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Office of the General Counsel

425 I Street NW
Washington, DC 20536

JAN 3 2000

MEMORANDUM FOR DORIS MEISSNER
COMMISSIONER

FROM:

Bo Cooper
Bo Cooper
General Counsel

SUBJECT: Elian Gonzalez

QUESTIONS PRESENTED

1. Who has the legal authority to speak on behalf of the six-year old Cuban national, Elian Gonzalez – his father, his great uncle, or the attorneys claiming to represent Elian?
2. Given Elian's father's apparent legal authority to speak for the child on immigration matters, under what circumstances should the child's interests be considered apart from the expressed wishes of the parent regarding disposition of the child's application for admission and his asylum application?
 - A. Is the father able to represent adequately the immigration interests of the child?
 - B. May Elian apply for asylum in direct opposition to the expressed wishes of his father?

SUMMARY ANSWERS

1. The documents and other submitted material indicate that Juan Miguel Gonzalez-Quintana has the legal authority to speak for his son Elian.
2. The INS must determine whether the father has an interest that conflicts with his ability to represent the immigration interests of the child. Specifically, the INS must consider whether the possibility of coercion precludes Elian's father from making his true

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intentions known and speaking on behalf of Elian and whether Elian's asylum application represents a divergence of interests between the father and child.

- A. After evaluating the testimony of the father and the uncle, we believe the father is able to convey to the INS his true intentions regarding Elian and to represent adequately the immigration interests of the child.
- B. At his tender age, Elian does not have the capacity to seek asylum on his own behalf. Since there is no objective basis to believe that Elian is at risk of persecution or torture, the INS should not accept his asylum application against the expressed wishes of his father.

DISCUSSION

1. Who has the legal authority to speak on behalf of the child – his father, his great uncle, or the attorneys claiming to represent him?

Juan Miguel Gonzalez-Quintana has submitted numerous documents establishing that he is the father of Elian Gonzalez. Elian's great uncle, Lazaro Gonzalez, does not dispute this claim. Because the child was born out-of-wedlock, some have questioned whether this fact affects the father's legal rights. Under Cuban law, however, parental rights are unaffected by questions of legitimacy. Constitution of Cuba, Article 37.

In immigration matters, relationships are generally assessed under the law of the jurisdiction where the relationship arose. See e.g., Matter of Hosseinian, Int. Dec. 3030 (BIA 1987). Cuban law also reinforces the right of both parents to exercise parental authority. Articles 82 and 83 of the Family Code of Cuba provide that minor children shall be under the authority of their parents and that parental authority is shared jointly by both parents. Should one parent die, as in this case, the surviving parent becomes the sole individual authorized to speak for the child. The specific rights and duties of a parent, enumerated in Article 85 of the Family Code, include the obligation to represent the child in all legal transactions and acts in which they have an interest (Article 85, clause 5). While a person may lose the right to exercise such authority, the absence of any evidence showing that a court has deprived or suspended such authority would indicate that the parent's rights continue in force. (See attached Opinion from Library of Congress.)

Without the consent of the surviving parent, the great-uncle, Lazaro Gonzalez, has no legal basis to act on behalf of Elian in immigration matters. Although attorneys in this case have characterized him as Elian's legal guardian, he has submitted no evidence and made no claim that he is actually a court-appointed guardian. While INS has placed the child into Lazaro Gonzalez's care, the fact that Elian has been released to him does not authorize him to speak for the child in immigration matters. Instead, he has agreed to care for the child and ensure that he appears at all immigration proceedings. 8 CFR 236.3(b)(4). Given these factors, Lazaro Gonzalez has no legal basis at this time to represent Elian in immigration matters.

Three attorneys have submitted Form G-28, Notice of Entry and Appearance as Attorney or Representative, with Elian's signature. They assert that they represent Elian, and not Lazaro, though they have conceded that this representation is through the consent of Lazaro Gonzalez, as well as by the apparent direct consent of Elian. The attorneys have also indicated that Elian wishes to pursue his application for admission in the United States. Although the attorneys claim to have the authority to speak on Elian's behalf, the law does not appear to support this claim. While there is no absolute prohibition against a minor signing a Form G-28, the ability to do so must be evaluated against general questions of capacity. In the state of Florida, for instance, a minor under the age of 18 is not considered competent to enter into contracts. See Section 743.07, Florida Statutes (1973). Under INS regulations, the parent or legal guardian may sign the application or petition of someone under the age of fourteen. 8 CFR 103.2(a)(2). Thus, while it appears that Elian may sign the Form G-28, 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. Here, the father has expressly stated that he does not authorize the attorneys to represent Elian, and that he does not want Elian to seek asylum. Unless the INS has direct evidence of Elian's capacity, Elian's signature on the Forms G-28 does not bear much weight.

Further, the attorneys appear to have a potential conflict of interest. In their letter of December 15, 1999, they stated that they represent Elian, "by direct consent, as well as through the consent of Lazaro Gonzalez, Elian's custodian, who is currently his legal guardian in the United States." As stated above, Lazaro Gonzalez has no legal basis to represent the immigration interests of Elian. Thus, his personal interests in this matter are separate and apart from Elian's immigration interests. Since Lazaro Gonzalez appears to have retained the services of the attorneys on Elian's behalf, any fiduciary duty they owe to Lazaro presents a potential conflict of interest.

The INS has no basis to reject the father's parental authority. Therefore, we presume that he has the legal authority to speak on behalf of the child in immigration matters.

2. Given the father's apparent legal authority to speak for the child on immigration matters, under what circumstances should the child's interests be considered apart from the expressed wishes of the parent regarding disposition of the child's application for admission and his claim for asylum?

On December 14, 1999, attorneys retained on behalf of Elian Gonzalez by Lazaro Gonzalez submitted an asylum application, under Elian's signature, claiming that Elian would be persecuted on the basis of his social group if he were returned to Cuba. The attorneys assert that the child is raising the asylum claim independently, rather than through a guardian or representative. The father has expressly stated that he does not want Elian to seek asylum. The attorneys have also indicated that Elian wishes to pursue his application for admission in the United States while Elian's father has stated he wants Elian returned to Cuba.

The attorneys have asserted that Elian's father cannot speak for him in immigration matters because he is under the control and jurisdiction of the country from which Elian fears

persecution. Because the father outwardly supports the regime, the attorneys claim that he cannot represent the child's best interests. They also claim that the Cuban government has prevented the father from expressing his actual wishes for his son.

While we do not regard the attorneys as authorized to represent the immigration interests of Elian, their assertions call into question the father's ability to represent adequately the immigration interests of the child. The underlying question goes to whether the father's personal interests conflict with his representation of the immigration interests of the child to a degree sufficient to justify interference with his parental authority. In this case, the possibility of a conflict has been raised based on allegations that the father is not free to express his wishes and the assertion that the child is free to raise an asylum claim regardless of the father's wishes.

A. Father's ability to represent the immigration interests of the child

Immigration law presents little guidance on the resolution of a parent's ability to adequately represent the interest of the child. In Johns v. DOJ, 624 F.2d 522 (5th Cir. 1980), the Fifth Circuit held that the government violated the due process rights of a five-year old Mexican national when it issued a deportation order against her, because the attorney retained to represent her spoke for her alleged parents, rather than the child. In that case, the court found a clear divergence between the interests of the child and those of the "parents," who had no legal authority over the child. The court further found that the Mexican birth mother, who claimed her child had been kidnapped, did not necessarily represent the interests of the child given that she had not seen the child since the day she was born. In making its finding, the court noted that the child had been raised in a different culture, spoke a different language, and would, if deported, be returned to her natural mother's home to reside with two older siblings who had never seen her and with whom she could not communicate. Id., at p. 524. The Fifth Circuit remanded the case to the district court with instructions to appoint a *guardian ad litem* to represent the child in all further proceedings. Id.

In this case, the alleged inability of the father to adequately represent the interests of the child rests not on any estrangement between father and child or the father's inability to adequately assess the best interests of his child. To the contrary, evidence in the record, including the interview of the father and the numerous affidavits he provided, establish that the father and child share a close relationship, and that the father has exercised parental responsibility and control for example, in the education and health care of the child. Instead, the alleged inability of the father to adequately represent the interests of the child is based on the possibility that the father has been coerced. If coerced, the father's representation of the immigration interests of the child may conflict with the father's interest in his own personal safety, rendering him unable to adequately represent the child in immigration matters. Following Johns, this inability would require the appointment of a *guardian ad litem* to represent Elian's immigration interests. Accordingly, it is necessary to evaluate the possibility of coercion and to determine whether the father's ability to adequately represent the interests of the child in immigration matters is impeded to such a degree as to justify an interference with the father's assertion of parental authority.

On December 13, 1999, the Officer in Charge for the INS Havana sub office (accompanied by the First Secretary and Chief of the Political/Economic Section of the US Interests Section) interviewed Juan Miguel Gonzalez-Quintana at his home. Mr. Gonzalez-Quintana described in great detail his close relationship with his son. He submitted affidavits from several neighbors, family friends, physicians, and Elian's teacher attesting to the affection between the father and son as well as the responsibility the father has taken in his son's life. He expressed his wishes that Elian be returned to him, that Elian not be allowed to apply for asylum, and that Elian not be represented by the attorneys purporting to represent him in the United States. Mr. Gonzalez-Quintana was also asked to express his wishes without speaking (in writing) in order to protect against the possibility of auditory monitoring of the interview by Cuban officials. Mr. Gonzalez-Quintana again expressed, in writing, his wish for the child to return to Cuba. The Officer in Charge found that "the honesty, concern and truthfulness on the part of Mr. Gonzalez-Quintana was palpable . . ." Thus, Mr. Gonzalez-Quintana's demeanor, as assessed in person by the Officer in Charge, supports the conclusion that the father's expressed wishes are not motivated by outside influences. The numerous affidavits attesting to the close relationship between the father and son lend further credence to the father's request that his son be returned to him.

On December 20, Elian's great uncle, Lazaro Gonzalez, was interviewed at the INS District Office in Miami. Lazaro Gonzalez expressed his opinion that the father's statements were coerced. He based this conclusion on four factors. First, Lazaro Gonzalez stated that Mr. Gonzalez-Quintana, in two phone calls, asked that Lazaro Gonzalez and his family take care of Elian. The first of these conversations occurred prior to Elian's arrival in the United States¹, and the second occurred on the day Elian was found at sea and brought to a hospital in Ft. Lauderdale. In subsequent conversations, Elian's father demanded the boy's return. The father never mentioned to INS a conversation prior to Elian's arrival in the United States and never acknowledged that he had ever asked his uncle to care for the child. Next, Lazaro Gonzalez, as well as his daughter, noted the tone of the subsequent telephone conversations with the father, and opined that he did not appear to be speaking freely. Third, Lazaro Gonzalez stated that, according to family members living in Cuba with whom he has spoken, Cuban officials are present at the father's home and have prevented him from leaving. Fourth, one of the attorneys stated that he was told by a reporter in Cuba that, according to sources in Mr. Gonzalez Quintana's neighborhood, the father had applied with the U.S. Interest Section for the lottery program to come to the United States. Because of the manner in which the DOS and the INS record applications for various immigration programs, it would be impossible to use government records to rule out completely that possibility.

In order to ensure that we have examined fully the question of coercion, the INS sought a second interview with Juan Miguel Gonzalez-Quintana. At the request of both the US and Cuban governments, a neutral site was selected, the home of the representative of the United Nations International Children's Emergency Fund (UNICEF). The INS officer in charge who had conducted the first interview also conducted this interview which was held on December 31, 1999. As was the case at the December 13, 1999 interview, Mr. Gonzalez was accompanied by his parents who were present for the interview, was asked a number of questions by the OIC, and

¹ It should be noted here that we have found no evidence that the father consented to Elian's travel to the United States prior to his departure.

was also given a set of written questions. The OIC concluded that Mr. Gonzalez "spoke truthfully." The OIC was convinced that Mr. Gonzalez "appeared honest and concerned for the well being of the child and in wanting the child with them [the Gonzalez family] in Cuba immediately."

The statements of Lazaro Gonzalez, as well as a general understanding of the practices of the Castro regime, make it essential that the INS closely examine the voluntariness of the father's statements. The evidence of coercion, however, is far from compelling when weighed against the personal interviews of the father and the interpretation of those interviews by the INS officer. Equally important, the existence of political pressure does not necessarily mean that the father's expression of his wishes is not genuine. If the father's statements truly reflect his belief as to the best interests of his child, then there is no divergence of interests. His statements would reflect his assessment of his child's best interests and should generally be given effect, notwithstanding any political pressure he may feel. Accordingly, it is important to evaluate all available evidence with an eye toward determining not merely whether the father is subject to political pressure or even coercion, but whether he is acting against his true belief as to the best interests of his child.

First, the opinions of Lazaro Gonzalez and his daughter, based on the tone of telephone conversations, conflict with the INS officer's interpretation of her interview with the father. Because the INS officer interviewed the father in person and was convinced that the father is speaking truthfully and freely, we believe that her interpretation carries more weight than the opinions of Lazaro Gonzalez and his daughter.

Second, the telephone conversations, recounted by Lazaro Gonzalez, wherein the father asked him to take care of the child do not establish a belief on the part of the father that the child should remain in the United States permanently. If true, the first of these conversations occurred prior to Elian's arrival in the United States and prior to any knowledge on the part of the father that Elian's mother had perished at sea. Her tragic death fundamentally changed the circumstances such that any prior statements of the father create no inference as to his true beliefs after the event. The second conversation with the father occurred while Elian was being examined and treated at a hospital in Ft. Lauderdale. The father's alleged request that Lazaro Gonzalez take care of the child is subject to varying interpretations. At the second interview, the OIC asked the father to discuss his earlier conversations with Lazaro Gonzalez. He disputed Lazaro's version. Elian's father stated "At all times I asked that Elian be returned to me." Elian's grandfather interjected and the OIC summarized his view "At no time during his conversation with his brother did he ask him to take care of Elian. As a family they did not have to say such a thing. It's humane and as family, it is an obligation." Assuming Elian's father made the statement, we believe the most reasonable interpretation is that it was a normal reaction of a father to the circumstances of his five year-old son's lone arrival and medical treatment in a foreign country following the tragic death of his mother, rather than a request that the child remain with Lazaro Gonzalez indefinitely.

Third, the statements of the attorney concerning the father's alleged applications under the United States lottery program carry little weight. We asked Elian's father in the written questions whether he had applied either in person or by mail to the US Interests Section for permission to go to the United States. He indicated in writing that he had not. The statements

that he had applied for an immigrant visa are based on hearsay and cannot be confirmed or denied by the U.S. Interests Section or the INS. Even if we assume the father had applied under the lottery program, there is no information concerning the circumstances of those applications, including his intentions concerning Elian.² Moreover, the circumstances faced by the father and his child have drastically changed from the time of any such application.

Fourth, Elian's great uncle and the attorneys argued that father's freedom of movement has been restricted by his government. We questioned Mr. Gonzalez-Quintana at the second written submission about this allegation and he indicated that his movements are not restricted by the Cuban government. We recognize that Cubans do not enjoy the freedom of movement we have in our own country and that Mr. Gonzalez-Quintana is certainly under a lot of scrutiny by the press and by the Cuban government. We have not, however, found evidence that he is unable to move as freely as other Cuban citizens or that his movements are restricted in order to punish or intimidate him or to influence his parental decisions. We have assumed for purposes of the recommendation that there are limitations on the father's freedom and that he is being monitored both by the Cuban government and by the Cuban press, but we do not believe that leads to an inference that the father's request for his child's return is not genuine.

Finally, the father's loving and active relationship with his child, as established by his interview and numerous affidavits, coupled with the circumstances under which he now finds his six year-old son, separated from his only surviving parent in a foreign country immediately following the tragic death of his mother, strongly suggests that the father's request for his child's return is genuine. After considering the totality of the information currently before the INS, we believe that the most reasonable inference is that the father is able to represent adequately the child's interests in immigration matters.

After weighing the information we have gathered, we believe the father is able to represent adequately the child's immigration interests. Accordingly, we believe the INS should give effect to the father's request for the return of his child by treating it as a request for a withdrawal of Elian's application for admission. Since we believe Elian's father is able to speak on behalf of his son, we should add that were Elian's father to come to the United States to assert his parental authority, we believe that the INS would be required to recognize Elian's father's interests with respect to all immigration matters involving Elian. Elian's father's arrival would necessarily change the custody arrangement we sought with his uncle in his absence. Under the INS regulations, a child is released in order of preference to 1) a parent; 2) legal guardian; or 3) an adult relative. 8 CFR 236.3 In the December 13th interview, our officer in charge indicated to Mr. Gonzalez-Quintana that visas to visit the United States are generally granted for persons in his situation. Mr. Gonzalez-Quintana indicated he was uninterested in applying for such a visa.

² No one has claimed and we have no indication in INS records that Elian's father ever applied under the refugee program. Therefore we must assume that the father did not base any such immigration application on a fear of persecution for himself or his family.

B. Elian's asylum application

While an application for asylum and a request for withdrawal of an application for admission are inherently contradictory requests, the acceptance of a parent's request for the withdrawal of his child's application for admission does not necessarily preclude a child from applying for asylum independent of his parent. INS must determine whether it will accept an asylum application prepared by one of the attorneys claiming to represent Elian and filed under Elian's signature. The INS has instructed its Texas Service Center to hold the application until this determination is made.

A child's right to seek asylum independent of his parents is well established. Section 208(a)(1) of the INA permits any individual physically present in the United States or who arrives in the United States—including any alien who has been brought to the United States after having been interdicted in international or United States waters—to apply for asylum. While Section 208(a)(2) of the INA describes certain exceptions to this right, those exceptions are not applicable to this case. There are no age-based restrictions on applying for asylum. Because the statute does not place any age restrictions on the ability to seek asylum, it must be taken as a given that under some circumstances even a very young child may be considered for a grant of asylum. The INS need not, however, process such 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. Further, the United Nations Convention on the Rights of the Child requires state parties to:

take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights.

United Nations Convention on the Rights of the Child, Article 22, 28 L.L.M. 1448, 1464 (1989).³

Neither section 208 of the INA, nor the Convention on the Rights of the Child, however, addresses whether a child may assert a claim for asylum contrary to the express wishes of a parent. We believe, in keeping with the United States' obligation of *nonrefoulement* under the 1967 Protocol Relating to the Status of Refugees, certain circumstances require the United States to accept and adjudicate a child's asylum application, and provide necessary protection, despite the express opposition of the child's parents.

The Seventh Circuit helped define those circumstances in Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985). The Court held that the significant rights of parents to direct the life of their child did not preclude the child from raising an asylum claim, despite the parents' opposition. The parents' significant interests entitled them, however, to participate in all immigration matters regarding their child. In that case, the INS accepted an asylum application by a twelve-year old

³ The United States is a signatory to the United Nations Convention on the Rights of the Child, not a party.

boy and granted asylum without notice to the parents. The Seventh Circuit held that the government had erred because it failed to ensure that both parties received an adequate opportunity to assert their interests. The Court found it persuasive that the boy, who was twelve, was sufficiently mature to articulate a desire for asylum apart from his parents' wishes.

In assessing the parents' rights, the Court applied the balancing test established by Mathews v. Eldridge, 424 U.S. 319 (1976), which provides a mechanism for assessing the level of procedural due process necessary in a given proceeding. Under that test, the government must assess the private interest affected by the proceeding, the risk of error inherent in the chosen proceeding, and the interest of the government in using a particular proceeding. Based on that analysis, the Polovchak court found that the involvement of the parents must be weighed against any competing procedural interests, ultimately concluding that the parents' risk -- the loss of their ability to direct their child's interests -- significantly outweighed the burdens imposed on the government by providing the parents with notice and opportunity to participate in the procedure.

The Supreme Court has applied the same balancing test in assessing the standard of proof necessary to permit the termination of parental rights. Recognizing "that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment," the Court held that parental rights could not be severed absent clear and convincing evidence of a basis to terminate. Santosky v. Kramer, 455 U.S. 745, 753 (1982). The Court noted that the child and the parents "share a vital interest in preventing erroneous termination of their natural relationship." *Id.* at 760. Consequently, applying the Eldridge factors, the Court determined that the private interest affected by proceedings to terminate parental rights is commanding, the risk of error in using a preponderance of the evidence standard is substantial, and the countervailing government interest in using the preponderance of the evidence standard, rather than the clear and convincing evidence standard, was slight.

The issue here -- whether the INS should accept and adjudicate Elian's asylum application in direct opposition to his surviving parent and legal guardian -- does not result in the termination of parental rights. It carries the potential, however, of significantly prolonging, perhaps indefinitely, Elian's separation from his father, resulting in a substantial interference with the father's parental rights. So, while Santosky is not directly applicable to this case, the INS must keep in mind the potential interference with the father's parental rights when determining whether to accept and adjudicate Elian's application for asylum. In Polovchak, the Seventh Circuit addressed the competing interests of the twelve-year old boy who had clearly expressed his desire to apply for asylum and of the parents in asserting their parental rights by requiring the government to allow the parents to participate in their child's immigration matters. Here, the father may not have an opportunity, in a meaningful way, to participate in the adjudication of Elian's asylum application because his residence in Cuba may preclude him from travelling to the United States or because he is unwilling to do so. In order to respect the parental rights of the father, the INS must first determine whether a true divergence of interests exists with respect to Elian's asylum application. Is Elian truly seeking asylum? If not, would his return violate United States' international obligations? If the answer to either question is yes, the INS must adjudicate the application, but in a way that provides the father with a meaningful opportunity to participate.

(i) Elian's capacity to assert a claim for asylum on his own behalf

While the asylum statute clearly invests a child with the right to seek asylum, the question of capacity to assert that right is unresolved. The Polovchak case recognized that a twelve-year-old boy was sufficiently mature to be able to articulate a claim in express contradiction to the wishes of his parents. It did not specifically reach issues relating to the capacity of a younger child, but opined that a twelve-year old was probably at the low-end of maturity necessary to sufficiently distinguish his asylum interests from those of his parents. Elian's tender age is clearly one of the factors that must be considered in assessing whether he can assert an asylum claim. At age six, well below the lower end of necessary maturity described by the Seventh Circuit in Polovchak, we have serious doubts as to Elian's capacity to possess or articulate a subjective fear of persecution on account of a protected ground. There is no indication from the information INS has received that Elian possesses or has articulated a subjective fear of persecution on a protected ground, or that he has the ability to do so. Moreover, we do not believe that Elian, at age six, is competent to affirm that the contents of his asylum application accurately reflect his fear of returning to Cuba, if any. We believe, therefore, that despite his signature on his application for asylum, Elian lacks the capacity to raise an asylum claim. Thus, we do not consider Elian to be seeking asylum or refugee status on his own behalf.

(ii) Objective basis for a valid asylum claim

Capacity is only one of the issues that must be assessed, however. In cases involving unaccompanied minors who may be eligible for asylum, the INS Children's Guidelines, following the recommendations of the UNHCR, advise adjudicators to assess an asylum claim keeping in mind that very young children may be incapable of expressing fear to the degree of an adult. In recommending a course of action for evaluating a child's fear, the Children's Guidelines note that the adjudicator must take the child's statements into account, but it is far more likely that the adjudicator will have to evaluate the claim based on all objective evidence available. The UNHCR notes that the need for objective evidence is particularly compelling where there appears to be a conflict of interest between the child and the parent. UNHCR Guidelines, para. 219.

Thus, while Elian appears to be too young to raise an asylum claim on his own behalf, if objective information demonstrates that there is an independent basis for asylum, notwithstanding the father's stated interests, the INS would be obliged to consider the claim. In evaluating whether such information exists, the INS should first consider the allegations contained in his asylum application.

Elian's application for asylum bases his claim on two grounds. First, the application describes past persecution to members of Elian's family, including detention of Elian's stepfather, imprisonment of his great-uncle, and harassment of his mother by the communist party. Second, the application describes the potential for political exploitation of Elian, based on a political opinion imputed to him by the Castro regime, resulting in severe mental anguish and suffering tantamount to torture. The application includes a request for protection under the

Convention Against Torture. When attorney Roger Bernstein first submitted the application on December 10, he reserved the right, in his cover letter, to supplement the application with supporting documentation. In a meeting prior to the interview of Lazaro Gonzalez, Mr. Bernstein stated that he has spoken to witnesses who could attest to the allegations of past persecution and the likelihood of political exploitation.

None of the information provides an objective basis to conclude that any of the experiences of Elian's relatives in Cuba bear upon the possibility that Elian would be persecuted on account of a protected ground. Further, while we are troubled about the possibility of political exploitation and resulting mental anguish, it does not appear to form the basis of a valid claim for asylum. There is no objective basis to conclude that the Castro regime would impute to this six-year old boy a political opinion (or any other protected characteristic), which it seeks to overcome through persecution. See INS v. Elias-Zacarias, 502 U.S. 478, 112 S.Ct. 812 (1992) (holding that an applicant for asylum based on political opinion must show that the alleged persecutors are motivated by the applicant's political opinion).

Finally, the allegation that any political exploitation of Elian requires protection under the Convention Against Torture is without objective basis. The assertion that the mental anguish Elian might face would be sufficiently severe to constitute torture under the Convention is purely speculative. Additionally, to merit protection under the Convention, the applicant must demonstrate that the torture would be inflicted intentionally. Even if the Castro regime seeks to exploit Elian for political gain, there is no reason to believe that it has any intention of inflicting severe mental anguish or any other form of harm recognized by the United States as torture upon Elian. Further, under U.S. law, the definition of mental suffering that can constitute torture is very narrow: it must be prolonged mental harm caused by the intentional infliction of severe physical pain or suffering, the administration or threatened administration of mind altering substances, or the threat of imminent death to the victim or another person. 8 CFR 208.18(a). Again, there is no indication that any political exploitation of Elian by the Castro regime would involve such tactics.

We do not believe Elian has the capacity to form a subjective fear of persecution on account of a protected ground. Further, there appears to be no objective basis for a valid claim for asylum or protection under the Convention Against Torture. Therefore, we believe that there is no divergence of interest between the father and child with respect to Elian's asylum application which warrants interference with the father's parental authority. Elian's return to Cuba would not violate the United States' obligations under the 1967 Protocol Relating to the Status of Refugees, the Convention Against Torture, or the Convention on the Rights of the Child. The INS may give effect to the father's request for the return of his child by not accepting or adjudicating the application for asylum submitted under Elian's signature.

Disapproved _____

Approved for the reasons stated in the memorandum _____

Louis Murrin

1/5/2000

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

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

Petitioners/Plaintiffs,

v.

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

Respondents/Defendants.

**CASE No. 00-0206-CIV-
HOEVELER**

**RESPONDENTS/DEFENDANTS'
MOTION FOR EXPEDITED
SCHEDULING OF
DEFENDANTS' MOTION TO
DISMISS OR ALTERNATIVE
MOTION FOR SUMMARY
JUDGMENT, AND PLAINTIFFS'
MOTION FOR PRELIMINARY
AND PERMANENT
INJUNCTIVE RELIEF AND
PETITION FOR WRIT OF
MANDAMUS**

Defendants move for expedited scheduling of the proceedings on the government's Motion To Dismiss Or Alternative Motion for Summary Judgment, and plaintiffs' Motion For Preliminary and Permanent Injunctive Relief and Petition for Writ of Mandamus. This Motion is based on matters set forth in the accompanying Motion To Dismiss Or Alternative Motion for Summary Judgment and Opposition To Motion for Preliminary Injunction, as well as on the following events:

1. Elian Gonzalez ("Elian"), a six-year-old native and citizen of Cuba, was one of

The language and the stated purpose of the *Guidelines* is consistent with this recognition: "This memorandum is written to provide [asylum officers] with background and guidance on adjudicating children's asylum claims." See *Guidelines for Children's Asylum Claims* (Plaintiffs' Complaint, Exh. C). Nothing in the language of the *Guidelines* mandates the adjudication of a juvenile applicant's application for asylum. See *Jean*, 727 F.2d at 982.

Under the foregoing analysis, the plaintiffs have failed to demonstrate that Elian has a clear right to the relief that is sought on his behalf — the nullification of INS's refusal to accept and adjudicate the asylum applications. For this reason alone, they have failed to state a claim for mandamus relief, and the request for relief should be dismissed. In the alternative, the Court should grant the government summary judgment on this claim.

D. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON WHETHER THE COMMISSIONER PROPERLY ACCEPTED JUAN GONZALEZ' WITHDRAWAL OF THE ADMISSION AND ASYLUM APPLICATIONS PURPORTEDLY PROFFERED ON ELIAN'S BEHALF

(1) THE COMMISSIONER'S DECISION IS "FACIALLY LEGITIMATE AND BONA FIDE"

As mentioned at the beginning of this Section, the test for granting summary judgment is whether there is "no genuine issue as to any material fact . . . [such that] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Plaintiffs' action challenges the Commissioner's decision to recognize Juan Gonzalez' parental authority to speak for six-year-old Elian in withdrawing the asylum applications that

others purported to file on Elian's behalf. Because in reviewing that decision, the Court looks to what was before the Commissioner when she rendered her decision and there is no dispute "as to any material fact" in that record, this case is ripe for summary judgment. In assessing that decision, moreover, the Court should determine only whether the Commissioner has advanced "a facially legitimate and bona fide reason" for her decision. *See Cuban American Bar Association v. Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995) (reviewing Attorney General's parole decisions for "facially legitimate and bona fide" reason); *Perez-Perez v. Hanberry*, 781 F.2d 1477, 1482 (11th Cir. 1986) (same). The Supreme Court first articulated this standard in *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), where it held that "when the Executive exercises [the power to make policies and rules for the exclusion of aliens] negatively on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion."

When Elian was brought ashore on November 25, he was, as a matter of law, deemed to be an applicant for admission to the United States. The source of that classification is INA § 235(a)(1), 8 U.S.C. § 1225(a)(1), which reads:

Aliens treated as applicants for admission. An alien present in the United States who has not been admitted 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) shall be deemed for purposes of this chapter an applicant for admission.

See also INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13) (defining admission as lawful entry after immigration inspection and authorization by immigration officer). Like any alien seeking to enter the United States, Elian had to be inspected by an immigration

officer to confirm his admissibility.¹⁴ See 8 U.S.C. § 1225(a)(3); 8 C.F.R. § 235.1(d).

"[T]he inspection process is critical to the integrity of the immigration system. . . . The purpose of these procedures is 'in addition to making a closer examination of [an alien's] right to enter in the first place, [to] require and obtain information and a variety of records that enable [immigration officials] to keep track of the alien after his entry.'"

Leal-Rodriguez v. INS, 990 F.2d 939, 946 (7th Cir. 1993) (citation omitted).

The day Elian arrived at Hollywood Hospital, Supervisory Immigration Inspector Edward Agundez deferred his immigration inspection until December 23. Record at 22. Elian's inspection was deferred because he was receiving emergency medical treatment and adequate information about his parents was unavailable. *Id.* Under this deferred inspection procedure, Elian was granted a limited parole into the United States pending his inspection. *Id.* at 22; see 8 C.F.R. § 235.2(e) (allowing parole for deferral of inspection on account of medical disability). "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, and to hold that petitioner's parole placed her legally 'within the United States' is inconsistent with the congressional mandate, the administrative concept of parole, and the decisions of this Court." *Leng May Ma v. Barber*, 357 U.S. 185, 188-90 (1957).

¹⁴ Under the statutory scheme, an alien (a person not a citizen or national of the United States) is deemed to be seeking "entry" or "admission" into the United States if he "arrives" at a port of entry (such as an airport) and has not yet been admitted by an immigration officer. INA § 235(a)(1), 8 U.S.C. § 1225(a)(1), as added by IIRIRA § 302(a); 8 C.F.R. § 1.1(q).

10-11



THE WHITE HOUSE

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Counsel to the President

→ Consult psychologist who
speaks Spanish

2 psychiatrists + 1 psychologist



Train on how to conduct
transfer

Eliau has, by virtue of his father's having spoken on his behalf, asked to withdraw his application for admission, and the INS has indicated that it would grant that request. Record at 1-2. Section 235(a)(4) of the Act expressly allows this. "An 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 . . . from the United States." 8 U.S.C. § 1225(a)(4). This is not rare. For fiscal year 1997, the INS reported permitting more than half a million aliens, 556,966 to be exact, to withdraw from seeking admission. See U.S. Immigration and Naturalization Service, *1997 Statistical Yearbook of the Immigration and Naturalization Service* 166 (1999).

The *INS Immigration Inspector's Field Manual* provides guidance for the use of this authority. Where unaccompanied minors are concerned, the *Manual* instructs immigration inspectors to allow withdrawal whenever appropriate. But before doing so, it further states, "the INS officer must be satisfied either that the minor is capable of understanding the withdrawal process, or that a responsible adult (relative, guardian, or in cases where a relative or guardian is not available, a consular officer) is aware of the actions taken and the minor's impending return." Record at 277 (*Inspector's Field Manual, Chapter 17.15(f)*). This is what happened here. The INS determined that Elian is of such a tender age that he lacks the capacity to make immigration decisions. It apprised Elian's father of the situation, and his father withdrew Elian's application for admission and declined to assert an asylum claim, as a result of which Elian will be returned.

The *Manual* also instructs immigration inspectors to make every effort to ascertain whether the safety of an unaccompanied minor lacking the capacity to make immigration decisions would be threatened if he returned home. *Id.* If there is an objective basis to support a claim for asylum, the minor would be placed in removal proceedings. *Id.*; see also *id.* at 285. The Attorney General explained how this section of the *Field Manual* applied to Elian's case in her letter to counsel of January 12, 2000. Record at 25-28. In that same letter, she made clear that the question of whether Juan Gonzalez was the appropriate person to speak for Elian in immigration matters was one of federal, not state law. *Id.* at 26. Section 103(a) of the INA provides that the Attorney General's determinations and rulings "with respect to all questions of law" under the INA "shall be controlling." 8 U.S.C. § 1103(a). Her determinations and rulings with respect to Juan Gonzalez' authority to speak for Elian are entitled to *Chevron* deference.

No one disputes the authenticity of the birth certificate Juan Gonzalez provided to the INS. Nor should there be any dispute that he possesses parental authority. In immigration matters, a legal relationship is generally assessed under the law of the jurisdiction where the relationship arose. See, e.g., *Matter of Hosseinian*, Int. Dec. 3030 (BIA 1987). Under Cuban law, on the death of one parent, parental authority remains with the surviving parent. Record at 202. That authority, under Article 85 of the Family Code of Cuba, includes the authority "to represent their children in all legal transactions and acts in which they have an interest. . . ." *Id.* That authority is precisely what Juan Gonzalez is seeking to exercise. Florida law is similar. See Fla. Stat. § 744.301 ("The

mother and father jointly are natural guardians of their own children and of their adopted children, during minority. If one parent dies, the natural guardianship shall pass to the surviving parent, and the right shall continue even though the surviving parent remarries.").

Lazaro Gonzalez and his attorneys are claiming that Juan Gonzalez's assertion of parental authority cannot be relied upon because he is saying only what Cuban officials demand he say. *Id.* at 266-68. The INS, however, expended great effort to assess that allegation through two interviews of Juan Gonzalez conducted by Officer-in-Charge Silma Dimmel, witnessed by State Department Official Jeffrey DeLaurentis, at Juan Gonzalez' home and at a neutral site. The INS carefully examined the issue of coercion. Neither Dimmel nor Jeffrey DeLaurentis believes Juan was coerced. *Id.* at 228-29, 235, 245. Dimmel's summations of her two interviews describe a father who is speaking from his heart. *Id.* at 55, 235. Elian was taken from Cuba without Juan Gonzalez' consent, and he wants him back:

It is this officer's observation that Mr. Juan Miguel Gonzalez Quintana is deeply concerned for the well being of his child. . . . He as well as his parents are emotionally distressed and became emotional several times during the interview. Mr. Gonzalez did not appear to be forced or coerced to speak with us and claim[ed] he wants his son. Both he and his parents appeared honest and concerned for the well being of the child in wanting the child with them in Cuba immediately. The longer the child remains in the U.S., the more they will continue to suffer. Their emotional stress and pressure is the reason for their not returning to work. Mr. Gonzalez met with us voluntarily and spoke truthfully and honestly. He misses and wants his son back and the grandparents cannot mention Elian's name without becoming emotional. This is an honest, genuine and unified family

thoroughly engaged in Elian's life, that has been under distress since the taking of the child by his mother.

Id. at 243. The INS asked questions in written form to overcome the possibility of listening devices. It also took into account the circumstances — that Juan Miguel and Elian had a close, loving relationship, and the tragic death of Elian's mother, and concluded that Juan Miguel's request for Elian's return to him represented his true wishes.

Moreover, the INS properly concluded that Juan Gonzalez' parental authority extends to the question of whether it should accept the asylum applications purportedly filed on Elian's behalf. As with the application for admission, to adjudicate an asylum application ostensibly submitted by a six-year-old without cognizance of the father's parental authority contradicts the principle that primary responsibility for the care of children rests with their parents. *See Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). With this role as primary caregiver and protector comes the "common law . . . recognition to the right of parents, not merely to be notified of their children's actions, but to speak and act on their behalf." *Hodgson v. Minnesota*, 497 U.S. 417, 483 (1990) (Stevens, J., concurring) (citing J. Schouler, *Law of Domestic Relations* 337 (3d. ed. 1882); 1 W. Blackstone, *Commentaries* 452-453; 2 J. Kent, *Commentaries on American Law* 203-206; G. Field, *Legal Relations of Infants* 63-80 (1888)). As Justice White explained in *Stanley v. Illinois*, 405 U.S. 645 (1972):

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing

interest, protection. . . . The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

405 U.S. at 650 (parallel citations omitted).¹⁵

Moreover, the government's position that only Juan Gonzalez can speak for Elian in immigration matters does not rest only on their parent-child relationship. A parent's interest in controlling the upbringing of his child is "a counterpart of the responsibilities they have assumed." *Lehr v. Robertson*, 463 U.S. 248, 257 (1983); accord *Parham*, 442 U.S. at 602. Biological parentage simply offers a person "an opportunity . . . to develop a relationship with his offspring." *Lehr*, 463 U.S., at 262; see also *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting). It is the "demonstration of commitment to the child through the assumption of personal, financial, or custodial

¹⁵ See *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979) (outlining a "presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."); *Grasmegna v. Parole Commission*, 666 So.2d 135, 136 (Fla. 1996) (Florida legislature has determined that consent of the victim is not defense to the crime of lewd conduct with minor because a child is incapable of understanding the full consequences of acts enumerated in statute); *Orange Motors of Miami, Inc. v. Miami Nat'l Bank*, 227 So. 2d 717, 718 (Fla. 3d DCA 1969) (finding agreements entered into by minors are voidable because minors do not have capacity to contract); *Liberty Mut. Ins. Co. v. Conley*, 152 So.2d 521, 523 (Fla. App. 1 Dist. 1963) (same); see also *Elkins v. Vanden Bosch*, 433 So.2d 1251, 1252 (Fla. App. 3 Dist. 1983) (holding that 12 and 15-year-old children possess sufficient intelligence, understanding, and experience to make mature choice between parents in a custody battle); *Berlin v. Berlin*, 386 So.2d 577 (Fla. 3d D.C.A. 1980), rev. denied, 394 So.2d 1151 (Fla. 1981) (same).

responsibility" that gives the natural parent the authority to speak for the child and triggers an interest warranting the protection of the courts. *See Hodgson*, 497 U.S. at 445; *Stanley*, 405 U.S. at 651; *Lehr*, 463 U.S. at 261.

The INS assured itself not only that Juan Gonzalez is Elian's father but that the relationship between the two is very close. Juan Gonzalez remained a central part of Elian's life despite his divorce from Elian's mother, Elisabeth. During the first INS interview in Cardenas, he explained that Elian spent more time at his residence than at Ms. Brotons' residence. *Id.* at 49, 52. "He would sleep and eat here and spent most of his time here." *Id.* at 49. Elian attended school near his father's home, ate most of his meals with his father, and shared the same bed as his father and step-mother. *Id.* His father participated in Elian's school activities and attended meetings with Elian's teachers. *Id.* at 52, 76. He saw to it that Elian received necessary medical care when he needed surgery. *Id.* at 51, 88. He met Elian's emotional needs and provided him with food and shelter. *Id.* at 52-53. The evidence is that Juan Gonzalez is committed to Elian "through the assumption of personal, financial . . . [and] custodial responsibility." *Hodgson*, 497 U.S. at 445.

Among cases the INS relied upon in its deliberations is *Polovchak v. Meese*, 774 F.2d 731 (7th Cir. 1985). There, against his parents' wishes, twelve-year-old Walter Polovchak had filed an asylum application claiming Soviet authorities would persecute him on account of his conversion to the Baptist faith. 774 F.2d at 733. The INS granted the application because it deemed him sufficiently mature to apply, later granted him

lawful permanent residence, and subsequently issued a departure control order.

Litigation ensued in both state and federal court. In the state litigation, the Illinois Supreme Court eventually held that the trial court had erred in making Walter a ward of the court, thereby removing him from his parents' custody. *Id.*

Meanwhile Walter's parents filed suit in federal court asserting that the INS' failure to give them notice and an opportunity to be heard before it granted Walter asylum and issued a departure control order violated their procedural due process rights. *Id.* The district court granted them summary judgment against the INS on their claim that the INS had not followed its procedures in issuing the departure control order and enjoined the order's enforcement. *Id.* at 734. The government appealed, and the Seventh Circuit affirmed. The primary question before it, the court of appeals observed, "concerns what action the government must take to ensure that both parties, the parents and the child, receive an adequate opportunity to assert their interests." *Id.* at 734. It sided with the parents, observing that "[f]ree personal choice in matters involving family life is a fundamental liberty interest of a parent because 'the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.'" *Id.*

The significance of the *Polovchak* case lies in its recognition of the importance of parental authority and in its recognition that some children are too young to assert certain rights that override that authority. The INS had accepted and adjudicated twelve-year-old Walter Polovchak's asylum application because it deemed him sufficiently mature to

apply. At that age, the Seventh Circuit noted, Walter "was presumably near the lower end of an age range in which a minor may be mature enough to assert certain individual rights that equal or override those of his parents." *Id.* at 736. By the time Walter's case reached the Seventh Circuit, he was on the eve of his eighteenth birthday. *Id.* That placed him at the high end of the range:

at age seventeen (indeed, on the eve of his eighteenth birthday), Walter is certainly at the high end of such a scale, and the question whether he should have to subordinate his own political commitments to his parents' wishes looks very different. The minor's rights grow more compelling with age, particularly in the factual context of this case.

The ability of a young person to decide to which political system he professes allegiance necessarily increases with age. We do not suggest that every twelve year old entertains serious political views (although some may); we would, however, suggest that many seventeen year olds do. Similarly, as the child grows, his parents' influence over him weakens, and the time his parents have in which to guide him grows shorter.

Id. at 736-37.

Deference to the INS is particularly important here because this case implicates questions of foreign relations. *See Aguirre-Aguirre*, 119 S. Ct. at 1445 (INS officials "exercise especially sensitive functions that implicate questions of foreign relations"). A declaration by Ambassador Mary A. Ryan discusses at length how the decision reached by the INS in Elian's case is consistent with the principles that the Department of State expects to be followed in similar cases involving American children. Record at 286-90. The INS decision to respect Juan Gonzalez' parental authority is consistent with the principles that inform the Department of State's consular work on behalf of American

citizen children in foreign countries. *Id.* at 288, ¶ 9. That consular work is based on the assumption that the parents of American citizen children, not the Department of State or the United States Government, should decide what is best for their children. *Id.* at 287, ¶ 6.

If a U.S. citizen minor child were found overseas and subject to a dispute concerning possible return to the United States, the Department of State explains, "we would expect the government of that country immediately to seek the child's surviving parent, if any, and to contact U.S. consular officials for assistance in doing so if necessary." *Id.* at 288, ¶ 8. The Department of State would not expect the surviving parent to be required to participate in a foreign court's custody proceedings to establish his or her right to assume responsibility for the child as against distant relatives or outright strangers. *Id.* Thus, what the United States does in Elian's case may have implications far beyond this case.

Elian is well below the low end of the range the court in *Polovchak* referred to. Given Elian's extreme youth and the absence of any reliable evidence that Juan Gonzalez is not being candid in insisting that Elian return home, the Commissioner's decision to recognize Juan Gonzalez' parental authority is facially legitimate and bona fide and must be upheld.

MAR-23-2000 19:14

DOJ/OIL

202 616 9777

P.01/05

URGENT: TO BE HELD CLOSELY

TO: MARY DEROSA (NSC)
KATHERINE BROWN (STATE)
SUSAN SNYDER (STATE)

FM: DAVE KLINE (DOJ)

RE: ELIAN GONZALEZ LETTER

Sent pursuant to Brad Glassman's
request.

Brad asks that the letter be
held closely.

URGENT: TO BE HELD CLOSELY

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

OFFICE OF THE LEGAL ADVISER

MARY DEROSA

Phone: 202/456-9111
FAX: 202/456-9110

Date: 3/24/00

FAX TRANSMITTAL COVER SHEET

TO	PHONE	FAX
Beth Nolan	62632	66279
Dan Feldman	69141	69140
Caryn Hollis	69131	69130

COMMENT: _____

MAR-23-2000 19:14

DOJ/OIL

202 616 9777

P.02/05



U.S. Department of Justice

Civil Division

Washington, D.C. 20530

March 23, 2000

BY FACSIMILE TRANSMISSION AND FIRST-CLASS MAIL

Kendall Coffey, Esq.
Coffey, Diaz & O'Naghten, L.L.P.
2655 South Bayshore Drive, Suite 200
Miami, Florida 33133

Re: Elían Gonzalez v. Reno, et al. No. 00-0206-CIV

Dear Mr. Coffey:

I want to thank you and your colleagues for meeting with us on such short notice yesterday to discuss matters in light of the Court's decision to dismiss the above-captioned lawsuit.

As discussed yesterday, the principal objective of Commissioner Meissner and the Attorney General is to bring about a prompt, fair, and orderly resolution of this case in the manner most conducive to Elián's well-being. As Judge Moore stated in his decision, "each passing day is another day lost between Juan Gonzalez and his son, [and] the Court can only hope that those on each side of this litigation place the interests of Elián Gonzalez above all others." Under these circumstances, we are prepared to revoke Elián's parole into Lazaro Gonzalez's temporary care in order to carry out Commissioner Meissner's decision of January 5, 2000.

In light of the Southern District's dismissal of the lawsuit and the need, emphasized by the court, to avoid any further delay, the government would now proceed, in the ordinary course, to carry out the decision of the Commissioner that the district court sustained by effecting the immediate reunion of Elián and his father, unless Lazaro Gonzalez obtained an injunction pending appeal to change the legal status quo. As you know, a motion for

-2-

an injunction pending appeal, while properly granted only rarely, is the recognized means within our judicial system by which Lazaro Gonzalez may seek judicial intervention if he disagrees with the district court's determination that the appellees are free to proceed with their intended course of action.

We are willing, however, to consider an alternative way of proceeding in this case so long as appellate proceedings can be completed and Elian can be reunited with his father in a timeframe comparable to what would normally be required for the Court of Appeals to rule on a request for an injunction pending appeal. Our discussions yesterday regarding a joint motion for an expedited appeal may present a framework for such an arrangement.

We propose that the parties agree in writing to request jointly, not later than tomorrow, March 24, 2000, that the Court of Appeals set an expedited briefing schedule and accelerate its consideration of your appeal, subject to the following terms and conditions:

1. Appellant's opening brief is due seven calendar days from tomorrow, March 24, 2000; appellees' answering brief is due seven calendar days from the date of service of appellant's brief; and appellant's reply brief is due three calendar days from the date of service of the answering brief. Service is to be by same-day facsimile transmission and first-class mail. Oral argument will be conducted as soon thereafter as practicable.
2. If the Eleventh Circuit panel grants the parties' joint motion for expedited briefing and consideration, appellees will not exercise their authority to revoke Elian's parole and terminate Lazaro Gonzalez's temporary care of Elian pending the court of appeals' decision on the expedited appeal. If the Eleventh Circuit panel affirms the district court, Lazaro Gonzalez and his family agree to comply with the instructions

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of the Immigration and Naturalization Service concerning Elian's transfer within three calendar days of the Eleventh Circuit panel's decision, unless appellant obtains an injunction pending the filing and disposition of a petition for a writ of certiorari in the Supreme Court. Any motion by appellant for such an injunction shall be expressly conditioned upon appellant's filing of such a certiorari petition within five calendar days of the court of appeals' decision and, if requested by appellees, shall be further expressly conditioned upon agreement by appellant to the filing of a joint motion in the Supreme Court for expedition of the consideration of the certiorari petition to the maximum extent possible.

3. In accordance with the ongoing responsibility of the INS for Elian under the Immigration and Nationality Act and implementing regulations, this agreement shall not prevent appellees from terminating Lazaro Gonzalez's temporary care of Elian in the event that the INS determines that there has been a material change of circumstances affecting Elian's appropriate placement.

We hope you will find this approach acceptable. If we are unable to reach agreement, the government will make arrangements to implement Commissioner Meissner's decision as described above. Please advise us as to your position not later than 12:00 p.m. tomorrow, March 24, 2000.

/ / /

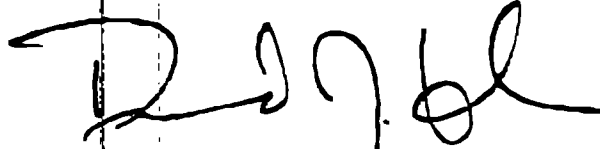
/ / /

/ / /

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We thank you for your continued professionalism and for your willingness to respond promptly.

Sincerely,



DAVID J. KLINE
Deputy Director
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 616-4900 (telephone)
(202) 616-4948 (facsimile)

cc: opposing co-counsel

THE WHITE HOUSE

Counsel to the President

Elian Gonzales

1. Miami relatives would like to meet w/ AG → w/ Elian → wrote back (James signature)
 - Happy to meet, but not in Miami over this weekend
 - Not necessary for Elian to attend
 - Adults can convey any info.

↓

Relatives have written back saying Cuban spy infiltrated the process (Believe he did not work on Elian case at all, but may have attended a few general staff mtgs).
2. Case itself - filing reply brief this afternoon for Tuesday hearing - a couple of narrow (but dispositive) jurisdictional issues.
Thurs. 2/22 + week of 3/6 - 2 hearings
↓
air briefs due 3/2
↓
Made request for appointment of guardian ad litem - answer reply due 3/23.
3. Sen. Torricelli ^{has} injected himself into the fray - Cuban American Natl Foundation; Torricelli talked w/ Sandy + Eric → family might be willing to transfer care to fr if he were willing to come here for duration of fed

lawsuit -- & maybe even drop state lawsuit. DOJ thought it needed to speak w/ LS directly - GC/CANF → bottom line: DOJ would like to pursue option, but there are lots of details to work out

THE WHITE HOUSE

[Counsel to the President]

~~Bill~~

- INS espionage

- Elian Gonzales

Preston King

INS + DOJ →

James →

↓ from may come

4562632

what happens at hearing
on 22nd?

what goes

State

Bills
Mandates

Juvenile Justice

same repeated stories
that RepubliKans want
to strip out gun provisions --
left signaling POTUS
intention to veto.

POTUS needs to know what's in
bill

least 8 amendments → all states to
display 10 command

learning it's ~~amendment~~ seeking

May
Ryan →

Jim
Brock
Carmichael
Brown

Talking Points
March 27, 2000

- We have never taken the position that we would wait out a full appeals process before reuniting Elian and his father.
 - We offered the Miami relatives an agreement to postpone the reunion of Elian and his father until the end of the 11th Circuit process if Lazaro Gonzalez explicitly agreed to promptly turn over Elian if their appeal did not prevail, and barring an injunction from the SC pending cert.
 - They have not agreed -- or in fact -- responded to this reasonable option that preserves their appeal rights while ensuring that Elian will not have to wait for an prolonged period before being reunited with his father.
 - We are in the process of informing Lazaro Gonzalez' counsel that we want to meet with them to work out the details of an orderly reunion between Elian and his father. We have informed counsel for Lazaro Gonzalez that Elian's parole status will be terminated as of Thursday, March 30, 2000 at 9:00 am.
-

Q: What if they still agree -- will you wait out this longer schedule?

A: We would not speculate.

Q: What is your reaction to the Court's schedule?

A: We're grateful that the Court of Appeals is willing to expedite its consideration of the case, however we continue to be concerned about the continuing separation of this little boy from his father. As we explained to the Court in our filing today, Lazaro has twice failed to commit to the condition that he to promptly turn over Elian if his appeal does not succeed. That being so, and as we told the Court of Appeals, the INS is under no obligation to maintain the current arrangement.

Q: The relatives have filed a notice of intent to appeal and say they will stay the course. Will you wait until all appeals are exhausted before removing the child?

A: As I have said, we are committed to reuniting this child with his father in a fair, prompt, and orderly way. Beyond that, I am not going to discuss the steps we may take or a timetable for achieving the reunion.

Q: What is the next step?

A: I do not think it would be appropriate for me to share the details of our plans, but I can say we will work with everybody concerned to achieve an orderly, fair and prompt reunion between Elian and his father.



Department of Justice

FOR IMMEDIATE RELEASE
Friday, March 24, 2000
WWW.USDOJ.GOV

AG
(202) 616-2777
TDD (202) 514-1888

Statement by Attorney General Janet Reno on the Elian Gonzalez Case

"As I said earlier this week, our goal is to reunite Elian with his father in a fair, prompt and orderly manner. From the beginning, we have been mindful of the fact that at the center of this case is a six year old boy who has been through a terrible ordeal. We are concerned for him and will continue to try to resolve this matter in a way that avoids additional trauma to him.

"Earlier this week, Federal District Court Judge K. Michael Moore sustained our judgment that Elian should be reunited with his father. We have been willing to postpone the reunion while the district court considered the case, but we are not willing to wait through an open-ended appeals process that could prolong the separation of this child from his father. We agree with Judge Moore that "each passing day is another day lost between Juan Gonzalez and his son," and we cannot risk the harm that a prolonged separation might create.

"That is why we have proposed a solution that allows Elian's Miami relatives adequate opportunity to appeal their case, while working to achieve a reunion between Elian and his father.

"Yesterday, we asked the relatives to agree to an expedited appeals schedule, and we also asked them to commit to quickly returning Elian to his father if their appeal does not prevail. As of this moment, they have not agreed to comply with these terms.

"We will continue to try to reach an agreement with Elian's Miami relatives that meets these objectives. To that end, we have sent their attorneys another letter this evening setting forth the next steps.

"A great strength of the United States is that we are a Nation of laws and of respect for the law. I hope that all in the community will work together to uphold our laws and help make an orderly process possible."

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Department of Justice

Statement By the Department of Justice

March 28, 2000

"From the beginning, we have been mindful of the fact that at the center of this case is a six year old boy who has been through a terrible ordeal. We are concerned for him and will continue to try to resolve this matter in a way that avoids additional trauma to him.

"We have gone to great lengths to bring about a resolution that is prompt and that is carried out in a manner that creates as little disruption for Elian as possible. Since the Commissioner announced her decision on January 5, 2000 that Elian Gonzalez' father speaks for Elian in immigration matters, the INS has encouraged all parties to work together to facilitate Elian's return to his father in a cooperative way.

"Both U.S. and international law recognize the unique relationship between parent and child, and family reunification has long been a cornerstone of both American immigration law and INS practice. This is a country where the rule of law is respected and upheld. A federal court has considered this case and has sustained the Justice Department's decision, a decision which was based on the facts and the law.

"It has been nearly twelve weeks since the Commissioner's decision, and four months since Elian was separated from his father and lost his mother. It is time for this little boy, who has been through so much, to move on with his life at his father's side. "As District Court Judge Moore said in his ruling last week: "each passing day is another day lost between Juan Gonzalez and his son.

"We continue to urge everyone involved to work together to understand, respect and uphold the bond between parent and child and the laws of the United States."

###

Parole and Revocation of Parole (permission to be here
w/out formal admission)

When Elian Gonzalez first arrived in the United States, the Immigration and Naturalization Service (INS) paroled him into the care of his great-uncle Lazaro Gonzalez, pursuant to 8 CFR 235.2(e). That regulation provides that "[w]henver an alien on arrival is found or believed to be suffering from a disability that renders it impractical to proceed with the examination under the [Immigration and Nationality] Act, the examination of such alien . . . shall be deferred for such time and under such conditions as the district director in whose district the port is located imposes." Elian has remained in a parole status under this provision since his arrival on Thanksgiving. Elian's parole status means that he has temporary permission to remain in the United States until the INS is prepared to complete the inspection process in his case.

→ Revocation of his parole entails the termination of his legal status in the United States. However, it does not necessarily entail the immediate restoration of physical custody by the INS.

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

OFFICE OF THE LEGAL ADVISER

FAX TRANSMITTAL COVER SHEET

DATE: 3/27	
TO: Beth Nolan	FROM: Mary DeRosa
PHONE NO.:	PHONE NO.: (202) 456-9111
FAX NO.: 66279	FAX NO.: (202) 456-9110
COMMENTS: Beth - Here are all 3 letters. 2 from DOS (3/23 + 3/24) and one from the family's lawyers (3/24). I understand there is another one from the family today, and might be another one from DOS later later today. Mary	
NUMBER OF PAGES (including cover page): 15	

03/24/00 22:27 202 514 9077

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MAR-24-2000 20:55

INS GENERAL COUNSEL

202 514 8044 P. 02/00



U.S. Department of Justice
Immigration and Naturalization Service

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

MAR 24 2000

Kendall Coffey, Esq.
Coffey, Diaz & O'Naghten, L.L.P.
2655 South Bayshore Drive, Suite 200
Miami, Florida 33133

Re: Eliau Gonzalez v. Reno, et al., No. 11424-D (11th Cir.)

Dear Mr. Coffey:

The Department of Justice yesterday provided you with a proposal that would give your client, Lazaro Gonzalez, the opportunity to pursue an appeal of the District Court's judgment sustaining Commissioner Meissner's decision that Elian Gonzalez' father speaks for Elian in immigration matters, while at the same time assuring a prompt reunification of Elian and his father if such an appeal is unsuccessful. This proposal followed the District Court's dismissal of your client's complaint, which sought to enjoin the Immigration and Naturalization Service (INS) from implementing its decision. In our proposal, the government expressed its willingness to withhold implementation of the Commissioner's decision, without requiring your client to seek and obtain an injunction pending appeal, while your client sought review in the Eleventh Circuit. In exchange, we had asked that your client join in a motion for an expedited appeal process, agree to a specific schedule governing an appeal to the Eleventh Circuit and any proceedings before the Supreme Court, and comply with INS instructions concerning Elian's transfer to his father should your client not prevail on appeal.

In order to provide your client with the opportunity to seek and obtain review in federal court, the INS has already withheld implementation of a decision that it has had full authority to implement since the Commissioner's announcement on January 5, 2000. The government's latest proposal would have postponed implementation pending expedited review at the Eleventh

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INS GENERAL COUNSEL

202 514 8044 P.03/04

Kendall Coffey, Esq.

Page 2

Circuit and an opportunity to seek an injunction from the Supreme Court, but your response does not accept our offer.

As an initial matter, we are unable to agree to your proposal that some newly constituted body make decisions concerning Elian's future. Under the Constitution and laws of the United States, as well as universally accepted standards of the international community, a parent speaks for and makes decisions for his child, especially one of such tender years as Elian. The Commissioner has determined that Elian's father properly speaks for Elian in immigration matters. The Attorney General has ratified that decision, and the district court has now sustained it.

While your reply suggests an alternative briefing schedule, your letter agrees to neither the filing of a joint motion to expedite the appeal with an accelerated briefing schedule nor a specific written commitment by Lazaro Gonzalez to abide by the instructions of the INS regarding Elian's reunification with his father in the event of a decision on appeal in favor of the government. If we have misinterpreted the intention of your letter and your client would agree to the other terms of our proposal, we would be willing to agree to a briefing schedule that accommodates your desire to have the additional time you feel you need to file your opening brief while adhering to the overall timeframe that we had proposed. Under that alternative, the parties would jointly propose filing simultaneous opening briefs on April 3, 2000 and simultaneous reply briefs on April 10, with a request to the court for oral argument the week of April 10. Because review by the Supreme Court is discretionary with the Court, and because of the need for a prompt reunification of Elian and his father, if the Eleventh Circuit affirms the district court's decision, we would proceed to revoke parole in the absence of an injunction pending certiorari as described in our letter of yesterday.

Otherwise, and as the Department of Justice had advised you in yesterday's letter, the INS is prepared to carry out the Commissioner's decision. In light of Judge Moore's recognition that "each passing day is another day lost between Juan Gonzalez and his son," we are not prepared to forestall the implementation of that decision to accommodate a lengthy appeals process, or without a firm commitment to an orderly reunification of Elian and his father if the Eleventh Circuit affirms the district court's decision. Elian should be reunited with his father in a prompt, fair, and orderly manner. Our offer was an attempt to reach that objective by agreement of the parties.

In the absence of such an agreement by noon on Monday, March 27, 2000, District Director Robert Wallis and I hereby give notice that Elian's parole will terminate as of Thursday, March 30, 2000, at 9:00 a.m. If you do not agree to our proposal, this time period will provide you the opportunity to seek an injunction pending appeal.

In view of the trauma that Elian has already experienced, it is obviously desirable to reunite this boy with his father in as smooth a manner as possible, and we continue to seek Lazaro Gonzalez' cooperation in that effort. Accordingly, we believe it is advisable for Lazaro

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INS GENERAL COUNSEL

202 514 6044

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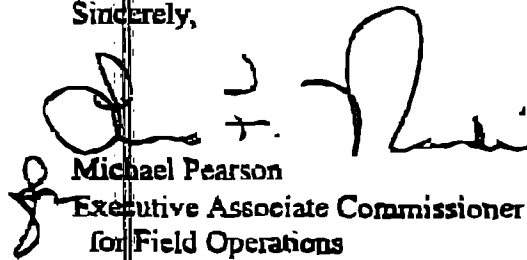
Kendall Coffey, Esq.

Page 3

Gonzalez and his counsel to meet with District Director Wallis at 9:00 a.m. on Tuesday, March 28, 2000 at the INS District Office, 7880 Biscayne Boulevard, Miami, to discuss the ramifications of the revocation of parole and the orderly return of Elian to his father. It will not be necessary to bring Elian to this meeting.

Should you have any questions, please contact Mr. Wallis at (305) 762-3680.

Sincerely,



Michael Pearson
Executive Associate Commissioner
for Field Operations

cc: Opposing co-counsel



Department of Justice

FOR IMMEDIATE RELEASE
Friday, March 24, 2000
WWW.USDOJ.GOV

AG
(202) 616-2777
TDD (202) 514-1888

Statement by Attorney General Janet Reno on the Elian Gonzalez Case

"As I said earlier this week, our goal is to reunite Elian with his father in a fair, prompt and orderly manner. From the beginning, we have been mindful of the fact that at the center of this case is a six year old boy who has been through a terrible ordeal. We are concerned for him and will continue to try to resolve this matter in a way that avoids additional trauma to him.

"Earlier this week, Federal District Court Judge K. Michael Moore sustained our judgment that Elian should be reunited with his father. We have been willing to postpone the reunion while the district court considered the case, but we are not willing to wait through an open-ended appeals process that could prolong the separation of this child from his father. We agree with Judge Moore that "each passing day is another day lost between Juan Gonzalez and his son," and we cannot risk the harm that a prolonged separation might create.

"That is why we have proposed a solution that allows Elian's Miami relatives adequate opportunity to appeal their case, while working to achieve a reunion between Elian and his father.

"Yesterday, we asked the relatives to agree to an expedited appeals schedule, and we also asked them to commit to quickly returning Elian to his father if their appeal does not prevail. As of this moment, they have not agreed to comply with these terms.

"We will continue to try to reach an agreement with Elian's Miami relatives that meets these objectives. To that end, we have sent their attorneys another letter this evening setting forth the next steps.

"A great strength of the United States is that we are a Nation of laws and of respect for the law. I hope that all in the community will work together to uphold our laws and help make an orderly process possible."

###

MAR. 25. 2000 5:37AM

CCL "NO. 863" P. 2/7

COFFEY, DIAZ & O'NAGHTEN, L.L.P.SUITE 200 GRAND BAY PLAZA
2885 SOUTH BAYSHORE DRIVE
MIAMI, FLORIDA 33133TELEPHONE (305) 285-0800, EXT.: 101
TELECOPIER (305) 285-0257
EMAIL: kc@abogadostia.com

KENDALL COFFEY

March 24, 2000

BY FACSIMILE TRANSMISSION AND FIRST-CLASS MAILDavid J. Kline, Deputy Director
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
Post Office Box 878, Ben Franklin Station
Washington, D.C. 20044RE: Eljan Gonzalez v. Reno, et al.; Case No. 00-0206-CIV

Dear Mr. Kline:

Receipt is acknowledged of your letter faxed to my office at roughly 5:30 P.M. yesterday demanding a response by noon today. Because the letter presents the INS' latest scenario for judicial resolution of the case of six-year old Elian Gonzalez, it may be productive to review briefly several such positions by the INS in the past.

Following Elian's tragic ordeal and miraculous arrival at our shores, the INS publicly announced its position that issues of Elian's custody should be determined in the family courts of our state judicial system. This position was not only sensible; it comported with the law. Indeed, as the leading judicial decisions have firmly established, the INS is not an agency with competency or expertise in assessing the best interests of minor children. Precisely for that reason, federal courts have typically deferred to state family courts when the needs and welfare of children are to be defined.

For reasons never adequately explained, after announcing its adherence to the tradition of relying on state family courts concerning children's issues, the INS abruptly reversed fields in the case of Elian. Instead of affording respect for the state judicial process, the INS refused to participate in those proceedings and opted to announce essentially that it would ignore any decision of Florida's judiciary.

Following the INS' insistence that any judicial remedy would have to be pursued in federal court, the Lazaro Gonzalez family proceeded to the U.S. District Court in the Southern District of Florida. Once again, however, the INS acted energetically to close the court house doors to a six-year-old child. Arguing lack of jurisdiction, lack of standing and lack of any meaningful judicial

COFFEY, DIAZ & O'NAGHTEN, L.L.P.

David J. Kline
March 24, 2000
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right to revisit INS decisions, the INS contended that Elian was not entitled to a day in federal court on the issues of his best interests and his right to remain in this country. As you know, while losing on the first two issues, the INS nonetheless prevailed on the third ground as Judge Moore held, in substance, that Elian's fate is to be finally determined by the INS, not a federal court.

With the court house closed to Elian a second time, the parties confront further proceedings to resolve whether this child's cause, paid for with the life of his beloved mother, deserves even a chance to be heard and considered. Like you, we share the hope of mutual approach so that "those on each side of the litigation place the interests of Elian Gonzalez above all others." We also share the desire for a prompt and fairly considered resolution of this case. Toward that end, we propose a framework for a final adjudication that will operate far more promptly than any envisioned in your letter. At the same time, the structure we propose is one that truly addresses the "interests of Elian Gonzalez," a reality that has not been yet adjudicated through the purely legal paper exchanges between lawyers to date. Indeed, while no court or other forum of adjudication has yet made any determination of the best interests of this child, the need for addressing that issue remains paramount. So clear is the primacy of this issue that Vice President Gore and Texas Governor Bush, the Democratic and Republican candidates for President of the United States, both agree that there should be a day in court to decide what is in the best interests of this child and whether he should remain in the United States.

Accordingly, we submit that starting a week from Monday, proceedings should be conducted to review and determine once and for all whether, based on the best interests of the child, Elian should continue the recovery and healing process that is now underway. In that proceeding, critical issues could be considered that have never been evaluated before as part of an analysis by the INS, the Department of Justice or any court. Examples of such information include reports by expert child psychologists who have testified under oath that the child faces substantial risk of serious psychological harm if forcibly removed to Cuba at this time. All of us are aware of the traumatic ordeal of this small child whose mother died to win him a chance at freedom and who then drifted alone on an inner tube for some fifty hours before being rescued by fishermen. The potential for long-term, even permanent damage from such an intensely traumatic experience remains a grave concern. Equally clear is the fact that the subsequent bonding with a maternal figure in his life, Marisleyis Gonzalez, has been an integral part of a healing process that, according to experts, cannot be disrupted at this time without great risk of injury to Elian.

Just as these key circumstances have never been part of the decision-making by the INS, also missing is any assessment of Elian's future in Cuba. Will he be in a healthy, stable household receiving urgently needed and continuing psychological care, or would he, whatever may be the father's wishes, be subject to control by the government that would inevitably include indoctrination, brain washing and political exploitation in accordance with the wishes of the regime in Cuba? In any evaluation of a child's interest in our country, the issues of present and potential psychological harm as well as the future environment awaiting a child are closely studied in order to do what is

COFFEY, DIAZ & O'NAGHTEN, L.L.P.

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Page 3

right for a child. And yet, remarkably, the INS has never done these things in the case of Elian. The framework we propose would permit that critically needed evaluation finally to take place.

As part of assessing the interests of the child, the wishes of the biological father are, of course, significant. We would readily agree to permit the Washington law firm of Williams & Connolly, along with their client, Juan Miguel Gonzalez, to appear in the adjudication process to present evidence on all relevant issues. Indeed, the participation of counsel for the father will be helpful in several respects. In this way, the father's lawyers could help address and potentially respond to troubling evidence that the father has been physically and psychologically abusive in the past, has a history of alcohol abuse, and has lied about matters ranging from the character of the stepfather who saved Elian's life to the father's own desires to leave Cuba and come to Miami. These are issues that would always be considered in any fair-minded evaluation of a child's interests in our country. Also a factor to be at least considered are the consistent and strong feelings of Elian himself who desperately wants to remain here, nurtured by a loving and protective family, and in fulfillment of his mother's dying wish. All these are matters which should be considered before Elian's fate can be fairly determined and irretrievably transformed. For obvious reasons, it is a process that is demanded by any basic notion of fairness and compassion.

In structuring a framework for this determination, the issues would include the matters described in this letter, especially the risks of psychological harm to Elian, as well as the question of his legal right to remain in this country. The family and the INS would agree to abide by the judgment of the neutral decision maker and forego any avenues of appeal whatsoever. Thus, we envision that, in its entirety, this process could be completed within two weeks. Stated simply, if the INS would agree at last to provide a day in court to this small child, the result would be not only a fair determination of what's right for Elian but a much faster resolution than is possible through further court battles.¹ While there are various approaches to selecting a fact-finder for what would amount to a binding arbitration, we are prepared to work immediately and responsively with any proposal the INS would suggest. By way of example, local individuals could include former Independent Counsel and Appellate Judge Daniel S. Pearson or former ABA President Chesterfield Smith. Should you prefer an arbitrator who is not from South Florida, names to discuss could include former Senators Bob Dole and George Mitchell as well as distinguished former family law judges. Due to the urgent time constraints imposed by the INS letter, we have had no opportunity to speak to any potential arbitrator. We are confident, though, that a neutral and highly respected arbitrator could be very promptly identified and agreed to by the parties if there is a will to do so.

¹Even under the scenario of the INS' ultimatum, the parties cannot control when an appellate court might hear oral argument or render its opinion. These processes are typically concluded months after all the briefs are filed. Moreover, should either side seek Supreme Court review, the Court's timetable cannot be predetermined, even by the INS.

COFFEY, DIAZ & O'NAGHTEN, L.L.P.

David J. Kline
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Page 4

In the event a dramatically expedited proceeding to provide a real day in court for Elian will not be considered by the INS, we turn to the pending appeal. Through this process we seek a ruling that, before forcibly removing Elian to Cuba, the INS must allow a chance for fair consideration of his asylum claim, that is, of his right to remain in this country. To a substantial extent, this appeal will center on the statutory mandate of U.S.C. §1158(a) concerning asylum rights for "Any alien...irrespective of the alien's status..." Stated simply, we believe that a six-year-old child also counts as "any alien." Indeed, your own agency's official position is that, "There are no age-based restrictions on applying for asylum." (Bo Cooper Memorandum, January 3, 2000) We agree with that premise, and intend to emphasize that point during the appeal. Moreover, as Judge Moore himself asked during the hearing, "Where does it say in the statute, 'But if you are under 6'?" (Hearing Transcript at 84).

We recognize, of course, that ultimately, the District Court found that "any alien" was "evidently not intended by Congress literally to include all aliens." (Order, at 45) Nonetheless, as reflected by the INS' own position, the district judge's own questions, and the language of the statute itself, the issue of the appeal, whether "any alien" includes Elian Gonzalez, is obviously an extremely substantial one. And yet, yesterday, you gave an ultimatum with an effect that could only reduce significantly our ability to present fairly these issues. Ironically, while condemned killers in our society enjoy appellate rights that ordinarily exceed ten years, the INS would now impose a timetable for submitting legal papers on behalf of Elian that totals ten days. This is truly troubling because there is no evidence in this case showing that Elian will be harmed by continuing to stay here during a normal appeal period. To the contrary, all the expert analysis on record compellingly demonstrates that he faces great harm if abruptly removed.

As a result, it is evident that the likely result of the INS' ultimatum is to minimize Elian's appellate rights and negatively impact his chances for a successful outcome. This is especially apparent concerning the five day ultimatum for receiving an appellate decision, researching all applicable issues and case law, drafting, finalizing, presenting and filing a petition for review before the United States Supreme Court. The five day demand for limiting a process that, according to court rules, should take ninety days, is a drastic and unconscionable impairment of Elian's rights.

We are thus deeply troubled by the unjustified insistence and accompanying threats directed at drastically diminishing the appellate rights of a vulnerable child. We believe that if the speediest possible resolution is your objective, you can and should agree to the two weeks, "no appeals" process that we advocate for concluding all issues relevant to this matter. If a fair and considered determination of the pending federal judicial litigation is your goal, the coercive and dramatic reduction of Elian's appellate rights cannot be reconciled with any thesis of fairness. Instead, the likely result of the INS' ultimatum would be to create, at most, a perception of meaningful appellate process while at the same time ensuring a reality of an exercise of legal futility. Thus, just as the federal district court case was never a true day in court for Elian's best interests, but rather an acknowledgment of the INS' broad discretion, your pre-conditions would transform appellate

COFFEY, DIAZ & O'NAGHTEN, L.L.P.

David J. Kline
March 24, 2000
Page 5

proceedings into a matter of form rather than the substance of any meaningful right to an appeal.

Notwithstanding the momentous issues and concerns implicated by this appeal, I will be working, along with our legal team, day and night so that the initial brief is filed no later than April 3rd, 2000, and earlier, if at all possible. I will be filing a reply brief within five days of faxed receipt of the INS answer brief and, depending on the scope of issues presented by the INS, we may be able to file sooner. I make these assurances because, as a result of Judge Moore's ruling, we need to move as expeditiously as possible through the appellate process. In that fashion, we seek to secure an asylum hearing so that we can resolve Elian's status and end the months of anxiety for our clients. We will, as I have said before, not oppose acceleration of the appeal. Moreover, assuming we prevail, we believe that it is appropriate for INS to proceed within ten days thereafter to conduct an asylum hearing.

Following the rendition of the appellate decision and should either side determine that Supreme Court review may be warranted in light of the extraordinary circumstances of this case, a petition for certiorari will be served within fifteen days. Indeed, no lesser amount of time is possible. In fact, we are astonished by your insistence that the ninety day period for filing a certiorari petition that all other litigants are entitled must be shrunk to five days for a proceeding to define the future of a small child. As with the appeal, in the event certiorari is sought, we will not oppose prompt acceleration of the certiorari process and will abide by any timetable that the Court directs. With respect to any other preliminary motions pending certiorari review, we believe it is proper for both sides to review what, if any, motions the INS or Elian would need to file at that point. It is obviously premature to address a scenario that neither side can predict with certainty. In any event, parties have a duty under the rules of proper procedure to discuss and attempt to work through issues before seeking extraordinary relief from the nation's highest court. We assume that if there is a decision by either side to seek Supreme Court review, an acceptable approach to addressing the attendant circumstances can be promptly developed.

Concerning your inquiry about the future actions of the family, we emphasize that the Lazaro Gonzalez family has always obeyed the laws concerning the matter of Elian and will continue to do so. Indeed, we are confident that both sides will continue to respect the law as well as the rights all of us have in our legal system.

Finally, we repeat our entreaty that the INS conduct an actual evaluation of the psychological condition of this child and of the potential for the serious harm he faces in the event of a precipitous removal to Cuba. Stepping away from our roles as lawyers and advocates, we appeal to you as individuals who are wielding the entirety of the power of the United States government, a power that could crush the fragile psyche of a little boy who has already suffered beyond human description. Frankly, we are surprised and troubled that the INS continues to refuse any psychological evaluation of Elian Gonzalez. At a minimum, before any more positions are taken in this difficult matter, we prevail upon your sense of decency and upon the Justice Department's stated goal of seeking to do

COFFEY, DIAZ & O'NAGHTEN, L.L.P.

David J. Kline
March 24, 2000
Page 6

the right thing, especially when young children are at risk. We believe that should you undertake such an evaluation by independent and competent experts, you will at last understand the real implications and potential consequences of your projected course of action. Should you finally choose to undertake this critically needed analysis, you will, of course, have our full cooperation.

We await your response.

Sincerely,



Kendall Coffey

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202 616 9777

P.02/05



U.S. Department of Justice

Civil Division

Washington, D.C. 20530

March 23, 2000

BY FACSIMILE TRANSMISSION AND FIRST-CLASS MAIL

Kendall Coffey, Esq.
Coffey, Diaz & O'Naghten, L.L.P.
2655 South Bayshore Drive, Suite 200
Miami, Florida 33133

Re: Elian Gonzalez v. Reno et al., No. 00-0206-CIV

Dear Mr. Coffey:

I want to thank you and your colleagues for meeting with us on such short notice yesterday to discuss matters in light of the Court's decision to dismiss the above-captioned lawsuit.

As discussed yesterday, the principal objective of Commissioner Meissner and the Attorney General is to bring about a prompt, fair, and orderly resolution of this case in the manner most conducive to Elian's well-being. As Judge Moore stated in his decision, "each passing day is another day lost between Juan Gonzalez and his son, [and] the Court can only hope that those on each side of this litigation place the interests of Elian Gonzalez above all others." Under these circumstances, we are prepared to revoke Elian's parole into Lazaro Gonzalez's temporary care in order to carry out Commissioner Meissner's decision of January 5, 2000.

In light of the Southern District's dismissal of the lawsuit and the need, emphasized by the court, to avoid any further delay, the government would now proceed, in the ordinary course, to carry out the decision of the Commissioner that the district court sustained by effecting the immediate reunion of Elian and his father, unless Lazaro Gonzalez obtained an injunction pending appeal to change the legal status quo. As you know, a motion for

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an injunction pending appeal, while properly granted only rarely, is the recognized means within our judicial system by which Lazaro Gonzalez may seek judicial intervention if he disagrees with the district court's determination that the appellees are free to proceed with their intended course of action.

We are willing, however, to consider an alternative way of proceeding in this case so long as appellate proceedings can be completed and Elian can be reunited with his father in a timeframe comparable to what would normally be required for the Court of Appeals to rule on a request for an injunction pending appeal. Our discussions yesterday regarding a joint motion for an expedited appeal may present a framework for such an arrangement.

We propose that the parties agree in writing to request jointly, not later than tomorrow, March 24, 2000, that the Court of Appeals set an expedited briefing schedule and accelerate its consideration of your appeal, subject to the following terms and conditions:

1. Appellant's opening brief is due seven calendar days from tomorrow, March 24, 2000; appellees' answering brief is due seven calendar days from the date of service of appellant's brief; and appellant's reply brief is due three calendar days from the date of service of the answering brief. Service is to be by same-day facsimile transmission and first-class mail. Oral argument will be conducted as soon thereafter as practicable.
2. If the Eleventh Circuit panel grants the parties' joint motion for expedited briefing and consideration, appellees will not exercise their authority to revoke Elian's parole and terminate Lazaro Gonzalez's temporary care of Elian pending the court of appeals' decision on the expedited appeal. If the Eleventh Circuit panel affirms the district court, Lazaro Gonzalez and his family agree to comply with the instructions

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-3-

of the Immigration and Naturalization Service concerning Elian's transfer within three calendar days of the Eleventh Circuit panel's decision, unless appellant obtains an injunction pending the filing and disposition of a petition for a writ of certiorari in the Supreme Court. Any motion by appellant for such an injunction shall be expressly conditioned upon appellant's filing of such a certiorari petition within five calendar days of the court of appeals' decision and, if requested by appellees, shall be further expressly conditioned upon agreement by appellant to the filing of a joint motion in the Supreme Court for expedition of the consideration of the certiorari petition to the maximum extent possible.

3. In accordance with the ongoing responsibility of the INS for Elian under the Immigration and Nationality Act and implementing regulations, this agreement shall not prevent appellees from terminating Lazaro Gonzalez's temporary care of Elian in the event that the INS determines that there has been a material change of circumstances affecting Elian's appropriate placement.

We hope you will find this approach acceptable. If we are unable to reach agreement, the government will make arrangements to implement Commissioner Meissner's decision as described above. Please advise us as to your position not later than 12:00 p.m. tomorrow, March 24, 2000.

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MAR-23-2000 19:15

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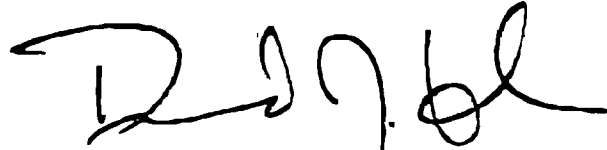
202 616 9777

P.05/05

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We thank you for your continued professionalism and for your willingness to respond promptly.

Sincerely,



DAVID J. KLINE

Deputy Director

Office of Immigration Litigation

Civil Division

U.S. Department of Justice

P.O. Box 878, Ben Franklin Station

Washington, D.C. 20044

(202) 616-4900 (telephone)

(202) 616-4948 (facsimile)

cc: opposing co-counsel

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

OFFICE OF THE LEGAL ADVISER

FAX TRANSMITTAL COVER SHEET

DATE:	
TO: Beth Nolan	FROM: Mary DeRosa
PHONE NO.:	PHONE NO.: (202) 456-9111
FAX NO.: 60279	FAX NO.: (202) 456-9110
COMMENTS: Another letter from the Miami family (just got this). Mary	
NUMBER OF PAGES (including cover page): 3	

03/27/00 MON 17:12 FAX 202 456 9110
03/27/00 17:53 202 456 9130
03/27/00 16:45 FAX

NSC/LGL ADVISER
NSC-INTERAMERICA

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Page 1/2

03/27/00 13:28 202 514 9077
Sent By: LAW OFFICES OF SPENCER EIG;

INS PRESS OFFICE
DOJ
3056723770; Mar-27-00 12:04PM;

49077

SPENCER EIG

ATTORNEY AT LAW
407 LINCOLN ROAD
SUITE 8C
MIAMI BEACH, FLORIDA 33139

ADMITTED IN:
FLORIDA
GEORGIA
DISTRICT OF COLUMBIA

TEL: (305) 672-2770
FAX: (305) 672-3770
SOBELAW@AOL.COM

B*H
March 27, 2000

Hon. Janet Reno
Attorney General of the United States
10th and Constitution Avenue, N.W.
Washington, D.C. 20536

BY FACSIMILE

Re: **Elian Gonzalez**

Dear Attorney General Reno:

We have complied with your demand for an expedited appeal.

We continue to view your ultimatum to cut off Elian's appellate rights as improper and rather un-American. Simply put, INS has threatened to use force to seize the boy to prevent him from completing his appeal in a fair and proper way. In order to avoid the intense psychological harm to Elian that forced deportation would cause, we have filed an emergency motion for an expedited appeal in the Eleventh Circuit Court of Appeals this morning.

In light of our cooperation, we request that your officials cease their constant threats to revoke Elian's parole. These heavy-handed tactics demonstrate a lack of sensitivity to Elian, his family and this community. Your officials have repeatedly failed to inform anyone of their intentions regarding Elian if they do revoke his parole. The only conceivable purposes of revoking Elian's parole are to either return him to the fascist regime in Cuba prior to the completion of the appellate process or to institutionalize him pending the outcome of the appeal.

If your purpose is to return him to Cuba immediately, you are, in effect, denying Elian any appeal whatsoever. Once Elian is returned to Castro's clutches he will not be permitted to leave if his appeal is successful.

OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL

of pages 1

To: MARY ERIC;	From: CARLYN
Dept./Agency: DAN	Phone #
Fax #	Fax #

NSN 7540-01-317-7388

5009-101

GENERAL SERVICES ADMINISTRATION

If your desire is to institutionalize Elian pending the appeal, or alter his present custody arrangements, we do not understand how you can consider this to be "the manner most conducive to Elian's well-being." Currently, Elian is being cared for by his family, to whom he has grown immensely attached since the premature and traumatic death of his beloved mother. No institution or stranger is capable of nurturing Elian to the degree that Marielsysis Lazaro, and his loving relatives can. The permanent psychological harm this will cause Elian has already been confirmed by his child psychologist and psychiatrist. The reports have been communicated to you already, and are part of the record of this case. Any harmful actions in light of the contents of those reports could only be described as reckless and wanton conduct. It's ironic that with all the money and effort expended by the White House, the Justice Department and the INS to deport Elian to Cuba, you have never sought to have Elian or his best interests evaluated by experts in any way, as we have done.

In light of the fact that we have filed for the expedited appeal you sought, the meeting the Associate Commissioner suggested between Lazaro Gonzalez and INS enforcement officials will not be necessary. We look forward to working with your officials achieve a prompt and fair adjudication of Elian's best interests. We remain saddened that you rejected out of hand our innovative suggestion of prompt, binding arbitration.

You should be aware of recent, broadcast threats by Cuban President Fidel Castro to send an armed commando team to Miami to kidnap Elian. Consequently, the Gonzalez family has asked the Lincoln-Marti School to educate Elian at home for the time being. The family's decision is based in part on their desire not to endanger the lives of Elian's schoolmates.

We conclude with assurances that the Gonzalez family will continue to observe the laws of the United States and the State of Florida.

Sincerely,
LAW OFFICES OF SPENCER BIG
By: SPENCER BIG

ROSENTHAL & RASCO
By: EDUARDO RASCO

COFFEY DIAZ & O'NAGHTEN, L.L.P.
By: KENDALL COFFEY
MANUEL DIAZ

HACKLEY, BERNSTEIN
& OSBERG-BRAUN, P.L.
By: LINDA OSBERG-BRAUN
ROGER BERNSTEIN

LAURA FABAR, P.A.
By: LAURA FABAR

RUDEN, McCLOSKEY, SCHUSTER
& RUSSELL, P.A.
By: JOSE GARCIA-PEDROSA

GREENBERG TRAUJG, P.A.
By: BARBARA LAGOA
JUDD I. GOLDBERG
ELIOT PEDROSA

Per Leslie - ^{4/21}
This has been
sent to
Staff Secretary.

-Em



JEB BUSH
GOVERNOR

STATE OF FLORIDA

Office of the Governor

THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001

cc: Echaveste
Podesta
Blair

Total Pages

5

FAX COVER SHEET

Date: 4-21-00

To: The Honorable William J. Clinton

Phone: _____

Fax: 202-456-1210

From: Office of the General Counsel Room 209, The Capitol
(850) 488-3494 Phone (850) 488-9810 Fax
(850) 922-0309 Fax

☒	Carol A. Licko, General Counsel	☒	Reginald Brown, Deputy General Counsel
☒	Leslie Jacobs, Executive Assistant		Susan Rehwinkel, Executive Assistant
	Daniel Woodring, Asst. General Counsel		Marty McDonnell, Asst. General Counsel
	Nancy Downing, Administrative Assistant		Janis Maloney, Administrative Assistant
	Greg Munson, Asst. General Counsel		Jose Luis Rodriguez, Asst. General Counsel
	Peggy Lawson, Administrative Assistant		Liesl Roper, Administrative Assistant
	Tena Pate, Victims' Rights Coordinator		Susan Smith, Extradition Coordinator

Comments: _____

Please call our office immediately if there is a problem with the transmission.



JEB BUSH
GOVERNOR

STATE OF FLORIDA

Office of the Governor

THE CAPITOL

TALLAHASSEE, FLORIDA 32399-0001

April 21, 2000

The Honorable William J. Clinton
President of the United States
1600 Pennsylvania Avenue
Washington, D.C. 20500

The Honorable Janet Reno
United States Attorney General
10th Street & Constitution Avenue, N.W.
Washington, D.C. 20530

Dear President Clinton and General Reno:

Several weeks ago, we wrote to ask you to take action to defuse rising tensions in the controversy over Elian Gonzalez's custody during the pendency of his federal appeals. Today we renew our request with an even greater sense of urgency.

News reports today indicate that federal officials may soon attempt to remove young Elian from the care of his Miami relatives in order to transfer custody to Elian's father at the home of a Cuban diplomat. The reports also indicate that federal officials are mobilizing to remove Elian by force.

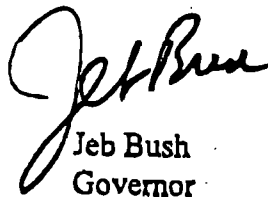
We believe that the forcible separation of Elian and his current caregivers is unwise and unwarranted. Elian's Miami relatives have requested court-supervised mediation of the current controversy, and the U.S. Court of Appeals for the Eleventh Circuit has now offered its mediation services to all interested parties. We urge the Department of Justice and INS to accept the Eleventh Circuit court's offer and encourage Juan Miguel Gonzalez to participate as well. Mediation, not confrontation, is what is in young Elian's best interest at this critical point in time.

Mediation could lead to a meeting on neutral territory between all of Elian's family members without the interference of government officials or lawyers. Such a meeting, free of governmental pressure and away from the glare of media attention, would present the best chance for a family-inspired solution to this controversy. If such a meeting could be arranged in Florida where Elian currently resides, we would be happy to provide any appropriate law enforcement support.

In offering our thoughts to you today, we realize that mediation offers no absolute guarantee of success. However, before more drastic measures are considered, it is appropriate to pursue all reasonable options, including the mediation option proposed by the federal courts.

Thank you for your consideration of this request.

Sincerely,



Jeb Bush
Governor



Bob Butterworth
Attorney General

cc: Senator Bob Graham
Senator Connie Mack



JEB BUSH
GOVERNOR

STATE OF FLORIDA

Office of the Governor

THE CAPITOL

TALLAHASSEE, FLORIDA 32399-0001

21 de Abril, 2000

Honorable William J. Clinton
Presidente de los Estados Unidos
1600 Pennsylvania Avenue
Washington, D.C. 20500

Honorable Janet Reno.
Fiscal General de los Estados Unidos
10th Street & Constitution Avenue, N.W.
Washington, D.C. 20530

Estimados Presidente Clinton y Fiscal General Reno:

Semanas atrás, les escribimos pidiendo su liderazgo y cooperación en calmar las tensiones causadas por la controversia sobre el caso de custodia de Elián González durante el proceso de apelación en la corte federal. Hoy repetimos nuestro pedido con gran urgencia.

Reportes noticiosos indican que pronto oficiales del gobierno federal tratarán de remover a Elian del cuidado de sus familiares en Miami para así transferir la custodia del niño a su padre, actualmente residiendo en la casa de un funcionario diplomático de Cuba. Los reportes indican que los oficiales federales están movilizando sus fuerzas para remover a Elian por la fuerza.

Creemos que la forzada separación de Elian de sus familiares no es aconsejable ni inteligente. Sus familiares han pedido mediación de las cortes en esta controversia, y la Corte de Apelación del Circuito Once ha ofrecido sus servicios de mediación a todos los participantes en el caso. Le pedimos al Departamento de Justicia y al Servicio de Inmigración y Naturalización que acepten la oferta de la Corte y que persuaden a Juan Miguel Gonzalez a que también participe en esta mediación. Mediación no confrontación, es lo más aconsejable para el bienestar de Elian en este momento crítico.

Mediación puede llevar a una reunión entre los familiares y el padre de Elian en territorio neutral, libre de intervención gubernamental y de abogados. Tal reunión, libre de intervención por parte del gobierno y de la prensa, presentaría la mejor solución familiar al caso. De ocurrir tal reunión aquí en la Florida, estamos dispuestos a ofrecer protección por parte de nuestras autoridades estatales.

Estamos concientes que mediación no ofrece ninguna garantía absoluta de éxito. Antes que medidas drásticas sean consideradas, pensamos que es apropiado considerar todas la opciones disponibles, incluyendo la mediación propuesta por la corte federal.

Le damos las gracias por considerar nuestros deseos.

Atentamente,



Jeb Bush
Gobernador



Bob Butterworth
Fiscal General del Estado

Cc: Senador Bob Graham
Senador Connie Mack



He can't get it.

DRUDGE REPORT

XXXXX DRUDGE REPORT XXXXX THURSDAY APRIL 20 2000 17:08:49 ET XXXXX

RENO PLANS REMOVING BOY BY FORCE IN THURSDAY MEETING WITH AIDES; TOLD STAFF THAT PRESIDENT WANTS BOY REMOVED

****Exclusive****

During an emotional meeting with aides Thursday, Attorney General Janet Reno discussed plans to forcibly remove Elian Gonzalez from the house of his Miami relatives, the DRUDGE REPORT has learned.

"The president wants the boy removed from the house," Reno told a group gathered in her fifth-floor conference room at the Justice Department.

Department lawyers, immigration officials and law enforcement experts heard Reno provide details on how the government would remove Gonzalez, one source present for the meeting said from Washington.

Reno's Plan: Early next week, the attorney general will seek a federal court order in Miami compelling relatives to surrender Elian. If the family does not comply with the order, law enforcement officials will be directed to enter the home to capture the boy.

The attorney general's course of action is so detailed, specific individuals who will be assigned to enter the house have already been chosen.

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Rumors swirl about fate of Elian as tensions flare

By Nancy San Martin

The Dallas Morning News

MIAMI Tension escalated in Little Havana on Tuesday with new rumors about the fate of Elian Gonzalez, whose father remained poised to travel for a reunion with his 6-year-old son.

Protesters broke through police barricades at the home of Elian's great-uncle and formed a human chain to block immigration officials who were rumored to be approaching.

The demonstrators intend only civil disobedience and will avoid violence, said Janelis Miranda, 21, a Cuban refugee.

"We're defending one of our own," she said. "This is a matter of saving a life twice of saving a little boy again."

Many Cuban exiles view Elian's survival as a miracle and a symbol of their own escape from the government of Cuban President Fidel Castro. They have promised to block any move to seize Elian by the INS, which a federal court has said legally controls Elian's fate.

The demonstrators dispersed as on-again, off-again talks between the attorneys for the Miami relatives and the federal government continued through a fifth day.

Negotiators emerged to say they would take a day off and resume talks on Thursday "as much as we're enjoying our endless marathon negotiations with U.S. officials," said Miami attorney Spencer Eig.

Another attorney for Elian's Miami relatives said they'd asked for a day's break because the boy's cousin Marisleysis Gonzalez was hospitalized. She fell ill during a morning of TV interviews about Elian, whom she has cared for at the home of her father, Elian's great uncle Lazaro Gonzalez.

The family has cared for Elian since late November when he was found floating in an inner tube off the coast of Florida. The child survived a boat accident that killed his mother and other Cubans who were trying to immigrate to the United States.

Family members continued to push for a court hearing on Elian's fate. But Justice Department authorities said again Tuesday that they've already decided the child will be reunited with his father, Juan Miguel Gonzalez of Cuba.

"The focus of the government continues to be on how to best to accomplish the reunification of Elian with his father," said Robert A. Wallis, Miami director for the Immigration and Naturalization Service.

Gonzalez's travel plans were unclear and under the control of Cuban authorities. U.S. authorities in Havana have issued six visas to him, his wife and child, a friend of Elian, a teacher and a Cuban pediatrician.

Gregory Craig, the father's Washington attorney was expected to travel Tuesday evening to Havana, where he will consult with Juan Gonzalez and Cuban officials, a U.S. government official said.

In the Miami talks, a key sticking point remained the role of professional counselors in Elian's transfer. The boy's Miami relatives insist that psychologists decide whether a custody change would damage the child. Federal negotiators say they only want advice on how best to accomplish the transfer.

Also at issue is whether the government can prevent the father from leaving the United States after he retrieves his son. The Miami relatives want assurance that Gonzalez won't leave while they continue a legal challenge.

The Cuban government has said the father will come to the United States when he has a guarantee that he can be reunited with his son.

That the father wants to come makes it a good time to hold a hearing on Elian's welfare, said Eig, one of a team of attorneys representing the Miami relatives.

"Elian deserves his day in court," he said.

The issue bubbled again to the upcoming presidential election, in which Cuban Americans could swing the pivotal state of Florida.

Vice President Al Gore, the presumptive Democratic presidential nominee, said Tuesday that Elian's father should be allowed to take his son home "if the father says on free soil that he believes the son should go back to Cuba with him."

But Gore also has said a family court should decide what's in Elian's best interests. He has endorsed legislation that might make that possible.

The expected GOP nominee, Gov. George W. Bush, has said Elian should be allowed to stay in the United States and says the vice president should be clearer on his stand.

On Tuesday, Bush said it was hard to trust the word of Juan Gonzalez because of the influence of Cuba's Communist government.

"My own personal judgment is I don't trust the Cubans to let this man make an informed decision," the governor told reporters.

END

PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED

----- U.S. COURT OF APPEALS -----

ELEVENTH CIRCUIT

No. 00-11424
JUNE 1 2000

----- THOMAS K. KAHN -----

D. C. Docket No. 00-00206-CV-KMM
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 ~~FILED~~ be 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.

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."

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.

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 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.

²A 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).

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.

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.

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 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

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.

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

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

II.

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.

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 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

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.

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.

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

⁷Also 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.

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

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

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.

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 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.

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 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.

Moreover, the authority of the executive branch to fill gaps is especially great in the context of immigration policy.¹² See Aguirre-Aguirre, 119 S. Ct. at 1445. Our proper

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

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).

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).

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 2752. 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-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

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).

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 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

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").

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 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.

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).

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,

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

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.

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.”).

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 (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

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, 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).

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 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

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.

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.

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.

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~~

"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

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").

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 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

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.

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.

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

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

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, 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

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, Marisleyxis, and Plaintiff's lawyers -- on more than one occasion about the nature of his asylum claim.

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 Perlra-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”);Brad vica v. INS, 128 F.3d 1009, 1012 (7th Cir.

1997) (“[M]ere harassment does not amount to persecution.”), Lev 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

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.

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, 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 **AFFIRMED**²⁷.

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.

THE WHITE HOUSE

Office of the Press Secretary
(Berlin, Germany)

For Immediate Release

June 1, 2000

STATEMENT BY THE PRESIDENT

I am pleased with the decision today of the 11th Circuit Court of Appeals. As I have said before, this is a case about the importance of family and the bond between a father and son. I have supported the Justice Department's conclusion that Elian's father, Juan Miguel Gonzalez, is the one best suited to speak for his child, and I am pleased that the court has upheld the Justice Department's determination.

30-30-30

PHOTOCOPY
PRESERVATION

*Elia
Gonzalez*

FROM: PATRICIA L. MAHER
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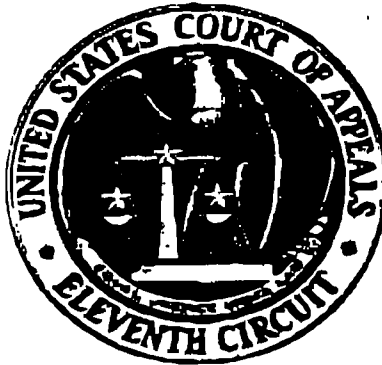
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United States Court of Appeals for the Eleventh Circuit



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PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-11424

D. C. Docket No. 00-206-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

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."

passengers, including Elizabeth, died. Plaintiff, clinging to an inner tube, endured and survived.

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,

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).

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 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.

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.

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 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

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.

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

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.

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 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

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.

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.

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,

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.

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

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

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.

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,

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 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

it is not for 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 immigration policy.¹² See Aguirre-Aguirre, 119 S. Ct. at 1445. Our proper

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.

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

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-promulgated policy.¹³ See SEC v. Chenery

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).

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).

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 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

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").

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 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)

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).

(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

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.").

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 (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

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, 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).

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 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

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.

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.").

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

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).

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 "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,

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.

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

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").

be necessary 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. Yuch-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

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, Marisleyxis, and Plaintiff's lawyers -- on more than one occasion about the nature of his asylum claim.

that, 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 Mikhailovitch 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"); Bradrica 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

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.

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, 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 **AFFIRMED**²⁷.

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.

THE WHITE HOUSE

Office of the Press Secretary
(Berlin, Germany)

For Immediate Release

June 1, 2000

STATEMENT BY THE PRESIDENT

I am pleased with the decision today of the 11th Circuit Court of Appeals. As I have said before, this is a case about the importance of family and the bond between a father and son. I have supported the Justice Department's conclusion that Elian's father, Juan Miguel Gonzalez, is the one best suited to speak for his child, and I am pleased that the court has upheld the Justice Department's determination.

30-30-30

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PRESERVATION