1158(a) falls into the category of statutes that are "silent or ambiguous," or otherwise contain a "gap left, implicitly or explicitly, by Congress." Chevron, 467 U.S. at 842-43 (1984) (citing Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

To begin, 8 U.S.C. § 1158(a) fails to mention one particular class of aliens—children. This could be construed as silence, in light of the fact that in immigration law, Congress and the INS often make special provisions for children and others who may have difficulty acting in their own best interests. See, e.g., 8 U.S.C. § 1182 (a)(9)(B)(iii)(I) ("No period of time in which an alien is *under 18 years of age* shall be taken into account in determining the period of unlawful presence in the United States under clause (i).") (emphasis added); Perez-Funez v. INS, 619 F. Supp. 656, 661 (C.D. Cal. 1985) ("The Court notes that, as discussed above, INS policy treats children *fourteen years of age and older* differently from younger class members.") (emphasis added); 8 C.F.R. § 236.2(a) ("If the respondent is confined, or if he or she is an incompetent, *or a minor under the age of 14*, the notice to appear, and the warrant of arrest, if issued, shall be served in the manner prescribed in § 239.1 of this chapter . . .") (emphasis added); 8 C.F.R. § 240.38 ("Every alien *14 years of age or older* who is excluded from admission to the United States by an immigration judge shall be fingerprinted . . .") (emphasis added). In light of these examples of age-specific provisions, it is apparent that Congress and the INS recognize that children deserve special treatment under immigration law.

³⁴In order to determine whether an agency's interpretation constitutes a permissible construction, a court must look to the structure and language of the statute as a whole. See Kmart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).

Plaintiff would have the Court focus purely on 8 U.S.C. § 1158(a)(1) to the exclusion of the remainder of section 1158 and other portions of the INA. However, for the Court to do so would be to reject firmly established principles of statutory interpretation that guide this Court's analysis, as well as to accept the logical extension of Plaintiff's argument, which is that Congress requires the Attorney General to adjudicate asylum applications from all children—no matter how young in age, no matter who claims to speak for them, and no matter what their mental condition.³⁵ This conclusion seems especially unreasonable in light of the potential harm that may result to a child on whose behalf an asylum application is filed.³⁶

Consider, as an example, the case in which a child is kidnapped abroad, brought to the United States, and an application for asylum is filed on his or her behalf by the kidnapper. In that case, Plaintiff would have the Court believe that even if the Attorney General were aware that the child had been kidnapped, the Attorney General would be obligated to accept the application. While it is true that the

³⁵This is not to say that the INS should, as a matter of course, prohibit children from applying for asylum when their parents oppose the application. Rather, the INS seems to contemplate occasional parental conflict in the context of unaccompanied juvenile aliens. See 8 C.F.R. 236.3(e) ("If a parent of a juvenile detained by the [INS] can be located, and is otherwise suitable to receive custody of the juvenile, and the juvenile indicates a refusal to be released to his or her parent, the parent(s) shall be notified of the juvenile's refusal to be released to the parent(s), and shall be afforded an opportunity to present their views to the district director, chief patrol agent, or immigration judge before a custody determination is made.").

³⁶The Court observes that if asylum is rejected, the child would lose his or her ability to apply for asylum again at any point in the future. See 8 U.S.C. § 1158(a)(2)(c) (providing that if an alien has applied for and been denied asylum, he or she may not apply for asylum again); see also 8 U.S.C. § 1158(d)(6) ("If the Attorney General determines that an alien has knowingly made a frivolous application for asylum . . . , the alien shall be permanently ineligible for any benefits under this chapter . . ."); see also *Polovchak v. Meese*, 774 F.2d 731 (7th Cir. 1985) (holding that the government violated the due process rights of a minor resident alien's parents by granting asylum to the alien without giving the parents notice and an opportunity to be heard).

Attorney General would have an ability to deny the application following an adjudication, this would not alter the fact that the child's status under 8 U.S.C. § 1158(a) would have changed.³⁷

Moreover, if Congress truly intended section 1158(a) to permit any alien to apply for asylum, why enact 8 U.S.C. § 1252(b)(4)(D) at all?³⁸ The fact that section 1252(b)(4)(D) provides a standard of review for "discretionary judgment" exercised by the Attorney General under section 1158(a) is the dagger to the heart of Plaintiff's request.³⁹

This conclusion is bolstered by the fact that within 8 U.S.C. § 1158(a)(2), Congress has provided for exceptions to the term "[a]ny alien." These include aliens who: 1) may be removed to a safe third country, 2) have failed to file for asylum within one year of arriving in the United States, or 3) have previously applied for and been denied asylum. See 8 U.S.C. § 1158(a)(2). Thus, "[a]ny alien" was evidently not intended by Congress literally to include *all* aliens.

Due to the failure of 8 U.S.C. § 1158(a) to address minors, as well as the fact that the word "[a]ny" in "[a]ny alien" is internally contradicted by 8 U.S.C. § 1158(a)(2), the Court concludes that

³⁷The Court acknowledges that the Attorney General has discretion to consider changed circumstances under 8 U.S.C. § 1158(a)(2)(D); however, this does not obviate the additional barrier that the kidnapped child would face in the future upon an attempt to file a new application for asylum.

³⁸The Court also observes that the scope of 8 U.S.C. § 1252(b)(4)(D), in providing a standard of review for decisions under 8 U.S.C. § 1158(a), must apply only to section 1158(a)(1), as judicial review is explicitly precluded as to section 1158(a)(2) by section 1158(a)(3) ("No court shall have jurisdiction to review any determinations of the Attorney General under paragraph (2)."). See also discussion supra at 18.

³⁹ To find otherwise would be to attribute to Congress an intentional inconsistency between these statutory provisions, and the Court hesitates to make such a finding. See Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1529 (11th Cir. 1996) ("Congress is presumed not to have intended absurd (impossible) results.").

the words “[a]ny alien” cannot be read as literally as Plaintiff suggests to the Court,⁴⁰ and that 8 U.S.C. § 1158(a), regardless of the reason,⁴¹ is sufficiently “silent or ambiguous” to warrant an analysis under Chevron.

Having found that the statute is “silent or ambiguous,” the pertinent question is whether the Attorney General’s construction of 8 U.S.C. § 1158(a) was a “permissible interpretation.” The Court finds that, in light of the discretion afforded to the Attorney General and the pertinent statutory provisions treating children differently from adults, the interpretation of the Attorney General was permissible, and relief cannot be awarded under Count II.

C. Counts III and IV: Violations of 8 C.F.R. § 208.9 and 8 C.F.R. § 208.14(b)

Following its determination that the decision of the Attorney General is controlling both on the issue of Plaintiff’s capacity to file an application for asylum and on the question of who may speak for Plaintiff in the face of Plaintiff’s incompetence, the Court addresses briefly Plaintiff’s claims under

⁴⁰See United States v. Kirby, 74 U.S. (7 Wall.) 482, 486-87 (1868) (“All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.”).

⁴¹As Justice Scalia has eloquently articulated,

In the vast majority of cases I expect that Congress neither (1) intended a single result, nor (2) meant to confer discretion upon the agency, but rather (3) didn’t think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.

Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517 (1989).

Counts III and IV that Defendants violated specific regulations.

Under Counts III and IV of the Complaint, Plaintiff sets forth claims under 8 C.F.R. § 208.9 and 8 C.F.R. § 208.14(b), which are regulatory provisions promulgated pursuant to the authority of the Attorney General to administer and enforce all laws relating to the immigration and naturalization of aliens.⁴² See 8 U.S.C. § 1103(a); 8 U.S.C. 1158(d)(1) (expressly directing the Attorney General to “establish a procedure for the consideration of asylum applications”).

As noted above, the Attorney General’s determination as to Plaintiff’s capacity to apply for asylum is controlling, and in light of that conclusion, no asylum applications are pending. Therefore, Counts III and IV must fail.

D. Count V: Petition for Writ of Mandamus

In Count V, Plaintiff seeks relief in the form of a writ of mandamus compelling Defendants to comply with their procedures for adjudicating asylum applications. Under 28 U.S.C. § 1361, this Court shall issue a writ “to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.” 28 U.S.C. § 1361.

A writ of mandamus is inappropriate, however, as to the exercise of a discretionary duty. See Einhorn v. DeWitt, 618 F.2d 347, 349 (5th Cir. 1980). In light of the Court’s findings above, to the extent that any duty existed with respect to the consideration of Plaintiff’s applications for asylum, that

⁴²Plaintiff does not challenge the promulgation of the cited regulations. Rather, he disputes whether Defendants properly applied these regulations to his application for asylum.

duty was discretionary. Accordingly, the issuance of a writ would be inappropriate in this case, and Count V must fail as a matter of law.

III. CONCLUSION

In the final analysis, a well-intended lawsuit filed on behalf of and for the benefit of Elian Gonzalez ran headlong into an equally well-intended Attorney General, sworn to uphold the letter and spirit of the immigration law, and determined to see that a father's wishes to be reunited with his six-year-old son be given primacy in law and fact.

At age six, Elian's recorded past is a profile of survival and courage in the face of adversity and the loss of his mother at sea. His future will undoubtedly unfold in due time, and it will surely remain a matter of interest to those who oppose his father's wishes.

Even this well-intended litigation has the capacity to bring about unintended harm. In light of the Attorney General's clearly articulated views on the matter of whether Elian Gonzalez should return home, as well as the reality that each passing day is another day lost between Juan Gonzalez and his son, the Court can only hope that those on each side of this litigation place the interests of Elian Gonzalez above all others.

From the outset, Plaintiff's counsel have urged that this lawsuit does not seek asylum, but rather seeks to vindicate a procedural right to apply for asylum. The determination to grant asylum is a matter within the discretion of the Attorney General. She has decided the issue of who may speak for Plaintiff, and her decision, by statute and in the exercise of congressionally delegated discretion, is controlling as a matter of law. A judicial review of the exercise of that discretion by the undersigned has found no abuse that would warrant a contrary conclusion.

BASED UPON the foregoing, it is hereby

ORDERED AND ADJUDGED that the Motion To Dismiss or Alternative Motion for

Summary Judgment is GRANTED. Accordingly, the above-captioned action is DISMISSED.

DONE AND ORDERED in Chambers at Miami, Florida, this ____ day of March, 2000.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: Linda Osberg-Braun
Roger A. Bernstein
Barbara Lagoa
Judd J. Goldberg
Eliot Pedrosa
Kendall Coffey
Spencer Eig
Jose Garcia-Pedrosa
Thomas E. Scott
Dexter A. Lee
David W. Ogden
Patricia L. Maher
Thomas W. Hussey
David J. Kline
William J. Howard
Jocelyn M. Wright
Russell J.E. Verby
John P. Moran
Michelle Gorden

From: Lisa J. Macecevic on 03/31/2000 09:47:08 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: Senate Floor Remarks on S.2314 (Elian bill)

CONGRESSIONAL RECORD

SENATE

PAGE S1856

March 29, 2000

MEASURE READ THE FIRST TIME-S. 2314

Mr. SMITH of New Hampshire. Mr. President, I rise for the purpose of introducing another bill that I send to the desk and ask that it be read for the first time.

The PRESIDING OFFICER. The clerk will report the bill or title.

The legislative clerk read as follows:

A bill (S. 2314) for the relief of Elian Gonzalez and other family members.

Mr. SMITH of New Hampshire. Mr. President, I now ask for the second reading and, on behalf of the minority, I object to my own request.

The PRESIDING OFFICER. The objection is heard.

The bill will be read for the second time on the next legislative day.

Mr. SMITH of New Hampshire. Mr. President, this bill refers to a matter that is on everyone's mind. I know the Senator from Nebraska has had some concerns on this. I rise to explain what this legislation does.

I think timeliness is important. This is an urgent matter. I introduced this bill along with my colleagues from Florida, Senators MACK and GRAHAM. I am pleased to have their support in introducing the bill. I am doing it today to correct an injustice.

There is an injustice being committed, as we speak, by the Attorney General and the Immigration and Naturalization Service against Elian Gonzalez. I thank Senator MACK for his leadership in sponsoring a private relief bill to grant Elian Gonzalez citizenship. A grant of citizenship to Elian Gonzalez has the practical effect of removing the Elian Gonzalez controversy from the immigration law and places the controversy in the Florida courts for a custody proceeding.

This bill today does not grant Elian Gonzalez citizenship. Again, I am doing this with the full support of Senator MACK and Senator GRAHAM. This grants what is called family permanent residency to the family of Elian Gonzalez-that would be Elian, Elian's father in Cuba, Elian's father's current wife in Cuba, Elian's father's son in Cuba or child in Cuba, Elian's two grandmothers and one grandfather, all of them-so they can now come to America, sit down as a family and resolve this matter. If they have to go to custody court, it takes it out of

<immigration> and puts it into the custody court. This does not grant citizenship. It does not interfere in any way other than to say, let's do it in a custody matter, the same way as any other 6-year-old boy would have to do.

Permanent residency status will settle the status of Elian Gonzalez under <immigration> and nationality law and leave the case to be resolved in the Florida State courts in a custody matter, not an <immigration> matter.

Some ask: What is the difference between permanent residency and citizenship? Why are they doing this as opposed to citizenship? Frankly, a lot of my colleagues have expressed concern about citizenship. We want to make it palatable because of the confrontation that is beginning to brew now and may come to a head as early as tomorrow morning where we have a deadline of 9 a.m., where literally this boy could be dragged kicking and screaming from the arms of his uncle, put on a plane, and sent to Havana.

Do we want to see that in America tomorrow? Do we want to see that? That is a confrontation I don't want to see. It is not called for. We don't have to let it happen. This Senate could act today, but under the rules, we may have to act on Tuesday or Wednesday, if it is delayed. Apparently, some have indicated they want to delay it.

I wish to make it clear, it could be acted on if there weren't delays being called for. Permanent residency status would make Elian Gonzalez a resident alien. Resident aliens don't have the privileges of citizenship. They are not allowed to vote and can be deported for committing a crime. Their status is as a resident alien, subject to Federal laws regarding deportation provisions. A citizenship bill would grant the individual all the rights of citizenship: voting rights, no deportation, and all other rights associated with being a citizen.

Do I support that? I happen to support that. I would be glad to give Elian Gonzalez citizenship. I know a majority of my colleagues do not. I am looking out not for what BOB SMITH wants to do but I want to do what is right for Elian Gonzalez. I want Elian to have his day in court as any other child would have in a custody matter where relatives were trying to determine who should have custody.

At 4 p.m. today, Lazaro Gonzalez, his uncle, Elian's uncle in Miami, is going to meet with representatives of the <INS>. They are going to ask Lazaro, in this meeting at 4 o'clock, to give up all rights to this boy, all rights to keep the boy in the country pending a possible appeal to the U.S. Supreme Court. If Lazaro Gonzalez says, "No, I will not give up those rights," then as early as 9 a.m. tomorrow, Elian Gonzalez's parole status will be revoked and the boy could be sent back to Cuba without Elian's appeal being heard by the Eleventh Circuit Court of Appeals.

Very seldom do we come down on the floor with an issue as urgent as this. This is an outrage. This is urgent. I have heard some people say: We don't want to vote on this thing. We should not have to vote on this. We don't want to deal with it. It is too hot to handle. We are not going to vote on this.

Whatever way they vote, I am not trying to tell Senators how to vote. I am asking for a vote. I think the Senate should say to the United States of America, to Fidel Castro, and to the Cuban American community, that we don't want to see this confrontation-and frankly, to Janet Reno-at 9 a.m. tomorrow or 9 a.m. on Friday or 2 o'clock on Saturday or Sunday or next week or next month. I don't want to see on my television screen pictures of Elian Gonzalez being dragged from his home in Miami and placed on that airplane crying and screaming and kicking. I don't want to see that. Not only do I not want it to happen, I don't want to see it happen, either.

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It doesn't have to happen. We can stop it. But if we wait and we delay and delay, and we don't send this message to the Attorney General that we mean business, it will happen. She has backed the family into a corner. Why, I will never know, but she has. We can stop it right here. We can stop it. I want my colleagues to know that if we don't vote and this happens, then it is on our conscience. We can stop this; we have the capacity to do it.

The <INS> and <Justice> Department to this day have not spoken to Elian Gonzalez.

Isn't it interesting? I spoke to him. I met with him for 2 hours. Diane Sawyer has spoken to him. She spoke to him. Senator BOB SMITH spoke to him. He is available. But Janet Reno can't speak to him. Do you know why? He doesn't have any rights. I say to anybody out there who has a 6-year-old child-and I have had three in my time, but they are long past 6 now, and they were pretty smart-at 6 years old, you know what is going on.

Do you know what happened to this little boy? I bet it didn't happen to too many boys anywhere in the world. He saw his mother die, slip under the waves and drown. The last words that came out of her mouth to the other survivors were: Please get Elian to America. That is my dying wish.

He didn't come here on a yacht. He wasn't escorted in some rich boat somewhere and brought to the shores and kidnapped. He was found drifting at sea for 3 days, surrounded by sharks. He survived, and his mother wanted him to be here. His mother had custody. She died. She can't speak for him. Do you know what? If she had lived-this is the irony-this would not be before the Senate. It would not be before the <INS>. They would have 13 months to work this out. He would be allowed to stay. So because his mother died, Elian is now being punished. So Diane Sawyer can talk to him, BOB SMITH can talk to him, but the Attorney General can't be bothered with it because Elian has no rights.

Are we in the Senate going to stand by and tolerate that? Do we want that on our conscience? I hope not. We need a vote on Senator MACK's bill for citizenship, if you wish, or on my bill on permanent residency status, if you wish. It doesn't matter to me. I want to have the vote on what we can get the most votes on so we can win, so that Elian wins, so that the process wins.

This is a little boy we are talking about, who endured more than most children would ever endure collectively throughout the world. I hear all the stuff about it is a family matter. Do you know what? It is a family matter, and we make it a family matter if we pass this resolution because then the family can come here from Cuba, if they care about this little boy. No restraints, no restrictions. Just come and sit down with Elian's family here in America, with the Cuban family, and work it out. If you can't work it out, then go to custody court in Florida, where this matter should be played out.

Without this vote-and I will repeat it for clarity-if we don't take a vote on this, Elian Gonzalez likely will be dragged kicking and screaming from the arms of his Uncle Lazaro and sent off to Cuba. Without this vote, that will happen, most likely. Or another alternative-perhaps worse-is violence, because people are up in arms about this, and they have a right to be. They have been very restrained.

I am proud of the Cuban American community for the way they have conducted themselves in this matter. But we don't need to let this kind of confrontation happen. Do you remember Waco? Janet Reno is doing the same thing again. So we need a vote. Now, if we vote and we vote no, at least you were heard; you are on record. The American people can say, Senator SMITH, or Senator so and so, this is how you voted. We heard you and you voted however you voted; we know how you felt about it.

At least have the courage to cast your vote on this matter.

My legislation grants Elian's family in Cuba permanent residency status. For the record, it includes Juan Miguel Gonzalez, Elian's father, for permanent residency status in America; Nelsy Carmenate, Juan Miguel's wife; Gianni Gonzalez, Juan Miguel Gonzalez's son; Mariella Quintana, Elian's paternal grandmother; Raquel Rodriguez, Elian's maternal grandmother; and Juan Gonzalez, Elian's grandfather. It grants all of them permanent residency. Does it mean that if they come to America, they have to stay? No. But it means if you care about Elian, then you have to come to America and talk to the family here.

I have been told by members of Elian's extended family that Juan Miguel Gonzalez, Elian's father, had expressed an interest in coming to the U.S. a few months before Elian was supposed to arrive.

The cold war is over, they say. It is over every place, I guess, but in the Senate because we want to say that Elian doesn't have any rights and we want to let Fidel Castro dictate what happens. Why would we want to let

Fidel Castro determine the fate of Elian Gonzalez? Let Juan Gonzalez come here. If Castro cares, let the Gonzalez family come here. We are not going to keep them. They can stay if they want and they can go home if they want. We just want them to come and meet with the family here in Miami.

I am deeply concerned about this arbitrary deadline. I repeat it again for emphasis: I am very concerned about this 9 a.m. deadline. I am very concerned that such a deadline would be imposed because it is inflammatory to remove this parole status of Elian Gonzalez.

The goal in introducing this bill is to get the <Justice> Department and the <INS> out of the case and turn it over to the Florida courts and make it a case for custody, so that any 6-year-old boy-if you think of America today, there are custody cases going on right now as we speak. And to say this child doesn't have any rights-how about a child abuse case? Children are interviewed by psychiatrists and psychologists all the time under allegations of child abuse. In custody battles and divorces, they hear from children in custody battles. They are heard every day. Yet Elian can't be heard because of this decision-a regrettable decision-by the Attorney General.

I am going to end with a plea to the Attorney General: Please remove the arbitrary 9 a.m. deadline. Let the courts hear Elian Gonzalez's appeal. This is America. We have courts to resolve custody issues. It is not an <immigration> issue. He didn't <immigrate> here. He didn't <immigrate into this country. He didn't emigrate from Cuba. He left Cuba. He wanted to get out of there and so did his mother. His mother died, and you are punishing him because she died. The other two people who survived-and I met with them as well-are adults, and they are here for 13 months. They are here. No problem. But Elian doesn't have any rights. Find a place in the law that says there is any age limit. At what age does he have rights? Is it 6, 7, 8, 9, 13, or 14? Find it in the law, Madam Attorney General. It is not in there.

We have courts to resolve these matters. Let the Eleventh Circuit Court of Appeals hear Elian's case before you attempt to send him back to Castro's open arms. Don't make the 6-year-old boy be paraded through the streets of Havana by Fidel Castro. Please, remove the arbitrary deadline. Let the Senate be heard. We will be heard, I hope, as early as Tuesday, perhaps Wednesday or Thursday-whenever we can work this through.

I appreciate the cooperation of the majority leader, who has been very helpful in this matter. I am grateful for that. But there are certain things he can't control. Senators have rights to delay, and that is what is happening. Please, I say to the Attorney General, don't try to impose that deadline. Remove it and let reason prevail.

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From: Lisa J. Macecevic on 03/31/2000 09:47:15 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: More Wed. Senate remarks on Elian

CONGRESSIONAL RECORD

SENATE

PAGE S1871

March 29, 2000

IN SUPPORT OF A PRIVATE RELIEF BILL FOR ELIAN GONZALEZ-BROTONS

Mr. MACK. Mr. President, I come to the floor of the Senate to speak about an incident that occurred just before Thanksgiving Day 1999, when a mother who so loved her son that she tried to bring him to the shores of the United States of America from Cuba. Had she succeeded, she would have joined her family members already in the United States. Instead, she met with tragedy in the Florida straits. The mother died. The five-year-old boy survived. Now, we are being forced to consider young Elian's future.

Today, the freedom sought by a mother for her son is being mocked. Elian Gonzalez finds himself in the middle of a struggle between his Miami family and the Department of Justice, an agency unwilling to consider what is in the best interest of the child, an agency continually impairing a fair presentation of the merits of this case.

I ask my colleagues to open their minds and their hearts and listen to why the current process being used by the DOJ and the INS represents a grave injustice and denies a decision that should be based upon Elian's best interest. Remember when Elian first arrived, the INS stated that the matter was a custody decision for a Florida state family court. Forty-eight hours after Castro threatened the United States, the decision flipped, and continues to bend to Castro's will. Now the administration wants to rush an appeals process to send him back to a country that Human Rights Watch states has "highly developed machinery of repression."

In the past week, the Department of Justice has put unrealistic demands on the family of Elian to expedite the appeal of the federal district court decision. The Department of Justice has repeatedly threatened to revoke Elian's parole and remove the child to Cuba if the family fails to agree to their demand that both sides have an appellate brief prepared in one week. These unprecedented tactics short-circuit and dismantle the judicial process in which an appellate is typically allotted a minimum of 30-60 days to prepare a brief. This is plain and simple-Elian's family's civil rights are being denied.

This past Monday, the family under great pressure filed a motion with the Eleventh Circuit to expedite the appeals process, and still, the government's threats have continued. In a letter sent to the family at 10 p.m. on Monday night, the government demanded that the family's attorneys appear for a meeting on Tuesday morning at 9 a.m. with INS officials to discuss the revocation of Elian's parole. The government has continually dictated the terms of all meetings and has bulldozed over the right of Elian and his Miami family.

Today, the Department of Justice has summoned Elian's great-uncle, Lazaro Gonzalez, to a meeting where he is expected by the INS to sign a unilateral demand "to comply with the instructions of the INS," yet the INS has failed to provide the attorneys and the family with what those instructions will be. After all this child has been through, is it too much to ask how the government plans on removing him from the only home he now knows? Should his family agree to having INS agents come to his Miami home and take him? Probably not. But one thing is for sure: they should know the details of what they are agreeing to.

Keep in mind that this same agreement, if signed, destroys any shred of dignity left in our judicial process. It demands that the family's attorneys have a brief prepared to submit to the Supreme Court within 5 days of the appellate court decision, a time line virtually impossible to meet.

In its effort to dictate terms for the family's appeal, the government has betrayed the very integrity for which the Attorney General is charged with defending-equal protection under the law and the right to pursue justice in a free America. In the past week, I've heard justice department officials say they are taking more aggressive action against the family because they want to prevent them from invoking more "legal maneuvers." These "legal maneuvers" happen to be the legal rights of Americans-properly exercised in the middle of an appeals process. These "legal maneuvers" are tools in which all Americans are empowered to seek a fair hearing in the United States of America. I find it unconscionable that the justice department would so blatantly express their desire to dictate terms and influence the outcome of this case.

[Page S1872]

My reason for coming to the floor today is express my sheer frustration and anger in the manner in which the DOJ and the INS has handled this case. The recent acts of these two agencies demonstrate that the administration is no longer interested in resolving this case in a fair, unbiased way. The offer by the Department of Justice is a deeply flawed offer, one that no American would ever accept, one that no person in America should ever have to accept. Elian's mother sacrificed her life for the freedoms of America, freedoms she never had in Cuba, freedoms she never thought our country would deny her son in his moment of need. We should all, despite our views on this issue, be deeply ashamed at any attempt to short circuit justice in order to reach a resolution in the quickest possible way.

In the United States, we stand up to injustice in the world by zealously guarding our laws. We consistently and rightly argue that our strength and power come from our commitment to America's principles: freedom, justice, democracy and the protection of basic human rights. We are a nation founded upon these principles and we remain strong because we defend them. Mr. President, today and throughout the course of Elian's stay in the United States the INS and our Attorney General have not stood up for the one thing they are supposed to defend-justice for all.

Mr. President, I yield the floor.

Mr. JEFFORDS. Mr. President, I ask unanimous consent to proceed as in morning business for a period not to exceed 5 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

The remarks of Mr. JEFFORDS pertaining to the introduction of S. 2311 are located in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

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April 2, 2000 Sunday, CHICAGOLAND FINAL EDITION

SECTION: News; Pg. 6; ZONE: C

LENGTH: 1170 words

HEADLINE: JEB BUSH'S ATTACK ON SET-ASIDES MIGHT HURT HIS BROTHER

BYLINE: By Dahleen Glanton, Tribune Staff Writer.

DATELINE: TALLAHASSEE, Fla.

BODY:

During his first year in office, Florida Gov. Jeb Bush took on the kinds of controversial issues most rookie politicians shy from. With the help of a Republican-dominated legislature, he racked up victory after victory and won high marks from most of his constituents.

But when Bush challenged affirmative action, the honeymoon ended. The governor was thrust into the center of a debate on social policy that has pitted blacks against whites and women against men across the nation.

The fight over Bush's One Florida initiative, which ends racial and gender preferences in university admissions and state contracting, has turned Florida into a battleground for affirmative action and made his brother, Texas Gov. George W. Bush, a target as he prepares to accept the Republican nomination for president.

Civil rights leaders, stung by the demise of affirmative-action programs in Texas, Washington state and California, have vowed to extend the battle to the presidential election by working to defeat George Bush in November. The effort to galvanize black voters, as well as white women and other minorities, began in March with a rally in Tallahassee that drew 11,000 people.

Signing an executive order last November won Bush accolades from many Republicans and stalled efforts by Ward Connerly, who heads a national anti-affirmative-action campaign, to get a proposal on the ballot in Florida like the initiatives that ended similar programs in California and Washington.

Bush was not prepared for the backlash from African-Americans who were incensed that they had been denied an opportunity to voice their concerns. Some analysts suggest Bush may have rushed plans into motion in order to help his brother.

"The last thing he wanted was for Florida to become the battleground for affirmative action during his brother's presidential campaign. So he did what could be described as a pre-emptive strike," said Kenneth Nunn, a law professor at the University of Florida and an expert on affirmative action. "As it turned out, exactly what he did not want to happen is what has happened."

Despite the political risk, Bush insists his move will pay off in the end. In his recent State of the State address, the governor emphasized that the program is working and vowed not to take "one step back in the struggle against racism and discrimination."

The Talented 20 element of the One Florida plan guarantees the top 20 percent of each graduating class at every Florida high school admission to the state's most prominent public universities. Over the next 12 to 36 months, an aide said, the numbers will show that more minorities are enrolled in state universities and awarded contracts under One Florida than under affirmative-action programs.

"Democrats believe the issue can energize their support in the African-American community, but my sense is that the community always is energized in a presidential election year. We expect a 60 to 65 percent African-American voter turnout whether affirmative action is an issue or not," said Al Cardenas, chairman of the Republican Party of Florida, who said he believed most blacks probably will vote Democratic.

"We still have a good ways to go, but my sense is the only way we have to build a successful bridge to the African-American community and its voters is to show that our way is better than the current way. One Florida is a bit of a gamble in that regard, but the payoffs could be very significant for us if we can demonstrate that Republicans have bettered the quality of life for minorities."

A statewide poll taken after the March 7 rally showed that 54 percent of Florida voters support the One Florida initiative, with 37 percent opposed and 9 percent undecided. Voters split sharply along racial lines, with 59 percent of whites and 51 percent of Hispanics supporting it and 81 percent of blacks opposing it. Forty-seven percent of women support it.

Though Jeb Bush has a 56 percent overall approval rating, the controversy may have left him further estranged from blacks, who have long been wary of his politics. When asked during his unsuccessful bid for governor in 1994 what he would do for African-Americans, Bush answered, "probably nothing," a reply for which he later apologized.

Four years later, Bush had transformed his image as a conservative, rich white male to a kinder, gentler candidate who made allies of minorities and garnered respect from some die-hard Democrats.

"Both Jeb Bush and George W. Bush have been portraying themselves as a new kind of Republican, as compassionate conservatives. It is a way to put a better face on the Republican Party, as a place friendly to minorities," said Dario Mareno, a political science professor at Florida International University.

"Part of the problem now is that the governor has been incredibly stubborn and it has reinforced a severe problem the Republican Party has with minorities, women and ethnic groups. What they've done is appear as though they are inviting them into the discussion and then shut the door as if it were an all-white male club."

The fallout could hurt George Bush because some of the programs Florida has adopted, including One Florida, are similar to those in Texas. Bush felt he had no choice but to develop his own affirmative-action program with threats of a Connerly-led referendum and court challenges looming over the state, said Cardenas, the state party's first Hispanic chairman.

Two years ago, a Florida court declared the minority procurement program in the State Department of Transportation unconstitutional. According to Cardenas, most other departments had similar plans. It was only a matter of time before they too were challenged, he said.

"We have a danger zone," said Cardenas. "With the federal court decision that banned various types of affirmative action in Texas and similar court decisions in Louisiana and Mississippi, we believe that if similar court action were brought in Florida, our minority enrollment program would likewise be invalidated."

Bush supporters insist the One Florida plan provides a safety net that would not be included in Connerly's ballot measure. Connerly is awaiting a decision by the state Supreme Court, which must approve ballot proposals, to determine whether he can continue collecting the 435,000 signatures needed to get the proposal on the ballot in November.

"The One Florida initiative is a good step in the right direction, but it is very limited in its impact. It doesn't end race and gender preferences at all in local city and county level, where the bulk of affirmative-action policies are practiced," said Kevin Nguyen, spokesman for Connerly's group, The American Civil Rights Coalition.

"The governor's plan only affects the 15 agencies under his direct control. There are 10 state agencies untouched. Absent his willingness to expand the initiative, we will continue to pursue a referendum. Voters in Florida have expressed the desire for an all-out ban on preferences."

GRAPHIC: PHOTOPHOTO (color): Flanked by African-American lawmakers, Florida Gov.

Jeb Bush prepares to make his State of the State speech last month. AP photo.

Today's debate: Elian Gonzalez

Elian dispute illustrates worst in custody battles

Our view:

Relatives ignore boy's interests to make a larger political statement.

Anti-Castro activists in Miami say the battle over 6-year-old Elian Gonzalez is a struggle between the champions of democratic capitalism and the bearded paladin of dictatorial Marxism. That's one of the first signs of a custody dispute gone bad: the interests of the child are forgotten except as the fulcrum for a fight between adults.

Indeed, viewed as a custody battle, Elian's plight tells us less about the contending political systems than about the way adults behave poorly around children. More than a million kids are caught up in divorce actions every year, and most are settled amicably. This case exemplifies those that aren't, with consequences that can be brutalizing.

Many of the nation's courts, lawyers and caseworkers have adopted an ad hoc set of standards, often called "the children's bill of rights" to guide and measure the behavior of parents in custody disputes. Parents who follow the guidelines typically won't find themselves in court, says Andrew Schepard, a law professor and director of the Center for Children, Families and the Law at Hofstra University. Elian's relatives, you will note, find themselves in numerous courts, and no wonder.

First on the list is the right of a child not to be forced to choose sides. That is exactly what the Miami relatives have been doing, manipulating the boy so that he'll reject his father and stay with them.

Another is the right to privacy while talking on the phone with the other "parent." That fundamental condition was violated as recently as last weekend, when the Miami clan allowed a reporter to listen to Elian's half of a phone call from his dad.

Yet another is that the child not be used as a messenger between adults. But just last week, Elian appeared in a stage-managed videotape, lecturing his father that he would not go home. The play was so crude that public sentiment quickly turned against it.

And yet another is the right to be protected from "parental warfare." Surrounded by hundreds and sometimes thousands of vocal supporters who have been welcomed by his relatives, Elian has not been shielded from warfare; he has been used as a neutron bomb.

Can it get worse? Possibly not. At his age, Elian does not have the ability to choose be-

A child's rights

Many courts, lawyers and caseworkers use a rough set of 12 "rights" to educate parents about how to treat their children during custody disputes. They include the right:

- ▶ Not to be asked to choose sides
- ▶ Not to be told the nasty details of legal proceedings
- ▶ Not to be told "bad things" about the other parent
- ▶ To have privacy when talking to the other parent
- ▶ Not to be quizzed about the other parent
- ▶ Not to be used as a messenger between parents
- ▶ Not to be asked to tell lies about the other parent
- ▶ Not to be a parent's legal confidant
- ▶ To express their feelings and to choose not to express certain feelings
- ▶ To be shielded from parental "warfare"
- ▶ Not to feel guilty for loving both parents

Source: Parent Education and Custody Effectiveness

tween homes or even the adults in his life, much less contending political systems. Children his age cannot resist adult blandishment, nor reconcile competing claims for affection. This is why the courts usually do not allow children his age to testify.

No doubt, the Miami faction believes it is doing the right thing. Such egocentric certitude is also common in custody battles, and it again betrays the loss of focus on the child. Because Castro has embraced the symbolic fight, he is guilty of the same. Indeed, the only clean person in this mess so far is Elian's father, Juan Miguel Gonzalez, who has been steady and patient despite being victimized by both systems.

If this were not an international case, a court first would try to mediate the dispute, educating the adults and protecting the child from making life-twisting decisions. The Miami relatives have defied mediation, however, and the correct course is clear anyway.

Elian must be allowed to love his Miami relatives, stay in contact with them and not be punished for doing so. But as a matter of law, international convention and simple compassion for a child bruised to the verge of abused, he must be returned to his father so the healing can begin.

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Insight on the News

February 14, 2000, Monday

SECTION: SYMPOSIUM; Pg. 41

LENGTH: 1519 words

HEADLINE: Q: Is sending Elian Gonzalez back to Cuba the wrong thing to do?;

No: U.S. officials correctly recognize the legal standing of the boy's father in Cuba.

BYLINE: Jan C. Ting; SPECIAL TO INSIGHT

BODY:

Here's why the Immigration and Naturalization Service, or INS, has taken the right position in the case of Elian Gonzalez.

First, power to regulate immigration in the United States is vested exclusively in the federal government and its laws, not in the laws or governments of the various states. The U.S. Constitution, which all lawyers and naturalized citizens have sworn to defend, tells us which powers are delegated to the federal government and which are reserved to the states. The U.S. Supreme Court held in 1889 that Congress holds the power to regulate immigration as "an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution."

Attempts by states and state agencies to infringe that or any other federal power have been struck down as unconstitutional. The attempt by California's Proposition 187 to exclude undocumented aliens from schools and social services, for example, was struck down as an unconstitutional infringement on federal power to regulate immigration. Thus, any lawyer or student of immigration law should know that no state court has the power to nullify or infringe upon any decision of any federal agency.

Second, Congress has by law assigned responsibility for people such as Elian Gonzalez to the U.S. attorney general and the INS. The Immigration and Nationality Act provides: "The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe i

any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

"Parole" is a term used in a correctional context to describe a prisoner who has no legal right to be out of prison but who is allowed out temporarily anyway. Parole in an immigration context refers to people who have no legal right to be in the United States but who are allowed in temporarily anyway. Although not required by law, every administration since President Kennedy's has instructed the INS to provide parole to undocumented Cubans who reach U.S. soil. This policy of routine parole for Cubans reaching U.S. soil has not been extended by any subsequent administration to any other nationality - not to Haitians or Dominicans and not to Mexicans or Chinese. Although some Cuban-Americans may view discretionary parole as an entitlement, it is not in fact required by law.

The Cuban Adjustment Act of 1966 was enacted into law by Congress and provides that those Cubans who have been paroled into the United States may, after one year in parole status, apply for legal permanent residence, often referred to as securing a "green card," which is the first step to U.S. citizenship. Again, no other nationality receives this benefit. But it has no bearing on the case of Elian Gonzalez.

Third, the INS has handled Elian's case in accordance with law. It extended parole to Elian. But after discussions with Elian's father, Juan Gonzalez, the INS determined that Gonzalez alone was entitled to speak for Elian and that he did not want any application for admission or asylum made on his son's behalf. Therefore, the INS concluded, in the exercise of its discretion, that it was appropriate to terminate the discretionary parole extended to Elian and to facilitate the reunion of father and son as Gonzalez requested. This conclusion is consistent with principles of U.S. and international law, which support the rights of a surviving parent to make decisions for a child and which support the return of a separated child to the child's place of habitual residence.

Critics of the INS decision fault the agency for believing that the father is able to express an honest opinion while living under a Communist dictatorship. But whether or not to believe what the father says is a question of fact. Somebody had to determine whether the father's request was credible under all the circumstances, including living in communist Cuba. A determination of Elian's future could not be put off until the overthrow of Fidel Castro and the establishment of a democratic government in Cuba, however imminent that may seem, and has always seemed, to some critics of the INS decision.

The INS never had a stake in the outcome of Elian's case. It was and is the neutral and proper agency to make the factual determination of the father's credibility, and it should be remembered that this is the agency which facilitated the settlement of 1 million Cubans in the United States since Castro's seizure of power in Cuba 41 years ago. If it can be criticized at all for the way it conducted this case, the INS most properly could be criticized for being too slow in reaching its conclusion. But perhaps the delay is understandable in a high-profile case in which the INS knew its decision and its process for reaching that decision would be scrutinized and second-guessed by everyone.

A determination of the father's credibility and Elian's future had to be made on the basis of the best available information. The intense political pressure surrounding the case required that the information be carefully assembled and documented. So the INS could not in this case rely upon information in the press or information relayed through diplomatic channels. It had to send its own interviewers to Havana to speak with Juan Gonzalez, not just once, but twice. They had to speak with the father privately in circumstances satisfactory to the INS interviewers, which meant the security of a third-country embassy in Havana. They confirmed the father's identity, his fitness as a father, his close relationship with his son and, most importantly, his wishes. And the INS interviewers had to make their determination supported by documentation sufficient to convince their bosses: INS Commissioner Doris Meissner, Attorney General Janet Reno and President Clinton.

I accept the argument of some critics of the INS decision that if the family in Cuba had a free choice they might in fact choose to live together in the United States rather than live together in Cuba. It's very possible. But if given the choice, so would lots of Haitian families, Dominican families, Mexican families, Chinese families, etc. So what does that prove?

The credibility question for the INS to decide is this: Is it credible for Elian's father to conclude, "Even if my family and I have to live in Cuba, we still want to live as a family. We still want our 6-year-old child back home with us." Is it really inconceivable for a Cuban family to make that decision? Or a Haitian family? Or a Dominican, Mexican or Chinese family? The INS has concluded, after a careful consideration of all the available information, that the father's statement that he wants his son back is in fact believable. So we have a decision that has been made in accordance with the Constitution and the laws of the United States.

The Immigration and Nationality Act enacted into law by Congress provides: "Notwithstanding any other provision of law, no court shall have jurisdiction to review i (ii) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General."

So, legally, this case well may have been over once the INS made its determination of the father's credibility and wish for the return of his child. If we are to remain a nation of laws, that determination must be carried out. The attempt by a state-court judge to nullify the INS decision simply is unconstitutional and of no legal significance. The attempt by one member of Congress to muddy the legal waters by issuing a congressional subpoena to 6-year-old Elian also is without legal significance. Six-year-olds have no obligation to respond to such subpoenas and neither do foreign nationals outside the United States. Adult foreign nationals in the United States are free to depart the United States without responding to such a subpoena. Only a federal court can review the actions of a federal agency. Only a federal court can decide its own jurisdiction.

It's time now for Elian to be reunited with his father, stepmother, younger brother and four grandparents. People will no doubt continue to argue about the substance of the decision, but it is the unique strength of the U.S. system of government that we have a legal method for determining difficult cases such as this. And that method, the rule of law, must be respected by all.

Ting is a professor of law at Temple University's Beasley School of Law and served from 1990 to 1993 at the U.S. Immigration and Naturalization Service as assistant commissioner for refugees, asylum and parole.

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any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

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The Cuban Adjustment Act of 1966 was enacted into law by Congress and provides that those Cubans who have been paroled into the United States may, after one year in parole status, apply for legal permanent residence, often referred to as securing a "green card," which is the first step to U.S. citizenship. Again, no other nationality receives this benefit. But it has no bearing on the case of Elian Gonzalez.

Third, the INS has handled Elian's case in accordance with law. It extended parole to Elian. But after discussions with Elian's father, Juan Gonzalez, the INS determined that Gonzalez alone was entitled to speak for Elian and that he did not want any application for admission or asylum made on his son's behalf. Therefore, the INS concluded, in the exercise of its discretion, that it was appropriate to terminate the discretionary parole extended to Elian and to facilitate the reunion of father and son as Gonzalez requested. This conclusion is consistent with principles of U.S. and international law, which support the rights of a surviving parent to make decisions for a child and which support the return of a separated child to the child's place of habitual residence.

Critics of the INS decision fault the agency for believing that the father is able to express an honest opinion while living under a Communist dictatorship. But whether or not to believe what the father says is a question of fact. Somebody had to determine whether the father's request was credible under all the circumstances, including living in communist Cuba. A determination of Elian's future could not be put off until the overthrow of Fidel Castro and the establishment of a democratic government in Cuba, however imminent that may seem, and has always seemed, to some critics of the INS decision.

The INS never had a stake in the outcome of Elian's case. It was and is the neutral and proper agency to make the factual determination of the father's credibility, and it should be remembered that this is the agency which facilitated the settlement of 1 million Cubans in the United States since Castro's seizure of power in Cuba 41 years ago. If it can be criticized at all for the way it conducted this case, the INS most properly could be criticized for being too slow in reaching its conclusion. But perhaps the delay is understandable in a high-profile case in which the INS knew its decision and its process for reaching that decision would be scrutinized and second-guessed by everyone.

A determination of the father's credibility and Elian's future had to be made on the basis of the best available information. The intense political pressure surrounding the case required that the information be carefully assembled and documented. So the INS could not in this case rely upon information in the press or information relayed through diplomatic channels. It had to send its own interviewers to Havana to speak with Juan Gonzalez, not just once, but twice. They had to speak with the father privately in circumstances satisfactory to the INS interviewers, which meant the security of a third-country embassy in Havana. They confirmed the father's identity, his fitness as a father, his close relationship with his son and, most importantly, his wishes. And the INS interviewers had to make their determination supported by documentation sufficient to convince their bosses: INS Commissioner Doris Meissner, Attorney General Janet Reno and President Clinton.

I accept the argument of some critics of the INS decision that if the family in Cuba had a free choice they might in fact choose to live together in the United States rather than live together in Cuba. It's very possible. But if given the choice, so would lots of Haitian families, Dominican families, Mexican families, Chinese families, etc. So what does that prove?

The credibility question for the INS to decide is this: Is it credible for Elian's father to conclude, "Even if my family and I have to live in Cuba, we still want to live as a family. We still want our 6-year-old child back home with us." Is it really inconceivable for a Cuban family to make that decision? Or a Haitian family? Or a Dominican, Mexican or Chinese family? The INS has concluded, after a careful consideration of all the available information, that the father's statement that he wants his son back is in fact believable. So we have a decision that has been made in accordance with the Constitution and the laws of the United States.

The Immigration and Nationality Act enacted into law by Congress provides: "Notwithstanding any other provision of law, no court shall have jurisdiction to review (i) any decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General."

So, legally, this case well may have been over once the INS made its determination of the father's credibility and wish for the return of his child. If we are to remain a nation of laws, that determination must be carried out. The attempt by a state-court judge to nullify the INS decision simply is unconstitutional and of no legal significance. The attempt by one member of Congress to muddy the legal waters by issuing a congressional subpoena to 6-year-old Elian also is without legal significance. Six-year-olds have no obligation to respond to such subpoenas and neither do foreign nationals outside the United States. Adult foreign nationals in the United States are free to depart the United States without responding to such a subpoena. Only a federal court can review the actions of a federal agency. Only a federal court can decide its own jurisdiction.

It's time now for Elian to be reunited with his father, stepmother, younger brother and four grandparents. People will no doubt continue to argue about the substance of the decision, but it is the unique strength of the U.S. system of government that we have a legal method for determining difficult cases such as this. And that method, the rule of law, must be respected by all.

Ting is a professor of law at Temple University's Beasley School of Law and served from 1990 to 1993 at the U.S. Immigration and Naturalization Service as assistant commissioner for refugees, asylum and parole.

THE RELEASE DISTRIBUTION CENTER FOR THE PUBLIC RELATIONS FIELD

**TO: President Clinton
WHITE HOUSE
FROM: Miriam E. Mason 312-263-6477
AMERICAN ACADEMY OF MATRIMONIAL LAWYERS
RE: Position Statement Of The American Academy Of
Matrimonial Lawyers Concerning Elian Gonzalez**

IF MESSAGE NOT RECEIVED PROPERLY CALL 800-637-3282

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Protecting the family. Improving the practice.

American Academy of Matrimonial Lawyers

Position statement of the American Academy of Matrimonial Lawyers concerning Elian Gonzalez

January 28, 2000

Dear Mr. President, Members of Congress:

The American Academy of Matrimonial Lawyers with National headquarters in Chicago, Illinois, is an organization of the top 1,500 family lawyers in the United States.

The AAML urges that Elian Gonzalez be returned immediately to the custody of his father. This statement does not take any position related to the government of Cuba, but instead focuses on the child and his family.

It appears unrefuted that Elian Gonzalez was born and lived his entire life in Cuba; and that he has had a close and continuous parental relationship with his father, Juan Gonzalez, who lives in Cuba. Because of the unfortunate death of Elian's mother, Juan Gonzalez is the only remaining parent of Elian.

The law in the State of Florida is clear that Juan Gonzalez, as Elian's father, should not be denied custody unless the award of custody to him would be detrimental to the welfare of the child. Florida has a strong public policy in favor of the natural family unit and that a parent should be denied custody only when it is demonstrated that the parent is disabled from exercising custody or that such custody will, in fact, be detrimental to the welfare of the child. The Florida Supreme Court has clearly stated "to hold otherwise would permit improper governmental interference with the rights of natural parents who are found fit to have custody of and raise their children." In Re: Guardianship of D.A. Mc.W., 460 So. 2d 368 (Fla. 1984). There is no allegation that Juan Gonzalez is not a caring and loving father who can adequately provide for this son.

The only allegation which has been raised by Lazaro Gonzalez in the action that he filed in Miami-Dade County, Florida, relates to the current government of Cuba. While a communist government and the Cuban government may not be the choice of the majority of citizens in this country, Elian's father has the right to have his son reside with him in Cuba.

The Hague Convention on the Civil Aspects Of International Child Abduction (hereinafter "The Hague") has been adopted by approximately 60 nations, including the United States (by way of the International Child Abduction Remedies Act [ICARA], 42 U.S.C. 11601 *et. seq.*). Cuba is not a signatory of The Hague and, therefore, Juan Gonzalez does not have the right to seek the return of his son, Elian, pursuant to The Hague. In spite of that, the United States has clearly adopted the principles which should be applied to all international child custody disputes as a result of its acceptance of The Hague. The Hague has as one of its objectives "to secure the prompt return of children to their places of habitual residence who were wrongfully removed to or retained in a member country." There are exceptions in The Hague which provide that a court may refuse to return a child and among those are:

- (1) There is a great risk that return would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation; or
- (2) That the return would be shocking to the conscience of the court and would violate "the fundamental principles" of the country where the child has been taken "relating to the protection of human rights and fundamental freedoms."

These provisions have been strictly construed to apply specifically to the child before the court.

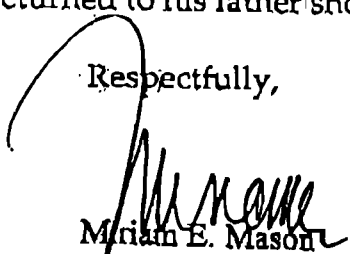
Likewise, Florida and all other states in the United States have accepted the Uniform Child Custody Jurisdiction Act (hereinafter "UCCJA"). That Act is clear that the courts of Florida should not take jurisdiction except under very limited circumstances. The prime consideration for jurisdiction is that Florida is the home state of the child at the time of the commencement of the action or has been the child's home state within six months before commencement of the proceedings. That is obviously not the case here. Accordingly, we must look to other aspects of the UCCJA to determine whether or not there is emergency jurisdiction which can only be used to maintain the status quo until a petition may be filed in the proper jurisdiction. The only other potential in this case is that "it is necessary in an emergency to protect the child because he or she has been subjected to or threatened with mistreatment or abuse or is otherwise neglected." This provision has typically applied to specific abuse or treatment directed at the child before the court. Even if jurisdiction were to be temporarily taken by the Florida court, it would be strictly for the purpose of maintaining the status quo until a petition may be filed in Cuba.

The above legal principles find their foundation in the precepts of the fundamental rights in all free societies for parents to exercise primary control in decisions concerning their children. Juan Gonzalez should immediately be given his right to exercise primary control in decisions concerning his son, Elian.

The suggestion that a six-year-old child should in some regard be given the right or opportunity to decide which country he should reside in is not supported by Florida law. Florida Statutes are clear that the court can consider in a determination of custody the reasonable preference of the child only if the court deems the child to be of sufficient intelligence, understanding and experience to express a preference. There is no case in Florida which has determined that a six-year-old meets those criteria.

The United States Immigration and Naturalization Service decision, which was issued January 5, 2000, states that the United States Immigration and Naturalization Service had two meetings with Juan Gonzalez and determined that he has expressed his clear wishes that Elian should be returned to him as soon as possible. The determination of the United States Immigration and Naturalization Service that Elian Gonzalez should be returned to his father should be given immediate enforcement.

Respectfully,



Miriam E. Mason

President,

American Academy of Matrimonial Lawyers

DRAFT

**OFFICE OF PUBLIC LIAISON
FY 2001 IMMIGRATION BUDGET BRIEFING AGENDA**

**Room 180, 3:00 p.m.
February 11, 2000**

Irene Bueno
Special Assistant to the President, Domestic Policy Council

Cynthia Rice
Special Assistant to the President, Domestic Policy Council

Steve Mertens
Policy Analyst, Office of Management and Budget

FYI 2001 IMMIGRATION BUDGET BRIEFING PARTICIPANTS

Tamar Adler, American Friends Service Committee
Kevin Appleby, US Catholic Conference
Gideon Aronoff, Hebrew Immigration and Society
Anike Buche, International Rescue Committee
Ruth Compton, United Methodist Church
Triana D'Orazio, Mexican American Legal Defenses and Education Fund
Matthew Dorf, American Jewish Congress
Shawn Fremstad, Center on Budget & Policy Priorities
Roberto Frisancho, Latino Civil Rights
Robert Gardner, National Immigration Foundation
Jennifer Grayson, United Jewish Communities
Fong Her, Hmong National Development Inc.
Jeffrey Lande, United Jewish Communities
Gabriela Lemus, League of United Latin American Citizens
Jon Melegrito, National Federation of Filipino American Association
Nuala Moore, Alliance for Children and Families
Heather Nolen, National Council of Churches
Elizabeth O'Connell, National Italian American Foundation
Van Ornelas, National Association of Latino Elected and Appointed Officials, Inc.
Jayne Park, National Asian Pacific American Legal Consortium
Jorge Pineda, National Council on Independent Living Latinos
Abigail Price, US Catholic Conference
Marcela Urrutia, National Council of LaRaza
Ka Yang, Southeast Asian Resource Action Center

Immig Budget Briefing - 2/11/00

premium processing?

Next go around. See may be ↓

Is 245(i) possible?

What about direct approximations?

- Establish a goal

AVLA - serious reservations about premium fees

Input H2O Hs

Family + other groups - What about

support 245 (i).

Michael - INS has a back ward of gods + meeting them

Dr. H. P. Kalish K-c

Bob Give it a chance

~~Sub~~ = Business entity to subsidize ~~the~~ ~~to~~ get a separate resource

Provide me \$, usually ~~less~~ lower fees for non-business applicant

but quantifiable goals

but quantifiable goals.
Unlikely Congress will promote additional

Ernest Boden

Ref. F42000 - 00/607

PT2001 - Not to determine

B.P. INS ~~the~~ directly man to Northern border

- Detention Beds

- Sprays on Border Safety - need visual

- Asylum

• extend holding centers at ~~airport~~ airports

• Effort to expand at airports -

• Problems at the airports

• Detention Units

Hospital - emergency room closed - trying to adjust other
+ it takes years.

message - premium processing

(1)

(2) Get INS ~~for~~ & ~~view~~

Computer unit provide me appropriated, but will get free.

ALA

→ Impact on I-1 & I-5 - business

→ How do guarantee processing times

where -

Ex. ^{where} attention to ~~the~~ rate, ~~adjust~~ backlog - P

SECTION: Domestic News

LENGTH: 912 words

HEADLINE: Dates in custody battle over Elián Gonzalez

BYLINE: By The Associated Press

BODY:

Key dates in the battle over 6-year-old Elián Gonzalez.

1999:

Nov. 22 - Elián and 13 others leave Cardenas, Cuba, bound for the United States aboard a 16-foot motor boat.

Nov. 23 - The boat capsizes.

Nov. 25 - Ariane Horta and Nivaldo Fernandez come ashore at Key Biscayne. Elián is rescued a short time later about three miles from Fort Lauderdale and taken to Hollywood Memorial Hospital.

Nov. 26 - Elián is released from the hospital. The Immigration and Naturalization Service releases him to his great uncle, Lazaro Gonzalez, until the agency can determine his immigration status.

Nov. 27 - Juan Miguel Gonzalez, Elián's father, demands that his son be returned to him in Cuba.

Dec. 8 - Robert Wallis, the INS district director in Miami, responds by letter to Juan Miguel Gonzalez, telling him the agency needed to meet with him to obtain proof that he was Elián's father.

Dec. 10 - Lazaro Gonzalez submits to the INS an asylum application on Elián's behalf.

Dec. 13 - Silma Dimmel, chief INS officer at the U.S. diplomatic mission in Havana, meets with Juan Miguel Gonzalez at his home in Cardenas, Cuba.

Dec. 20 - Lazaro Gonzalez and his attorneys meet with INS officials to respond to Juan Miguel Gonzalez's assertion that only he can speak for the boy.

Dec. 31 - The INS conducts a second interview of Juan Miguel Gonzalez at the private "neutral" residence of a representative for the United Nations

International Children's Emergency Fund in Havana.

2000:

Jan. 3 - Representatives of the National Council of Churches meet with Juan Miguel Gonzalez and promise to press the U.S. government to return the child to Cuba.

Jan. 5 - Doris Meissner, commissioner of the INS, sends a letter to Juan Miguel Gonzalez, Lazaro Gonzalez and attorneys for Elian notifying the family of the government's decision that the boy "belongs with his father" and must be returned to Cuba by Jan. 14. Attorneys for the family seek the attorney general's reconsideration of the decision.

Jan. 6 - James Burzynski, director of the INS's Texas Service Center, sends letter to the attorney's representing Lazaro Gonzalez indicating the asylum applications filed on behalf of Elian were being returned per the wishes of the boy's father.

Jan. 6 - Hundreds of Cuban-Americans chanting "Liberty! Liberty!" block intersections and cut off access to the Port of Miami in protest of the decision.

Jan. 7 - Lazaro Gonzalez files petitions for temporary custody of Elian in a Florida state court. Elian is subpoenaed to appear before a committee of the U.S. House.

Jan. 10 - The state court issues an order setting a March 6 hearing on the petition for temporary custody.

Jan. 12 - Attorney General Janet Reno responds to Lazaro Gonzalez's request that she overturn the decision of the INS commissioner, upholding Juan Miguel Gonzalez's right to custody of Elian.

Jan. 19 - Lazaro Gonzalez files federal lawsuit to challenge the INS ruling.

Jan. 21 - Elian's grandmothers arrive in New York City from Cuba.

Jan. 22 - Grandmothers meet with Janet Reno to appeal for Elian's return to Cuba.

Jan. 24 - Senate Majority Leader Trent Lott and a group of Florida lawmakers put in motion a process to give citizenship to Elian without his father's consent.

Jan. 26 - Grandmothers meet Elian in Miami.

Jan. 27 - The nun who hosts the meeting between Elian and his grandmothers, originally a neutral party in the dispute, says that the boy should stay in the United States.

Jan. 28 - The U.S. government files court papers asking a federal judge to dismiss a lawsuit filed by Elian's Miami relatives.

Feb. 4 - Elian's father asks Reno to return the boy to him in Cuba and says that in the meantime his son should be moved to the home of another relative in Miami.

Feb. 4 - The Miami relatives file a complaint with police over the recent meeting between Elian and his grandmothers, citing a report from one of the grandmother on Cuban television that she playfully bit his tongue and unzipped his pants during their reunion.

Feb. 10 - Justice Department says it is reviewing whether alcohol-related driving violations or other actions by Elian's relatives in Miami warrant moving him to a temporary custodian.

Feb. 14 - Lawyers for the Miami relatives argue that the INS can't send the boy back to Cuba without first holding an asylum hearing. They ask U.S. District Judge William Hoeveler to deny the government's motion to dismiss the lawsuit.

Feb. 18 - Reno visits Miami, refuses to meet with Elian or his family. The INS refuses the request of Elian's father to have the boy moved to another relative in Miami.

Feb. 20 - U.S. District Judge William M. Hoeveler, who originally planned to hear arguments about jurisdiction in the case, has a mild stroke.

Feb. 22 - U.S. District Judge K. Michael Moore assigned to hear the case.

Feb. 29 - Miami-Dade Circuit Judge Michael Chavies removes himself from the family court custody dispute over Elian. Circuit Judge Jennifer Baile is assigned to hear the case.

March 3 - Government lawyers ask Moore to dismiss lawsuit filed by Miami relatives.

March 9 - Moore hears arguments on whether to interfere with the decision by INS to send Elian back to Cuba.

March 16 - Elian's father accuses the Miami relatives of blocking him from speaking to the boy on the phone.

March 21 - Federal judge dismisses political asylum lawsuit filed on behalf of Elian by his Miami relatives.

February 17, 2000, Thursday, PM cycle

SECTION: Washington Dateline

LENGTH: 336 words

HEADLINE: Backers of sending Elian back voice frustration over stalemate

BYLINE: By GEORGE GEDDA, Associated Press Writer

DATELINE: WASHINGTON

BODY:

Supporters of sending Elian Gonzalez back to Cuba criticized the Clinton administration and the Miami exile community today for the stalemate that has kept the 6-year old in South Florida almost three months after he was rescued at sea.

Rep. Maxine Waters, D-Calif., said the Immigration and Naturalization Service had botched the case by not implementing its ruling requiring that the boy be returned to his father in Cuba.

She appeared at a news conference sporting a button with a red-framed picture of Elian along with a written admonition that he be sent home. She and other Democratic lawmakers were joined by religious leaders, children's-rights advocates and an American whose two daughters were abducted by their mother in Japan several years ago. He has not seen them since.

Rep. Charles Rangel, D-N.Y., said he found it hard to believe that federal official would place the boy in the hands of Miami relatives who have a "questionable background" - a reference the numerous problems with the law that some relatives have had over the years.

"The poor child is being used as a pawn to see who wins," Rangel said.

Elian survived a crossing from Cuba last November but his mother drowned when their boat capsized. Cuba has been demanding the boy's return but his case has been tied up in federal court. Many Cuban exiles believe it would be cruel to send Elian back to a country which does not adhere to democratic values.

Rep. Jose Serrano, D-N.Y., took aim at lawmakers who are taking steps to grant citizenship to Elian in an effort to strip the INS of jurisdiction in the case.

Asserting that there are 9 million undocumented aliens in the United States,

Serrano said that if Elian is granted citizenship, he will try to amend the legislation to ensure that all aliens are awarded permanent residency on the same day.

Rep. Julia Carson, D-Ind., said, "The relationship between father and son is the one we should focus on, not the relationship between the United States and Cuba."

LANGUAGE: ENGLISH

LOAD-DATE: February 18, 2000

21 of 106 DOCUMENTS

The Associated Press

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February 17, 2000, Thursday, AM cycle

SECTION: Washington Dateline

LENGTH: 360 words

HEADLINE: Lawmakers target war criminals for deportation

BYLINE: By JANELLE CARTER, Associated Press Writer

DATELINE: WASHINGTON

BODY:

Lawmakers worried about the growing number of alleged war criminals seeking refuge in the United States are considering a bill that would expand guidelines blocking the entry of Nazi War criminals to include recent human rights offenders.

The bill would cover persons who committed acts of torture in places like Rwanda and Yugoslavia. A companion measure has already passed the Senate.

"We need to slam the door shut on these thugs and rid our country of those who have already managed to make their way here," said Rep. Mark Foley, R-Fla.,

and one of the bill's sponsors.

One of those alleged criminals, Carl Dorelien, lives in Foley's district. Dorelien is the former head of personnel for the 7,000-member army that seized power from Haitian President Jean-Bertrand Aristide in 1991 and killed as many as 4,000 civilians.

He now lives in a resort community in Port St. Lucie, Fla. and won \$3.2 million in the Florida lottery in 1997. Last year, in an interview with The Boston Globe, Dorelien said the U.S. military got him a five-year visa after the corrupt Haitian army was forced from power in 1994 by 20,000 U.S. troops. Fifteen other Haitian military officers have since joined him in the United States and are living mainly in New York and Florida, according to Dorelien.

"It is ludicrous that the INS (Immigration and Naturalization Service) denies citizenship or permanent residency to individuals whose only offense was to cross the border, but grants citizenship and permanent residency to perpetrators of human rights violations," said Richard Krieger, president of the International Educational Missions Inc., a group which deals with the issue of foreign war criminals and refugees.

The bill allows the Justice Department's Office of Special Investigations to expand its operations to include provisions to bar admission and deport aliens who engaged in acts of terror abroad.

The Justice Department supports the bill but also wants to include conduct such as persecution, war crimes and crimes against humanity, said James Castello, associate deputy attorney general.

EDITOR'S NOTE - The bill is H.S. 3058.

1 of 4 DOCUMENTS

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Insight on the News

February 14, 2000, Monday

SECTION: SYMPOSIUM; Pg. 41

LENGTH: 1519 words

HEADLINE: Q: Is sending Elian Gonzalez back to Cuba the wrong thing to do?;

No: U.S. officials correctly recognize the legal standing of the boy's father in Cuba.

BYLINE: Jan C. Ting; SPECIAL TO INSIGHT

BODY:

Here's why the Immigration and Naturalization Service, or INS, has taken the right position in the case of Elian Gonzalez.

First, power to regulate immigration in the United States is vested exclusively in the federal government and its laws, not in the laws or governments of the various states. The U.S. Constitution, which all lawyers and naturalized citizens have sworn to defend, tells us which powers are delegated to the federal government and which are reserved to the states. The U.S. Supreme Court held in 1889 that Congress holds the power to regulate immigration as "an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution."

Attempts by states and state agencies to infringe that or any other federal power have been struck down as unconstitutional. The attempt by California's Proposition 187 to exclude undocumented aliens from schools and social services, for example, was struck down as an unconstitutional infringement on federal power to regulate immigration. Thus, any lawyer or student of immigration law should know that no state court has the power to nullify or infringe upon any decision of any federal agency.

Second, Congress has by law assigned responsibility for people such as Elian Gonzalez to the U.S. attorney general and the INS. The Immigration and Nationality Act provides: "The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe i

any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

"Parole" is a term used in a correctional context to describe a prisoner who has no legal right to be out of prison but who is allowed out temporarily anyway. Parole in an immigration context refers to people who have no legal right to be in the United States but who are allowed in temporarily anyway. Although not required by law, every administration since President Kennedy's has instructed the INS to provide parole to undocumented Cubans who reach U.S. soil. This policy of routine parole for Cubans reaching U.S. soil has not been extended by any subsequent administration to any other nationality - not to Haitians or Dominicans and not to Mexicans or Chinese. Although some Cuban-Americans may view discretionary parole as an entitlement, it is not in fact required by law.

The Cuban Adjustment Act of 1966 was enacted into law by Congress and provides that those Cubans who have been paroled into the United States may, after one year in parole status, apply for legal permanent residence, often referred to as securing a "green card," which is the first step to U.S. citizenship. Again, no other nationality receives this benefit. But it has no bearing on the case of Elian Gonzalez.

Third, the INS has handled Elian's case in accordance with law. It extended parole to Elian. But after discussions with Elian's father, Juan Gonzalez, the INS determined that Gonzalez alone was entitled to speak for Elian and that he did not want any application for admission or asylum made on his son's behalf. Therefore, the INS concluded, in the exercise of its discretion, that it was appropriate to terminate the discretionary parole extended to Elian and to facilitate the reunion of father and son as Gonzalez requested. This conclusion is consistent with principles of U.S. and international law, which support the rights of a surviving parent to make decisions for a child and which support the return of a separated child to the child's place of habitual residence.

Critics of the INS decision fault the agency for believing that the father is able to express an honest opinion while living under a Communist dictatorship. But whether or not to believe what the father says is a question of fact. Somebody had to determine whether the father's request was credible under all the circumstances, including living in communist Cuba. A determination of Elian's future could not be put off until the overthrow of Fidel Castro and the establishment of a democratic government in Cuba, however imminent that may seem, and has always seemed, to some critics of the INS decision.

The INS never had a stake in the outcome of Elian's case. It was and is the neutral and proper agency to make the factual determination of the father's credibility, and it should be remembered that this is the agency which facilitated the settlement of 1 million Cubans in the United States since Castro's seizure of power in Cuba 41 years ago. If it can be criticized at all for the way it conducted this case, the INS most properly could be criticized for being too slow in reaching its conclusion. But perhaps the delay is understandable in a high-profile case in which the INS knew its decision and its process for reaching that decision would be scrutinized and second-guessed by everyone.

A determination of the father's credibility and Elian's future had to be made on the basis of the best available information. The intense political pressure surrounding the case required that the information be carefully assembled and documented. So the INS could not in this case rely upon information in the press or information relayed through diplomatic channels. It had to send its own interviewers to Havana to speak with Juan Gonzalez, not just once, but twice. They had to speak with the father privately in circumstances satisfactory to the INS interviewers, which meant the security of a third-country embassy in Havana. They confirmed the father's identity, his fitness as a father, his close relationship with his son and, most importantly, his wishes. And the INS interviewers had to make their determination supported by documentation sufficient to convince their bosses: INS Commissioner Doris Meissner, Attorney General Janet Reno and President Clinton.

I accept the argument of some critics of the INS decision that if the family in Cuba had a free choice they might in fact choose to live together in the United States rather than live together in Cuba. It's very possible. But if given the choice, so would lots of Haitian families, Dominican families, Mexican families, Chinese families, etc. So what does that prove?

The credibility question for the INS to decide is this: Is it credible for Elian's father to conclude, "Even if my family and I have to live in Cuba, we still want to live as a family. We still want our 6-year-old child back home with us." Is it really inconceivable for a Cuban family to make that decision? Or a Haitian family? Or a Dominican, Mexican or Chinese family? The INS has concluded, after a careful consideration of all the available information, that the father's statement that he wants his son back is in fact believable. So we have a decision that has been made in accordance with the Constitution and the laws of the United States.

The Immigration and Nationality Act enacted into law by Congress provides: "Notwithstanding any other provision of law, no court shall have jurisdiction to review (i) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General."

So, legally, this case well may have been over once the INS made its determination of the father's credibility and wish for the return of his child. If we are to remain a nation of laws, that determination must be carried out. The attempt by a state-court judge to nullify the INS decision simply is unconstitutional and of no legal significance. The attempt by one member of Congress to muddy the legal waters by issuing a congressional subpoena to 6-year-old Elian also is without legal significance. Six-year-olds have no obligation to respond to such subpoenas and neither do foreign nationals outside the United States. Adult foreign nationals in the United States are free to depart the United States without responding to such a subpoena. Only a federal court can review the actions of a federal agency. Only a federal court can decide its own jurisdiction.

It's time now for Elian to be reunited with his father, stepmother, younger brother and four grandparents. People will no doubt continue to argue about the substance of the decision, but it is the unique strength of the U.S. system of government that we have a legal method for determining difficult cases such as this. And that method, the rule of law, must be respected by all.

Ting is a professor of law at Temple University's Beasley School of Law and served from 1990 to 1993 at the U.S. Immigration and Naturalization Service as assistant commissioner for refugees, asylum and parole.

Justice Dept. looks into DUIs of Elian's relatives

Great-uncle's custody of Cuban boy at issue

By Kevin Johnson
USA TODAY

WASHINGTON — The Justice Department is reviewing the propriety of leaving a 6-year-old Cuban refugee in the custody of Miami relatives after reports that two of the relatives have drunken driving convictions.

Deputy Attorney General Eric Holder said Thursday that authorities would determine the fitness of the current arrangement and then "decide what steps, if any, need to be taken."

Earlier this week, it was disclosed that Elian Gonzalez's primary guardian, great-uncle Lazaro Gonzalez, 49, has two drunken driving convictions dating back at least three years.

Records in Miami also show that Lazaro's brother, Delfin Gonzalez, 62, who often stays at Lazaro Gonzalez's home, has two convictions for driving under the influence (DUI).

Lawyers for the boy and his Miami relatives insist that Lazaro Gonzalez remains a suitable guardian for Elian.

"We can't tell the government what they can and can't review," said Jose



By Alan Diaz, AP

Off to school: Lazaro Gonzalez escorts Elian in Miami on Thursday.

Garcia-Pedroza, one of the Miami's lawyers. "But this is one of the most successful placements the U.S. Immigration and Naturalization Service has ever

made. Elian is happy where he is."

The boy began living with Gonzalez, his wife, Angela, and their 21-year-old daughter, Marisleysis, almost immediately his Thanksgiving Day rescue at sea.

Lazaro Gonzalez has since led a campaign to keep the government from returning Elian to his father in Cuba. His home is an informal gathering place for a large extended family.

Eleven people, including Elian's mother, died last year when their boat sank off the Florida coast. Elian and two others survived.

Senior federal officials said they were aware of at least one drunken driving conviction against Lazaro Gonzalez when Elian was placed with him. Disclosure of the more detailed record prompted authorities to take a closer look at the custody arrangement.

"There was an understandable desire to have (Elian) put in a comfortable environment," Holder said. "Now that we have this new information, we'll have to look at it."

The government also is considering a request from Elian's father, Juan Gonzalez, to transfer custody to another relative in Miami.

Authorities are expected to respond to the father's request before Feb. 22,

when attorneys for Elian and his Miami relatives are scheduled to challenge an INS decision to return the boy to his father in Cuba.

Experts in psychology and family law say that drunken driving convictions reflect directly on the person seeking custody. The convictions would be weighed along with everything from psychological fitness to the strength and length of the bond between Elian and the parties battling for custody.

"A judge makes a determination based on all those factors," said Alan Delamater, a University of Miami professor of pediatrics and psychology.

"Drinking alcohol is no crime, but there's a difference between that and abusive behavior," said Delamater. "A psychologist would have to evaluate that as part of the whole environment the child would be living in."

The revelations about the DUI convictions follow allegations of sexual abuse made by the Miami relatives after one of Elian's grandmothers from Cuba playfully bit his tongue and unzipped his pants last month.

"It's getting dirty, and it's going to get nastier," Delamater said of the custody fight.

Contributing: Deborah Sharp



FIX '96:

*Restore America's Tradition as a
Nation of Immigrants and A Nation of Just Laws*

2000-1

3 pages

Contact: Angela Kelley (202) 544-0004, ext. 19

February 10, 2000

LIKE ELIAN GONZALEZ, ALL IMMIGRANTS DESERVE THEIR DAY IN COURT

In recent weeks, the Miami relatives of Elian Gonzalez, a boy who came to the U.S. in a raft with others who left Cuba seeking freedom and opportunity in the U.S, have fought for the boy's right to have his day in Court. Congress has been listening, and some have intervened on the boy's behalf. Elian Gonzalez has been fortunate.

Thousands of immigrants *lost* the chance to have *their* day in court due to anti-immigrant laws passed in 1996. The 1996 laws—the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA)—stripped immigrants of due process rights so fundamental to American democracy.

As a result, immigrants are being torn from their families, jobs, and communities for crimes they may have committed years ago and for which they have already paid their debt to society. The new laws changed the rules and are applied *retroactively*, and immigrants are being punished a *second* time—thrown in prison ultimately to be permanently banished from the United States and their American families. Immigrant victims of unjust government decisions have been stripped of their right to appeal those decisions in court. Refugees arriving at our ports of entry may never get the chance to adequately make their claim for asylum, instead being turned around and sent back to their persecutors by low-level immigration officials in "expedited" proceedings.

The vast majority of victims of the 1996 immigration laws are not so lucky as to be the focus of headline news or Congressional attention. Instead, they languish out of the public eye in INS detention facilities. For them, the promise of American rights and liberties is an empty one.

These immigrants, and other victims of the harsh provisions enacted in 1996, are no less deserving of their day in court than is Elian Gonzalez. In the session that is just beginning, Congress should do the right thing and restore for *all* immigrants the basic American right to have their day in court.

Right the Wrongs - Restore the Balance

January 10, 2000

Woman faced with ouster from U.S.;
After 33 years, German immigrant could be deported for hair-pulling

BYLINE: Doug Payne, Staff

Changes in immigration law have left a Covington woman who has lived in the United States virtually all of her life facing deportation over a hair-pulling incident more than a decade ago.

Mary Anne Gehris was born in Germany in 1965 and brought to the United States by her adoptive parents in February 1967. Since then she has experienced a fairly typical American life: growing up in a loving home, going to school and the senior prom, graduating, getting a job, struggling to make ends meet, finding Mr. Right.

But suddenly, she is a victim of one of the things Americans are supposed to be free from -- fear.

"I'm scared to death," Gehris said in an interview Sunday. "I'm petrified of being deported out of the United States, my home. I have known this country for 33 years. I don't know Germany. I don't want to live in Germany. My family's here, my friends are here, my parents are buried here."

Gehris faces deportation because of reforms to immigration law made in Congress in 1996. The laws were designed to expedite the removal of people convicted of crimes of theft and violence, but many immigration advocates say the laws went too far and have led to the deportation of immigrants convicted of relatively minor crimes, such as shoplifting.

The law requires immigration judges to deport most people convicted of a crime and sentenced to a year or more in jail. That causes serious problems for immigrants who have minor brushes with the law because people convicted of misdemeanors in Georgia routinely are sentenced to a year on probation -- just enough to trigger deportation proceedings.

Prior to 1996, the law made that demand only for sentences of five years or more.

Another problem with the federal law is that it is applied retroactively. In other words, immigrants put on probation for a minor offense long before the law passed can be deported.

As you would expect of someone who grew up in Covington, Gehris's accent is Georgian, not German. Her interests are American, not European. Recently she decided to seek citizenship -- so that she could vote, hold a government job, get scholarship money and just, as she put it, "have same rights as other citizens."

But she is not a citizen, as the Immigration and Naturalization Service reminded her in a letter in November. Using information that Gehris provided in her effort to be naturalized, the INS informed her that she is "deportable" and "subject to removal from the United States" because she has been convicted of an "aggravated felony ... as defined by" the Immigration Act of 1996.

In 1988, Gehris -- then 22 -- pleaded guilty in Rockdale County to a charge of simple battery after pulling another woman's hair. According to her lawyer, Socheat Chea, one day her boyfriend stood her up. She went out looking for him. She found him with another woman. She and the other woman tussled. Her boyfriend separated the two and she went home.

Days later, the other woman took out an arrest warrant charging Gehris with simple battery. She pleaded guilty and was sentenced to a year on probation and ordered to pay a fine. She paid her fine and completed a year on probation.

That was the end of the matter as far as she was concerned. "It was a mistake," she says now. "I shouldn't have done it. And I'm sorry I did it." The hair-pulling, she says, was just that -- pulling hair, not pulling it out by the roots or causing serious injury to the victim.

Gehris was given a one-year suspended sentence. But because the 1996 law, sponsored by Sen. Orrin Hatch (R-Utah), defines any act of violence that results in a sentence of one year or more as an "aggravated felony," for which non-U.S. citizens can be deported to their country of origin.

Before 1998, immigration law made such a finding only for sentences of five years or more.

But Gehris feels American, speaks American, and has decorated in country American style the Covington home where she, her husband and 4-year-old stepdaughter live. Gehris also has a son, 14, who is hospitalized with severe mental retardation and other problems. She calls him every Sunday and is concerned about what might happen to him if she is deported.

Gehris received national attention over her plight when it was detailed in a Saturday column in The New York Times and on NBC's "Today" show Sunday morning.

The INS has not set a date for Gehris' deportation. Indeed, since the day after Thanksgiving, when she received a letter notifying her of the agency's intention, the only communication between the government and Gehris has been a letter that her lawyer sent to the INS office in Atlanta on Friday, urging them to reconsider.

"They need to go back and look at this law and change the terms so that it does not affect mental crimes --- and take a long, hard look at murderers, rapists and drug lords, not someone who pulled a girl's hair," she said.

1/19/00

National Immigration Forum

Fax Cover Page

Date

2/14/00
~~December~~, ~~1999~~

To:

Irene Buerd

Of:

DPL-WH

Fr:

Angela Kelley

Re:

Total number of pages INCLUDING this page:

3

Irene, Here is our letter to Diaz-Balart
or E. Gonzalez. I have heard that
Rep. Diaz-Balart is not particularly pleased
w/ the letter. I will be surprised if
he uses it any way at all.

I would ask that you not distribute
it widely as there is no reason to
give it more attention than it deserves! Thanks. Ange

National Immigration Forum

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February 10, 2000

The Honorable Lincoln Diaz-Balart
 404 Cannon House Office Building
 Washington, DC 20515

Dear Representative Diaz-Balart,

In response to your office's inquiry regarding the National Immigration Forum's views on the case of Elian Gonzalez, we would like to offer our reflections regarding both this particular case and on the general state of due process rights for all immigrants.

When the government is deciding the fate of an individual—whether that individual will be torn from family members or not; whether the individual will be removed and banished from the United States or not; whether the individual will be offered refuge in the United States or sent back to his persecutors—it is a fundamental principle of American jurisprudence that the individual is entitled to a fair and unbiased procedure where all the relevant factors are carefully weighed and considered. When the stakes are so high, the individual deserves his or her day in court.

The case of Elian Gonzalez is a difficult one. There is a concern as to whether a fair and unbiased procedure can be conducted. At the federal level, there is an immigration bureaucracy unversed in family law, and unprepared to make a determination in a child custody matter. At the state level, it may be that elected judges in such a highly politically-charged atmosphere cannot ultimately render an unbiased ruling. The stakes are high for Elian, for his father in Cuba, and for his American relatives. The exceptional circumstances may call for a third way. For example, a special procedure conducted by a specially-appointed adjudicator might be the best way to fairly consider all of the relevant factors, and obtain a decision that would be seen as fair and unbiased. Such a procedure, whatever the outcome, would be consistent with basic American principles of fairness.

Regrettably, as you know from your efforts to restore balance to our nation's immigration laws, thousands of immigrants have been denied their day in court due to laws passed in 1996. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA) stripped immigrants of due process rights we consider basic to the American way. As a result, refugees arriving at our ports of entry may never get the chance to adequately make their claim for asylum, instead being turned around and sent back to their persecutors by low-level immigration officials in "expedited" proceedings. Immigrants who are the victims of unjust government decisions have been stripped of their right to appeal those decisions in court. Immigrants are being torn from their families, jobs,

Executive Director

Frank Sherry

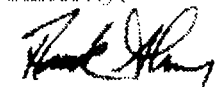
Immigration Forum
 2201 Street, NW, #250

Washington, DC 20002-4362 ■ Tel: 202-544-0004 ■ Fax: 202-544-1945 ■ www.immigrationforum.org

and communities, for crimes they may have committed years ago and for which they long ago paid their debt to society. Now, due to the retroactive application of the laws, they are faced with prison and, ultimately, permanent banishment from the U.S. and their American families.

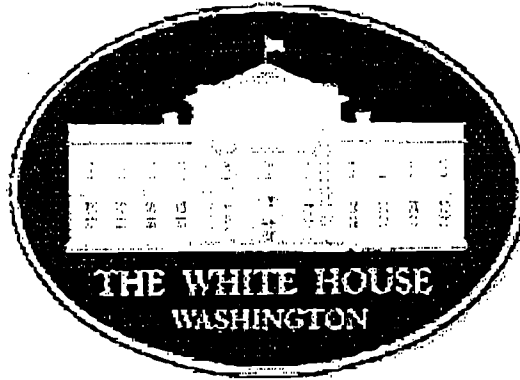
Elian is, in a sense, very fortunate. The media and Congressional attention showered on him improve his chances of having his day in court. The immigrant victims of the harsh legislation enacted in 1996 are no less deserving of their day in court than is Elian Gonzalez. Very few are the stars of headline news. Instead, they languish out of the public eye in INS detention facilities. For them, the promise of American rights and liberties is an empty one. They, too, deserve their day in court.

Sincerely,



Frank Sharry
Executive Director

**THE WHITE HOUSE
OFFICE OF LEGISLATIVE AFFAIRS
HOUSE LIAISON**



112 East Wing
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Office fax: 456-2604

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PAGE ONE OF _____

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Office of Congressman José E. Serrano
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MESSAGE:

FYF -
Nadine

Congress of the United States

Washington, DC 20515

January 31, 2000

"We conclude that it would be unconstitutional, contrary to U.S. immigration law and congressional rules, and a serious interference in the parent-child relationship for Congress to grant Elián citizenship without the consent of his father." Law professors' legal opinion, attached

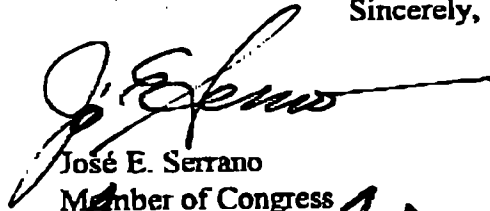
Dear Colleague:

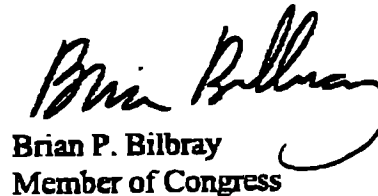
Attached please find a copy of a legal opinion, written by professors who teach constitutional, family, immigration, and human rights law at major law schools throughout the United States, about the issues raised by the Mack-McCollum bills to impose citizenship on Elián González. These arguments also apply to any effort to impose resident status.

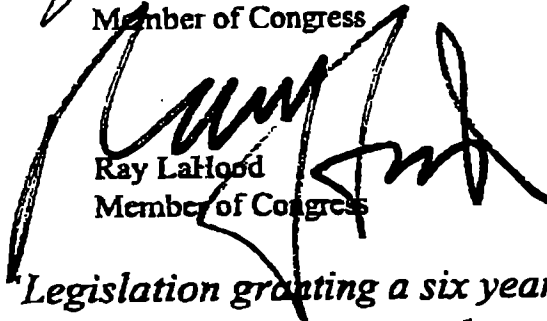
Before you vote on any citizenship or permanent residency legislation for Elián González, we urge you to carefully review these compelling legal arguments and the conclusion that the law requires early reunification of Elián with his father. The professors confirm constitutionally and legally what we all know is the right thing to do -- return Elián to his father.

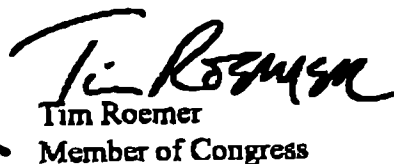
With thanks for your consideration and best wishes, we are

Sincerely,


José E. Serrano
Member of Congress


Brian P. Bilbray
Member of Congress


Ray LaHood
Member of Congress


Tim Roemer
Member of Congress

"Legislation granting a six year old child citizenship, against the wishes of his father...is unprecedented and would involve Congress in family matters that are traditionally protected from government invasion." Ibid.



YALE LAW SCHOOL

P.O. Box 208215

New Haven, Connecticut 06520-8215

January 27, 2000

The Honorable José Serrano
United States House of Representatives
Washington, DC 20515

Dear Cong. Serrano:

You have requested a legal opinion regarding proposed legislation that would grant citizenship to Elián González, the six year old Cuban boy. We teach in the fields of constitutional, family, immigration, and human rights law, and respectfully offer this response.

As we explain below, respect for family integrity is a basic principle of U.S. law, enshrined in our Constitution, statutes, and regulations. The Supreme Court, the Executive Branch and the Congress have all emphasized the importance of parental rights, the importance of family reunification, and the right of parents to choose where a child will live and his citizenship. Legislation granting a six year old child citizenship, against the wishes of his father, a father whom the Immigration and Naturalization Service has determined has the legal right to speak for his son in immigration matters, is unprecedented and would involve Congress in family matters that are traditionally protected from government invasion. We conclude that it would be unconstitutional, contrary to U.S. immigration law and congressional rules, and a serious interference in the parent-child relationship for Congress to grant Elián citizenship without the consent of his father.

1. Imposing citizenship on Elián González without the consent of his father Juan González would be an unconstitutional interference with the parent-child relationship.

Granting Elián citizenship would interfere with the parent-child relationship, a relationship that the Constitution has long protected against government "usurpation, disregard, or disrespect."¹ Our courts have repeatedly stated that "a parent's desire for and right to 'the companionship, care, custody and management of his or her children'"² is a fundamental right under our Constitution and can be disturbed only in the most egregious of circumstances. The rights to conceive and raise one's children have been deemed "essential, basic civil rights of

¹ *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); see also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972).

² *M.L.B. v. S.L.J.*, 519 U.S. at 117-18 (quoting *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18, 27 (1981) and *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

man.”³ This constitutionally protected parent-child relationship includes the right “to determine where [the child] will live during his minority and of what country he will be a citizen of while he lives there.”⁴ Not only will granting citizenship to Elian interfere with the parental right to determine the political system he owes allegiance to, but it will have a divisive impact on family relations as it will be the predicate for further government action.⁵

Legislation conferring citizenship on Elián would directly invade “the private interest here, that of a man [Juan González] in the children he has sired and raised.”⁶ Elián’s father has made clear his choice for his family and his son—he wants his son to live with him, in Cuba, as a Cuban citizen, and does not desire that the boy live in the United States as a U.S. citizen.⁷ As his grandmother recently said: “No one has a right to make him an American citizen. He was born in Cuba. He lives in Cuba. He’s a Cuban.”⁸

The wishes of a father for his child—the country in which he is to live and be a citizen of—are constitutionally protected and must be respected. Only unequivocal proof that “the natural parent cannot or will not provide a normal family home for the child” can override the parent-child relationship protected by the Fifth Amendment to the Constitution.⁹ No such proof exists here. After U.S. officials conducted lengthy and private interviews of Mr. González in Cuba, INS Commissioner Doris Meissner determined that “there is no question that Mr. González is Elián’s father,” that Mr. González “has a close and continuous parental relationship with his son,” and therefore that Mr. González “has the sole authority to speak for his son on immigration matters.”¹⁰ INS also determined that there was “no credible information indicating

³ *Stanley v. Illinois*, 405 U.S. at 651; see also *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (decisions about upbringing of children are “of basic importance in our society”).

⁴ *Polovchak v. Smith*, 1984 U.S. Dist. LEXIS 20922, 20924 (N.D. Ill. Dec 27, 1984).

⁵ *Polovchak v. Landon*, 614 F. Supp. 900 (N.D. Ill. 1985) (parents right to bring up children as atheists or Communists), *affirmed in relevant part, modified in other part*, *Polovchak v. Meese*, 774 F.2d 731, 734 (7th Cir. 1985) (fundamental right of parents to determine political system child professes allegiance to).

⁶ *Stanley v. Illinois*, 405 U.S. at 651.

⁷ Elián’s constitutional right to parental custody and the “companionship” and “care” or his parent are also violated by his detention in this country in the custody of one who is not his parent. See *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1197-99 (9th Cir. 1975) (court allowed challenge to Attorney General’s parole power where plaintiffs claimed that the continued detention of Vietnamese children airlifted from Vietnam who had living parents violated the child’s Fifth Amendment right to liberty and due process); *Stanley v. Illinois*, 405 U.S. at 651.

⁸ Robert D. McFadden, *Grandmothers Make Plea for Cuban Boy’s Return*, N.Y. TIMES, Jan. 22, 2000, at A9.

⁹ *Santosky v. Kramer*, 455 U.S. 745, 767 (1982).

¹⁰ Statement of INS Commissioner Doris Meissner dated January 5, 2000 (“Statement of INS Commissioner”).

that the child would be at risk of torture or persecution if returned to his father."¹¹ In these circumstances to override the decisions the father has made for his son and family, would be contrary to the family values that this country has deemed "essential" since its founding.

2. Imposing citizenship on Elián González without his father's consent would violate the right of every individual to determine his own citizenship.

Under the U.S. Constitution individuals have the right to determine their own citizenship; imposed citizenship (other than at birth) is an interference with fundamental constitutional rights. This has always been the position of the U.S. government: "No person should have the nationality of a foreign country forced upon him after birth without his consent."¹²

Our country's rejection of imposed nationality originates from its interference with an individual's fundamental liberty interest to determine his or her own citizenship. That interest is constitutionally protected. Citizens have a constitutional right to voluntarily relinquish their citizenship, cannot be constitutionally punished by forced denationalization, and cannot relinquish their citizenship except through voluntary actions. So too, the forced acquisition of new citizenship for Elián would carry with it new obligations, such as military service, and new burdens, such as the restrictions on travel to Cuba for U.S. citizens.¹³ New citizenship also often removes or weakens the diplomatic protection afforded by the person's prior citizenship; and involves an important aspect of personal self-definition. Those substantial individual interests and obligations cannot be made subject to government compulsion by forced citizenship.¹⁴

Nor is there any argument that the great uncle has the legal right to give his consent for Elián to become a citizen. The Attorney General and INS Commissioner have already determined that Mr. González alone may speak for the child, and that he desires his son's

¹¹ Letter from Attorney General Janet Reno to Linda Osberg-Braun, Roger Bernstein, and Spencer Eig dated January 12, 2000 ("Attorney General Letter"), at 3.

¹² P. Weiss, *Nationality & Statelessness in International Law* 110 (1956) (quoting United States Government at Hague Conference of 1930). As long ago as 1886, Secretary of State Bayard objected to Mexico's imposition of citizenship upon certain American citizens, stating that "a new national status [cannot] be forced as *a favor* by one government upon a citizen of another." 3 J.B. Moore, *A Digest of International Law* 306 (1906) (emphasis added).

¹³ 31 C.F.R. 515.560; 31 C.F.R. 515.561.

¹⁴ The only exception to the rule against imposing citizenship is with regard to minors; Elián González can be made a citizen without his consent, but only upon the consent of his father or by reason of his father's own voluntary naturalization. See Parts 3 & 4, *infra*. The reason for this narrow exception is obvious: a minor, particularly one that is 6 years old, is deemed incapable of consent. In order to promote family unity that might otherwise be disturbed if the parent were made a citizen and the child were not, and also because the parent can be deemed to provide implied consent for the child—a child is entitled to derivative naturalization upon his parents own naturalization. To make Elián González a citizen in circumstances where his father does not seek to naturalize and has not consented to his son's own naturalization is contrary to the Constitution.

immediate return to his home in Cuba.¹⁵ That is the father's right, according to the Attorney General and federal law. Elián was merely placed in the temporary physical care of his great uncle by the Attorney General; it is a placement that can be revoked by her at any time and gives the great uncle no right to speak on Elián's behalf with regard to such matters as his citizenship.¹⁶ Elián is still considered to be in the legal custody of the Attorney General;¹⁷ she has determined that Elián belongs back with his father and that it is he who can speak for his six year old son.

The Florida State court order provides the great uncle with no additional right to consent to citizenship on behalf of Elián. As the Attorney General said, "the question of who may speak for a six-year-old child" on "asylum" and "immigration matters" "is a matter of federal law." "[T]he Florida court's order has no force or effect insofar as INS's administration of the immigration laws is concerned."¹⁸ In these circumstances, the only person who can speak for Elián is his father. He has spoken. To impose citizenship upon Elián in these circumstances is unconstitutional.

3. Imposing citizenship on Elián González without his father's consent would flout the principles of family integrity codified in the naturalization statutes.

Like other areas of American law, our country's naturalization statutes respect the fundamental, constitutional rights of parents to raise their children without government interference, including deciding the citizenship status of their minor children. Congress has crafted these naturalization statutes to ensure that family integrity is accorded paramount significance. To impose citizenship on Elián would flout these constitutional principles and their longstanding incorporation by Congress into the naturalization statutes.

It is plain that under the naturalization statute and its implementing regulations, Elián is far too young to make an independent application for naturalization in his own right.¹⁹ Rather,

¹⁵ Attorney General Letter at 1; INS Commissioner Statement at 1.

¹⁶ 8 C.F.R. §§ 235.2, 212.5(d).

¹⁷ *Reno v. Flores*, 507 U.S. 292, 298, 302-03 (1993).

¹⁸ Attorney General Letter at 1. The Florida state court order purported to give the great uncle interim custody of Elián until a hearing on March 6. Even were such an interim order valid, that would not give the great uncle the right to consent to granting Elián citizenship—it is an order giving temporary custody pending a hearing, hardly sufficient to allow him to act as Elián's guardian. In any case, the Florida court order was invalid even as to this temporary custody question. Elián's legal custody in the United States is vested with the Attorney General as a matter of federal law and it is she who determines in whose temporary physical care the boy shall be placed. Attorney General Letter at 2; *Reno v. Flores*, 507 U.S. 292 (1993); 8 C.F.R. § 212.5.

¹⁹ 8 U.S.C. § 1427; 8 C.F.R. § 316.2(a) (1999) ("Except as otherwise provided in this chapter, to be eligible for naturalization, an alien must establish that he or she: (1) Is at least 18 years of age").

children are eligible to naturalize only on a derivative basis, upon the successful naturalization application of their natural or adoptive parents. There is absolutely no provision in the naturalization statutes for another relative, such as a great-uncle (even one granted temporary custody), to arrange for the naturalization of a child. In fact, the naturalization statutes specifically address Elián's situation, providing a single path to citizenship for him: a child under 18 years of age and born outside the U.S. to two alien parents automatically acquires U.S. citizenship upon the "naturalization of the surviving parent if one of the parents is deceased."²⁰

Under the naturalization statutes, Elián is too young to apply for citizenship in his own right, and may acquire U.S. citizenship only if Mr. González himself were to file a successful application for naturalization. No other relative can seek to convert Elián's citizenship. This statutory scheme is the product of wise legislative choices, but it is also grounded in the Constitution, which recognizes the basic parental right to raise one's children, and shields that right from governmental attack. Imposing citizenship on Elián without his father's consent would flout the naturalization statutes and violate the Constitutional protections they codify.

4. Imposing citizenship on Elián González without his father's consent would flout House and Senate rules governing private bills.

Like the naturalization statutes, House Rules governing private bills recognize and incorporate the powerful constitutional protections afforded the parent-child relationship. For example, these Rules require "a signed statement by each beneficiary, or the beneficiary's guardian, that he or she desires the relief sought by the bill" (emphasis added).²¹ Granting Elián González citizenship without the consent of his father flouts House Rules regarding private immigration bills and violates the constitutional principles upon which the Rules rest. Although it may be true that House Rules can be overridden by vote of the House itself, this rule is not a mere rule of procedure, but one of substance that reflects the constitutional requirements outlined above—that it is only the parents (and perhaps a legal guardian) that can request citizenship on behalf of their minor child. Ignoring the House Rule that requires a guardian's consent would violate the constitutional due process rights of both Elián and his father and would be unconstitutional.

In addition, House and Senate Rules require that all administrative and judicial proceedings regarding a beneficiary's immigration status be completed before a private bill is considered.²² Congress has recognized by this Rule that extra-legal remedies should be a course of last resort. This is to insure the rule of law, that Congress is given the benefit of judicial rulings and that it is not burdened with bills presenting issues that may be remedied in courts. At present Elián González is the subject of two court proceedings in Florida—one in federal court and the other in state court. Although in our view the Attorney General is not required by law to await the outcome of further judicial proceedings before implementing her decision to return

²⁰ 8 U.S.C. § 1432(a)(2).

²¹ House Immigration Subcommittee Private Bill Rules of Procedure ("House Rules") 1(i).

²² Senate Immigration Subcommittee Rules of Procedure for Private Bills ("Senate Rules") 3; House Rules 3.

Elián to his father, nevertheless she has announced that she will do so. No private bill should even be considered until these proceedings are concluded.

Finally, Senate Rules mandate that no private bill may be given favorable consideration until appropriate Executive Branch departments have prepared and submitted a report to the Subcommittee, and establish a scheduling rule that private bills be considered in "chronological order of their introduction, except that priority shall be given to bills introduced earliest in any previous Congress."¹ These rules ensure the orderly consideration of private bills as well as coordination with executive branch agencies charged with, among other things, management of foreign affairs. An immediate vote on a private bill imposing citizenship on Elián González would defy the ordinary Senate rules, disadvantage beneficiaries of other proposed legislation, and deny members the benefit of the Executive branch's view of the proposed private bill.

5. Conclusion

In our opinion, private legislation purporting to confer U.S. citizenship on a six year-old boy, contrary to the unambiguously expressed desires of his sole surviving parent, would be unlawful. Such legislation would violate constitutional protections of the parent-child relationship and the right of an individual to determine his own citizenship. It would also flout the codification of these basic constitutional principles in U.S. naturalization statutes and congressional rules.

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¹ Senate Rules 4, 5.

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In the last sentence of the second paragraph (the sentence beginning, "Here, after Elian's inspection deferred, the INS met...."), insert "in Cuba" after "the INS met". This will avoid any confusion.

CA's foremost citizenship expert suggests a change to the third paragraph on page two (the sentence beginning, "For example, a frequent subject...."). His comments follow below:

I think the letter generally makes the right points. This issue is a bit tricky because many countries' laws, including our own 14th Amendment, confer citizenship on children without their parents' consent. Thus, what must and has been stressed here is the fact that this is being done outside the usual boundaries of even private bills. Nonetheless, and within those confines, I think it does a good job.

One somewhat tangential matter which is somewhat mis-stated, however, concerns the last line in the third para. on page two. It has always been a requirement that only voluntary actions could result in expatriation. What changed was the requirement, enacted by Congress in 1986, that the act had to be not only voluntary but undertaken with the intent to relinquish US citizenship before expatriation could occur. Thus the end of that sentence (the last in the para. should read "...by new requirements that the act, in addition to being voluntary, must be accompanied by an intention to relinquish U.S. citizenship."

To: Irene Bueno
From: Lisa Macevic
State comments
on Justice letter
on Elian Gonzalez

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