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### RESTRICTION CODES

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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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

Case No. 00-206-CIV-MOORE

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

Plaintiff,

vs.

**ORDER**

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

Defendants.

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

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

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

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

## **I. BACKGROUND**

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 50.

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

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

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

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

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

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

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

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

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

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

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

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

. . .

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

. . .

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

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

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

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

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

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

part:

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

. . . .

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

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

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

. . . .

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

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

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

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

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

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

Letter from James Burzynski, Director, Texas Service, to Roger Bernstein of 1/13/00, Defendants' Notice of Filing Record and Exhibits, at 317-18.

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

## **II. JURISDICTION AND STANDING**

### **Summary of Part II**

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

### **Plaintiff's Status**

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

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

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

#### **A. Subject Matter Jurisdiction**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **B. Proper Plaintiff**

### **1. Introduction**

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

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

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

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

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

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

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

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

## **2. Plaintiff's Article III Standing**

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

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

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

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

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

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

to act as Plaintiff's next friend.<sup>17</sup>

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

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

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

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

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

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

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

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

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

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

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

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

at 58 (supp. 1999).<sup>18</sup>

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

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

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

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

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

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

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

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

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

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

The Court need not decide whether Plaintiff was and is a domiciliary of Cuba or Florida, for under the laws of either jurisdiction, Plaintiff lacks capacity to bring suit for the purposes of Rule 17(b). Cuba’s Family Code<sup>20</sup> clearly provides that children “are under the *patria potestas* of their parents,” id. art. 82, which bestows upon parents the right and duty of “representing their children in every judicial action . . . in which they are involve[d] . . . .” Id. art. 85(5). More specifically, Cuban law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INS<sup>24</sup> itself placed Plaintiff in his hands on November 25, 1999.<sup>25</sup>

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

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

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

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

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

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

#### **6. Proper Plaintiff Conclusion**

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

### **III. ANALYSIS OF THE COMPLAINT**

#### **Summary of Part III**

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

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

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

**A. Count I: Constitutional Due Process<sup>26</sup>**

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

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

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

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

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

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

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<sup>27</sup>See supra note 8.

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

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

**B. Count II: Violations of 8 U.S.C. § 1103(a) and 8 U.S.C. § 1158(a)<sup>28</sup>**

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

**1. Analysis of Applicable Statutory Provisions**

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

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

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

8 U.S.C. § 1103(a)(1) (emphasis added).<sup>29</sup>

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

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

8 U.S.C. § 1158(a)(1).

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

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

...

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

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

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

## **2. Analysis of the Attorney General’s Actions<sup>30</sup>**

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

Faced with an unprecedented set of circumstances—including a six-year-old child who had recently lost his mother, a father who had indicated (prior to his son’s application for asylum) that he opposed any potential application for admission or asylum, the fact that the INS had conducted two in-person interviews with the father and had found no evidence of abuse, and principles of international standards that support the presumption that a parent speaks for his or her child<sup>31</sup>—the Attorney

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

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

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

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

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

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

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

### **3. Deference Analysis**

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

#### **a. Presumption of Deference to Administrative Decisionmaking**

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

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

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

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

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

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

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

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

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

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

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

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

reasonable factors).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>41</sup>As Justice Scalia has eloquently articulated,

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

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

Counts III and IV that Defendants violated specific regulations.

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

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

**D. Count V: Petition for Writ of Mandamus**

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

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

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

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

### **III. CONCLUSION**

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

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

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

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

BASED UPON the foregoing, it is hereby

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

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

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

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K. MICHAEL MOORE  
UNITED STATES DISTRICT JUDGE

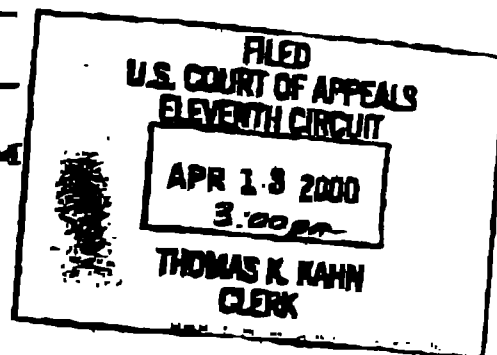
cc: Linda Osberg-Braun  
Roger A. Bernstein  
Barbara Lagoa  
Judd J. Goldberg  
Eliot Pedrosa  
Kendall Coffey  
Spencer Eig  
Jose Garcia-Pedrosa  
Thomas E. Scott  
Dexter A. Lee  
David W. Ogden  
Patricia L. Maher  
Thomas W. Hussey  
David J. Kline  
William J. Howard  
Jocelyn M. Wright  
Russell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

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**No. 00-11424-D**

**D. C. Docket No. 00-206-CV-KM**

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



**Plaintiffs,**

**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.**

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

## **ORDER**

**Plaintiff-Appellant, Elian Gonzalez, by and through his next friend, Lazaro Gonzalez, has filed a motion for an injunction to preclude Plaintiff's physical removal from the jurisdiction of the United States during the pendency of this appeal. In ordinary cases, a motion for injunction pending appeal will not be granted except after consideration by a panel of three judges of this Court. Fed. R. App. P. 8(a)(2)(D). But where time may be short, a single judge of this Court may grant a temporary injunction, preserving the status quo until a panel of three judges can more fully consider the motion for injunction pending appeal. See Fed. R. App. P. 8(a)(2)(D); see also Fed. R. App. P. 27(c); 11<sup>th</sup> Cir. Local R. 27-1(d)(7).**

**Consideration of Plaintiff's motion for injunction pending appeal requires examining four factors: (1) whether Plaintiff is likely to succeed on the merits of his appeal; (2) whether Plaintiff**

will suffer irreparable injury if the injunction is not granted; (3) whether the injunction, if granted, would substantially harm other parties; and (4) whether the injunction, if granted, would harm the public interest. In re Federal Grand Jury Proceedings, 975 F.2d 1488, 1492 (11<sup>th</sup> Cir. 1992). Plaintiff, however, need not necessarily show that he probably will succeed on the merits of his appeal; "Instead, [Plaintiff] need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay." Ruiz v. Estelle, 650 F.2d 555, 565 (5<sup>th</sup> Cir. 1981); see also United States v. Hamilton, 963 F.2d 322, 323 (11<sup>th</sup> Cir. 1992); Garcia-Mir v. Meek, 781 F.2d 1450, 1453 (11<sup>th</sup> Cir. 1986).

I understand that Plaintiff is subject to being placed under the physical control, custody, and care of the Immigration and Naturalization Service at any time after 2 o'clock this afternoon. Because of the possibility that Plaintiff might be removed from this country before the motion for injunction

**pending appeal can be determined by a panel of three judges, I have decided to act alone but only until a panel can act. I have considered each of the four elements, particularly irreparable injury and likelihood of success. For now, at least—in the light of Plaintiff's motion and Plaintiff's brief on appeal, already filed with this Court—it seems that Plaintiff probably has demonstrated that he is entitled to an injunction prohibiting his removal from the United States during the pendency of this appeal.**

**THEREFORE,**

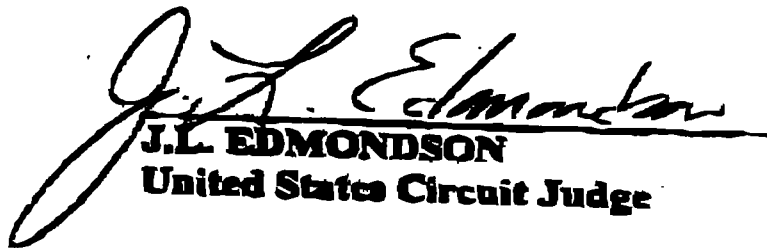
- (1) Plaintiff, Elian Gonzalez, is ENJOINED from leaving the United States;**
- (2) Any and all persons acting for, on behalf of, or in concert with Plaintiff, Elian Gonzalez, are ENJOINED from aiding or assisting the removal of Plaintiff from the United States; and**
- (3) All officers and agents of the United States (including, but not limited to, officers and agents of the United States**

Department of Justice) are **ENJOINED** to take such lawful and reasonable precautions and actions as are necessary to prevent the removal of Plaintiff from the United States,

until further Order of this Court.

This temporary Order is entered without the Court's having received a response from Defendants-Appellees. Defendants shall have until 9:30 a.m. Friday, 14 April, to file a response to Plaintiff's motion.

**IT IS SO ORDERED.**

  
**J.L. EDMONDSON**  
United States Circuit Judge

Order and Opinion

*In Re: Lazaro Gonzalez, as Custodian of Elian Gonzalez, a Minor, Petitioner, and Juan Miguel Gonzalez-Quintana*, Case No. 00-00479-FC-28 (Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Florida)

IN THE CIRCUIT COURT OF THE 11<sup>TH</sup> JUDICIAL CIRCUIT  
IN AND FOR MIAMI-DADE COUNTY, FLORIDA  
**FAMILY DIVISION**

IN RE: THE MATTER OF

CASE NO. 00-00479-FC-28

LAZARO GONZALEZ, as Custodian of  
ELIAN GONZALEZ, a Minor,  
Petitioner,  
and

JUAN MIGUEL GONZALEZ-QUINTANA,  
Respondent.

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**Final Order**

THIS CASE comes to the Court upon various emergency motions brought by Petitioner seeking expedited discovery and an imminent hearing upon his Petition for temporary custody of the minor child, Elian Gonzalez.

For the reasons stated below, and with concern for those on both sides who feel so passionately about this case, the Court finds that this matter is federally pre-empted and that this court further lacks subject matter jurisdiction, and therefore dismisses this action and terminates the order of January 10, 2000 entered by a predecessor judge.

**Index to Order**

|                                                                                                         |         |
|---------------------------------------------------------------------------------------------------------|---------|
| Case History                                                                                            | Page 2  |
| General Principles of Jurisdiction                                                                      | Page 7  |
| Lack of Jurisdiction Due to Federal Preemption                                                          | Page 8  |
| Lack of Jurisdiction Due to Petitioner's Lack of Standing<br>To Sue under Chapter 751, Florida Statutes | Page 12 |
| The Effect of This Ruling                                                                               | Page 18 |
| Orders                                                                                                  | Page 21 |

CASE NO. 00-00479-FC-28

Case History

Core facts are not in dispute: this extraordinary case began on an evening on a Cuban beach, when fourteen people, including this child and his mother, fled the island in a small boat. Their destination was the shore of Florida and the United States of America. In rough seas, eleven people perished, including the child's mother. The child survived, alone in the ocean, by clinging to a floating tire. He was found at sea by fishermen who immediately contacted the United States Coast Guard, which transported the child to a local hospital. On November 27, 1999, Elian Gonzalez reached America. As an unaccompanied minor alien, Elian Gonzalez was taken into custody by the United States Immigration and Naturalization Service ("INS") and paroled into the loving arms of his great uncle, Petitioner in this matter. Who would have dreamed that the celebration of this child's survival would have been lost so soon in an international tug of war over him?

The child's father, investigation revealed, remained in Cuba. After two interviews in Cuba, the INS determined that Juan Miguel Gonzalez-Quintana was an active, involved and loving father, who freely and voluntarily requested that his son be returned to his home in Cuba.

In the meantime, in Florida, the Petitioner sought to file political asylum petitions on behalf of the child and by the child directly. After the INS determined that the father had the right to control the child's asylum application and wished it withdrawn, INS rejected the asylum applications filed, and announced in early January that the child would be returned to the father in Cuba.

**CASE NO. 00-00479-FC-28**

INS and the United States Attorney General, who is charged with the executive responsibility for immigration, determined that only the father could speak for the child, that there would be no hearing on the asylum petitions filed by Petitioner, and that the child would be returned to the father by January 14, 2000, four months ago.

Petitioner did not agree with INS and the Attorney General that the child should be returned to his father in Cuba. Petitioner objected to the INS procedure and asserted that INS had violated the child's independent due process rights to an political asylum hearing. He wanted the child to stay in the United States, where he would live in a free country. Recognizing that his control over the child extended only to the extent of the grant of the INS parole, Petitioner filed this action in state court on January 7, seeking temporary custody and a protective order prohibiting action by the INS.

The Petitioner, Lazaro Gonzalez, sought the following:

"Petitioner requests temporary custody of the Minor Child for purposes of providing legal consent to all necessary and reasonable medical care for ELIAN GONZALEZ, including psychological care, and to provide for ELIAN's due process rights to seek political asylum in the United States, and for such other things which are necessary for the care of ELIAN, until such time as there is a final disposition of the aforesaid application for political asylum on behalf of the Minor Child." *Petition* at p. 6, paragraph h.

"Petitioner seeks an evidentiary hearing, an Order awarding temporary custody of ELIAN for a period of time sufficient to adjudicate the application for asylum with INS." *Petition* at p. 6, paragraph 14.

The Petition was predicated upon implied consent from Elian's deceased mother, see memorandum of law p. 7, and the argument that the father could not object or consent

because he could not freely express his wishes while in Cuba and under the control of Castro.

**CASE NO. 00-00479-FC-28**

*See, memorandum of law at l., page 7.*<sup>1</sup>

The Petition further alleges that if JUAN MIGUEL GONZALEZ-QUINTANA objects to Petitioner's custody of the child, that Petitioner asserts he is unfit to provide for the care and control of Elian and that he has abused, abandoned, or neglected Elian based on the argument that: "While it is true that his father...is not responsible for the environment existing in Cuba or the violations of humanitarian rights commonplace in Cuba, by insisting that the boy be placed in the aforesaid environment, the father is engaging in conduct which constitutes abuse or neglect, as referred to in Fla. Stat. § 751.05(3) and as defined in Fla. Stat. Chapter 39." *Memorandum of law p. 11.*

A predecessor judge considered the petition's allegations and the motion for protective order on an emergency ex-parte basis, without a response from the INS or the father. On January 10, 2000, she entered a Temporary Protective Order granting Lázaro Gonzalez temporary custody pending service of process upon the father and a full hearing. The Judge reserved on subject matter jurisdiction. *Order of January 10, 2000, p.4, n.3.* The order also stated that it prohibited the removal of the child from the jurisdiction of the court. *Order of January 10, 2000, p.6, paragraph 3.*

The ruling of January 10, 2000 was based upon the ex-parte motion, in an effort to act as quickly as possible given the urgent nature of Petitioner's allegations. Jurisdiction was

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<sup>1</sup>"...[T]his Court should not and cannot consider any objection of JUAN MIGUEL GONZALEZ-QUINTANA, the child's father, unless he is removed from his coercive environment and appear [sic] in this Court so that he may speak openly concerning the best interests of the Minor Child." *Memorandum of law at p. 9.*

**CASE NO. 00-00479-FC-28**

primarily justified under the theory of *parens patriae*, the theory that the state has the inherent power to protect children within its borders. The essential nature of the Temporary Protective Order was to give Petitioner the opportunity to pursue legal remedies in federal court with regard to his assertions that INS had violated due process and the child's constitutional rights by failing to give him a political asylum hearing. Petitioner did so. The order also permitted Petitioner to secure necessary health, psychological and material care for the child.

Additional research and developments in the case have caused the examination of relevant case law which was not available to the court in January. After receiving the temporary custody order, Petitioner proceeded to federal district court to seek an injunction prohibiting the INS from removing the child from Lazaro Gonzalez and requiring INS to grant the child a political asylum hearing. The federal district court concluded that Lazaro Gonzalez had standing to bring the action in federal court as the child's next friend, *Order of Judge K. Michael Moore in Gonzalez v. Reno*, 2000 WL 289604 (S.D. Fla. March 21, 2000) and did not reach the validity of the state custody order. *Id.* at fn. 25.

Petitioner attempted to serve the summons and petition upon Juan Miguel Gonzalez-Quintana, Elian's father, in Cuba. However, no additional substantive relief was requested in state court until after the Petitioner lost the federal district court case. Last Saturday night, four months after the state court action was commenced, the Petitioner filed a request to take the deposition of the father within three days, and asked for a trial within 10 days. In sum, only after that loss, and during the currently pending appeal to the federal court of appeals for the Eleventh Circuit, and only since the father has arrived in the United States to seek

**CASE NO. 00-00479-FC-28**

implementation of the federal decision, has Petitioner returned to state court to aggressively seek a hearing in an effort to continue to keep the child in Miami. INS and the Attorney General have decided to move forward on reuniting father and son.

In response to Plaintiff's motions, the court requested Petitioner brief the issues of subject matter jurisdiction, federal preemption, standard of law and their motion for default. As the first two jurisdictional issues are dispositive, the court does not reach standard of law or default.

Some may question the court's decision to rule without oral argument from the attorneys. The court decided to rule on this case without additional hearings for the following reasons: first, Petitioner's lawyers submitted an excellent brief which did an exceptionally thorough job of laying out the legal authority under which Petitioner asks this court to proceed. These are exclusively legal issues. Hearings are generally granted so that the court may take evidence. In this matter, evidence cannot be taken until the court can determine whether it has jurisdiction. It is important to understand that the question before the court at this point is not whether it should hear this case, but rather whether it could hear this case. This is not a discretionary call. Let no one conclude that this case was decided on legal technicalities — jurisdiction is ground zero in court. Without it, judges have no power to intervene.

Finally, this case has inflamed the passions of our community to the point that references to potential riots have been made by our leaders. There is no purpose in prolonging the anxiety of this family and other people who feel so strongly about this case when the law is so clear and when the inevitable result would be ever more crushingly disappointing.

**CASE NO. 00-00479-FC-28**

Holding a hearing would only have raised false hopes that somehow this court could legally act and keep Elian Gonzalez here.

**General Principles of Jurisdiction**

"Jurisdiction is the oxygen of an action. If present, the action is alive and the court may act." Keena v. Keena, 245 So.2d 665 (Fla. 1<sup>st</sup> DCA 1971). Equally if subject matter is not present, the court may not act.

Jurisdiction over the subject matter in a case refers to a court's power to hear and determine a controversy. Calhoun v. New Hampshire Ins. Co., 354 So.2d 882 (Fla. 1978). Generally, it is tested by the good faith allegations of the pleading, in this case the petition seeking temporary custody. See, Calhoun v. New Hampshire Ins. Co., 354 So.2d 882 (Fla. 1978), cited in Jefferson v. State, 724 So.2d 105 (Fla. 3<sup>rd</sup> DCA 1998).

"Subject matter jurisdiction arises by virtue of law only; it is conferred by constitution or statute and cannot be created by waiver or acquiescence." [citations omitted] Jesse v. State, 711 So.2d 1179 (Fla. 2<sup>nd</sup> DCA 1998).

"Subject matter jurisdiction, always essential to the validity of a court's action, can be challenged at any time, and a lack of subject matter jurisdiction should be recognized by a court even if unchallenged; when party or a court's own examination of a case suggests a lack of jurisdiction, the court is duty bound to consider such issue." Walt v. Walt, 574 So.2d 205 (Fla. 1<sup>st</sup> DCA 1991). This court required the Petitioner to present his position on subject matter jurisdiction because of the independent obligation imposed upon the court to recognize its own limitations; as stated in the briefing order: "Courts are bound to take notice of the

**CASE NO. 00-00479-FC-28**

limits of their authority and if want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order." Greene v. Greene, 432 So.2d (Fla. 3<sup>rd</sup> DCA 1983).

The issue of preemption is a question of subject matter jurisdiction. Florida Auto. Dealers Industry Ben. Trust v. Small, 592 So.2d 1179 (Fla. 1<sup>st</sup> DCA 1992). The issue of standing to sue concerns a question of jurisdiction to hear and decide the case pled by a particular party. Rogers & Ford Constr. Corp. v. Carlandia Corp. 626 So.2d 1350 (Fla. 1993).

**Lack of Jurisdiction due to Federal Preemption**

Elan Gonzalez's physical presence in this country is at the discretion of the federal government. The state court cannot, by deciding with whom his custody should lie, subvert the decision to return him to his father and his home in Cuba. This court is prohibited from acting by the Supremacy Clause of the United States Constitution from acting in this case. Const. Art. I, §8.

Federal Preemption is a principle based on the Supremacy Clause of the United States Constitution: Const. Art. I §8. There are different kinds of preemption, two of which are implicated in this case: field preemption and conflict preemption. "Field preemption" arises when Congress has so thoroughly regulated a field or federal interest is so dominating, that an intent for federal law to occupy the field exclusively may be inferred. Pacific Gas & Electric Co. v. Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 202, 103 S.Ct. 1713, 1721, 75 L.Ed 2<sup>nd</sup> 752 (1983). "Conflict preemption" arises where state and federal laws or orders are in direct conflict, particularly here where the state order is intended to

**CASE NO. 00-00479-FC-28**

"prevent or hinder the [federal agency, here the INS] from operating the way Congress intended it to operate." *Id.* at 202. Both field and conflict preemption apply in immigration matters. Hines v. Davidowitz, 312 U.S. 52, 61 (1941).

"Power to regulate immigration is unquestionable exclusively a federal power." Decanas v. Bica, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976).; Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, (1941); Nyquist v. Mauclet, 432 U.S. 1, 97 S.Ct. 2120, 53 L.Ed.2d 63, (1977). The proposition that courts do not have the authority to second-guess the executive branch's decisions regarding permission of immigrants to enter the country is one of long standing, addressed as far back as 1892 in the case of Eiku v. U.S., 142 U.S. 651, 12 S.Ct 336, 35 L.Ed. 1146 (1892).

"The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field." [immigration] Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). Nowhere is the "delicacy" of the policy judgment implicated more closely than in connection with Cuba.<sup>2</sup>

The Petition presented to this court's predecessor judge sought the opportunity to go to federal court and seek review of the decision of the INS and the Attorney General that the

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<sup>2</sup> Cuba lays 90 miles from our shores. It which has been the subject of an economic embargo for 30 years. We have transmitted both Radio and TV Marti to it people. Our community remains linked to the island with intimate family ties. Federal immigration policy shifts seismically affected this community in the 1980's with the Mariel Boatlift. The question of interdiction of *bakers* at sea remains a difficult issue, and current immigration detente with Cuba was achieved only after apparently difficult negotiations. Foreign policy toward Cuba continues to shape local issues.

**CASE NO. 00-00479-FC-28**

father speaks for the child and to pursue a claim of denial of due process, by INS, to the child. She granted Petitioner that opportunity through the Temporary Protective Order. The federal district judge determined that Petitioner could pursue the claim as a "next friend" on behalf of the child under federal procedural rules.<sup>3</sup> Petitioner can proceed with his appeal to the Eleventh Circuit based upon the district court's ruling as to his standing to sue on behalf of the child. The status of the state court action no longer affects the federal action or appeal.

The Petitioner went to federal district court, and the district court judge rendered a fifty-page carefully and thoroughly reasoned ruling which addressed the issues. Judge Moore determined that the Attorney General conducted the necessary investigation and did not abuse her discretion in coming to the conclusion that the child had a loving and adequate home waiting for him with his father, who desperately wanted his first-born son back in his arms.

The remedy sought in this court is custody of the child. While the court recognizes the many, many authorities that establish that domestic relations, family law, is an area reserved to the state courts, Petitioner fails to recognize the fundamental nature of his case -- it is an immigration case, not a family case. See, Jaggiella v. Jagiella, 647 F.2d 561 (5<sup>th</sup> Cir. 1981): "Recent authority ... seems to favor a broader inquiry into the nature of the claim rather than resolution of the issue by technical appellation" *Id.* at 564.

This case is designed to keep Elian Gonzalez in Miami over the federal government's and his father's objection, and under the name of a custody claim. Petitioner's increased

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<sup>3</sup> The state court order was not the basis of Petitioner's standing to sue in federal court under Federal District Court Judge Moore's analysis..

**CASE NO. 00-00479-FC-28**

level of activity in the state court action correlates with announcements by INS of reunification of the child with his father. The United States through the Attorney General has articulately and bluntly insisted that reunification **will** occur. The basis for the custody claim is that the child should not live in Cuba, with his father, and is better off here. The Court's ability to reach that decision is derailed by the federal government decision that he must return to Cuba, his homeland, and be with his father. This court cannot second guess the INS. In the end, a determination by this court as to who should have custody of Elian Gonzalez would not prevent his deportation to Cuba and his father, because deportation is exclusively the province of the federal government. "Custody is not a statutory factor in determining deportability." Johns v. Department of Justice, 653 F.2d, 884 (5<sup>th</sup> Cir. 1981).

The cases cited by Petitioner in his brief do not provide guidance under the unique facts of this case. Gao v. Jenifer, 185 F.3rd 548 (6<sup>th</sup> Cir. 1999) deals with a juvenile alien whose status was addressed by the INS prior to an amendment to the federal immigration law which provided that: "...no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction." 8 U.S.C §1101(a)27(j) (1999) [dealing with illegal and unaccompanied minors placed in foster care and whether the juvenile court has jurisdiction to declare them dependent.] The Johns case, *supra*, specifically addressed the lack of control the state court has over deportation issues. Bergstrom v. Bergstrom, 623 F.2d 517 (8<sup>th</sup> Cir. 1980) involved a U.S. citizen father's attempt to utilize the federal district court to modify a prior custody ruling between him and the U.S. citizen mother

**CASE NO. 00-00479-FC-28**

regarding the U.S. citizen child.

The court finds the reasoning of In Re C.M.K., 552 N.W. 2d 768 (Minn.Ct. App. 1996) of most assistance. In C.M.K., the child was a juvenile Chinese national who was smuggled into the United States. INS found him, and after he was placed with a foster family, moved to deport him. The family filed in state court for dependency. The Minnesota Court of Appeals affirmed the trial court's finding that it was without jurisdiction due to federal immigration preemption, particularly noting that issues of asylum are not subject to state court jurisdiction. Most importantly in that case, the family alleged that the child would be subject to "imprisonment, fines, harassment, and physical assault if he is returned to China." *Id.* at 771. The Court of Appeals found that the family was basing its claim on "... alleged circumstances in another country and therefore, circumstances directly related to the immigration process." *Id.* at 771. "A finding that C.M.K. is in need of protection or services based on circumstances in China would directly conflict with the immigration proceedings and, thus, is preempted by federal law." *Id.* at 771.

Petitioner is not without a remedy to seek delay of the INS action, which has been available to him since March 21, 2000. Federal Rule of Appellate Procedure 8 provides that a party may proceed in federal court to seek a stay of the ruling of the district court which affirmed the authority of the Attorney General and the INS in this matter.

**Lack of Jurisdiction based upon Petitioner's Lack of Standing  
to sue under Chapter 751**

The Petitioner sought relief under Florida Statute 751 titled "Temporary Custody of

**CASE NO. 00-00479-FC-28**

Minor Children by Extended Family." If the petitioner does not have standing to sue under Fla. Stat. 751, then this court cannot exercise jurisdiction under Fla. Stat. §61.1308 because there is no viable custody claim. The Act's mission is stated:

The purposes of ss. 751.01-751.05 are to:

(1) Recognize that many minor children in this state live with and are well cared for by members of their extended families. ...Because of the care being provided the children by their extended families, they are not dependent [wards of the state] children.

(2) Provide for the welfare of minor children who are living with an extended family...At present, such family members are unable to give complete care to the child in tier custody because they lack a legal document that explains and defines their relationship to the child, and they are unable effectively to consent to the care of the child by third parties

(3) Provide temporary custody of a minor child to a family member or putative father having physical custody of the minor child to enable the custodian to:

(a) Consent to all necessary and reasonable medical and dental care for the child, including non-emergency surgery and psychiatric care;

(b) Secure copies of the child's records, held by third parties, that are necessary to the care of the child, including, but not limited to:

1. Medical, dental, and psychiatric records;
2. Birth certificates and other records; and
3. Educational records;

(c) Enroll the child in school ...

(d) Do all other things necessary for the care of the child.

*Fla. Stat. §751.01*

In the definition section of the statute, Fla. Stat. §751.011, The Florida legislature defined the words "Extended family" and "putative father" and stated:

As used in ss. 751.01-751.05, the term:

**CASE NO. 00-00479-FC-28**

(1) "Extended family" is any family composed of the minor child and a relative of the child who is the child's brother, sister, grandparent, aunt, uncle or cousin."

The terms "relative" and "family member" are not defined anywhere in Chapter 751. The term "extended family" is not used in the rest of the statute, even though the definition says "as used in ss. 751.01-751.05".

Fla. Stat. §751.02, "Determination of temporary custody proceedings; jurisdiction" provides: "Any relative of a minor child...with whom the child is presently living, may bring proceedings in the circuit court to determine the temporary custody of the child."

Lazaro Gonzalez's petition seeking temporary custody under Chapter 751 reflects that the Petitioner is "Paternal Great Uncle." *Petition, p.g, paragraph 13 (g)*. Despite the limited list of extended family members who may sue under chapter 751, Petitioner asserts that he is a "relative", and therefore has standing to bring this claim to the child. If the statute's effect is limited by the definition of "extended family", then Petitioner is too remotely related to the child to bring this action under chapter 751 and this court has no jurisdiction.

To determine whether the legislature meant to empower any relative to take a child or whether the legislature sought to limit the remedy to the list of "extended family" members that they took the trouble to define is a question of statutory construction.

The legislative intent in passing the law is the polestar by which the court must be guided. State v. Webb, 398 So.2d 820, 824 (Fla. 1981). The rules of statutory construction exist so that a court may determine the legislature's intent and effect the purpose of the law.

Barnett Bank of South Florida v. State Dept. of Banking, 511 So.2d 1527, 528 (Fla. 3<sup>rd</sup> DCA 1987).

**CASE NO. 00-00479-FC-28**

1990). The starting point is the clear language of the statute itself; if the language is clear and unambiguous, the court stops there. Barnett Bank, id. at 528. Petitioner argues that the word "relative" used in §751.02 is clear and unambiguous. However, courts must look beyond plain language if applying the literal construction would render other provisions meaningless. Unruh v. State, 669 So.2d 242, 245 (Fla. 1996).

To determine intent, the court must look to other factors in addition to the language used, including the subject matter and the stated purpose of the law. Badaraco v. Suncoast Towers V Assoc., 676 So.2d 502, 503 (Fla. 3<sup>rd</sup> DCA 1996). The title of the act is important. Carlile v. Game and Fresh Water Comm'n, 354 So.2d 362, (Fla. 1977). The title is deemed to be a "...direct statement by the legislature of its intent." State v. Webb, 398 So.2d 820 (Fla. 1981). The title of this act is "Temporary Custody of Minor Children by **Extended Family**". [emphasis added]

Also of importance is identification of the "evil to be corrected" by the law. Webb, supra. The legislative history reflected in the bill analyses of the Florida House of Representatives and the Florida Senate reflect as follows: the bill summary from the House states: "This bill creates an action for temporary custody of minor children who are currently living with members of their extended family..." Florida House of Representatives, Committee on Judiciary, Final Bill Analysis & Economic Impact Statement CS/HB 1185, 5/3/93. The House's substantive analysis states:

"PRESENT SITUATION: At the present time it has been reported by Florida Legal Services, Inc. that there are minor children living with family members... without an order granting custody. This presents a problem to these family members when a third party

**CASE NO. 00-00479-FC-28**

requires consent to care for or provide services to these children. Currently, the available solution for these families is to initiate a guardianship proceeding in probate court or to initiate a dependency proceeding under Chapter 39, Florida Statutes." *Id.* at p. 2, "Substantive Analysis." The Senate's summary of the "Present Situation" echoes the House staff analysis. Florida Senate, Senate Staff analysis and Economic Impact Statement, 2/25/93.

The "Comments" section provides: "This bill would provide a relatively simple procedure for extended families and putative fathers to obtain custody of minor children....At the present time there is statutory authority for an adjudication of the custody of a child in a dissolution proceeding, through a paternity action, adoption, and juvenile dependency. In addition, a guardianship action encompasses custody, but the procedure is cumbersome and results in a family law issue being adjudicated in probate court rather than in a family law court. The dependency proceeding requires the showing of abandonment or unfitness of the natural parent. In addition, it results in the continual involvement of the Department of Health and Rehabilitative Services which is costly and not warranted in the types of situations which this bill addresses." Florida House bill analysis, *supra.*, p. 5, 5/3/93.

The Senate's legislative staff analysis acknowledged the definition issue: "The bill defines 'putative father' and 'extended family' for purposes of **its provisions**. [emphasis added]. However, the term 'extended family' is used only in the statement of the act's purpose...not...in the substantive provisions of the bill. Therefore, the bill would probably be clarified if the term 'relative' were defined in lieu of, or in addition to the term 'extended family'." Florida Senate staff analysis *supra.*, p. 4, 2/25/93.

The legislature ignored its staff's advice on clarifying the bill, and passed Chapter 751 with the definition of "extended family". However, during the rush of passage, uncles were omitted from the list. The legislature revisited the statute in 1997 to add "an uncle of a minor child" to the definition of extended family. See, Florida House of Representatives Committee on Judiciary, Final Bill Analysis & Economic Impact Statement CS/HB 1087, 5/20/96. The Bill analysis again refers to Chapter 751 as providing means to place minor children with extended family members, and notes: "This chapter allows those extended family members to seek temporary custody of the child, without which they could not consent to care of the child by third parties. In the 1993 session, the word 'uncle' was inadvertently left out of CS/HB 1185."

**CASE NO. 00-00479-FC-28**

As a result, the definition of extended family does not include the word "uncle". At least two men were denied legal temporary custody because of the current definition of extended family." *Id.* at p. 3. In reviewing the entire legislative history and every staff analysis available, not once does a legislative intent to grant the opportunity to seek custody to any relative outside the extended family definition ever appear.

An additional fundamental rule of construction requires the application of the doctrine of *in pari materia*, which means looking at all the provisions of the chapter together. DeArmas v. Ross, 680 So.2d 1131 Fla. 3<sup>rd</sup> DCA 1996). Phrases cannot be read in isolation. Instead the phrases at issue must be read in the context of the entire section. Acosta v. Richter, 671 So.2d 149, 154 (Fla. 1994). Whenever possible, a court must adopt a construction of a statute that harmonizes and gives effect to all the provisions within an act, giving effect to the whole statute. Unruh, *supra.*, at 245. Allowing any "relative" to sue for temporary custody under §751.05 would wipe out the definition of extended family in §751.011. Why create a limited list of family members if any relative, no matter how distantly related, can sue? To adopt Petitioner's construction would violate the laws governing the court's obligation in construing the laws passed by the legislature.

"Categorical distinctions between relatives and nonrelatives, and between relatives of varying degree of affinity, have always played a predominant role in determining child custody and in innumerable other aspects of domestic relations." Reno v. Flores, 507 U.S. 292, 113 S.Ct 1439, 123 LEd.2d 1 (1993), fn. 6.

Under case law decided prior to the passage of Chapter 751 in 1993, and of which the legislature is presumed to be aware, the "great-uncle" issue was raised. In Kennedy v.

**CASE NO. 00-00479-FC-28**

Kennedy, 559 So.2d 713 (Fla. App. 1990) a great uncle and aunt were denied custody of their great niece/nephew where there was an attempt to show that the mother was unfit. Certainly the legislature could have included relatives within the second degree of consanguinity, meaning great-aunts, great-uncles, and second or third cousins, if they had wished to exercise the choice to do so.

The single application of this statute in a similar case, Glockson v. Manna, 711 So.2d 1332 (Fla. 2<sup>nd</sup> DCA 1998) states: "Section 751.05(3) specifies that an award of temporary custody to **an extended family member** over the objection of a natural parent may be granted only upon a finding, by clear and convincing evidence, that the parent is unfit, in which case the trial court must make a finding that the parent has abused, abandoned, or neglected the child as defined by chapter 39, Florida Statutes (1997)." [emphasis added by the court]. The Glockson court applied the definition section to the cause of action. *Id.*

In considering all the rules that apply when a court construes a statute, the court must conclude that as a paternal great-uncle, despite how loving, caring and well-motivated he may be, the law of the state of Florida does not permit the Petitioner to sue under this statute for temporary custody of this child.

**The Effect Of This Ruling**

A black robe is not a license for a judge to intervene in many of society's tragedies. The most difficult aspect of being a judge is watching horrible situations unfold and knowing that despite the awesome power of the judiciary, you are powerless to intervene. This case is one of those situations. This case has brought out strong feelings, passions, nowhere

**CASE NO. 00-00479-FC-28**

more visibly than in the streets of the city where this courthouse sits. Along with the people of the world, this court has watched the struggle between a family fighting for love and freedom and a father fighting for love and family. Which is more important? In the end, it depends on every person's individual experience.

Lazaro Gonzalez, and his wife Angela, and his daughter Marisleysis, have sacrificed their home, their health, and their peace of mind for this child. They nursed him through his recovery from his ordeal at sea and the loss of his mother. They are afraid for him, and are striving to do what they think is best for this child. This case has torn apart a once-close family. Although this court is constrained by the law to reach this result, but it must recognize the devotion and selflessness of this family.

This court also recognizes that the decision of this family court will be very difficult for those members of the community who had hoped desperately that the child could stay here. As family judges sitting in downtown Miami, we see case after case where families are separated because of the oppression and tyranny in Cuba. We handle divorce cases where fathers and mothers are divorcing spouses and children left in Cuba, whom they may never see. We see the pain in their faces when as we ask them about their children. In miles, this courthouse is roughly as close to Havana as it is to Orlando. This court knows that many in this community are sons and daughters, mothers and fathers, brothers and sisters of those who suffer the political oppression and tyranny of Cuba from the inside of a Cuban prison. They are angry and they are frustrated and they know exactly what the price of freedom is, and they are very afraid for this child. The experience of this community must be respected.

**CASE NO. 00-00479-FC-28**

Equally worthy of respect are those who have reached the opposite conclusion about where Eian Gonzalez should be. Those who believe that the child should be with his father understand the unbearable pain of the loss of a child. There is nothing to compare with the sorrow of an empty home where a child is missing. There are toys that will not be played with, a bed undisturbed. There is an awful silence that comes with the loss of a child that cannot be filled with any degree of noise other than the sound of that particular child. Every parent who has for a moment imagined their world without their child in it, the total fear and overwhelming emptiness, can empathize with Juan Miguel Gonzalez-Quintana. Some feel the father is selfish by insisting his son be returned to him -- but what parent really believes that anyone else could raise his child with the same degree of love and devotion as he? While we may not agree with Juan Miguel Gonzalez-Quintana's decision to live in Cuba, the freedoms which we stand for here in America require that we respect that decision, which the Attorney General has concluded is genuine and not coerced. Seeing the love and devotion to their Cuban homeland in our exile community, perhaps one can understand why Juan Gonzalez does not want to leave a country which many believe is Paradise lost.

The difference between the United States and Cuba is far wider than the 90 miles of the Florida Straits. Here, we live under a system of laws, not a system of men. The law is established by the representatives of our citizens in our legislature. This court is sworn to uphold the laws and the Constitution of the State of Florida, and is not free to substitute her individual opinions. If the law were what any one powerful person decreed it to be, then the differences between Cuba and America which make this case so difficult would vanish. None

**CASE NO. 00-00479-FC-28**

of us would be free. Our nation, and this state, guarantees the precious right to parent your children, in privacy, without the unfettered intrusion of others. That freedom necessitates this result. Courts must "reconcile ourselves to the idea that there are myriads of problems and troubles which judges are powerless to solve..." quoting United States Supreme Court Justice Warren Burger, in In Re Dubreuil, 603 So.2d 538 (Fla. 4<sup>th</sup> DCA 1992).

Judges watch television, too. I have watched Elian Gonzalez day after day. This is a beautiful child. He has survived the heart-wrenching loss of a mother and is enmeshed in the terror of a custody fight, and no matter how well-intentioned everyone in this case is, his days are filled with uncertainty. It is axiomatic in family court that six years old is too young to make life-altering decisions. What a lonely place for a six-year old. This is so hard for him. This is so hard for us all.

At this point, this child has become a joke on Letterman and Leno, a skit on Saturday Night Live, and an hourly update on daytime tv. We are losing sight of him as a child and starting to treat him as a thing. We need to stop. We need to turn off the cameras and let him return to the life of a child. The challenge with regard to this court's decision will be the choice of whether Elian Gonzalez will bring out the best in us all, or bring out the worst in us all. He deserves our best.

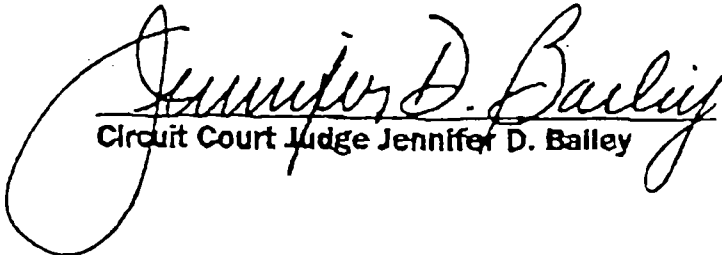
**Orders**

For the reasons stated above, this court terminates the effect of the order of January 10, 2000, and determines it does not have subject matter jurisdiction in this case, based

**CASE NO. 00-00479-FC-28**

on federal preemption and standing. This matter is dismissed. No motion for rehearing will be entertained.

Done and ordered in chambers at Miami, Miami-Dade County, Florida, this 13<sup>th</sup> day of April, 2000. *at 12:02 p.m.*

  
Circuit Court Judge Jennifer D. Bailey

Cc:  
Service List & U.S. Attorney

EXHIBIT ONE



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 (5<sup>th</sup> 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 States<sup>1</sup>, 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

<sup>1</sup> 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.<sup>2</sup> 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 13<sup>th</sup> 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.

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<sup>2</sup> 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 I.L.M. 1448, 1464 (1989).<sup>3</sup>

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 (7<sup>th</sup> 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

<sup>3</sup> 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 Matthews 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



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OFFICE OF THE LAW LIBRARIAN

OFFICE: (202) 707-5065  
FAX: (202) 707-1820

LOC # 012-00  
LL File No. 99-8098  
December 17, 1999

Dear Ms. Podolny:

In response to your request for information on the Cuban laws relating to custody and legitimation of children, enclosed please find a report we have prepared for you entitled "Parental Authority in Cuba."

We hope this information is helpful. If we may be of further assistance, please let us know.

Sincerely,

Norma C. Gutiérrez  
Senior Legal Specialist

Enclosure

Janice Podolny  
Chief, Examination Officer  
Immigration and Naturalization Services  
425 I St., N.W.  
Washington, D.C. 20536

000015

## PARENTAL AUTHORITY IN CUBA

The requester, the Immigration and Naturalization Services (INS), asks for an opinion on provisions of Cuban family law relating to custody and legitimation. Briefly, the facts of the case are as follows: A child was born out of wedlock and, when his mother died, the minor was under her *de facto* custodianship. According to the requester, the child's custody was not assigned by the court, but the parents had a friendly, informal shared custody arrangement. The requester states that the child used to spend at least 50% of his time with his father.<sup>1</sup>

Specifically, INS seeks to ascertain the following: (1) if the custodial parent dies, whether the non-custodial parent automatically gets custody; (2) whether it matters that the parents were not married when the child was born.

The INS has not furnished the Law Library with the birth certificate of the child nor with any other legal document pertaining to the minor.

The inquiry raises the following issues under the laws of Cuba:

- Paternity and filiation
- Parental authority

## Paternity and filiation

The INS asks for an opinion on the law pertaining to legitimation. The Constitution of Cuba<sup>2</sup> provides as follows:

Article 37. All children have equal rights, whether they were born in or out of wedlock. Any classification of the nature of the relationship is abolished.

No statement shall be put on record making any distinction regarding births, or the civil status of parents, in the certificates registering children, nor in any other document pertaining to the relationship.

<sup>1</sup> Telephone interview with Justice Exelby, Chief Examination Officer at the Immigration and Naturalization Services (Dec. 16, 1999).

<sup>2</sup> CONSTITUTION OF CUBA, as amended, Gaceta Oficial (G.O.), August 1, 1992, translated by Foreign Broadcast Information Service, FBIS-LAT-92-226-5.

## LAW LIBRARY OF CONGRESS 2

The State guarantees the determination and recognition of paternity through suitable legal procedures.<sup>1</sup>

In view of the above article and based on the principle of constitutional supremacy, the old categories of legitimacy and illegitimacy are no longer operative and, therefore, have no effect in the reciprocal rights and obligations between parents and children.

The registration in the Office of the Civil Registry of acts concerning the civil status of individuals—i.e., birth, marriage, death, acquisition and loss of Cuban nationality—is governed by the Law on the Civil Registry.<sup>2</sup>

Article 55 of the Law on the Civil Registry provides as follows:

Article 55. Parentage of children shall be proved with the certification of the birth registration issued with the formalities established by law.<sup>3</sup>

The lack of a birth certificate limits the Law Library's ability to ascertain the parentage relationship of the father and child in the case at hand. The INS states, however, that it has the child's birth certificate wherein the alleged father is named as the child's father.<sup>4</sup>

### Parental Authority

Parental authority in Cuba is governed by the Family Code of Cuba.<sup>5</sup> The provisions of the Code relevant to this inquiry provide the following:

Article 82. Minor children shall be under the parental authority of their parents.<sup>6</sup>

Article 83. The parental authority belongs to both parents jointly.

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<sup>1</sup> *Id.* art. 37.

<sup>2</sup> Ley No. 51 de Julio 15, 1925, Del Registro del Estado Civil (G.O. Aug. 22, 1925), art. 3.

<sup>3</sup> *Id.* art. 82.

<sup>4</sup> *Supra* note 1.

<sup>5</sup> Código de la Familia, Anotado y Concordado (Divulgación Ministerio de Justicia, Cuba, 1927).

<sup>6</sup> *Id.* art. 82.

### LAW LIBRARY OF CONGRESS 3

[Parental authority] belongs to only one parent on the death of the other, or due to the fact that the exercise of such right has been suspended or deprived from him/her [by the pertinent authority].<sup>9</sup>

Article 85. The parental authority comprises the following rights and duties of the parents:

- 1) to have their children under their custody and care; to make an effort to provide them a stable dwelling and adequate nourishment; to care for their health and personal hygiene;...
- 2) to care for the education of their children;...
- 3) to direct the formation of their children for social life;....
- 4) to administer and care for the personal and real property [*bienes*] of their children in the most industrious way;....
- 5) to represent their children in all legal transactions and acts in which they have an interest;...<sup>10</sup>

#### Extinction and suspension of the parental authority

Article 92. The parental authority is extinguished:

- 3) due to the death of the parents or the child;
- 4) due to the child's arrival at legal age;
- 5) due to the marriage of the child who has not arrived at the legal age;
- 6) due to the adoption of the child.<sup>11</sup>

Article 93. Both parents, or one of them, shall lose the paternal authority over their children

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<sup>9</sup> *Id.* art. 83.

<sup>10</sup> *Id.* art. 85.

<sup>11</sup> *Id.* art. 92.

LAW LIBRARY OF CONGRESS 4

- 1) when it is imposed as a sanction upon them by a final court decision in a criminal process;
- 2) when it is assigned to one of them or when both are deprived of the paternal authority by a final court decision issued in a divorce or nullity of marriage proceeding.<sup>12</sup>

Article 94. Parental authority is suspended by incapacity or absence of the parents when declared by the court.<sup>13</sup>

Article 95. The courts, taking in consideration the circumstances of the case, may deprive both parents, or one of them, of parental authority, or suspend them from its exercise in the cases of articles 93 and 94, or by a judgment issued in a trial brought about by the other [parent] or the government attorney [*fiscal*], when one or both parents:

- 1) gravely fail[s] to comply with the duties provided in article 85;
- 2) induce[s] the child to perform an act which constitutes a crime;
- 3) abandon[s] the national territory and, thus, their children;
- 4) engage[s] in a behavior which is antisocial [*conducta viciosa*], corruptive, criminal or dangerous, which is not compatible with the exercise of parental authority;
- 5) commit[s] a crime against the person of the child.<sup>14</sup>

Conclusion:

- Articles 82 and 83 of the Family Code of Cuba grant the parental authority of children to both parents jointly.
- Article 83 grants parental authority to only one parent on the death of the other, or when such right has been suspended or deprived to one of the parents by the pertinent authority.
- In the case at hand, as stated above, the Law Library does not have the birth certificate of the minor. Assuming that the parentage relationship between the father and child has been legally

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<sup>12</sup> *Id.* art. 93.

<sup>13</sup> *Id.* art. 94.

<sup>14</sup> *Id.* art. 95.

**LAW LIBRARY OF CONGRESS 5**

established, and assuming that no prior ruling has been issued by a Cuban court under Articles 94 and 95 of the Family Code depriving or suspending the right of the child's father to exercise the parental authority granted to him by articles 82 and 83 of the Code, the father has never lost it. Furthermore, if the above two assumptions are correct, under article 83 of the Family Code, such parental authority right belongs entirely to the father from the moment that the child's mother died.

Prepared by Norma C. Gutiérrez  
Senior Legal Specialist  
Law Library of Congress  
Legal Research Directorate  
December 1999

000023

EXHIBIT TWO



Office of the Attorney General

Washington, D. C. 20530

January 12, 2000

Linda Osberg-Braun, Esq.  
Roger A. Bernstein, Esq.  
Hackley, Bernstein & Osberg-Braun, P.L.  
Turnberry Plaza  
2875 NE 191<sup>st</sup> Street  
Penthouse 1B  
Aventura, Florida 33180

Spencer Big, Esq.  
420 Lincoln Road  
Suite 379  
Miami Beach, Florida 33139

Dear Messrs. Big and Bernstein and Ms. Osberg-Braun:

I have reviewed your letter of January 5 concerning the case of Elian Gonzalez, as well as the issues that Mr. Bernstein raised when he and others met with me on the evening of January 7, including the fact that you have filed a custody action on behalf of Lazaro Gonzalez in the Miami-Dade County Circuit Court. I understand that court has granted a temporary protective order to Lazaro Gonzalez. While I am always open to considering new information that might arise, I am not currently aware of any basis for reversing Commissioner Meissner's decision that Juan Gonzalez, Elian's father, has the sole authority to speak for his son on immigration matters.

As you know, the United States is not a party to the action you have filed in Florida court, nor is it named in the temporary protective order that the Florida Circuit Judge issued January 10. Indeed, the question of who may speak for a six-year-old child in applying for admission or asylum is a matter of federal immigration law. Nothing in the temporary protective order changes the government's determination that Juan Gonzalez can withdraw applications for admission and asylum relating to Elian and that he has done so. In the Department's judgment, the Florida court's order has no force or effect insofar as INS's administration of the immigration laws is concerned.

In our meeting last Friday evening, Mr. Bernstein said that the INS itself had originally announced that state courts could resolve Elian's status in the United States. I think it is important to clarify, therefore, this Department's view that the INS

000025

the possible role of state courts in a case such as this. In the first few days after Elian's arrival in the United States, when it was suggested that INS's placement of Elian in the care of his great-uncle amounted to a grant of custody, INS indicated that it could not grant custody and that such a request would have to be put before the state courts. As the case evolved, it became clear that Elian's father, who was still in Cuba, was asserting a parental relationship with Elian and had adequately expressed his wish, under the immigration laws, for Elian's petition for admission to this country to be withdrawn. In these circumstances, INS was obliged to determine whether the father was the appropriate person to speak for Elian on immigration issues. That question, as I have said, remains one of federal, not state, law. The Commissioner's resolution of that question--as well as of other immigration matters--may be challenged, if at all, only in federal court. We are prepared to litigate in that forum. Accordingly, Commissioner Meissner has determined that the January 14 date should be extended to accommodate any federal court proceedings. This little boy has been through so much, and it is therefore imperative that all of us do what we can to resolve his case as soon as possible.

With respect to the issues raised in your January 5 letter, I would make the following observations. Elian Gonzalez is a six-year-old child who has lost his mother. As a general matter, when dealing with a child this young, the immigration law, like other areas of law, looks to the wishes of the surviving parent. One circuit court case indicated that a twelve-year-old child may apply for asylum over the wishes of his parents in some circumstances. See *Polovchak v. Meese*, 774 F.2d 731, 736 (7th Cir. 1985). That case also makes it clear, however, that a twelve-year-old child is "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." Commissioner Meissner has determined that, under applicable law, Elian is too young to make legal decisions for himself, and that his father has the legal authority to speak for him in immigration matters.

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

000026

with Elian, and the other evidence provided, that the father has expressed his true wishes in asking that his son be returned to him.

The INS does not rule out the possibility of a case in which an asylum application would be accepted from a young child against the wishes of a parent. In that regard, the INS Guidelines for Children's Asylum Claims provide a useful framework. In particular, they provide for a review of the objective circumstances relating to possible torture or persecution in the child's home country in cases where a child is too young to express a competent view on these matters. The INS reviewed the asylum application you sought to file on Elian's behalf, considered all other relevant available information, and found no objective basis for overriding the father's wishes for his son. In particular, the INS found no credible information indicating that the child would be at risk of torture or persecution if returned to his father, and thus concluded that it had no reason to question the father's decision not to assert an asylum claim.

The specific language you cite from the INS Inspector's Field Manual is not applicable here. It is designed to protect an unaccompanied minor who arrives here illegally, has no parent to speak for him, and is also capable of speaking for himself. In those circumstances, if the child indicates a wish to return voluntarily to his country of origin, he would normally be allowed to withdraw the application for admission and be sent home, rather than being placed into removal proceedings. If the child expresses a fear of persecution, however, the Field Manual provides that the child should be placed not in expedited removal proceedings, but rather in conventional removal proceedings before an immigration judge.

Nothing in the field guidance suggests that a father's wishes regarding his six-year-old child should be overridden. On the contrary, in a related provision you do not cite, the Field Manual makes it clear that the first responsibility of the INS when confronted with an unaccompanied minor is to attempt to remedy the situation by finding the child's parent or legal guardian, even if that person is outside the United States. It is only when that effort is unsuccessful that the Field Manual provisions you cite even come into play.

Even if it were applicable in this situation, the provision you cite would not answer the basic question presented by this case: Who speaks for the child? If Elian is not competent to "indicate[] a fear of persecution or intention to apply for

000027

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

Once again, it is my strong hope that we can work together to resolve this child's status as soon as possible.

Sincerely,

A handwritten signature in dark ink, appearing to read "Janet Reno", written in a cursive style.

Janet Reno

000028

EXHIBIT THREE



U.S. Department of Justice  
Immigration and Naturalization Service

Office of the Executive Associate Commissioner

425 I Street NW  
Washington, DC 20536

April 7, 2000

Mr. Lazaro Gonzalez  
2319 N.W. 2<sup>nd</sup> Street  
Miami, Florida 33125-5207

Re: Elian Gonzalez

Dear Mr. Gonzalez:

On January 5, 2000, the Commissioner announced her decision that Juan Miguel Gonzalez has the sole legal authority to speak on behalf of his son in immigration matters. This decision was reached after a thorough inquiry that included two interviews with Juan Miguel Gonzalez and an interview with you and your daughter. At the conclusion of that process, the Commissioner determined that Juan Miguel Gonzalez had clearly requested that Elian be allowed to withdraw his application for admission and return to Cuba, that Juan Miguel's request represented his true wishes, and that she would honor that request. Since her decision was announced, the Immigration and Naturalization Service (INS) has had the authority to implement its decision by terminating Elian's parole and returning him to his father in Cuba. The INS refrained from taking those steps while you presented your objections to the Attorney General and then sought review in the federal district court.

As you are no doubt aware, Elian's father has now arrived in the United States and has requested that Elian's parole be transferred to his care. We will honor his request. Our decision today honors the bond between a father and son who have been separated for over 4 months, and recognizes the legal right of a father to have his child with him, to care for the child, and to speak on his behalf. This decision is consistent with the Commissioner's January 5 decision that Juan Miguel Gonzalez is Elian's proper legal representative in immigration matters, with the Attorney General's ratification of that decision, with the federal district court's ruling, and with INS regulations that provide for the release of minors into the care of their parents. See 8 CFR § 236.3(b)(1)(i).

In the interest of ensuring that Elian's transfer will take place in the most appropriate manner, we have sought the advice of two eminent psychiatrists and an eminent psychologist. These experts have all advised that Elian should return to his father's care as soon after his

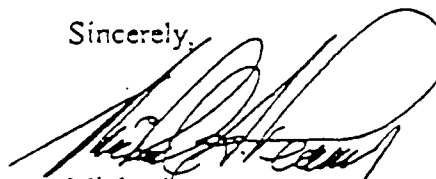
father's arrival in this country as possible. They have also emphasized how important it is that Elian's primary caregivers over the past four months both prepare the child in advance and accompany him at the time of the transfer. We urge your cooperation in assisting Elian and all concerned to prepare for and carry out this transfer so that it will occur in a manner that is most appropriate and most supportive of Elian under the circumstances.

To that end, the experts we have consulted have offered to meet with you, and to meet separately with Juan Miguel Gonzalez, to discuss how to prepare for the upcoming transfer and to assist Elian in making a smooth transition. These experts have told us that the best way to ensure a smooth transition that is most sensitive to Elian's needs would be to talk with you and the adult members of your family about how you can assist in a transfer that is cooperative. Dr. Jerry M. Weiner (Professor Emeritus in Residence of Psychiatry and Pediatrics at The George Washington University Medical School), Dr. Paulina F. Kernberg (Professor of Psychiatry at the Weill Medical College of Cornell University and Director of the Child and Adolescent Psychiatry Residency Training at New York-Presbyterian Hospital) and Dr. Lourdes Rigual-Lynch, (Director of Mental Health Services at the Division of Community Pediatrics of Montefiore Medical Center), will come to Miami on Monday, April 10 in order to meet with you and the adult members of your family. The experts have said that it would not be advisable to bring Elian to this meeting. Drs. Kernberg and Rigual-Lynch are fluent in Spanish. District Director Bob Wallis and I request that you and your family attend this meeting, which will occur at the Jackson Memorial Hospital, 1695 N.W. 9<sup>th</sup> Ave., at the University of Miami School of Medicine. We will contact you over the weekend to confirm a time for Monday's meeting.

We are also open to discussing with you other specific measures that can ensure a peaceful and orderly transfer that is most sensitive to Elian's needs. Following the April 10 meeting, we plan to issue instructions to you as to the time and manner of transferring Elian's parole to the care of Juan Miguel Gonzalez.

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

Sincerely,



Michael A. Pearson  
Executive Associate Commissioner  
for Field Operations

cc: Juan Miguel Gonzalez  
Linda Osberg-Braun, Esq.  
Roger A. Horowitz, Esq.  
Spencer Eig, Esq.  
Kendall Coffey, Esq.  
Manual Diaz, Esq.  
Barbara Lagoa, Esq.  
Jose Garcia Pedrosa, Esq.  
Gregory Craig, Esq.

EXHIBIT FOUR



U.S. Department of Justice  
Immigration and Naturalization Service

Office of the Executive Associate Commissioner

425 I Street NW  
Washington, DC 20536

April 12, 2000

Mr. Lazaro Gonzalez  
2319 N.W. 2<sup>nd</sup> Street  
Miami, Florida 33125-5207

Dear Mr. Gonzalez

The goal of the Department of Justice and the Immigration and Naturalization Service is to ensure that Elian's transition to his father's care is as peaceful as possible. We must all do everything in our power to see that the transfer is accomplished in a thoughtful, constructive manner.

We understand from your attorneys and various other representatives that you would like an opportunity to meet with Juan Miguel Gonzalez. We are prepared to accommodate that request as part of an orderly transfer of the care of Elian to his father.

To that end, please present Elian at Opa-Locka Airport, 1500 N.W. 42nd Ave., Opa-Locka, Florida, where you should proceed to the Main Coast Guard Gate at 2 p.m. Thursday, April 13. Rosa R. Urquiola, a bilingual INS official experienced in immigration matters involving children, will be there to accompany you, Elian, your daughter Marisleysis, and an agreed number of other members of your family to Washington, D.C., for this meeting. Before the meeting, Juan Miguel Gonzalez will have an opportunity to meet privately with his son. During the meeting, Elian will remain with Ms. Urquiola, and INS will have custody and care of Elian during that time. After the meeting, care and parole of Elian will be transferred to Juan Miguel Gonzalez. These successive transfers of parole and care are being ordered pursuant to 8 C.F.R. §§ 212.5, 235.2, 236.3 (1999).

If you do not wish to meet with Juan Miguel Gonzalez as described above, District Director Bob Wallis and I hereby instruct you to present Elian at the same time and place, i.e., the Main Coast Guard Gate at Opa-Locka Airport, at 2 p.m. on Thursday, April 13. At that time,

the parole of Elian into your care will be revoked, and care of Elian will be temporarily transferred to Ms. Urquiola, who will bring Elian to Washington, D.C. Once Elian has arrived in Washington, D.C., he will be paroled into the care of his father. These successive transfers of parole and care are being ordered pursuant to 8 C.F.R. §§ 212.5, 235.2, 236.3 (1999).

You and your representatives have frequently stated in the last several weeks that while you did not agree with the Department of Justice's determination in this case or the federal judge's ruling upholding it, you would nevertheless abide by the law. The time has now come to carry through on that commitment, above all for the sake of a boy who deserves to have his reunion with his father take place without any further conflict or stress.

Please contact Mr. Wallis at 305-762-3680 with your response to this letter.

Sincerely,



Michael A. Pearson  
Executive Associate Commissioner  
for Field Operations

cc: Linda Osberg-Braun, Esq.  
Roger A. Bernstein, Esq.  
Spencer Eig, Esq.  
Kendall Coffey, Esq.  
Manuel Diaz, Esq.  
Barbara Lagoa, Esq.  
Jose Garcia Pedrosa, Esq.

EXHIBIT FIVE

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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

Appellants,

v.

JANET RENO, Attorney General of the  
United States, *et al.*,

Appellees

No. 00-11424-D

DECLARATION OF PAULINA F.  
KERNBERG, M.D.

1. My name is Paulina F. Kernberg, M.D. I make this declaration in connection with the Appellees' Opposition to Appellant's Motion for an Injunction Pending Appeal in the above-captioned action. I am currently (a) a Professor of Psychiatry at Weill Medical College of Cornell University, New York; (b) Director of the Child and Adolescent Psychiatry Residency Training Program at the New York-Presbyterian Hospital, Weill Cornell Westchester; and (c) a Training and Supervising Analyst, Adult and Child, Columbia University Center for Psychoanalytic Training and Research, New York. My professional address is The New York Hospital-Cornell Medical Center, Westchester Division, 21 Bloomingdale Road, White Plains, New York 10605. Attached to this declaration is my curriculum vita, which accurately reflects my educational background, training, professional experience, and publications that I have contributed to the medical literature.

2. My testimony in this case relates to my advice and recommendations to

Immigration and Naturalization Service Commissioner Doris Meissner concerning the impact of a continued delay in the transfer of Elian Gonzalez into the custody of his father, Juan González. My opinion is based on my interview of Elian's father, Juan Gonzalez, and his wife, Niercy; my interview with Lazaro Gonzalez, Elian's great-uncle; and my own knowledge of the psychiatric care of children, particularly where they have suffered separation from their parents and/or have experienced traumatic events.

3. I met with Juan and Niercy Gonzalez and their infant son on April 9, 2000 in the office of Mr. Gonzalez's attorney. Also present was Lourdes Rigual-Lynch, Ph.D. Both Dr. Lynch and I speak Spanish, and the meeting was conducted in that language. The interview left us with the impression of a well-functioning, nuclear family with a support network of extended family members.

4. I met with Lazaro Gonzalez on April 10, 2000. Also present were Lourdes Rigual-Lynch, Ph.D., and Jerry M. Wiener, M.D. The purpose of that interview was to discuss the impact of the current situation on Elian and to talk about how to implement the transfer of Elian to his father in a manner that would minimize stress and anxiety for the child.

5. We reported to Commissioner Meissner our impression that Mr. Lazaro Gonzalez does not recognize the extent of the negative impact of the current circumstances on the well-being of Elian. It was our advice to her that it is crucial for Elian to be clear about who has authority for him, namely his father. Not to return to his father as soon as possible may make him feel that he has lost not only one parent, but two parents. Separation of a young child from a parent is a stress, and when preceded by the death of the other parent would be considered traumatic. A six-year-old child craves stability and a sense of safety. Critical to a child's psychological well-being is the notion that somebody is and will remain responsible for his care,

and that adults in his life can compromise and negotiate their differences.

6. It is my opinion that the immediate, definitive, and unambiguous transfer of Elian into the custody of his father, Juan Gonzalez, preferably in a neutral setting, would make an essential contribution to Elian's mental and emotional well-being. This is especially so given that Elian is aware that his father has been in the United States for nearly one week. An immediate transfer of custody to Juan Gonzalez would reassure Elian of his father's love for him, and allow him to begin to reconstitute a sense of safety and security. Any further delay in reuniting Elian with his father or any action that would create a sense of ambiguity or uncertainty as to who will be responsible for Elian's care and well-being could be expected to cause increasing stress and psychological harm to Elian. I recommend that Elian's reunion with his father take place outside Miami. A transfer in a neutral setting would be preferable so as to avoid the intense media and community attention.

7. While it is clear that continued contact or visitation between Elian and his Miami relatives, including Marileysis Gonzalez, would benefit Elian, the most important consideration at this time is Elian's immediate and unambiguous reunion with his father.

I declare under penalty of perjury that the foregoing Declaration of Paulina F. Kernberg, M.D., is true and correct.

Executed on: April 12, 2000

By: Paulina F. Kernberg  
Paulina F. Kernberg, M.D.

***CURRICULUM VITAE***

**PAULINA F. KERNBERG, M.D.**

**February, 2000**

PAULINA F. KERNBERG, M.D.

BIOGRAPHICAL INFORMATION SKETCH

Dr. Paulina F. Kernberg was born in Santiago, Chile, South America. She completed her medical education at the University of Chile, and her psychiatric and psychoanalytic education at The Menninger Foundation in Topeka, Kansas. Dr. Kernberg speaks fluent Spanish and French.

Dr. Kernberg is Professor of Psychiatry at Weill Medical College of Cornell University, New York, and Director of the Child and Adolescent Psychiatry Residency Training Program at the New York-Presbyterian Hospital, Weill Cornell Westchester. Dr. Kernberg is also a Training and Supervising Analyst, Adult and Child, Columbia University Center for Psychoanalytic Training and Research, New York, and Faculty Member, Committee on Child Committee on Child Analysis, Columbia University Center for Psychoanalytic Research and Training, and the Director of the Postgraduate Psychotherapy Institute for Child and Adolescent Psychiatrists.

In 1994, Dr. Kernberg was the recipient of "The Hulse Award" given by THE NEW YORK COUNCIL ON CHILD AND ADOLESCENT PSYCHIATRY and was named the 1995 winner of the American Academy of Child and Adolescent Psychiatry's *First Psychotherapy Research Award* for significant contributions to the field of psychotherapy research over the past several years. She has written 92 scientific communications on the following topics: clinical and psychotherapeutic aspects of borderline conditions in children; narcissistic personality disorders in childhood; psychoanalytic perspectives of psychosis; child and adolescent psychoanalysis; friendships; adoption; sibling relations; parent/child interactions and mirror behavior. In 1991, Dr. Kernberg and her colleagues published CHILDREN WITH CONDUCT DISORDERS: A PSYCHOTHERAPY MANUAL (Basic Books, Inc., NY). In 2000 Dr. Kernberg and her colleagues published PERSONALITY DISORDERS IN CHILDREN AND ADOLESCENTS (Basic Books, Inc., NY).

Dr. Kernberg has lectured extensively in the United States, Europe, and South America.

QUEENS COUNTY NEUROPSYCHIATRIC INSTITUTE, Jackson Heights, NY

*Psychotherapist, January 1978 - August 1979*

Part-time employment as a psychotherapist and psychodiagnostician. Caseload included children, adolescents and adults.

PUERTO RICAN FAMILY INSTITUTE, INC., New York City, NY

*Psychodiagnostician, September 1977 - October 1978*

Part-time work conducting psychological evaluations (both children and adults) as well as in-service training.

VOCATIONAL EDUCATION AND EXTENSION BOARD, Hempstead, NY

*Researcher, September 1975 - August 1976*

Worked on a research project under the direction of Dr. George Stricker, Adelphi University. Project title: DEVELOPMENT OF TESTING BATTERY FOR SPANISH SPEAKING APPLICANTS. This project was aimed at developing a testing battery to be used with Spanish speaking individuals seeking educational and/or vocational counseling/training. Responsibilities included administering the selected battery of tests to a Spanish speaking population in attendance at various training agencies in Nassau County. Involved in collecting and developing appropriate statistical normative data.

## SUPERVISED PRACTICUM EXPERIENCE

ST. VINCENT'S HOSPITAL AND MEDICAL CENTER OF NEW YORK, New York, NY

*Clinical Psychology Internship, September 1976*

St. Vincent's Internship Program offered a variety of supervised individual and group psychotherapy experience (inpatient and outpatient), as well as further training in psychological testing. This internship also included training in the treatment of alcoholism.

VETERANS ADMINISTRATION, FRANKLIN DELANO ROOSEVELT HOSPITAL, Montrose, NY

*Trainee in Psychology service, September 1975*

Third year level clinical stipend (1,200 hours requirement). Responsibilities included individual and group psychotherapy, psychodiagnostic evaluation, attendance and full participation in psychiatric team meetings (Re: patient disposition, treatment planning, etc.); participation in training seminars (Interview Techniques, Individual Psychotherapy Seminar, Behavior Therapy Seminar, etc.)

# Withdrawal/Redaction Marker

## Clinton Library

| DOCUMENT NO.<br>AND TYPE | SUBJECT/TITLE                                          | DATE       | RESTRICTION |
|--------------------------|--------------------------------------------------------|------------|-------------|
| 001. resume              | Personally Identifiable Information [partial] (1 page) | 00/00/2000 | P6/b(6)     |

### COLLECTION:

Clinton Presidential Records  
National Security Council  
Legal Advisor (Mary DeRosa)  
OA/Box Number: 2543

### FOLDER TITLE:

Immigration (Elian Gonzalez Opinions) [1]

2012-0371-F

rs2163

### RESTRICTION CODES

#### Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

#### Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

F. 1/7/45

**CURRICULUM VITAE**  
**Paulina F. Kernberg, M.D.**

SOCIAL SECURITY NUMBER:

(b)(6)

DATE OF BIRTH:

(b)(6)

FAMILY:

Husband: Otto F. Kernberg, M.D.  
Son: Martin (d.o.b. 1954)  
Daughters: Karen (d.o.b. 1958)  
Adine (d.o.b. 1969)

PLACE OF BIRTH:

Santiago, Chile

NATURALIZED U.S. CITIZEN:

December 4, 1968

PROFESSIONAL ADDRESS & TELEPHONES:

The New York Hospital-Cornell Medical Center,  
Westchester Division  
21 Bloomingdale Road  
White Plains, New York 10605  
Office: (914) 997-5951 Fax: (914) 682-6988

HOME ADDRESS & TELEPHONE:

8 Murray Hill Road  
Scarsdale, New York 10583  
(914) 723-1830

MEDICAL LICENSES HELD:

1959 Chile  
1969 Kansas  
1973 New York

CERTIFIED BY SPECIALTY BOARD:

1971- Psychiatry, American Board of Psychiatry & Neurology.  
1973- Child Psychiatry, American Board of Psychiatry  
& Neurology.

EDUCATIONAL BACKGROUND:

1952 Bachelor of Science (Biology), University of Chile, Santiago, Chile  
1953-1959 M.D., University of Chile  
(includes rotating internship 1/58 - 4/59, Hospital San Juan de Dios, Santiago, Chile).  
1959-1960 Resident in Psychiatry, Sheppard and Enoch Pratt Memorial Hospital,  
Towson, Maryland.  
1961-1962 Resident in Psychiatry, Topeka State Hospital, Topeka, Kansas.  
1962-1963 Resident in Psychiatry, C.F. Menninger Memorial Hospital, Topeka, Kansas.  
1963-1965 Post-Residency Fellowship in Hospital Psychiatry, C.F. Menninger Memorial  
Hospital, Topeka, Kansas.  
1965-1967 Post-Residency Fellowship, Child Psychiatry, Children's Division,  
The Menninger Foundation.  
1969 Psychoanalyst, Topeka Institute for Psychoanalysis, Topeka, Kansas  
1970 Child Psychoanalyst, Topeka Institute for Psychoanalysis, Topeka, Kansas

### Special Post Graduate Training Activities:

- 1968 Participant, Group Relations Conference, A.K. Rice Institute, Univ. of Leicester, United Kingdom.
- 1972 Participant, Group Relations Conference, A.K. Rice Institute and Washington School of Psychiatry, Amherst College, Amherst, Massachusetts.
- 1977-1983 Training Analyst Group on Supervision, Columbia University Center for Psychoanalytic Training and Research.
- 1969 Expert Witness, divorce case, New York Supreme Court.
- 1997- present  
Leader of the Faculty Group on Divorce and Marriage
- 1998- present  
Course on Divorce Mediation Training, The Association of the Bar of New York
- 1999- present  
Instructor: Parent Education and Custody Effectiveness (PEACE). Hofstra University School of Law and Hofstra University School of Education and Allie Human Services/Manhattan Bar Association.

### PROFESSIONAL POSITIONS:

#### ACADEMIC POSITIONS:

- 1967-1973 Faculty, Director of Therapy, The Menninger School of Psychiatry, Topeka, Kansas.
- 1970-1973 Faculty, Child and Adult Analysis, Topeka Institute for Psychoanalysis, Topeka, Kansas.
- 1974-1976 Associate Clinical Professor of Psychiatry, Albert Einstein College of Medicine at Yeshiva University, Bronx, New York.
- 1974-1976 Associate Supervising Child Analyst, Columbia University Center for Psychoanalytic Training and Research; New York, NY.
- 1977-1978 Associate Professor of Psychiatry, Albert Einstein College of Medicine at Yeshiva University, Bronx, New York.
- 1978-1995 Associate Professor of Psychiatry, Cornell University Medical College; NY. (Tenured position effective as of November 3, 1981.)
- 1977 - present Training and Supervising Analyst (Adult and Child), Columbia University Center for Psychoanalytic Training and Research; New York, NY.
- 1974 - present Lecturer in Psychiatry, Columbia University College of Physicians and Surgeons, Center for Psychoanalytic Training and Research.
- 1985 - present Visiting Associate Professor of Psychiatry, Albert Einstein College of Medicine at Yeshiva University, Bronx, New York.
- 1995 - present Professor of Psychiatry, Cornell University Medical College.
- 1997 - 1998 Lecturer in Psychiatry, Columbia University College of Physicians and Surgeons, New York, NY

### HOSPITAL POSITIONS:

|                |                                                                                                                                                                                                          |
|----------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1967-1972      | Staff Psychiatrist, Children's Div., The Menninger Foundation, Topeka, Kansas.                                                                                                                           |
| 1972-1973      | Director of Therapy, Children's Division, The Menninger Foundation, Topeka, Kansas.                                                                                                                      |
| 1969-1973      | Consultant, Topeka State Hospital, Child Development Center, Topeka, Kansas.                                                                                                                             |
| 1973-1975      | Chief, Child Outpatient Psychiatry Clinic, Bronx Municipal Hospital Center, Albert Einstein College of Medicine at Yeshiva University, Bronx, New York.                                                  |
| 1975-1978      | Associate Attending Psychiatrist, Child and Adolescent Psychiatry, Bronx Municipal Hospital, Albert Einstein College of Medicine at Yeshiva University, Bronx, New York.                                 |
| 1975-1978      | Director, Child and Adolescent Psychiatry, and Director, Child Psychiatry Training Program, Bronx Municipal Hospital Center, Albert Einstein College of Medicine at Yeshiva University, Bronx, New York. |
| 1978 - 1995    | Associate Attending Psychiatrist, The New York Hospital-Cornell Medical Center, New York, New York.                                                                                                      |
| 1978 - 1996    | Director, Division of Child and Adolescent Services, The New York Hospital-Cornell Medical Center, Westchester Div., White Plains, New York.                                                             |
| 1978 - present | Director, Residency Training Program in Child and Adolescent Psychiatry at The New York Hospital-Cornell Medical Center, Westchester Division, White Plains, New York.                                   |
| 1995 - present | Attending Psychiatrist, The New York Hospital-Cornell Medical Center, New York, NY.                                                                                                                      |

### PROFESSIONAL MEMBERSHIPS:

|                |                                                                            |
|----------------|----------------------------------------------------------------------------|
| 1962 - present | The Menninger School of Psychiatry, Alumni Association, Full Member.       |
| 1964 - 1973    | American Psychiatric Association, Associate Member.                        |
| 1969 - 1982    | Center for Advanced Psychoanalytic Studies (CAPS), Member.                 |
| 1971 - present | American Psychoanalytic Association, Member.                               |
| 1971 - present | International Psychoanalytic Association, Full Member.                     |
| 1972 - present | Association for Child Psychoanalysis, Inc., Full Member.                   |
| 1973 - present | Westchester Psychoanalytic Society, Member.                                |
| 1973 - present | Association for Psychoanalytic Medicine, Columbia University, Full Member. |
| 1973 - present | New York County Medical Society, Member.                                   |
| 1973 - present | American Academy of Child and Adolescent Psychiatry, Member.               |
| 1973 - present | American Group Psychotherapy Association, Full Member.                     |
| 1974 - present | American Psychiatric Association, Fellow.                                  |
| 1974 - 1975    | Center for Psychoanalytic Studies at Aspen, Colorado.                      |
| 1975 - present | David Levy Lectureship Committee Foundation, Member.                       |
| 1976 - present | Board Member, Margaret Mahler Foundation.                                  |
| 1976 - 1978    | Secretary, Association for Child Analysis, Inc.                            |
| 1977 - present | Member, World Association for Infant Mental Health (WAIMH)                 |

### PROFESSIONAL MEMBERSHIPS: (con't.)

- 1977 - present Society for Psychotherapy Research, Member.
- 1977 - present New York Council on Child Psychiatry, Inc., Member.
- 1979 - 1982 The Association for Child Psychoanalysis Inc., Councilor.
- 1979 - present Board Member, Parent's Place, Inc., White Plains, New York.
- 1986 - present American Society for Adolescent Psychiatry, Member.
- 1988 - present Group for the Advancement of Psychiatry, Member, Committee on Adolescence.
- 1997 - present Member, Manhattan Interdisciplinary Law Forum.
- 1997 - present Member, American Academy of Psychiatry and the Law.

### HONORS AND AWARDS:

- 1985 Honorary Member, Finnish Psychiatric Society.
- 1988 Gerald H.J. Pearson Lectureship, The Institute of the Philadelphia Association for Psychoanalysis.
- 1989 V. Hulse Lectureship, The New York Council of Child Psychiatry.
- 1990 Best Teacher of the Year Award in Child Psychiatry, Cornell University Medical College, Department of Psychiatry, The New York Hospital, Westchester Division.
- 1991 Honorary Member, Asociacion de Psicoterapia de Ninos, Lima, Peru.
- 1991 Chosen by peers in a Special Report as one of The Best Doctors in New York for Psychiatry, under the heading of Pediatric Specialists (New York Magazine, November 11, 1991).
- 1991 Member, New York Psychiatric Society.
- 1992 Invited Speaker, Residents Symposium, American Academy of Child and Adolescent Psychiatry Annual Meetings.
- 1992 Invited Speaker, "The Anna Freud Lecture," sponsored by the University of Vienna, Department of Psychotherapy and by The Vienna Psychoanalytic Society.
- 1994 Listed in The Best Doctors In America, 1994-95 Second Edition, and 1992-93 First Edition, published by Woodward/White, Inc., Aiken, South Carolina.
- 1994 Wilfred C. Hulse Award, from The New York Council on Child and Adolescent Psychiatry.
- 1995 Recipient of the American Academy of Child and Adolescent Psychiatry's first *Psychotherapy Research Award*
- 1997 Member, Memorials and Awards Committee, American Academy of Child and Adolescent Psychiatry (through October 1, 2000).
- 1997 Recipient of the Annual Achievement Award given by The Society of the Institute for Child, Adolescent and Family Studies (SICAFS) to an outstanding member of the field (Honoree/Lecture, June 12, 1997).
- 1998 Ramon Parres Lecture - Society of Neurology and Psychiatry, Mexico City, Mexico (March 26, 1998).

## INSTITUTIONAL RESPONSIBILITIES:

- |                          |     |
|--------------------------|-----|
| 1. Teaching              | 40% |
| 2. Clinical Care         | 20% |
| 3. Administrative Duties | 20% |
| 4. Research              | 20% |

### 1. Teaching:

#### A. 3rd Year Medical Students: Course Instructor

1. Developmental Perspectives of Borderline Pathology.
2. The Role of Friendships.
3. Play Therapy.

#### B. 3rd Year Residents in General Psychiatry: Course Instructor

1. The Pre-School Years.
2. The School Age Child.
3. Borderline and Narcissistic Personality Disorders in Children.
4. Gender Identity Disorders in Children.
5. Play - Its Functions in Child Development and Its Uses in Therapy.

#### C. Child and Adolescent Psychiatry Residents: Course Instructor

1. Child and Adolescent Psychotherapy Workshop: 2 year weekly seminar includes psychotherapy techniques of the main child psychiatric syndromes, mother-infant interventions, adolescent psychotherapy, research in psychotherapy, and child psychotherapy supervision.
2. Child Observation Course: 1 year weekly seminar.
3. Supervision of 1 Borderline Research Project Adult Resident (weekly).
4. Supervision of 3 Child and Adolescent Psychiatry Residents (weekly).

#### D. Psychoanalytic Candidates, Columbia University Psychoanalytic Institute: Course Instructor

1. Psychoanalytic Perspectives of Childhood Psychosis
2. Play in Normality and Pathology
3. Defense Mechanisms: Current Concepts, Developmental Perspectives
4. Psychoanalytic Process: Verbal Interventions and Technique
5. Child Development Course: Friendships, Siblings, 1st Year of Life, and 2nd Year of Life
6. Supervision of 2 candidates (1 adult, 1 child)
7. Child Observation Seminar: 8 sessions
8. Ethical Professional Conduct Seminar: 8 sessions

#### E. Financial Support for Educational Programs:

1. N.I.M.H. Clinical Training/Human Resource Development, 1978 - 1983,  
Principal Investigator: Paulina F. Kernberg, M.D.

Amount: \$35,000 - 47,000

2. N.I.M.H. Clinical Training/Human Resource Development, 7/1/84 - 6/30/87. Principal Investigator: Paulina F. Kernberg, M.D.  
Amount: \$19,367

3. Abramson Fund, 1993-1994. Support for Post-graduate Psychotherapy Institute for Child and Adolescent Psychiatrists co-sponsored by the American Academy of Child and Adolescent Psychiatry and The New York Regional Council of Child Psychiatry.  
Amount: \$15,000

2. Clinical Care:

- A. Consultant to Child and Adolescent Division clinical case conferences (weekly).  
B. Consultant, Adult Division clinical conferences (weekly), 1980-1985.

3. Administrative Duties:

- A. General Administrative Duties (Division of Child and Adolescent Psychiatry)
1. Steering Committee, The New York Hospital, Westchester Division, Member.
  2. Committee on Continuity of Care, The New York Hospital, Westchester Division, Member.
  2. Division of Child and Adolescent Psychiatry Council, Chairman.
  3. Division of Child and Adolescent Psychiatry Education Council, Chairman.
  4. Chairman, Committee on Ethics, New York Hospital-Cornell Medical Center, Westchester Division.
  5. Recruitment and Assessment of Faculty.
  6. Meeting with parents of hospitalized children for grievances.
  7. Organizing activities for international visiting professionals.
  8. Boundary functions with the community: speaker, board member, White Plains Special Education Liaison.
  9. Development of new programs (e.g., Adolescent After-School Day Program, Families of Divorce Program, School Consultation Program).
- B. Educational Administrative Duties (Child and Adolescent Psychiatry Training Program)
1. Recruitment of Child and Adolescent Psychiatry Residents.
  2. Supervisory Assignments for Child and Adolescent Psychiatry Residents.
  3. Mini-Boards in Child and Adolescent Psychiatry.
  4. Yearly curriculum review and update.
  5. Recruitment of Voluntary Faculty.
  6. Bi-annual meetings with Full-Time and Voluntary Faculty.
  7. Assessing and documenting training program implementation, according to A.C.G.M.E. standards.
  8. Bimonthly administrative meetings with Child Residents.
  9. Mock Boards, Senior Examiner.
  10. Coordination with the Payne Whitney Clinic Residency Training Program in Child and Adolescent Psychiatry.

11. Coordination with General Residency Program.  
12. Individual Administrative meetings with Child Residents.

4. Research Activities:

- A. Friendship and Peer Relations in Different Diagnostic Categories: Validation Study, 1992-present. I.R.B. approved. Principal Investigator: Paulina F. Kernberg, M.D. Co-Investigators: Jonathan Cohen, Ph.D., Audrey Clarkin, Ph.D., and Lina Normandin, Ph.D.

Project Role: 1-2 hours a week, train raters and interviewers, data analysis and interpretation.

- B. Dynamic Psychotherapy of Children with Conduct Disorders: Cross National Study on Process and Outcome, 1991-1993. Paulina F. Kernberg, M.D.: Co-Investigator.

Overall proposal, design, and selection of instruments with:

I. Kolvin, Principal Investigator  
John Bowlby Professor of  
Child & Family Mental  
Health, The Royal Free Hospital  
Hospital School of Medicine,  
The Tavistock Clinic, London, England

J. Tsiantis, M.D., D.P.M., F.R.C.  
Director, Department of  
Psychological Pediatrics,  
Aghia Sophia Children's Hospital  
Athens, Greece

Project Role: 8 hours per month, consultant, design,  
providing instruments for process

- C. Health-Sickness Rating Scale for Children - Construction of Anchoring Scale, Reliability Study, 1985-1988. Jerome Liebowitz, M.D., James Rembar, Ph.D., and Paulina Kernberg, M.D.

Project Role: Contribute concepts for design, participating  
in vignettes, and as an independent rater

Observational Criteria of Change Within the Sessions, (1985). Paulina F. Kernberg, M.D.

Project Role: 4 hours per month, building the instrument

- D. Personality Assessment in Adolescents, 1987-1989.  
Principal Investigator: Barbara Marcus, Ph.D.  
Co-Investigators: Paulina F. Kernberg, M.D., Michael Selzer, M.D.,  
Theodore Cherbuliez, M.D., and Saverio Moratti, M.D.

Project Role: 3 hours per week, interviewer, rater, theorist

- E. Co-Investigator in N.I.M.H. Prevention Grant: Dynamic and Family Therapy with Borderline Hispanics: A Grant Proposal, 1991.  
Jose Szapocznik, Ph.D.: Principal Investigator  
Professor and Director, Spanish Family Guidance Center  
Department of Psychiatry / School of medicine  
University of Miami, Miami, Florida

Project Role: 20 hours, drafted technical outline for individual psychodynamic psychotherapy with Borderline adolescents

- F. Mirror Behaviors in Young Children: A Developmental Study, 1992 - present.  
I.R.B. approved. Paulina F. Kernberg, M.D.: Principal Investigator.  
Co-Investigators: Lina Normandin, Ph.D., Alejandra Wortman, M.D., Lois Macri, B.A., Patricia Harteneck, B.A.

Project Role: instrument on mirror behaviors, validity, building and revising Mirror Behavior Checklist, prediction of mother-child interaction from mirror behaviors and attachment classification

- G. The Diagnostic Interview for Narcissism: Adolescent Adaptation for Record Review, 1992-1994. Principal Investigator: Paulina F. Kernberg, M.D., with Fady Hajal, M.D., and Lina Normandin, Ph.D.

Project Role: 1 hour per week, instrument adaptation for adolescent record review, rating of records, data analysis

- H. Play in Therapy: Instrument Development, 1991 - 1997.  
Principal Investigator: Paulina F. Kernberg, M.D., with Saralea Chazan, Ph.D., Elsa Blum, Ph.D., Lina Normandin, Ph.D. and R. Kruger, Ph.D.

Project Role: 3 hours per week, conceptualized instrument, theoretical concepts of its uses for diagnostic assessment and therapist change

RESEARCH SUPPORT:

- A. Cornell Interview for Children's Friendships and Peer Relations: Reliability and Validity Study, 1985-1986. Principal Investigator: Paulina Kernberg, M.D., with Audrey Clarkin, Ph.D., Edward Greenblatt, Ph.D., and Jonathan Cohen, Ph.D., Co-investigators. Funding by the Saul Z. and Amy Scheuer Cohen Family Foundation, Inc.

Amount: \$ 20,000

Project Role: 2-4 hours per week, contributor of the idea for the study, building the instrument, provided all data gathered from children's letters on friendships, interviewing children, rating interviewers, training interviewers

1. Research groups are currently carrying out this protocol in the following countries:
  - a. Mexico, Dr. Pedro Colin Alvarez, Universidad Iberoamericana, Mexico City.
  - b. Sweden, Dr. Ann-Charlotte Smedler, Stockholms Universitet, Stockholm.
  - c. Brazil, Drs. Machado & Rohde, Universidade Federale Rio Grande Du Sol, Porto Alegre.
  - d. Canada, Lina Normandin, Ph.D., Universite Laval, Quebec City.
  - e. Canada, Dr. Ruth Stirtzinger, Toronto, Ontario.
  - f. Italy, Graziella Fava Vizziello, Ph.D., University of Padua, Padua.
  - g. U.S.A., David J. Kolko, Ph.D., Western Psychiatric Institute, Pittsburgh.
  - h. U.S.A., Suzy Krueckeberg, Ph.D., University of Illinois at Chicago.
2. Doctoral dissertations in progress based upon this research instrument:
  - a. Friendship Patterns Among Regular and Special Education Students, by Donna Robin Murray, M.A., Ferkau Graduate School of Psychology, Yeshiva University (seeking Psy.D.)
  - b. Validating the Cornell Interview of Peers and Friends for Adolescents, by Marianna Wainer, State University of New Jersey, Rutgers (seeking Psy.D.)
  - c. Friendship Patterns and Peer Relations of Bi-Racial Girls, by Rachel Hannah Fields, The Professional School of Psychology, San Francisco, California

- B. Child Therapist Verbal Interventions Instrument, 1985 - 1989. Paulina F. Kernberg, M.D., Principal Investigator, with co-investigators Chazan, Saralea, Ph.D., Cohen, Jonathan, Ph.D., Scholl, Hannah, Ph.D., Kruger, Robert, Ph.D., Frankel, Alice, M.D. Grant funding from the Cornell University Medical Center, Department of Psychiatry.

Amount: \$ 5,000

Project Role: 2 hours per week, conceptualized original idea, trained raters, collected material for training tape

- C. Psychoanalytic Psychotherapy of the Borderline Patient, 1987-1989.  
John Clarkin, Ph.D., and Harold Koenigsberg, M.D.-- Co-Principal Investigators.  
Paulina F. Kernberg, M.D., Member, Cornell Borderline Personality Disorder  
Research Group. Funding by The Fund for Psychoanalytic Research, American  
Psychoanalytic Association.
- Amount \$ 12,000 (1st year)  
12,000 (2nd year)
1. Pilot Study on a comparison of adolescent inpatients and non-patients  
on the Self Report Instrument for Borderline Personality Organization  
(1984-1986).  
  
Project Role: participated in production of instrument, collected data
  2. Therapist Attitudes Instrument - Interrater Reliability Study. Dr. P.F.  
Kernberg with Dr. H. Koenigsberg, and Dr. T. Smith (1991-1994).  
Collaboration with Carolinska Institute: Danutta Wasserman.  
Principal Investigator, 95-97.  
  
Project Role: 2 hours per week, participated in building instrument,  
rated fifteen, 22-minute videotaped segments.
  3. Senior Research Psychotherapy Supervisor: Joanne Parks, M.D.  
(1984-1992)
- D. Psychotherapy of Borderline Personality Disorder Patients, Dec, 1994-Nov., 1996.  
John Clarkin, Ph.D., and Harold Koenigsberg, M.D.-- Co-Principal Investigators.  
Paulina F. Kernberg, M.D., Member, Cornell Borderline Personality Disorder  
Research Group. Funding by an N.I.M.H. Grant.
- Amount: \$ 88,631 (1st year)  
64,254 (2nd year)
- Project Role: 5 hours per week, research psychotherapist
- E. Mirror Behaviors and Mother/Child Interactions in Young Children: A Pilot Study,  
1993-1994.  
Principal Investigator: Amy Lynn Bloch, M.D., with co-investigators: Paulina F.  
Kernberg, M.D., Lynn Yanuck, B.A., Barbara Milone, R.T., M.S.W., and Laurie  
Olson, O.T.R. Grant Funding from The Cornell University Medical Center,  
Department of Psychiatry.
- Amount: \$ 9,500
- Project Role: 2 hours per week, mentor, provided original idea, co-wrote  
grant, recruited subjects, recruited research assistant, administered  
protocol, rated videotapes, individual feedback interview with mothers

## EXTRAMURAL PROFESSIONAL RESPONSIBILITIES:

- 1993 - present      Director, Post-Graduate Psychotherapy Institute for Child and Adolescent Psychiatrists, funded by The Abramson Fund, co-sponsored by The American Academy of Child and Adolescent Psychiatry and The New York Council on Child and Adolescent Psychiatry, Inc.
- 1990 - 1995      Chairperson, Ethics Committee, International Psychoanalytic Association.
- 1981 - 1985      Co-Chairman, Child Analysis Program, Columbia University Center for Psychoanalytic Training and Research, New York, New York
- 1985 - 1995      Chairperson, Child Psychotherapy Committee, American Academy of Child and Adolescent Psychiatry.
- 1989 - 1995      Associate Co-Editor: The Grade School Child, Volume 2 of 7, The Handbook of Child and Adolescent Psychiatry, Editor-in-Chief, Joseph Noshpitz, M.D., John Wiley & Sons, 1995.
- 1981 - 1988      Board Examiner in Adult Psychiatry. American Board of Psychiatry and Neurology, Inc.
- 1970 - 1973      Senior Psychotherapy Supervisor, C.F. Menninger Foundation, Topeka, Kansas.
- 1970 - 1973      Co-Instructor, Course on Child Development, Topeka Institute for Psychoanalysis, Topeka, Kansas.
- 1971 - 1973      Associate Supervisor of Child Analysis, Topeka Institute for Psychoanalysis.
- 1971 - 1973      Instructor, Child Psychotherapy, The Menninger School of Psychiatry, Topeka, Kansas.
- 1971 - 1973      Instructor, Continuous Case Seminar in Child Analysis, Topeka, Institute for Psychoanalysis, Topeka, Kansas.
- 1974 - 1976      Associate Supervising Child Analyst, Psychoanalytic Clinic, Columbia University, New York.
- 1970 - 1973      Chairman, Program Committee, The Psychotherapy Service, C.F. Menninger Foundation, Topeka, Kansas.
- 1972 - 1973      Senior Consultant, C.F. Menninger Foundation, Topeka, Kansas.
- 1979 - present      Board Examiner, Committee on Certification in Child Psychiatry. American Board of Psychiatry and Neurology.
- 1991 - present      Member, Curriculum Committee, Columbia University College of Physicians and Surgeons, Center for Psychoanalytic Training & Research.
- 1982 - present      Reader, Journal of Hospital and Community Psychiatry.
- 1983 - present      Reader, American Journal of Psychiatry.
- 1984 - 1987      Member, Editorial Board, International Journal of Psychoanalytic Psychotherapy.
- 1989 - present      Reader, American Journal of Orthopsychiatry.
- 1991 - present      Reviewer, Journal of the American Academy of Child and Adolescent Psychiatry. John McDermott, Jr., Editor.
- 1991 - present      Reviewer, Journal of Psychotherapy: Practice and Research, Jerald Kay, Editor.
- 1991 - present      Editorial Board, American Journal of Psychotherapy.
- 1991 - present      Co-Editor, Acta Paedopsychiatrica, Springer-Verlag, Heidelberg, Germany.
- 1997 - present      Editorial Board, Journal of Child Psychoanalytic Therapy.

## EXTRAMURAL PROFESSIONAL RESPONSIBILITIES (con't):

|                |                                                                                                                                                                                                                                                                                                                                  |
|----------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1992 - present | Member, Scientific Board, <i>Kinderanalyse: Zeitschrift für die Anwendung der Psychoanalyse in Psychotherapie und Psychiatrie des Kindes - und des Jugendalters</i> (Journal for the Practice of Psychoanalysis in Psychotherapy and Psychiatry with Children and Adolescents), Technische Universität München, Munich, Germany. |
| 1992 - present | Member, International Scientific Committee, <i>Italian Journal of Child and Adolescent Psychoanalysis: "Richard and Piggie, Studi psicoanalitici del bambino e dell'adolescente,"</i> of Rome, Italy.                                                                                                                            |
| 1994 - present | Reviewer, <i>International Journal of Psychoanalysis</i> , Arnold M. Cooper, Editor for North America.                                                                                                                                                                                                                           |
| 1974 - 1976    | Secretary Elect, Association for Child Psychoanalysis, Inc., New York.                                                                                                                                                                                                                                                           |
| 1976 - 1978    | Secretary, Association for Child Psychoanalysis, Inc., New York.                                                                                                                                                                                                                                                                 |
| 1976 - 1981    | Committee on Infant Psychiatry, American Academy of Child Psychiatry, member.                                                                                                                                                                                                                                                    |
| 1977 - 1988    | Chairperson, Rado Advanced Psychoanalytic Studies (RAPS) Seminar on Child Analysis.                                                                                                                                                                                                                                              |
| 1981 - 1986    | Member, Editorial Board, <i>The Psychiatric Hospital, Journal of The National Association of Private Psychiatric Hospitals</i> .                                                                                                                                                                                                 |
| 1982 - 1985    | Committee on Child Psychotherapy, American Academy of Child Psychiatry, Member.                                                                                                                                                                                                                                                  |
| 1982 - 1985    | Committee on Child Psychotherapy, American Academy of Child Psychiatry, Member.                                                                                                                                                                                                                                                  |
| 1982 - 1986    | Member, Program Committee, American Orthopsychiatric Association.                                                                                                                                                                                                                                                                |
| 1984 - 1991    | Child Analysis Committee, American Psychoanalytic Association; New York, NY.                                                                                                                                                                                                                                                     |
| 1986 - 1989    | Consultant, Program Committee, The American Orthopsychiatric Association, Inc.                                                                                                                                                                                                                                                   |
| 1988 - 1997    | Group for the Advancement of Psychiatry, Committee on Adolescence.                                                                                                                                                                                                                                                               |
| 1989 - 1997    | Member, Senate Standing Committee on Mental Hygiene, State of New York, Senator Nicholas A. Spano, Chairman.                                                                                                                                                                                                                     |
| 1989 - 1990    | Member, Board of Assessors, Intl. Psychoanalytic Association Congress, Rome, Italy.                                                                                                                                                                                                                                              |
| 1989 - present | Member, Ethics Committee, International Psychoanalytic Association.                                                                                                                                                                                                                                                              |
| 1990 - present | Member, Advisory Committee on Children's and Adolescents' Mental Health Services, The Mental Health Association of Westchester County, Inc.                                                                                                                                                                                      |
| 1991 - 1997    | Chairperson, Human Development Track, Columbia University College of Physicians and Surgeons, Center for Psychoanalytic Training and Research.                                                                                                                                                                                   |
| 1991 - 1997    | Member, Foundations' Fund Prize Board for Research in Psychiatry, American Psychiatric Association.                                                                                                                                                                                                                              |
| 1991 - present | Member, International Advisory Board, Hellenic Psychiatric Association; Athens and Delphi, Greece.                                                                                                                                                                                                                               |
| 1992 - present | Member, Ethics Committee, American Psychoanalytic Association.                                                                                                                                                                                                                                                                   |
| 1994 - present | Member, Subcommittee to revise Ethics Code & Procedures, American Psychoanalytic Association, William O'Brien, Chairman.                                                                                                                                                                                                         |

**EXTRAMURAL PROFESSIONAL RESPONSIBILITIES** (con't):

- 1999 - present      Member, Work Group on Quality Issues and Practice Parameters  
Authors, American Academy of Child & Adolescent Psychiatry.
- 1999 - present      Member, Memorials and Awards Committee, American Academy of  
Child & Adolescent Psychiatry.

## BIBLIOGRAPHY

### ARTICLES IN PROFESSIONAL JOURNALS:

1. Kernberg P.F., Hirschberg C., Rosen I., Ack M.: Panel Discussion of Psychoanalysis for Adolescents. Transactions of the Topcka Psychoanal. Soc., Appelbaum, A., M.D., Recorder, Bull. Menninger Clin. 33:59: 64, 1969.
2. Kernberg P.F.: The problem of organicity. J. Amer. Acad. Child Psychiatry 8:517-541, 1969.
3. Kernberg P.F., Rousey C.: Variation in Speech Sounds During Psychotherapy: An Independent Indicator of Change. J. Amer. Acad. Child Psychiatry 9:762-777, 1970.
4. Kernberg P.F.: The Course of the Analysis of a Narcissistic Personality with Hysterical and Compulsive Features. J. Amer. Psychoanal. Assoc. 19:451-471, 1971.
5. Kernberg P.F.: Referral of Hospitalized Patients for Psychotherapy. Bull Menninger Clin 38 (6): 559-564; 1974.
6. Kernberg P.F., Ware L.: Understanding child development through group techniques and play. Bull. Menninger Clin. 39:409-419, 1975.
7. Kernberg P.F.: Countertransference reaction in work and adoptive children and their families. Revista Brasileira de Psicanalise, Vol. XII, pp. 439-448 1978.
8. Kernberg P.F.: Use of latency-age groups in the training of child psychiatrists. International Journal of Group Psychotherapy, 28:95-108, 1978.
9. Kernberg P.F.: Update of borderline disorders in children. Journal of the National Association of Private Psychiatric Hospitals, 13:4:Fall, 1982.
10. Kernberg P.F.: Summary update of borderline disorders in children. Occupational Therapy in Mental Health, Vol 3, No.3, Fall, 1983.
11. Kernberg P.F.: Introduction: The Effects of Divorce and Custody on Children. Psychiatric Hospital; 1983. (Summer), Vol. 14(3), 130-132.
12. Egan J., Kernberg P.F.: Pathological narcissism in childhood. J. of the Amer. Psychoanal. Assoc.; Edited by Blum, H.P., Vol. 32 (1), 39-62, 1984.
13. Kernberg P.F.: Child analysis with a severely disturbed adopted child. International Journal of Psychoanalytic Psychotherapy, Vol. 11, pp. 277-299, 1985-1986.
14. Kernberg P.F., Richards A.K.: Siblings of preadolescents: their role in development. Psychoanalytic Inquiry, Vol. 8, No. 1, 1988. Hillsdale, New Jersey: The Analytic Press.

15. Liebowitz J., Kernberg P.F., Rembar J., Frankel A., Kruger R.: Judging mental health-sickness in children: development of a rating scale. J. Amer. Acad. Child Adolesc. Psychiatry 1988; 27, 2:193-199.
16. Kernberg P.F.: Psicología del desarrollo según Margaret Mahler y su importancia en los trastornos de personalidad. Revista De Psiquiatría, III: 179-183, Chile, 1986.
17. Kernberg P.F.: Personalidad narcisista en la niñez y adolescencia. Revista De Psiquiatría, III: 185-191, Chile, 1986.
18. Kernberg P.F.: Rol de las amistades en el preadolescente. Revista de Psiquiatría, III: 193-197, Chile, 1986.
19. Kernberg P.F.: Mother-child interactions and mirror behavior. Infant Mental Health Journal, Vol. 8 No. 4, pp. 329-339, Winter 1987.
20. Selzer M.A., Kernberg P.F., Fibel B., Cherbuliez T., Mortati S.G.: The personality assessment interview: preliminary report. Psychiatry, Vol. 50, No. 2., pp. 142-153, 1987.  
Kernberg P.F.: Entrevista Para La Evaluación de la Personalidad. Revista de Psiquiatría. Año 5 No. 3, pp 217-222. Santiago, Chile, 1988.
21. Kernberg P.F., Richards A.K.: Die Psychologie Der liebe in Der Vorpubertät anhand Von Kinder Briefen. Eine Anwendung Der Psychoanalyse in Studien Zur Kinderpsychoanalyse; Vol. 11, pp. 79-96, 1987. Salzburg: Österreichische Studiengesellschaft.
22. Kernberg P.F.: Case Discussion and Position Statement on Intrapsychic and the Interpersonal. Psychoanalytic Inquiry, Vol. 8, No. 4, pp. 535-544, 1988.
23. Kernberg P.F. and Richards, A.K.: Siblings of preadolescents: their role in development. Psychoanalytic Inquiry, Vol. 8, No. 1, pp. 51-65. Hillsdale, NJ: The Analytic Press, 1988.  
Kernberg P.F.: El rol de los hermanos en el desarrollo. Revista de Psiquiatría Año 5, No. 3, pp. 223-228. Santiago, Chile, 1988.
24. Kernberg P.F.: Funciones Parentales. Revista de Psiquiatría. Año 5 No. 3, pp. 167-182, Santiago, Chile, 1988.
25. Kernberg P.F.: Freundschaften in der Vorpubertät: ihre Rolle, in Der Normale und Abnormale Entwicklung Studien Zur Kinder Psychoanalyse. Salzburg: Österreichischen Studiengesellschaft für Kinder-psychoanalyse, Verlag V. III, pp. 77-104, 1988.

26. Kernberg P.F.: Troubles narcissiques de la personnalite dans l'enfance expose theorique. Journal de la Psychoanalyse de L'enfant. Vol. 7, pp. 39-76. Centurion, 1989.
27. Kernberg P.F.: Los padres de ninos y adolescentes narcisistas. Revista Chilena de Psicoanalysis; Vol. 8:9-19, 1989-90.
28. Kernberg P.F.: "Hermanos en La Preadolescencia Su Rol En El Desarrollo, Aplicaciones Para La Psicopatologia." In "40 Years of Psychoanalysis in Chile", 1990.
29. Kernberg P.F., Clarkin A., Greenblatt E., Cohen J.: Friendships and Peer Relations: Reliability and Validity Study. J. Amer. Acad. Child Adolesc. Psychiatry 31:3, May, 1992.
30. Kernberg P.F.: Aktuelle Perspektiven uber Abwehrmechanismen. Bulletin Der Wiener Psychoanalytischen Vereinigung; 1/1992, pp. 1-46. Vienna, Austria.  
Kernberg P.F.: Current perspectives in defense mechanisms. Translated from German to English: Bull Menninger Clin 58(1): 55-87, Winter, 1994.
31. Kernberg P.F.: Outline of Psychological Interventions for the Suicidal Adolescent. Owen Lewis, Guest Editor. Amer. J. Psychotherapy 48(1): 52-63, Winter, 1994.
32. Kernberg P.F.: El Vinculo En El Nino Con Rasgos Antisociales. Revista de la Sociedad Colombiana de Psicoanalysis, 20(2): 146-158. Junio, 1995.
33. Kernberg P.F. (1996): Las formas del juego: Una comunicaci3n preliminar. Revista Latinoamericana de Psicoanalysis 1:(2); Julio; 197-201.
34. Kernberg P.F., Chazan S.L., Normandin, L.: The children's play therapy instrument (CPTI). Journal of Psychotherapy Practice and Research; Vol. 7, No. 3, Summer, 1998.
35. Kernberg, P.F.: Reflexions sur l'attachment. PRISME, 29:170-185, 1999.

#### **BOOKS:**

1. Kernberg P.F., Richards A.K.: Good Vibrations - Straight Talk and Solid Advice for Kids. A Dynamite Book from Scholastic Book Services, 1979.
2. Kernberg P.F., Chazan S.E., Frankel A.K., Kruger R.S., Rosenberg-Hariton J., Saunders, P.S., and Scholl, H.H.: Children with Conduct Disorders: A Psychotherapy Manual. New York: Basic Books, Inc., 1991.

Danish Translation: Copenhagen, Denmark: Hans Reitzels Forlag, in conjunction with New York: Basic Books, Inc., 1992.

Portuguese Translation: Porto Alegre, Brazil: Editoria Artes Medicas Sul (in conjunction with New York: Basic Books, Inc.), 1994.

Swedish Translation: Stockholm, Sweden: Bokforlaget Natur och Kultur (in conjunction with New York: Basic Books, Inc.), 1994.

3. Kernberg P.F., Bemporad J.B. (Co-Assoc. Editors): The Grade School Child, Vol. 2 of 7, in The Handbook of Child and Adolescent Psychiatry Joseph D. Noshpitz, Editor-in-Chief. New York: John Wiley & Sons, 1997.
4. Kernberg P.F., co-author with Appelbaum A., Kernberg O.F., Koenigsberg H.W., Smith T., Yeomans F.: Complications and Crisis in the Treatment of Borderline Patients. New York: Basic Books, Inc. - Submitted For Publication (1998).
5. Kernberg P.F., Wiener A., Bardenstein K.: Personality Disorders in Children and Adolescents. New York: Basic Books, Inc., 2000.

#### **BOOK CHAPTERS:**

1. Kernberg P.F.: The Analysis of a 15 1/2-Year-Old Girl with Suicidal Tendencies, in The Analyst and the Adolescent at Work. Edited by Harley, M., Quadrangle, The New York Times Book Company, pp. 232-268, 1974.
2. Kernberg P.F.: Counter-indications to adolescent psychoanalysis and the widening scope. International Encyclopedia of Psychiatry, Psychology, Psychoanalysis. Edited by Wolman, B.. Aesculapius Publications, Inc., by Van Nostrand Rheinbold Co., 3:400-403, 1977.
3. Kernberg P.F.: Childhood schizophrenia and autism: a selective review, in The Disorders of the Schizophrenic Syndrome. Ed. Bellak, L. New York: Basic Books, pp. 509-559, 1979.
4. Kernberg P.F.: Psychoanalytic profile of the borderline adolescent. Adolesc. Psychiatry, Vol. VII. Edited by Feinstein, S.C., Giovacchini, P.L. Chicago: University of Chicago Press, pp. 234-256, 1979.
5. Kernberg P.F.: The Origins of the Reconstructed in Psychoanalysis, in Rapprochement: The Critical Subphase of Separation-Individuation. Lax, R., Bach, S. and Burland, J.A. (co-eds)., New York: Jason Aronson, Inc., 1980, pp. 264-281.
6. Kernberg P.F.: Childhood psychosis: a psychoanalytic perspective, in The Course of Life: Psychoanalytic Contributions toward Understanding Personal Development. Volume I: Infancy and Early Childhood. Eds. Greenspan, S.I., Pollock, G.H. U.S. Government Printing Office, Volume I, pp. 603-617, 1980.

7. Kernberg P.F.: Aspectos psicologicos de las dificultades de aprendizaje, in El Nino Con Dificultades para Aprender. (ed.) Fondo de las naciones Unidas Para La Infancia - UNICEF, Pontifica Universidad Catolica de Chile, Alfaveta Impresores, editorial Galdoc, pp. 185-222, 1980.
8. Kernberg P.F.: Disfuncion cerebral minima. In: El Nino Con Dificultades Para Aprender. (ed.) Fondo de las Naciones Unidas Para La Infancia Unicef, Pontificia Universidad Catolica de Chile, Alfaveta Impresores, Editorial Galdoc, pp. 247-290, 1980.
9. Kernberg P.F.: Hysterical personality in child and adolescent-analysis, in Three Further Clinical Faces of Childhood. Edited by Anthony, E.J. Jamaica, New York: SP-Medical and Scientific Books, pp. 27-58, 1981.
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11. Kernberg P.F.: Issues in the psychotherapy of borderline conditions in children, in The Borderline Child. Edited by Robson, K.S. McGraw-Hill, Inc. pp. 223-234, 1983.
12. Kernberg P.F.: Kinderanalyse und Adoption. Studien Zur Kinderpsychoanalyse, Jahrbuch III, Herausgegeben von der Osterreichischen Studiengesellschaft fur Kinder-psychoanalyse, Verlag, 1983, pp. 11-41.
13. Kernberg P.F.: Reflections in the mirror: mother-child interactions, self-awareness, and self-recognition, in Frontiers of Infant Psychiatry, Volume II. Edited by Call, J.D., Galenson, E. and Tyson, R.L. New York: Basic Books, Inc., pp. 101-110, 1984.
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15. Kernberg P.F., Liebowitz, J.: Diagnostic play groups for children: their role in assessment and treatment planning, in Child Group Psychotherapy: Future Tense. Edited by A. Riester and I. Kraft. Connecticut: International Universities Press, Inc., 1986, pp. 71-79.
16. Kernberg P.F., Cherbuliez, T. and Selzer, M.: Personality integration interview, in Probleme Der Adoleszenz Arbeitstagung der Wiener. Child Guidance Clinic, Institut fur Erziehungshilfe, Verlag Bruder Hollinek, pp 30-36, 1986.
17. Kernberg P.F.: Narcissistic personality disorder in childhood. Sigmund Freud House Bulletin. Vol. 10/Special Issue, pp. 28-38, 1986.
18. Kernberg P.F.: Research Advances in Adolescent Psychiatry. In: Current Research in Private Psychiatric Hospitals. Washington, D.C.: The Education and Research Foundation of the N.A.P.P.H., 1987.

19. Kernberg P.F.: "Hacia un perfil de las funciones maternas en la relevancia de las funciones parentales en el desarrollo de niños y adolescentes. Proceedings 1st Congress of the Mexican Association of Psychoanalytic Psychotherapy of Children and Adolescents. Mexico City, 1988.
20. Liebowitz J., Kernberg P.F.: Psychodynamic psychotherapies, in Handbook of Clinical Assessment of Children and Adolescents. Eds., Kestenbaum, C.J. and Williams, D.T. New York: New York University Press, 1988, pp. 1045-1065.
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22. Koenigsberg H.W., Kernberg O.F., Rockland L., Appelbaum A., Carr A., Kernberg P.F.: Developing an instrument for characterizing psychotherapy techniques in the psychotherapy of borderline patients, in Psycho-analytic Process Research Strategies. Edited by Dahl H., Kachele H., Thomas H. New York: Springer-Verlag, 1988, pp. 147-162.
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24. Kernberg P.F. and Rosenberg, J.: Play group therapy for children with socialized conduct disorders. In Psychoanalytic Group Theory and Therapy. Edited by S. Tuttmann. Connecticut: International Universities Press, Inc., 1991, pp. 195-210.
25. Kernberg P.F.: Termination in child psychoanalysis: criteria from within the sessions, in Saying Goodbye: A Casebook of Termination in Child and Adolescent Analysis and Therapy. Ed. A.G. Smukler. New Jersey: Erlbaum, 1991, pp. 321-38.
- German Translation: Kernberg P.F.: Die Beendigung Der Kinderpsychoanalyse: Kriterien, Die Sich Aus Den Sitzungen Ergeben. Studien Zur Kinder Psychoanalyse. Salzburg: Österreichisches Studiengesellschaft für Kinder-Psychoanalyse, Verlag, 1985, pp. 71-89.
26. Kernberg P.F., Wiener J.M.: Personality disorders, in Textbook of Child and Adolescent Psychiatry, 2nd Ed. Edited by Jerry M. Wiener. Washington: American Psychiatric Press, 1996 pp. 739-758.
27. Trad P.V., Kernberg P.F.: Previewing imminent development change and its implications for the mother-infant relationship, in Dalle Cure Materne All'interpretazione: Nuove Terapie per il Bambino e le sue Relazioni: i Clinici Raccontano. Edited by Daniel N. Stern and G. Fava Vizziello. Milano: Raffaello Cortina Editore, 1992, pp. 235-61.

28. Kernberg P.F., Richards A.K.: Love in pre-adolescence as seen through children's letters. In: The Spectrum of Psycho-analysis: Essays in Honor of Martin Bergmann. Arlene Kramer Richards and Arnold David Richards (Eds.). Connecticut: International Universities Press, 1994.
29. Kernberg P.F. (1992): Individual psychotherapy (in Child Psychiatry section). In Comprehensive Textbook of Psychiatry, Sixth Edition. H.I. Kaplan and B.J. Sadock Editors. Baltimore: Williams & Wilkins, 1995.
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35. Kernberg P.F.: Children With Borderline Personality Organization, in Handbook of Clinical Assessment of Children and Adolescents. Eds., Kestenbaum, C.J. and Williams, D.T. New York: New York University Press, 1988, pp. 604-625.

#### **BOOK REVIEWS, DISCUSSIONS AND BRIEF COMMUNICATIONS:**

1. Kernberg P.F.: Therapeutic Consultation in Child Psychiatry and Playing and Reality, by D.W. Winnicott. Bull Menninger Clin 1973, 37:283-285.
2. Kernberg P.F.: Introduction a las Ideas de Bion, by Greenberg, L., et al. Psychoanalytic Quarterly 1975, 44:466-468.
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5. Kernberg P.F.: The Psychoanalytic Study of the Child, Vol. 35. Edited By Solnit, A.J., Eissler, R.S., Freud, A., Kris M., and Neubauer, P.B. Behavioral Science Book Service, 1981.
6. Kernberg P.F.: Surviving the Breakup: How Children Cope with Divorce, By Judith Wallerstein and Joan Berlin Kelly. J. Amer. Acad. Child Psychiatry, 1981, 20:(4):876-878.
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10. Kernberg P.F.: Clinical Empathy, By D.M. Berger. J. Amer. Acad. Child Adolesc. Psychiatry 1988; 27:3:392-393.
11. Kernberg P.F.: Forms of Brief Therapy, By S.H. Budman. J. Amer. Acad. Child Adolesc. Psychiatry 1988; 27:3:392-393.
12. Kernberg P.F.: Psychotherapy - The Art of Wooing Nature, By S. Roth. J. Amer. Acad. Child Adolesc. Psychiatry 1988; 27:3:392-392.
13. Kernberg P.F.: Approaches to Child Treatment: Introduction to Theory Research and Practice, By J.H. Johnson et al. J. Amer. Acad. Child Adolesc. Psychiatry 1988; 27:3:392-392.
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15. Kernberg P.F.: Overview of Borderline Conditions in Children and Adolescents. Stella Maris Foundation Proceedings. Lucca, Italy, 1991.
16. Kernberg P.F., Noshpitz, J. (Section Co-Editors), and Bleiberg, E. (Assoc. Editor): Borderline conditions and narcissism, in Bibliography for Training in Childhood and Adolescent Mental Health, 3rd Edition. Albuquerque: Univ. of New Mexico Press, 1991, 350-357.

17. Kernberg P.F.: The Course of Life, Vol. IV: Adolescence. Edited By S. I. Greenspan & G. H. Pollack. Amer. J. Psychiatry, 1992, Vol. 149 (11), p. 1597.
18. Kernberg P.F.: The Child Patient and Therapeutic Process, By Diana Siskind. Psychotherapy Book News 1992, 26, p. 7.
19. Kernberg P.F.: Discussion of "a re-evaluation of estimates of child therapy effectiveness." J. Amer. Acad. Child Adolesc. Psychiatry, 1992, 31:4, p. 710.
20. Kernberg P.F.: Narcissistic Personality Disorder in Childhood. Published Proceedings from the November 8, 1991, 25th Anniversary for Child and Adolescent Psychiatry Services, Department of Psychiatry, Hospital of Notre Dame, University of Montreal, Montreal, Canada. Editor: Monique Meloche. Bibliothèque Nationale du Canada, 3e Trimestre, 1992. pp. 5-39.
21. Kernberg P.F.: Developmental Pathogenesis and Treatment of Borderline and Narcissistic Personalities, By Donald B. Rinsley. Amer. J. Psychiatry, N.C. Andreasen, (Editor), 1993.
22. Kernberg P.F.: The Emotional Problems of Normal Children, Manuscript By Stanley Turecki, M.D., with Sarah Wernick, Ph.D., 1993. New York: Bantam Doubleday Dell.
23. Kernberg P.F.: Anna Freud: The Dream of Psychoanalysis, By Robert Coles. Contemporary Psychology: A Journal of Reviews, 1994, 39 (10): 946.
24. Kernberg P.F.: Commentary on Dr. Jan Ehrenwald's *Patterns of Neurotic Interaction: A Study of Empathy and Enkinesis in Interpersonal Relationships* Amer. J. Psychotherapy, Vol. 50, No. 4, Fall 1996.
25. Kernberg, P.F.: Time-Limited Psychotherapy with Adolescents, J. Psychotherapy Practice and Research, 1999. (Manuscript Review)
26. Kernberg, P.F.: Psychotherapy of Borderline Conditions in Children, Psychotherapy Book News: A Journal of Essays & Reviews, January 6, 2000, 28-31.

## ***Appendix A***

### **Extramural Presentations for January 1, 1996 - December 31, 1997**

- 1996 San Diego Psychoanalytic Society and Institute, San Diego, California. Presentations on the Theme: The Clinical Faces of Hatred (February 2)
- 1996 New Jersey Psychoanalytic Society, Hackensack, New Jersey. Presentation: Notes on Integrating Research Findings in the Psychotherapy of Gender Identity Disorders (March 21).
- 1996 American Psychoanalytic Association, Los Angeles, California. Presentation: Play Activity in Therapy: A Look at its Multiple Meanings (May 2)
- 1996 American Psychiatric Association Annual Meeting, New York, New York. Presentation: Borderline Pathology in Childhood: An Overview within the Symposium Borderline Pathology in Latency Aged Children led by Joel M. Paris, M.D., McGill University (May 8).
- 1996 American Society of Hispanic Psychiatry, Mt. Sinai Hospital, New York, New York. Presentation Discussant: Education and Training: The Place of Research in Child Psychiatry (May 9).
- 1996 24th Annual Conference on The Leadership Role of the Psychiatric Chief Resident, Tarrytown, New York. Led Small Discussion Groups with Residents (June 7-9).
- 1996 1st Congress of the World Council for Psychotherapy, Vienna, Austria. Workshop: Cornell Play Therapy Instrument and Child Psychotherapy: Assessing the Process (July 1-5).
- 1996 Fourth Joint Clinical Conference between European and North American Analysts, Glasgow, Scotland. Case Study Presentation: What Constitutes Psychoanalytic Process? (July 18-21).
- 1996 4th Delphi International Psychoanalytic Symposium, Delphi, Greece. Chair and Discussant: Giocasta's Complex (July 23-29).
- 1996 Federacion Psicoanalitica de America Latina (FEPAL), Monterrey, Mexico. Discussion Group Coordinator (July 30-August 4).
- 1996 Primer Congreso Internacional sobre Psicoterapia, Fundacion Universidad del Norte Division de Humanidades y Ciencias Sociales, Baranquilla, Columbia. Presentation: Difference between Child Psychotherapy and Child Psychoanalysis (September 5-8).
- 1996 Primer Congreso Internacional sobre Psicoterapia, Fundacion Universidad del Norte Division de Humanidades y Ciencias Sociales, Baranquilla, Columbia. Presentation: Psychoanalytic Psychotherapy with Children (September 5-8).

- 1996 Primer Congreso Internacional sobre Psicoterapia, Fundacion Universidad del Norte Division de Humanidades y Ciencias Sociales, Baranquilla, Columbia. Presentation: Children of Borderline Mothers (September 5-8).
- 1996 The New York Hospital-Cornell Medical Center, Westchester Division. Child and Adolescent Psychiatry Rounds Panel Presentation: The Quiet Borderline Extensive Identity Diffusion(September 13).
- 1996 The New York Freudian Society and Psychoanalytic Training Institute Conference, New York, NY. Discussant: The Family Crucible of High Conflict Divorce (September 28).
- 1996 Zon en Schild Psychiatrisch Centrum, Amersfoort, Holland. Workshop: Antisocial Personality Disorder in Children and Adolescents (October 10).
- 1996 Zon en Schild Psychiatrisch Centrum, Amersfoort, Holland. Case Study Presentation: Psychotherapy Interview with a 14 Year Old Girl (October 10).
- 1996 Istituto di Psicoterapia del Bambino e dell'Adolescente, Milan, Italy. Presentation I: Psychotherapy in Play (October 12).
- 1996 Istituto di Psicoterapia del Bambino e dell'Adolescente, Milan, Italy. Presentation II: Cornell Play Therapy Instrument (October 12).
- 1996 Universita Degli Studi di Padova, Dipartimento di Psicologia, Padova, Italy. Presentation: Narcissistic Personality Disorder in Adolescents (October 13).
- 1996 1st European Congress of the Psychopathology of the Child and the Adolescent, Venice, Italy. Presentation 1: Specificity and Mechanisms of Change During the First Year of Life. Presentation 2: Trauma, Its Effects and the Process of Change in The Pre-School Child (October 17-19).
- 1996 Istituto D Neuropsichiatria e Psipedagogia Dell'Eta Evolutiva, Pisa, Italy. Presentation: Personality Disorders: Diagnosis and Treatment (November 11).
- 1996 Istituto D Neuropsichiatria e Psipedagogia Dell'Eta Evolutiva, Pisa, Italy. Presentations: Play Therapy Instrument: Measuring Change; Ethical Issues in Psychotherapy with Children and Adolescents; Mother-Child Attachment and Mirror Behavior Instrument; Update on Gender Identity Disorders (November 11-12).
- 1996 Universita degli Studi di Pavia, Pavia, Italy. Developmental Perspectives on Personality Disorders: An Overview (November 14).
- 1996 University Laval, Quebec City, Canada. Presentations: Evaluating Children and Adolescents; Psychotherapy and Treatment of Children and Adolescents; Child Psychotherapy and Working with Parents (December 7).

- 1996 Mt. Sinai Hospital, New York, New York. Grand Rounds Presentation: Cornell Play Therapy Instrument (December 12).
- 1996 The Anna Freud Centre, New York, New York. Panel Presentation: Eating Disorders in Late Adolescence (December 14).
- 1996 American Psychoanalytic Association Annual Meetings, New York, New York. Presentation: Child Analysis and Psychoanalytically Oriented Psychotherapies: A Look at the Process of Play and its Relation to Defense Mechanisms (December 19)
- 1997 April 4, The New York Hospital-Cornell Medical Center, Westchester Division. Child and Adolescent Psychiatry Rounds Presentation: Madonna and Child Configurations.
- 1997 April 10-13, The International Psychoanalytic Association, Interdisciplinary Symposium, Florence, Italy. Presentation: Madonna and Child Configurations.
- 1997 April 18, Department of Psychiatry, University of Virginia, Charlottesville, Virginia. Presentation: Clinical Case Study & Discussion with Residents.
- 1997 April 18, Department of Psychiatry, University of Virginia. Presentation: Identity Diffusion in Adolescence: Psychotherapeutic Approaches to 'As if' Personalities.
- 1997 April 19, Virginia Psychoanalytic Society. Clinical Workshop: Identity Diffusion in Adolescence: Psychotherapeutic Approaches to 'As if' Personalities.
- 1997 May 14, American Psychoanalytic Annual Meetings, San Diego. Presentation: A Look at the Process of Play and its Relation to Defense Mechanisms.
- 1997 May 15, American Psychoanalytic Annual Meetings, San Diego. Panel Presentation: The Psychoanalytic Study of Divorce: Clinical and Legal Implications.
- 1997 May 23-24, San Francisco Psychoanalytic Institute, San Francisco, California. Presentations: Working with Borderline Personality Disorder Children; Anorexia.
- 1997 May 30-June 1, Berlin Psychotherapy Institute, Berlin, Germany.
- 1997 June 3-7, San Francisco, California: Second World Congress on Family Law and the Rights of Children and Youth.
- 1997 June 5-7, Centro de Psiquiatria Infanto-Juvenil de Uribe, Bilbao / Madrid, Spain. Workshop Presentation: Play: Function, Assessment and Measurement of Play in Psychotherapeutic Treatment of Children.
- 1997 June 12, Annual Achievement Award given by The Society of the Institute for Child, Adolescent and Family Studies (SICAFS). Honoree's Lecture Presentation: Play Therapy with Children. The Cosmopolitan Club, New York, New York.

1997 June 19-21, Aspen Child & Adolescent Institute, Aspen, Colorado:  
Characteristics of Traumatic Play.

Academic Year 1997-1998

1997 July 24-31, 8th Annual I.P.A. Conference for Training Analysts, Barcelona, Spain.  
Clinical Case Conference Presentation: Identity Diffusion.

**Extramural Presentations for January 1, 1998 - December 31, 1999**

1998 January 16-19, Sociedad Mexicana de Neurologia y Psiquiatria, A.C. Workshop:  
The Diagnosis and Treatment of Oppositional and Socialized Conduct Problems in  
Children. Mexico City, Mexico.

1998 May 27-31, 87th Annual Meeting, The American Psychoanalytic Association, New  
York, New York.

Academic Year 1998 - 1999

1998 August 14-29, Congress FEPAL, Cartagena, Columbia. Presentation: The Small  
House: Educational Uses of Play.

University of Buenos Aires, Psychiatry and Neurology Society, Argentinean  
Psychoanalytic Association. Presentation: Psychopathology in Childhood and  
Adolescence.

Psychoanalytic Society of Buenos Aires. Presentation: Research and Its  
Applications to Gender Identity Disorders

University of Montevideo, Department of Psychology. Presentation: Play  
Assessment in Diagnosis and as a Measure of Change.

University of Puerto Alegre Brazil. Presentation: The Forms of Play With  
Traumatized Children; Madonna and Child Configurations: Clinical  
Consultations.

Psychoanalytic Association, Sao Paulo, Brazil. Presentation: Gender Identity  
Disorders in Children: Clinical Consultations.

1998 September 16, University of Pisa, Stella Maris Foundation, Pisa, Italy.  
Presentation: Madonna and Child: Configurations.

1998 October 16-17, European Psychopathology Conference, Seville, Spain.

1998 December 4-5, Amsterdam, Holland. Presentation: Friends & Peer Relations  
Instrument - Play Instrument.

- 1999 January 7, Chilean Psychoanalytic Association. Presentation: Mirror Behavior Instrument: Its Relations to Attachment.
- 1999 January 15, University of Basel. Presentation: Child and Adolescent Symposium - Forms of Play.
- 1999 February 12, Mexican Psychoanalytic Association. Presentation: Mirror Behaviors: Clinical Implications, 1st Baby Observation Symposium.
- 1999 March 3, Grand Rounds, St. Lukes Hospital NYC - Forms of Play.
- 1999 March 26, Society of Neurology and Psychiatry, Mexico. Presentation: Personality Disorders in Children. Antisocial Personality.
- 1999 March 27, Society of Neurology and Psychiatry, Mexico. Presentation: The Personality Assessment Interview.
- 1999 April 16-17, Hospital de Clinicas, Montevideo University. Presentation: The Children's Play Therapy Instrument (CPTI).
- 1999 May 7, ALTXA, Bilbao, Spain. Presentation: Play in Sexually Abused Children.
- 1999 July 30, 41st IPA Congress, Santiago, Chile. Presentation: "Trauma in dreams and in Play." Workshop: Dreams, Play and Affects in Abused Children.
- 1999 August 5, University de los Andes, Santiago, Chile. Presentation: "Play instrument and its applications."
- 1999 August 23, Reflections on mirrors. Clinical application. American Psychological Association. Boston, Massachusetts.
- 1999 September 2, Bispebjerg Hospital, Copenhagen, Denmark. Presentation: "Methods of Assessment of Personality Disorder (the Neurotic Personality Organization, the Borderline Personality Organization)."
- 1999 September 3 and 4, Bispebjerg Hospital, Copenhagen, Denmark. Course in the Institute. Clinical consultations.
- 1999 September, Child Rounds. New York Presbyterian Hospital. Weill Medical College of Cornell University, Weill Cornell Westchester.
- 1999 October 1 and 2, Sociedad Psicoanalítica de Caracas, Venezuela. Presentations:  
"Trastornos de Personalidad Narcisista en Niños y Adolescentes."  
"Trastornos de Personalidad Antisocial en Niños y Adolescentes."  
"Abordaje Diagnóstico y Terapéutico a Través del Juego en Niños abusados sexualmente."  
"Las Formas del Juego en la Situación Terapéutica."  
"El Juego Como Instrumento de Evaluación."  
"El Juego en Niños Con Abuso Sexual: Un Proyecto de Investigación."

- 1999 October 11, XVI Congreso Estudiantil, Universidad Iberoamericana, Santa Fe Ciudad de Mexico. Presentation: "El juego en niñez; aproximaciones al tratamiento" Talleres: "El juego en niños abusados sexualmente."
- 1999 October 12, XVI Congreso Estudiantil, Universidad Iberoamericana, Santa Fe Ciudad de Mexico. Talleres: "Formas de juego en la normalidad y la patología" with Aula González Uribe.  
"Desórdenes de Identidad de Género."

## Exhibit Six

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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

**Appellants,**

**v.**

**JANET RENO, Attorney General of the  
United States, et al.,**

**Appellees**

**No. 00-11424-D**

**DECLARATION OF JERRY M.  
WIENER, M.D.**

1. My name is Jerry M. Wiener, M.D. I make this declaration in connection with the Appellees' Opposition to Appellant's Motion for an Injunction Pending Appeal in the above-captioned action. I am currently Emeritus Professor in Residence of Psychiatry and Pediatrics at The George Washington University School of Medicine and Health Services in Washington, D.C. I am the immediate past chairman (1977-1997) and Leon Yochelson Professor of the Department of Psychiatry and Behavioral Sciences. My professional address is The George Washington University Medical School, 2150 Pennsylvania Avenue, N.W., Washington, D.C. 20037. Attached to this declaration is my curriculum vita, which accurately reflects my educational background, training, professional experience, and publications which I have contributed to the medical literature.

2. My testimony in this case relates to my advice and recommendations to Immigration and Naturalization Service Commissioner Doris Meisner concerning the impact of

a continued delay in the transfer of Elian Gonzalez into the custody of his father, Juan Gonzalez. My opinion is based on the interview with Lazaro Gonzalez, Elian's great-uncle; my extensive discussion with Dr. Kernberg and Dr. Rigual-Lynch regarding their interview with Juan Miguel Gonzalez; and my own knowledge of psychological care of children and my experience in the consequences to a young child of separation from and/or loss of a parent.

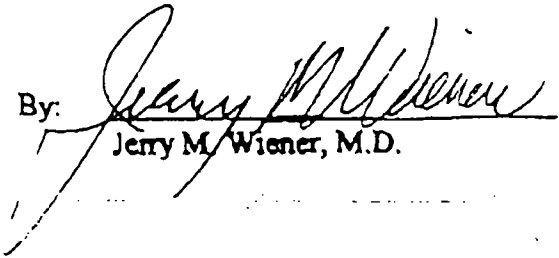
3. I attended a meeting with Lazaro Gonzalez on April 10, 2000, which was conducted primarily by Paulina F. Kernberg, M.D. and also attended by Lourdes Rigual-Lynch, Ph.D. The purpose of that interview was to discuss the impact of the current situation on Elian and to talk about how to implement the transfer of Elian to his father in a manner that would minimize stress and anxiety for the child.

4. I have reviewed Dr. Kernberg's declaration concerning our advice and recommendations to Commissioner Meissner, and I concur with that declaration.

I declare under penalty of perjury that the foregoing Declaration of Jerry M. Wiener, M.D., is true and correct.

Executed on: April 13, 2000

By:

  
Jerry M. Wiener, M.D.



DEPARTMENT OF PSYCHIATRY AND BEHAVIORAL SCIENCES

CURRICULUM VITAE

September, 1999

JERRY M. WIENER, M.D.

Emeritus Professor of Psychiatry and Pediatrics

The George Washington University Medical School

2150 Pennsylvania Avenue, N.W.

Washington, D.C., 20037

E-mail: psyjmw@gwu.edu

Jerry M. Wiener, M.D. is the immediate past-chairman (1977-1997) and Leon Yochelson Professor of the Department of Psychiatry and Behavioral Sciences and is currently Emeritus Professor in Residence of Psychiatry and Pediatrics, The George Washington University School of Medicine and Health Sciences, Washington, D.C.

Dr. Wiener received his undergraduate education at Rice University and medical degree at the Baylor College of Medicine ('56), Houston, Texas. His postgraduate training was initially in internal medicine ('56-'58) and then in psychiatry (Mayo Clinic, '58-61), child and adolescent psychiatry ('61-'62) and psychoanalysis ('64-'68) at the Columbia-Presbyterian Medical Center, New York City.

Academic and clinical positions before coming to The George Washington Medical Center included Columbia/St. Luke's Hospital (N.Y.C.), Emory University Department of Psychiatry (Atlanta), and Children's National Medical Center (Washington, D.C.). He is a Fellow of the American Psychiatric Association, The American Academy of Child and Adolescent Psychiatry and The American College of Psychiatrists.

In addition Dr. Wiener has served as President of the Association of Chairmen of Departments of Psychiatry ('81-'82), President of The American Academy of Child and Adolescent Psychiatry ('87-'89), President of The American Psychiatric Association ('94-'95), Chairman of the Board of the American Psychiatric Press, Inc. (1995- ), and as Guest Scholar at the Woodrow Wilson International Center jointly with the Holocaust Memorial Museum ('96-'97), as Senior Psychiatric Consultant to the Federal Bureau of Prisons (Fall, 1996), and since 1997 as a member of the House of Delegates of the American Medical Association. He also serves on the Medical Advisory Boards of the Magellan Behavioral Health Corporation and the Charter Behavioral Health Services.

At George Washington Dr. Wiener has served as Chairman of the Education, Student Evaluation and Appointment and Promotion Committees, as Vice-Chair of the Medical Faculty Associates Governing Board and as a member of the Medical Center Management Committee.

Dr. Wiener has lectured and published extensively on clinical, educational and health policy issues; is most recently the Editor-in-Chief of the leading Textbook of Child and Adolescent Psychiatry (1996), and serves on the Editorial Board of several journals, including (1995-1998) The Proceedings of the Mayo Clinic.

Phone: 202 994 8308 Fax: 202 994 6377 E-Mail: psyjmw@gwumc.edu

# Withdrawal/Redaction Marker

## Clinton Library

| DOCUMENT NO.<br>AND TYPE | SUBJECT/TITLE                                          | DATE       | RESTRICTION |
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### COLLECTION:

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Legal Advisor (Mary DeRosa)  
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Immigration (Elian Gonzalez Opinions) [1]

2012-0371-F

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### RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

## CURRICULUM VITAE

Name: Jerry M. Wiener, M.D.

Date of Birth:

(b)(6)

Birthplace:

Citizenship: United States

Soc Sec. No:

(b)(6)

### I. Education

|             |                                                                                          |
|-------------|------------------------------------------------------------------------------------------|
| 1949 - 1952 | Rice University, Houston, TX                                                             |
| 1952 - 1956 | Baylor University College of Medicine, Houston, TX, M.D. Degree                          |
| 1956 - 1957 | Jefferson Davis Hospital, Houston, TX - Intern in Medicine                               |
| 1957 - 1958 | Resident in Medicine, Mayo Clinic, Rochester, MN                                         |
| 1958 - 1961 | Resident in Psychiatry, Mayo Clinic, Rochester, MN                                       |
| 1961 - 1962 | Columbia-Presbyterian Medical Center, New York, NY - Resident in Child Psychiatry        |
| 1964 - 1968 | Psychoanalytic Clinic for Training and Research, Columbia University, Certificate - 1968 |

### II Board Certified in Psychiatry (1963) and Child and Adolescent Psychiatry (1965)

### III. Professional Positions

|             |                                                                                                 |
|-------------|-------------------------------------------------------------------------------------------------|
| 1962 - 1971 | Director, Division of Child and Adolescent Psychiatry, St. Luke's Hospital Center, New York, NY |
| 1963 - 1971 | Psychiatric Consultant, The Riverside Church Nursery School, New York, NY                       |
| 1968 - 1971 | Psychiatric Consultant, The Trinity School, New York, NY                                        |
| 1965 - 1971 | Director, The Riverside Church Therapeutic Nursery School, New York, NY                         |

|             |                                                                                                                                                                                                                                           |
|-------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1971 - 1973 | Director, Division of Youth, Georgia Mental Health Institute, Atlanta, GA                                                                                                                                                                 |
| 1971 - 1975 | Director, Division of Child and Adolescent Psychiatry, Emory University College of Medicine, Atlanta, GA                                                                                                                                  |
| 1973 - 1975 | Chief, Psychiatry Service, H. Eggleston Hospital for Children, Woodruff Medical Center, Emory University, Atlanta, GA                                                                                                                     |
| 1976 - 1977 | Chairman, Department of Psychiatry, Children's Hospital National Medical Center, Washington, D.C.<br><br>Acting Chairman, Department of Psychiatry and Behavioral Sciences, George Washington University Medical School, Washington, D.C. |
| 1977 - 1997 | Chairman, Department of Psychiatry and Behavioral Sciences, George Washington University Medical School, Washington, D.C.                                                                                                                 |

#### IV. Academic Appointments

|             |                                                                                                                                   |
|-------------|-----------------------------------------------------------------------------------------------------------------------------------|
| 1961 - 1971 | Instructor and Assistant Professor of Psychiatry, Columbia College of Physicians and Surgeons, New York, NY                       |
| 1963 - 1965 | Lecturer in Child Psychiatry, New York Academy of Medicine Post-Graduate Division                                                 |
| 1968 - 1971 | Senior Lecturer in Human Development, Columbia College, New York, NY                                                              |
| 1971 - 1975 | Associate Professor (1971 - 1974) and Professor of Psychiatry, Emory University, Atlanta, GA                                      |
| 1973 - 1975 | Geographic Training and Supervising Analyst, Columbia University Psychoanalytic Clinic at Emory University, Atlanta, GA           |
| 1976 - 1998 | Professor of Psychiatry and Behavioral Sciences and Pediatrics, George Washington University School of Medicine, Washington, D.C. |
| 1977 - 1995 | Teaching Analyst, The Washington Psychoanalytic Institute, Washington, D.C.                                                       |
| 1982 - 1998 | Leon Yochelson Professor of Psychiatry, George Washington University School of Medicine, Washington, D.C.                         |

|         |                                                                                                                       |
|---------|-----------------------------------------------------------------------------------------------------------------------|
| 1990    | Visiting Professor, The Postgraduate School in Psychiatry, Budapest, Hungary                                          |
| 1995    | Visiting Professor, Semmelweis Medical School, Department of Behavioral Sciences, Budapest, Hungary                   |
| 1996-97 | Guest Scholar, The Woodrow Wilson International Center, Washington, D.C.                                              |
| 1996    | Senior Psychiatric Consultant, Federal Bureau of Prisons, Washington, D.C.                                            |
| 1998    | Emeritus Professor of Psychiatry and of Pediatrics, George Washington University School of Medicine, Washington, D.C. |

V. Elected and Appointed Offices

|             |                                                                                                                                         |
|-------------|-----------------------------------------------------------------------------------------------------------------------------------------|
| 1966 - 1970 | Board of Directors, New York Council on Child Psychiatry                                                                                |
| 1966 - 1967 | Board of Directors, New York Society for Adolescent Psychiatry                                                                          |
| 1967 - 1990 | Examiner for Boards in Child and Adolescent Psychiatry                                                                                  |
| 1969 - 1993 | Examiner and Senior Examiner for Boards in General Psychiatry                                                                           |
| 1972 - 1974 | Founder and President, Georgia Council on Child and Adolescent Psychiatry, Inc.                                                         |
| 1973 - 1977 | Chairman, Program Committee, American Academy of Child Psychiatry                                                                       |
| 1974 - 1977 | Steering Committee, Society of Professors of Child Psychiatry                                                                           |
| 1977 - 1979 | Board of Directors, Hillcrest Children's Center, Washington, D.C.                                                                       |
| 1980 - 1981 | Treasurer, American Association of Chairmen of Departments of Psychiatry                                                                |
| 1981 - 1982 | President, American Association of Chairmen of Departments of Psychiatry                                                                |
| 1981 - 1983 | Treasurer, American Academy of Child Psychiatry                                                                                         |
| 1982 - 1995 | Executive Committee and Representative to Council for Academic Societies, American Association of Chairmen of Departments of Psychiatry |

- |             |                                                                                                                |
|-------------|----------------------------------------------------------------------------------------------------------------|
| 1986 - 1991 | Residency Review Committee in Psychiatry                                                                       |
| 1987 - 1989 | President, The American Academy of Child and Adolescent Psychiatry                                             |
| 1987 - 1992 | American Psychiatric Association Council on Medical Education and Career Development (Vice-Chair, 1988 - 1989) |
| 1990 - 1993 | Trustee-at-Large, The American Psychiatric Association                                                         |
| 1993 - 1995 | President-Elect and President, The American Psychiatric Association                                            |
| 1995 -      | Board of Trustees, American Psychiatric Association                                                            |
| 1995 -      | Chairman of the Board, The American Psychiatric Press, Inc.                                                    |
| 1997 -      | Board of Directors, Community Psychiatric Clinics Health Corporation (non-profit)                              |
| 1997 -      | APA Delegate to AMA                                                                                            |

VI. Licensed: Texas, Minnesota, New York, Georgia, District of Columbia (current), Maryland (current)

VII. Memberships

American Medical Association  
American Psychiatric Association (Fellow)  
American Academy of Child and Adolescent Psychiatry (Fellow)  
American College of Psychiatrists (Fellow)  
American Academy of Psychoanalysis  
American Psychoanalytic Association  
Medical Society of the District of Columbia  
Washington Psychoanalytic Society

VIII. Previous Committee and Other Appointments (selected)

1. Specialty Site Visitor, Residency Review Committee in Psychiatry
2. American Psychiatric Association
  - a) Committee on Quality of Psychiatric Residency Training Programs
  - b) Committee on Manpower Data (Chair)

- c) Committee on Biographical Directory and Data Collection
  - d) Budget Committee
  - e) Task Force on Managed Care Contract Review
3. N.B.M.E. Task Force on Part I Behavioral Science Examination (1982 -1983)
  4. George Washington University Medical Faculty
    - a) Educational Evaluation Committee (Chair)
    - b) Appointment, Promotion and Tenure Committee (Chair)
    - c) Faculty Senate (Executive Committee)
    - d) Medical Faculty Associates Governing Board, Vice-Chair and Acting Chair
    - e) George Washington University Hospital Executive Committee
    - f) Education Council (Chair)
  5. National Health Advisory Committee, The American Mental Health Fund
  6. National Leadership Forum, NIMH
  7. Professional Advisory Board, Magellan Health Corporation (1998 -)
  8. Medical Advisory Board, Charter Health Care Corp. (1996 - )
  9. Policy Review Committee (Chair), American Academy of Child and Adolescent Psychiatry (1997 -)
  10. Joint Commission on Government Relations, American Psychiatric Association

IX. Editorial Positions

1. Editorial Board, The Journal of the American Academy of Child & Adolescent Psychiatry, 1977-1982, 1984-1986.
2. Editorial Board, Journal of Child & Adolescent Psychopharmacology, 1990 -.
3. Editorial Board, The Journal of Psychiatric Practice, 1994 -.
4. Editorial Board, Proceedings of the Mayo Clinic, 1996-1999.
5. Editorial Board, Clinical Psychiatry News, 2000 -.

X. Publications

1. An EEG Study of Delinquent & Non-delinquent Adolescents, with Delano, J.G and Klass, D.W., Arch. Gen. Psych.: 15:9, August, 1966
2. Psychological & Social Factors in a Pediatric-Gynecology Clinic, with Altheik, A. and Stevenson, S., N.Y. State J. Med., 69:24, December, 1969
3. Children Who Set Fires, with Vandersall, T., Arch. Gen. Psych.: 22, January, 1970
4. Outcome of Re-referrals from a Child Psychiatric Clinic, with Bader, J., and Kresch, R., N.Y. State J. Med., 70:6, March, 1970
5. Attitudes of Pediatricians Toward the Care of Fatally Ill Children, J. Pediatrics, 76:5, May, 1970
6. Psychological Disturbances in Pediatric Gynecology, Bull of Sloane Hospital for Women, XVI, 3, Fall, 1970
7. Direct Child Observation in Psychiatric Residency Training, with Michels, R.; American J. Psychiatry, 127:12, June, 1971
8. The Rights of Children, Psychiatric Annals, September, 1972
9. Heroin Addiction in an Adolescent Population, with Egan, J., J. of Am. Acad. of Child Psych.; 12:1, January, 1973
10. Anorexia Nervosa in One of Identical Male Twins, J. Am. Acad. of Child Psych.; 15:3, 1976
11. Adolescent Depression and Suicide, Clin. Proceedings, Children's Hospital National Medical Center, 33:6, June, 1977
12. Psychotropic Drug Therapy in Children and Adolescents, Psychosomatics, 23:5, May, 1982
13. Childhood Depression, with Hendren, R., Journal of Developmental Behavioral Pediatrics, 4:2, March, 1983
14. Introductions, Grand Rounds in Child Psychiatry, J. Am. Acad. of Child Psych., 22, July, 1983; 1986, 1987, 1989
15. The Future of Child & Adolescent Psychiatry: If Not Now, When?, J. Am. Acad. of Child Psych., 27:1, January, 1988
16. ADHD: An Introduction, Psychiatric Annals, 19:11, November, 1989

Jerry M. Wiener, M.D.

17. Roots, Diversity and Professional Identity, Journal of the American Psychiatric Association, 151:9, September, 1994
18. Encompassing Diversity & The Future of Psychiatry, Journal of the American Psychiatric Association, 152:9, September, 1995
19. The relationship between mental illness and violence in adolescents in Review of Psychiatry, Ed. R. Hendren, v.18; American Psychiatric Press, 1999.
20. Early Recognition in Schizophrenia: The Prodromal Stages, with Duzyurek, S., Journal Practical Psychiatry and Behavioral Health, 5:4, 187-196, July, 1999

#### XI. Books and Chapters

1. Response of Medical and Paramedical Personnel to the Fatal Illness & Death of a Child, in Loss & Grief: Psychological Management in Medical Practice, eds. W. Kutscher, B. Schoenberg, D. Peretz, A. Carr, New York, Columbia Univ. Press, 1970
2. Response of the Family to the Fatal Illness & Death of a Child, op. cit.
3. Psychopharmacology of Childhood and Adolescence, (Ed.), Basic Books, New York, 1977
4. History of Drug Therapy in Childhood & Adolescent Psychiatric Disorders, with S. Jaffe, M.D., in Psychopharmacology of Childhood and Adolescence, Ed. J.M. Wiener, Basic Books, New York, pp. 9-40, 1977
5. Conclusion and Prospect: Summary, op. cit., 217-222
6. Organic Therapies in Comprehensive Textbook of Psychiatry, Third Edition, eds. Kaplan, H., Freedman, A., Sadock, B., Baltimore, Williams & Wilkins, 2: 2679-84, 1980
7. Psychopharmacology of Childhood Disorders, in Psychiatric Clinics of North America, Raymond Lake (Ed.), 6:3, December, 1984
8. Diagnosis and Psychopharmacology of Childhood and Adolescent Disorders, (Ed.), John Wiley & Sons, Inc., New York, 1985, Second Edition 1995  
 Chapters:
  1. Historical Overview of Childhood and Adolescent Psychopharmacology, with Jaffe, D., Goldstein, G., School of Law, Justice, L. pp. 3-70
  2. A Review of DSM-IV Categories, pp. 71-79
9. Summary & Prospect; op. cit.

Jerry M. Wiener, M.D.

XIII. Lectures and Visiting Professorships (Selected sites)

1. Psychiatry Grand Rounds, Columbia University College of Physicians and Surgeons, New York, NY
2. Psychiatry Grand Rounds, Cornell University School of Medicine, New York, NY
3. Visiting professor, University of Louisville School of Medicine, Louisville, KY
4. Invited Speaker, 40<sup>th</sup> Anniversary Dedication, Baylor College of Medicine, Houston, TX
5. Psychiatry Grand Rounds, Emory University College of Medicine, Atlanta, GA
6. Visiting Professor, Department of Psychiatry, University of Colorado School of Medicine, Denver, CO
7. Grand Rounds, Department of Psychiatry, Mayo Clinic and Graduate School of Medicine, Rochester, MN
8. Psychiatry Grand Rounds, University of South Carolina School of Medicine, Charleston, SC
9. Psychiatry Grand Rounds, Jefferson Medical College, Philadelphia, PA
10. Psychiatry Grand Rounds, University of Kansas School of Medicine, Kansas City, KS
11. Psychiatry Grand Rounds, University of New Mexico School of Medicine, Albuquerque, NM
12. Invited Speaker, Yale University College of Medicine, Department of Psychiatry Alumni Day, New Haven, CT
13. Psychiatry Grand Rounds, University of Oregon School of Medicine, Portland, OR
14. Psychiatry Grand Rounds, University of Utah School of Medicine, Salt Lake City, UT
15. Psychiatry Grand Rounds, University of Utah School of Medicine, Salt Lake City, UT
16. Psychiatry Grand Rounds, University of Tennessee School of Medicine, Memphis, TN
17. Psychiatry Grand Rounds, Mt. Sinai School of Medicine, New York, NY

18. Psychiatry Grand Rounds, University of South Florida, Tampa, FL
19. Distinguished Visiting Professor, Department of Psychiatry, University of Nebraska School of Medicine, Omaha, NE
20. Invited Speaker, Regional Meeting, World Psychiatric Association, Bariloche, Argentina
21. Keynote Speaker, Annual Meeting, Royal College of Psychiatry, Sheffield, England

## Exhibit Seven

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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

**Appellants,**

**v.**

**JANET RENO, Attorney General of the  
United States, *et al.*,**

**Appellees**

**No. 00-11424-D**

**DECLARATION OF LOURDES  
RIGUAL-LYNCH, PH.D.**

1. My name is Lourdes Rigual-Lynch, Ph.D. I make this declaration in connection with the Appellees' Opposition to Appellant's Motion for an Injunction Pending Appeal in the above-captioned action. I am currently the Director of Mental Health Services and Case Management for the Division of Community Pediatrics of Montefiore Medical Center (MMC) and an Assistant Professor of Pediatrics at the Albert Einstein College of Medicine, which is affiliated with MMC. My professional address is 308 E. 84<sup>th</sup> Street, New York, New York, 10028. Attached to this declaration is my curriculum vita, which accurately reflects my educational background, training, and professional experience.

2. My testimony in this case relates to my advice and recommendations to Immigration and Naturalization Service Commissioner Doris Meissner concerning the impact of a continued delay in the transfer of Elian Gonzalez into the custody of his father, Juan Gonzalez. My opinion is based on my interview of Elian's father, Juan Gonzalez, and his wife, Niercy, my

interview with Lazaro Gonzalez, Elian's great-uncle; and my own knowledge of and experience in the psychological care of children, particularly where they have suffered separation from their parents and/or have experienced traumatic events.

3. I participated in a meeting with Juan and Niercy Gonzalez and their infant son on April 9, 2000 in the office of Mr. Gonzalez's attorney. Also present was Paulina F. Kernberg, M.D. Both Dr. Kernberg and I speak Spanish, and the meeting was conducted in that language. The interview left us with the impression of a well-functioning, nuclear family with a support network of extended family members.

4. I participated in a meeting with Lazaro Gonzalez on April 10, 2000. Also participating were Paulina F. Kernberg, M.D., and Jerry M. Wiener, M.D. The purpose of that interview was to discuss the impact of the current situation on Elian and to talk about how to implement the transfer of Elian to his father in a manner that would minimize stress and anxiety for the child.

5. I have reviewed Dr. Kernberg's declaration concerning our advice and recommendations to Commissioner Meissner, and I concur with that declaration.

I declare under penalty of perjury that the foregoing Declaration of Lourdes Rigual-Lynch, Ph.D., is true and correct.

Executed on: April 13, 2000

By: Lourdes Rigual-Lynch, Ph.D.  
Lourdes Rigual-Lynch, Ph.D.

# LOURDES RIGUAL-LYNCH, Ph. D.

308 E. 84th Street ■ New York, NY 10028 ■ 212-717-7864

## EDUCATION

INSTITUTE OF ADVANCED PSYCHOLOGICAL STUDIES, ADELPHI UNIVERSITY, Garden City, NY

*Ph. D. Clinical Psychology*

Doctoral Dissertation: Self-Esteem and Puerto Rican Migrant

Awarded a grant from the Ford Foundation for the year 1978-1979 to aid in completing dissertation.

August 1979

Thesis completed and Ph. D. awarded

1973-1975

INSTITUTE OF ADVANCED PSYCHOLOGICAL STUDIES, ADELPHI UNIVERSITY, Garden City, NY

*M.A. Clinical Psychology*

NIMH Fellowship

1969-1973

MARYMOUNT COLLEGE, Tarrytown, NY

*Bachelors Degree*

Majors in Psychology and French; Marymount scholarship (4 years); Magna Cum Laude; Psychology Award Winner.

## EMPLOYMENT

THE NEW YORK CHILDREN'S HEALTH PROJECT, New York City, NY

*Director of Mental Health Services, January 1990 - Present*

Director of the Mental Health Services section of the Division of Community Pediatrics. This innovative program is designed to provide primary health care to homeless, indigent children via the use of mobile medical vans staffed by pediatricians, pediatric nurse practitioners and nurses. Psychological assessments, crisis intervention, case management, treatment, and specialty referrals are provided to the children and their families.

MANHATTAN CHILDREN'S PSYCHIATRIC CENTER, Wards Island, NY

*Staff Psychologist, September 1979 - January 1990*

Worked on a interdisciplinary treatment team (children ages 5-12). Responsible for coordinating the complete treatment (clinical, social, educational) of a caseload of 10 children in a day hospital program. Duties also included psychological testing and psychodiagnostic supervision of two psychology interns.

PRIVATE PRACTICE, New York City, NY

*Psychologist, January 1980 - Present*

This part-time work involves seeing patients in individual and family counseling. Specialization in psychoanalytic oriented psychotherapy and psychodiagnostic evaluations of children.

**LOURDES RIGUAL-LYNCH, Ph.D.**

Lourdes Rigual-Lynch, Ph.D., is the Director of Mental Health Services and Case Management for the Division of Community Pediatrics of Montefiore Medical Center (MMC) and a clinical psychologist. Dr. Rigual-Lynch is also an Assistant Professor of Pediatrics at the Albert Einstein College of Medicine, which is affiliated with MMC. Dr. Rigual-Lynch has worked with homeless children and families for the past 10 years, and her interests include early childhood development and assessment, the effects of domestic violence on children and the impact of homelessness on children and families. She obtained her Ph.D. from The Institute of Advanced Psychological Studies, Adelphi University.

## Departure Control Order



U.S. Department of Justice  
Immigration and Naturalization Service

Office of the District Director

7880 Biscayne Boulevard  
Miami, FL 33138

APR 14 2000

Mr. Juan Miguel Gonzalez,  
as legal custodian of  
Elian Gonzalez  
7105 Millwood Rd.  
Bethesda, MD 20817

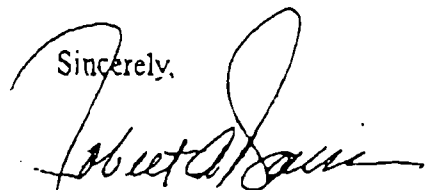
Re: Elian Gonzalez

Dear Mr. Gonzalez:

Pursuant to 8 C.F.R. § 215.3(k), the Immigration and Naturalization Service (INS) has determined that the departure of your son, Elian Gonzalez, would be prejudicial to the interests of the United States. This determination is based upon the pending appeal to the United States Court of Appeals for the Eleventh Circuit in Gonzalez v. Reno, No. 00-11424-D. In accordance with 8 C.F.R. § 215.2, Baltimore District Director Louis Crocetti and I hereby order your son, Elian Gonzalez, not to depart or attempt to depart from the United States, and order you not to depart or attempt to depart with your son from the United States, until the Eleventh Circuit Court of Appeals panel has issued its decision on plaintiff's appeal of the district court's ruling in that case.

This departure control order will become effective upon the presentment of your son, Elian Gonzalez, to the INS by Lazaro Gonzalez, as directed by the INS. We understand that you do not oppose this order.

Sincerely,



Robert Wallis  
District Director

cc: Gregory Craig, Esq.