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Folder Title:

Elian Gonzalez [1]

Staff Office-Individual:

Multilateral & Humanitarian Affairs-Patten, Wendy

Original OA/ID Number:

3135

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40	5	7	3	v

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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001. email	Caryn Hollis to APNSA re: Wendy Sherman Cuba Meeting (2 pages)	04/24/2000	P1/b(1)
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COLLECTION:

Clinton Presidential Records
National Security Council
Multilateral and Humanitarian Affairs (Wendy Patten)
OA/Box Number: 3135

FOLDER TITLE:

Elian Gonzalez [1]

2012-0371-F

rs2166

RESTRICTION CODES

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

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

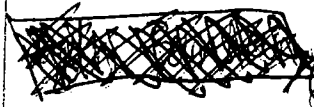
P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the 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]

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]

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.



Stoun Workshop

S-22-00

GAL (Graham) bill pending
(Alex A: sd that be your (honor) lawyer)

- Wendy Yang - ~~22~~ 9's Comm
^{Phoenix} AZ pjt abt it implement
in children seeking asylum
builds on guidelines for
(proced + evidentiary)
kids asylum claims

fascinated
piled top
of these
ideal on
unaccompanied
minors

- hope to appoint "GAL" to
unaccompanied children
(will call it "friend of child")
- ensure fully working on
behalf of child
- does anticipate FCC advocacy
C's best int (but not w/
any oblig to the C) +
attys in fact role of
advocating child's stated
preferences
- pjt needs review

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED No. 00-11424
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
06/23/00
THOMAS K. KAHN D. C. Docket No. 00-206-CV-KMM
CLERK

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

Plaintiff-Appellant,

v.

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

Defendants-Appellees,

JUAN MIGUEL GONZALEZ,

Intervenor.

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

(June 23, 2000)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

FILED (Opinion _____ 11th Cir. 2000, F.3d ____).
U.S. COURT OF APPEALS

ELEVENTH CIRCUIT

06/23/00

THOMAS K. KAHN

Before EDMONDSON, DUBINA and WILSON, Circuit judges.

PER CURIAM:

Our decision of 1 June hung largely on two ideas: (1) that the policy adopted by the INS in this case -- a policy developed in what we called "informal adjudication" -- was due "some deference" because 8 U.S.C. § 1158(a) was silent on the precise question at issue and because the INS had the duty to set how the statute was to be applied when the statute was silent, and (2) that the level of deference due the INS policy was strengthened -- becoming "considerable" -- when we also took into account the foreign policy implications of the administrative decisions dealing with immigration. Among other things, our opinion spoke of Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S. Ct. 2778 (1984).

When our opinion was written, we knew of Christensen v. Harris County, 120 S. Ct. 1655 (1 May 2000), a Fair Labor Standards Act (FLSA) decision. But

no lawyer in this case had cited or argued Christensen to us. More important, we thought that Christensen -- which involved no immigration law, no foreign policy considerations, and no kind of agency adjudication -- was noncrucial to this case. So, we never mentioned Christensen.

Now in the petition for rehearing, Plaintiff stresses Christensen. Therefore, we will write briefly about it.

First, Christensen involved an opinion letter from the Department of Labor giving advice to Harris County, Texas. The letter, in itself, did not decide Harris County's rights; it did not stop and did not purport to be able to stop Harris County from acting against the advice given. The letter was in no way binding on Harris County. And later when Christensen arose as active litigation, Harris County was not sued by the Department of Labor, but by private citizens: county employees who contended that Harris County was misconstruing the FLSA. The Supreme Court said that the administrative position taken in the opinion letter was not due Chevron deference. As we read it, the Supreme Court's opinion also indicated that the view of the pertinent statute taken in the opinion letter was wrong and unreasonable: "this view is exactly backwards." Id. at 1663.

In our case, the INS did directly decide Plaintiff's specific right to file certain asylum applications under the pertinent statute and did so after receiving and weighing some evidence. The INS acted in the context of an actual and concrete dispute with and before that agency. The INS decision¹ was final and binding on Plaintiff unless he, in effect, appealed it to a court. The sovereign power of the United States -- per the INS and the Attorney General -- had determined that neither Plaintiff himself nor Lazaro Gonzalez could file for asylum on Plaintiff's behalf over the objections of Plaintiff's father. This kind of administrative decisionmaking -- which we think no one can seriously question was the deliberate and official position of the pertinent agencies of the executive branch of our government -- is substantially different from and more than the opinion letter in Christensen. We considered the administrative decisionmaking in this case to be adjudication² and to be outside Christensen's scope.³ In our view, to apply

¹By "the INS decision," we mean the decision of the INS Commissioner, as affirmed by the Attorney General.

²See 5 U.S.C. § 551(6)-(7).

³The Supreme Court opinion gives some examples of the kinds of agency acts that are due Chevron deference. In setting out some examples, "formal adjudication" is mentioned. We have described what happened before the INS in our case as informal adjudication. We understand the listing in Christensen to be illustrative and not to be an exhaustive or complete list of agency acts due deference. And, see Pension Benefit Guar. Corp. v. LTV Corp., 110 S. Ct. 2668, 2678-79,

Christensen to this case would not be following Christensen, but would be an extension of Christensen.

Second, we thought, even when Christensen does apply, administrative decisions of agencies are still due some deference. And we believed that under Chevron or Christensen, when the foreign-policy impact of immigration law was added as a separate source of judicial deference, we were justified in exercising the judicial restraint that marked our opinion. In addition, we did conclude that the executive branch decisions under section 1158 were reasoned and reasonable.

2681 (1990).

The petition for rehearing⁴ is DENIED; and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition for Rehearing En Banc is DENIED.

The mandate of this court will issue on Wednesday, 28 June 2000, at 4:00 in the afternoon (Atlanta time). A filing of a motion to stay the issuance of the mandate will **NOT** extend the time for the issuance of the mandate. Expect no motions to stay the issuance of the mandate to be granted. All injunctions in this case will dissolve on Wednesday, 28 June 2000, at 4:00 in the afternoon (Atlanta time). All further requests for stays or for injunctive relief should be directed to the Supreme Court of the United States.

*Entered for the
Court:*

/s/ J.L. EDMONDSON
UNITED STATES CIRCUIT JUDGE

⁴Plaintiff, in his petition for rehearing, also argues that we should not have rejected his constitutional claim. We, however, feel bound by the decision in Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd on other grounds, 105 S. Ct. 2992 (1985), to reject Plaintiff's constitutional claim.

Patten, Wendy L. (MULTI)

From: Hollis, Caryn C. (INTERAM)
Sent: Thursday, May 18, 2000 12:18 PM
To: @APNSA
Cc: @EXECSEC - Executive Secretary; @LEGAL - Legal Advisor; @MULTILAT - Multilateral and Humanitarian Affairs; @INTERAM - Inter-American
Subject: Visa extensions for Elian's Classmates [UNCLASSIFIED]

Please pass to Jim from Caryn. Cleared by Arturo, Multi and Legal. Thanks

Jim,

At the Wendy Sherman Cuba policy meeting, the issue of visa extensions for the four Cuban children and their parents was raised. As you recall, these children and their family members came to the United States to provide playmates for Elian Gonzalez. Originally on two week tourist visas, these were extended for an additional two weeks. The extensions will run out next Wednesday.

INS and Justice may want to grant another extension, but State strongly disagrees. It believes that the time has come to rotate this group of four children out and grant visas to a second group of four. We agree.

The Cubans set up a school for Elian and the children at Wye, something State asked them not to do. The Miami Herald ran a photo of Elian in his Pioneer uniform that appeared in Cuban press on May 16. The Cuban media proclaimed that Elian is being provided with a Cuban education under Communist principles while staying at Wye. Bob Menendez is outraged and reportedly will call Madeleine to demand that the teacher's visa be pulled. The teacher is here on a 90-day visa. State will call Greg Craig and summon the head of the Cuban Interests Section to tell them it is inappropriate behavior and has the potential to damage Juan Miguel's case.

Wendy Sherman will hold a "serious" conference call on the visa extension matter later this week with Doris Meisner and James Castello and she would like you to participate.

Caryn

WHA Press Guidance
June 8, 2000

Cuba: Alleged USG-Cuban Government "Coordination" over Elián Gonzalez

Question: Can you comment on press reports about an e-mail from the Department of Justice - INS that says that the State Deptment wants to coordinate press guidance and contact with Cuban Government officials about the Elián Gonzalez matter?

Answer:

- **WE HAVE SEEN THE E-MAIL IN QUESTION.**
- **IT REFERS TO PRESS COORDINATION BETWEEN AGENCIES --
STANDARD OPERATING PROCEDURE IN HAVING ACCURATE
INFORMATION FOR THE AMERICAN PEOPLE.**
- **IT REFERS TO COORDINATING THROUGH OFFICIAL CHANNELS ALL
COMMUNICATIONS WITH A FOREIGN GOVERNMENT.**
- **THE DEPARTMENT OF STATE, OFFICE OF CUBAN AFFAIRS, IS THE
ONLY AUTHORIZED POINT OF CONTACT FOR THE U.S.
GOVERNMENT WITH THE CUBAN OFFICIALS IN THE UNITED
STATES.**

- THE DEPARTMENT OF STATE WANTED TO ENSURE THAT NO OTHER DEPARTMENT OF THE GOVERNMENT ENTERED DIRECT COMMUNICATION WITH THE CUBAN GOVERNMENT.
- ANY OTHER ^{interpretation} ~~CONSTRUCTION~~ OF ONE OF THE E-MAILS CITED IN THE WASHINGTON TIMES IS INCORRECT.

Question: Did the Administration "coordinate" press strategy with the Cuban Government on the return of Elián Gonzalez?

Answer:

- NO! WE HAVE SEEN THE WASHINGTON TIMES' ARTICLE. IT IS INACCURATE AND IRRESPONSIBLE.
- AT NO POINT HAVE WE EVER COORDINATED ANY PRESS GUIDANCE WITH THE CUBAN GOVERNMENT ON ANYTHING -- EVER.

Background to Briefer:

The Washington Times (June 8, 2000) in its lead story claim that "Cuba, U.S. 'coordinated' Elián seizure strategy." The story was based on two e-mails obtained from the INS under a Freedom of Information request by a group called "Judicial Watch, Inc."

There are only two authorized points of contact with Cuban officials are either the U.S. Interests Section in Havana and the Office of Cuban Affairs of the Department of State. All Executive Branch contacts and meetings with Cuban officials are either arranged by these two entities or representatives from USINT or WHA/CCA are present at such meetings.

2nd
version

June 8, 2000

Mr. Wesley Pruden
Editor in Chief
Washington Times

Dear Mr. Pruden:

Today's Washington Times lead story and headline is misleading, inaccurate, and irresponsible.

The article's author, Tom Carter, claimed that State Department officials sought to work with the Cuban government to manage reporting on the Elián Gonzalez incident. Late Monday evening, Mr. Carter contacted a State Department press spokesman about the story he was intending to write. Mr. Carter was informed -- in detail -- that his assessment of the aforementioned e-mail was incorrect and that under no circumstances does the Department of State coordinate any press effort with the Cuban Interests Section. ~~He was told in no uncertain terms that we were indignant about such implications and inaccurate interpretations.~~ Nonetheless, the Washington Times proceeded with publication.

Any informed reader of the e-mail in question can determine for themselves that the INS official who authored the e-mail was merely restating standard operating procedures. First, in the interests of providing the American public with accurate information, it is standard procedure for different departments and agencies of the Government to coordinate their press statements. Second, the Department of State is the only authorized point of contact with foreign government officials, including Cubans.

We regret that the Washington Times chose to portray the e-mail in question inaccurately and incorrectly.

Sincerely,

Charles S. Shapiro
Coordinator, Office of Cuban Affairs

7270

for review

June 8, 2000

Mr. Wesley Pruden
Editor in Chief
Washington Times

Dear Mr. Pruden:

Today's Washington Times lead story and headline is misleading, inaccurate, and irresponsible.

The article's author, Tom Carter, late Monday evening contacted a State Department press spokesman about the story he was writing. Mr. Carter was advised -- in detail -- that there simply wasn't a story. Nonetheless, the Times proceeded with publication.

Once they get beyond the headline, any reader of the e-mail in question can determine for themselves that the INS official was merely restating two obvious truths. *(Carter) we say not a word, but are they obligated not to say it?*

Second First, Department of State is the only authorized point of contact with foreign government officials, including Cubans. *First* Second, in the interests of providing the American public with accurate information, it is standard procedure for different departments and agencies of the Government to coordinate their press statements. *we do not in any way involve press guidance of the part of Cuba.*

I regret that the Times chose to do its readers a disservice by opting for the lurid over the accurate.

Sincerely,

Charles S. Shapiro
Coordinator, Office of Cuban Affairs

do not intend to lose credibility

this process occurred within the past, however, and

to Wash Times:

already made news
daily coverage
cannot accept anything

Lotus cc:Mail for Ronald W Whitney

Date: 01/19/2000 10:03 AM
Sender: Owen B Cooper
To: Ronald W Whitney; Arthur D Strathern III; Dea D Carpenter
Priority: Normal
Subject: Re: Daily conference calls re: Elian
Who will join from our office? Have we coordinated this with the press office and the chief of staff's office?

Reply Separator

Subject: Daily conference calls re: Elian
Author: Ronald W Whitney
Date: 01/19/2000 9:29 AM

DOS wants to have a daily conference call to coordinate press guidance and communications with the Cubans. They have lots of questions concerning the timing of litigation, so they have asked for OIL to participate. The calls will be at 9:00am, at

--Ron

450



Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, JUNE 1, 2000
WWW.USDOJ.GOV

AG
(202) 514-2007
TDD (202) 514-188 8

STATEMENT BY ATTORNEY GENERAL JANET RENO ON THE 11TH CIRCUIT COURT'S DECISION IN THE ELIAN GONZALEZ CASE

"We are pleased that the Court has upheld our decision that only Juan Miguel Gonzalez can speak for his son Elian on federal immigration matters. These three federal appellate judges have now joined with a federal district court judge and a Florida state court judge in recognizing the authority of the INS to make this determination.

"This is an important step in achieving the goal we have sought from the very beginning - to give Juan Miguel and his family the opportunity to return to a life together. I am hopeful that this matter will soon reach a final resolution so that Elian, his father and his family, may resume their lives away from the scrutiny of the media and the uncertainty that the legal battle has caused for them.

"I hope that all of us -- regardless of our disagreements about this case -- can join together and wish this family well.

"Elián remains in his father's care, but he and his family will not immediately depart the United States. The injunction put in place by the 11th Circuit will remain in effect until the Court's mandate in this case is issued. The INS departure control order put in place on April 22 will remain in place until the injunction is no longer in effect.

"Finally, I want to take a moment to commend the dedicated and absolutely splendid attorneys and staff at the Department of Justice and the Immigration and Naturalization Service who have worked so hard over the past six months on this litigation. They, like so many

- 2 -

Americans, were moved by this human drama, and they have devoted long hours to bring about an outcome consistent with the law and our tradition of respect for the parent-child relationship."

###

00-312

**PRESS CONFERENCE WITH ATTORNEY GENERAL JANET RENO AND
DEPUTY ATTORNEY
GENERAL ERIC HOLDER
SUBJECT: COURT'S DENIAL OF ASYLUM HEARING FOR ELIAN GONZALEZ
THE DEPARTMENT OF JUSTICE, WASHINGTON, D.C.
2:15 P.M. EDT THURSDAY, JUNE 1, 2000**

ATTY GEN. RENO: We are pleased that the court has upheld our decision that only Juan Miguel Gonzalez can speak for his son, Elian, on federal immigration matters.

These three federal appellate judges have now joined with a Federal District Court judge and a Florida State Court judge in recognizing the authority of the INS to make this determination. This is a very important step in achieving the goal we have sought from the very beginning -- to give Juan Miguel and his family the opportunity to return to a life together.

I am hopeful that this matter will soon reach a final resolution so that Elian, his father and the family may resume their lives away from the scrutiny of the media and the uncertainty that the legal battle has caused for his entire family. I hope that all of us, regardless of our disagreements about this case, can join together and wish these people well.

Elian remains in his father's care, but he and his family will not immediately depart the United States. The injunction put in place by the 11th Circuit will remain in effect until the court's mandate in this case is issued. The INS Departure Control Order, put in place on April 22nd, will remain in effect until the injunction is no longer in effect.

Finally, I want to take a moment to commend the dedicated and just absolutely splendid attorneys and staff at the Department of Justice and the Immigration and Naturalization Service, who have worked so hard over the past six months on this litigation. They, like so many Americans, and indeed, people around the world, were moved by this human drama, and they have devoted long hours to bring about an outcome consistent with the law and tradition of respect for the parent-child

relationship.

Q Ms. Reno, Elian and his family won't depart until the mandate is issued. There's a little bit of confusion about when that takes place. At the end of the 14 days? Within 52 days?

ATTY GEN. RENO: My understanding is that if nothing else was done -- it will depend on what is filed, but if nothing is done and no steps are taken, it would end seven days after the 14 days.

Q In his emergency application to the Supreme Court this morning, Lazaro Gonzalez says Elian will be subjected to irreparable harm if he's returned to Cuba, citing brainwashing and forced labor for the children of dissidents. How do you respond to the fact that this really isn't in the best interest of Elian, sending him back to his home country?

ATTY GEN. RENO: I respond by pointing to Elian.

And if there is one thing that everybody, I think, can agree on, it is that he is a wonderful little boy, a remarkable little boy, a strong little boy, a little boy that has been raised in an excellent manner by both his mother and his father. One of the things that was made clear by the mother of Elian's mother, when she came to see me, was that Juan Miguel Gonzalez had been a very important part of Elian's life.

He has made, along with the boy's mother, judgments concerning the child. They're responsible for that young man. And I think he will do a good job of raising him.

Q What is the significance of the court denying Juan Miguel's request to replace Lazaro as "next friend"? Does that pose any particular problems for you, as this case progresses?

ATTY GEN. RENO: I don't think it will because it is confined just to the litigation.

Q Have you had any conversations with the attorney for Juan Miguel Gonzalez today? And if so, can you tell us anything about that communication?

ATTY GEN. RENO: I have not, but I believe Mr. Holder has.

Q Can you tell what their plans are?

MR. HOLDER: Well, I can tell you one thing; they plan to make a statement shortly after this one, so that you should get your organizations over there, I suppose. They were happy, obviously, with the decision and I think happy also with the work that has been done by the INS and by the Justice Department. But I'd let them speak for themselves with regard to any amplification of that.

Q Did they give any indication of how soon they might want to return to Cuba, or did you discuss how soon they could return?

MR. HOLDER: No, I did not discuss that with him. But as I said, I'll leave that to Mr. Craig.

Q Ms. Reno, as far as the timing -- you mentioned the 14 days, plus seven days for the mandate -- is that your best expectation as to when Elian could and would actually return to Cuba, the three weeks?

ATTY GEN. RENO: No, that is assuming that nothing is filed.

Q What would expect to happen timing-wise?

ATTY GEN. RENO: I don't know. I think the other lawyer should answer that.

Q What is your understanding of the papers that were filed in the Supreme Court? Were they just lodged, or were they filed? And --

ATTY GEN. RENO: I am told that they were lodged in case the injunction was dissolved.

Q And now?

ATTY GEN. RENO: Now, they serve no purpose, as I understand it.

Q Ms. Reno, can I just ask you? In this opinion, although it upheld your legal authority to decide, as you and the INS did, there was some criticism by the court. Like on page 22, it said, "We are not untroubled by the degree of obedience you put to the wishes of parents who live outside the country"; and that, on page 23, "It worries us some that a parent who lives in a communist state is not given special circumstances for this."

What's your assessment of that criticism?

ATTY GEN. RENO: I don't take it as criticism. I think it is important, as the court notes, to

make sure that Juan Miguel's decisions were his decisions. I think we -- the court notes what steps that we took. And I think, as the court said, our decision was reasoned and reasonable.

MR. HOLDER: Any more questions?

Q I'm sorry to do the timing again. But in your hypothetical, if nothing happens -- because the Appeals Court has allowed 14 days for an appeal for a full hearing before the full court, and so on, where does the extra seven days come in? Would they not -- if nothing happened, would they not be presumed to issue the mandate at the end of the 14 days?

ATTY GEN. RENO: As I understand it, the mandate will issue at the end of seven days after the final steps taken in the process. Now, I don't know what the other attorneys in this litigation will do in terms of what they might file.

Q But it's seven days beyond when there's a conclusion, as you say?

ATTY GEN. RENO: That's as I understand it.

Q So the earliest that he could he leave is three weeks?

ATTY GEN. RENO: No, I didn't say that. I said you have to ask the other lawyers in this litigation what they intend --

Q I understand that. But the earliest. If they do nothing.

ATTY GEN. RENO: I don't know what the lawyers in the litigation will do.

Q Ms. Reno, are any of the other courts bound by the time frame you're discussing, making a decision, you know, in terms of whether or not they take the case, reject it or anything, by the 21 days?

ATTY GEN. RENO: I'm not sure I understand your question.

Q If the family says -- you know, wants to make an appeal to the full court or to the Supreme Court, are those courts bound by that timeframe, that 21-day timeframe to make a decision on whether to take --

ATTY GEN. RENO: The 21 days applies if nobody files, if the attorney for Juan Miguel or the attorneys for Lazaro Gonzalez, if they don't file.

Q Ms. Reno, a number of groups that handle refugee and asylum cases have said that this case spotlighted the plight of thousands of unaccompanied minors who come into the country every year, and they question whether the INS is really equipped to deal with children in these sorts of circumstances, whether they are unclaimed or there is a custody battle. Are you satisfied that the INS is doing the best it can to deal with the — I think it's about 3,000 cases a year of unaccompanied minors, many of them in detention?

ATTY. GEN. RENO: I think the detention of children and the appropriate care of children, particularly in situations involving smugglers and people who trade in human lives, is one of the most difficult jobs that INS has, and I think, with the resources they have, they are doing a very good job.

Q But could they use something else? I mean, is this —

ATTY. GEN. RENO: We can always use more help.

Q The court was careful not to endorse the INS's decision, and when you say they have the authority to do what it did, do you think that the INS's policy when it comes to the treatment of minors and six-year-olds, et cetera, needs to be reviewed in light of the aspects of this case that have been —

ATTY. GEN. RENO: I think that justice has been done. You have a situation here that is different, and the court notes that there is no other decision of any court or this court that would apply in this situation, because I don't think any of us have seen this situation framed precisely before. And I think, based on all the circumstances, that justice has been done.

STAFF: One last question? Okay.

END.

Patten, Wendy L. (MULTI)

From: Hollis, Caryn C. (INTERAM)
Sent: Monday, May 22, 2000 2:16 PM
To: Patten, Wendy L. (MULTI); DeRosa, Mary B. (LEGAL)
Subject: Donato sues... [UNCLASSIFIED]

0571

^BC-Cuban Boy-Lawsuits,0227

^Elian rescuer, protester suing government officials

MIAMI (AP) The man photographed holding Elian Gonzalez during the armed raid in which the Cuban boy was seized is suing the federal government, saying his constitutional rights were violated.

The federal lawsuit filed Monday by Donato Dalrymple against Attorney General Janet Reno, Deputy Attorney General Eric Holder and Immigration and Naturalization Service Commissioner Doris Meissner seeks damages in excess of \$100 million.

"The complaint alleges unnecessary and excessive physical force," said Tom Fitton, president of Judicial Watch, a conservative group that is providing legal representation for Dalrymple.

Dalrymple who with his cousin rescued Elian from the water last Thanksgiving claims his Fourth Amendment right against unreasonable search and seizure was violated when agents broke into the Little Havana home where Elian had been staying with relatives.

The suit also claims that Reno, Holder and Meissner violated his Fifth Amendment due process rights.

In addition, the attorneys filed another lawsuit on behalf of Michael Stafford, a protester who claims he was beaten and tear-gassed during the raid. Stafford is also seeking damages in excess of \$100 million.

On the Net:

Judicial Watch: <http://www.judicialwatch.org>

APE- 05/22/00 12:47:56

OFFICE OF CUBAN AFFAIRS

**U.S. Department of State
ARA/CCA, Room 3234
2201 C Street, N.W.
Washington, D.C. 20520-6263**

Phone: (202) 647-9273

FAX: (202) 736-4476

FAX HELMS-BURTON UNIT: (202) 647-7095

F A X C O V E R S H E E T

DATE: May 12, 2000

**TO: Brad Glassman
Caryn Hollis
Wendy Patten**

FROM: Natly Torres

SUBJECT: Request for Clearance

FOR: Clearance	Information	Per Request	Action
			XX

REMARKS:

Attached you will find four documents for clearance: (1) press guidance, (2) Talking Points for the Secretary to use with Menendez or Graham, (3) two q and a for the secretary to use this weekend with the press, and (4) talking points to use if necessary during her press conference with Rosario Green. Please clear by 2:30.

NO. OF PAGES, INCLUDING COVER PAGE: 9

(IF THIS TRANSMISSION WAS NOT RECEIVED IN ITS ENTIRETY, PLEASE CALL 647-9272)

TALKING POINTS ON ELIÁN

For Menendez or Graham

- Concerns have been raised on this matter.
- The Coordinator for Cuban Affairs has called the Principal Officer of the Cuban Interests Section in to convey these concerns.
- The Cubans were non-committal. We will continue to raise this issue with them.

IF ASKED ONLY:

- As you know, there are a number of visa applications still pending for the purpose of visiting Elián and they are being reviewed very thoroughly.
- With regard to the teacher, she was issued a visa because she was a family friend, someone with whom Elián felt comfortable with as his former kindergarten teacher and someone who could presumably tutor him.
- Once visa holders arrive in the United States, it is the Department of Justice, not the Department of State, who determines if and how long the person can stay.
- We are in close contact with the INS and the Attorney General regarding this and other matters pertaining to visitors to Wye.

IF ASKED ONLY:Question:

Why can't you expel the teacher?

Answer:

- The teacher is in this country on a visa that the Department of State issued. Upon her arrival in the U.S., the INS issued the teacher an I-94 good for 90 days.

If Pressed:

Cont.
TP for
menendez

- She has not violated the terms of the visa and it would be very difficult to remove her.

CUBA: ELIÁN GONZÁLEZ

*For the Secretary to use w/ Press
Over the weekend*

Background:

Elián González and his family moved from Andrews Air Force Base to the Wye Farm facility on April 25. On April 27 Elián's former kindergarten teacher and 11 year-old cousin arrived, followed on April 28 by Elián's four playmates, their accompanying parents and a pediatrician. On May 15 the pediatrician returned to Cuba. The Federal Court of Appeals heard the case on May 11. It is expected that the Court will render its decision in a few weeks.

Question:

What is the latest update on Elián?

Answer:

- We expect that the González family will remain at Wye until the appeal process has concluded.
- Hearing was held at the Federal Appeals Court in Atlanta on May 11.
- We are awaiting the court's decision.

CUBA: ELIÁN GONZÁLEZ

For the Secretary to use with press over the weekend

Background:

The media has reported that Elián is being indoctrinated with Communist principles while staying at Wye. The Miami Herald showed a picture of Elián with his pioneer uniform and he has also been shown on video chanting allegiance to the Revolution.

Question:

What about the Cubans running a school at Wye?

Answer:

- Concerns have been raised.
- We have called the Principal Officer of the Cuban Interests Section in to discuss those concerns.
- But while we have your attention on Cuba, I want to say that we welcome the release of Félix Bonné and Marta Beatriz Roque.
- And we urge the Cuban authorities to free the remaining two members of the dissident working group, as well as all other prisoners being held for political reasons.

Cuba: Elian Gonzalez
Q and A for Press with Rosario Green

Background:

The media has reported that Elián is being indoctrinated with Communist principles while staying at Wye. The Miami Herald showed a picture of Elián with his pioneer uniform and he has also been shown on video chanting allegiance to the Revolution.

Question:

Any comments on the Cuban school at Wye?

Answer:

- One of the freedoms we most enjoy in this country is free choice. People can make choices that other find objectionable-- that goes for Mr. González as well.
- We are looking into concerns that have been raised.
- What is most important is for the legal process to complete its work and bring this difficult situation to an end as expeditiously as possible.
- But while we have your attention on Cuba, I want to say that we welcome the release of Félix Bonné and Marta Beatriz Roque.
- And we urge the Cuban authorities to free the remaining two members of the dissident working group, as well as all other prisoners being held for political reasons.

Question: The Department of State constantly criticizes Cuba's human rights record, why are you insisting that Elian be returned to Cuba?

Answer:

- This is about a six year old child who has lost his mother and whose only surviving parent is exercising his parental rights.
- We simply cannot take the position that because the government of a country denies its citizens human rights a parent in that country must lose his or her parental rights.

**WHA Press Guidance
May 18, 2000**

Cuba: Elián González

Question: What are your views on Elián's schooling at Wye?

Answer:

- **SOME CONCERNS HAVE BEEN RAISED ABOUT THIS.**
- **WE ARE TALKING WITH THE CUBAN GOVERNMENT ABOUT IT.**

Question: Why did the State Department issue a visa to a teacher for the purpose of holding classes?

Answer:

- **SHE WAS ISSUED A VISA AT THE REQUEST OF JUAN MIGUEL GONZÁLEZ BECAUSE SHE WAS A FAMILY FRIEND, SOMEONE WITH WHOM ELIÁN FELT COMFORTABLE AS HIS FORMER KINDERGARTEN TEACHER.**

Context: The media has reported that Elián is being indoctrinated with Communist principles while staying at Wye. The Miami Herald showed a picture of Elián with his pioneer uniform and he has also been shown on video chanting allegiance to the Revolution. According to INS, the State of Maryland Education Department does not see Elián's education at Wye as a violation of state law because the kids are not residents and it is a Cuban teacher teaching Cuban children who are all here on temporary visas.

Patten, Wendy L. (MULTI)

From: WHSR
Sent: Wednesday, May 17, 2000 7:31 PM
To: Baker, James E. (LEGAL); Clarke, Richard A. (TNT); Crowley, Philip J. (PRESS); DeRosa, Mary B. (LEGAL); Hammer, Michael A. (PRESS); Hollis, Caryn C. (INTERAM); Krass, Caroline D. (LEGAL); McCarthy, Mary O. (INTEL); Patten, Wendy L. (MULTI); Rosshirt, Thomas M. (SPCHW); Scharfen, Jonathan R. (LEGAL); Stockwell, David B. (PRESS); Valenzuela, Arturo A. (INTERAM)
Subject: MIAMI CUBAN AMERICANS OUTRAGED OVER ELIAN'S ``COMMUNIST" SCARF
Classification: UNCLASSIFIED
Distribution: SIT: BAKER CLARKER CROWLEY Derosa HAMMER HOLLIS KRASS MCCARTHY Patten ROSSHIRT SCHARFEN STOCKWELL VALENZUELA
Identifier: A231ca00
Originator: AP/East
Precedence: RUSH
TimeOfReceipt: 05/17/2000 18:30:28 ET

D0501

^BC-Carib-US-Cuban Boy
,0392

^Miami Cuban Americans outraged over Elian's ``communist" scarf

MIAMI (AP) Local Cuban Americans are outraged after seeing photographs of Elian Gonzalez wearing a blue scarf, which is the uniform of the Pioneers, a communist youth group.

The Cuban Americans said Tuesday that the photographs, published in the Cuban newspaper Granma, are proof that the Castro government is brainwashing the 6-year-old boy.

While federal courts decide whether to send Elian back to Cuba, he has been living at a Maryland retreat with his father. He has been there since shortly after he was seized by federal agents last month from the home of Miami relatives.

The five photographs apparently were taken while he was receiving instruction from a Cuban teacher sent to Maryland. It is unclear when they were taken.

``The oppression has already started," said Dr. Marta Molina, a psychologist who said she has treated 500 children in 20 years whose problems she said were caused by communist indoctrination.

Elian has been in the United States since Nov. 25, when two men out fishing found him clinging to an inner tube off the coast of South Florida. The boy's mother died trying to flee their country in a boat that capsized.

Kendall Coffey, a lawyer for Elian's great-uncle Lazaro Gonzalez, said the Miami relatives plan to complain to the Immigration and Naturalization Service.

In Cuba, the Pioneers instill communist values through song, farm labor and their pledge, ``Pioneers for communism, we will be like Che Guevara."

``We're very troubled," Coffey said. ``He's being paraded as a trophy in the garb of the Communist Party. It's happening even more rapidly than our worst expectations."

But INS spokeswoman Maria Cardona said Elian's father, Juan Miguel Gonzalez, selects the boy's clothes. ``It is not the INS's business what Elian wears on daily basis," she said.

Cuban diplomats scoffed at the accusations that Elian is being brainwashed. They said the scarf is part of his school uniform.

``It's part of our system of children going to school," said Luis Fernandez, spokesman for the Cuban Interests Section in Washington. ``Children go to school in uniform just the way they do at private schools in the United States. I don't see what the problem is."

DRAFT

Context: USINT received visa applications for Elián's grandparents and his step-grandparents and these being reviewed. Despite the Miami Herald's report that Elián's playmates and the pediatrician will be permitted to remain in the U.S. another two weeks the pediatrician's stay in the United States will not be extended. The Washington Times reported on the arrival of a Thai child into the U.S. He was paroled into the custody of the Thai government and then released to a community group who now wants to block the child's return to Thailand.

4 pages

To: Janelle Jones
(please show maria c.)

Caryn Hollis
Wendy Patton

Fr: Natley

DRAFT

**WHA Press Guidance
May 10, 2000**

Cuba: Elián González

Question: Is it true that Elián's grandparents applied for visas?

Answer: **ON FRIDAY, MAY 5 THE U.S. INTERESTS SECTION RECEIVED VISA APPLICATIONS FOR ELIÁN'S MATERNAL AND PATERNAL GRANDPARENTS AS WELL AS HIS STEP-MOTHER'S MOTHER. THIS WAS FOLLOWED ON MONDAY WITH A VISA APPLICATION ON BY HIS STEP-MOTHER'S FATHER.**

Question: Is it true that the Department committed itself issuing the visas for Elián's grandparents and step-grandparents on Tuesday and then changed its mind?

Answer: **NO SUCH COMMITMENT WAS GIVEN. WE AGREED TO UNDERTAKE EXPEDITED CONSIDERATION, BUT UNDER THE LAW WE CANNOT PREJUDGE AN APPLICATION. THE VISAS FOR ELIÁN'S GRANDPARENTS AND STEP-GRANDPARENTS REMAIN UNDER REVIEW.**

Question: How long will the process take?

Answer: **THERE IS NO SET PERIOD OF TIME FOR REACHING THE DECISION. EACH VISA APPLICATION IS CONSIDERED INDIVIDUALLY ON ITS OWN MERITS.**

Question: Any response to the Cubans characterization of the Department's latest actions in this case?

Answer: **THE CUBAN GOVERNMENT AND THEIR SPOKESMEN ARE WELL KNOWN FOR THEIR INACCURATE AND INTEMPERATE REMARKS. WE**

DRAFT

WILL NEITHER DIGNIFY THEIR CHARGES NOR CHANGE OUR POSITION WHICH IS TO RESPECT AND FOLLOW THE RULE OF LAW IN THIS CASE. WE CAN UNDERSTAND HOW THE PROCESS TO FOLLOW THE RULE OF LAW WOULD NOT BE UNDERSTANDABLE TO THE CUBAN GOVERNMENT.

Question: Any comments on the case of the Thai child that was brought into the U.S. recently without his parents as part of a smuggling operation?

Answer: **THERE ARE NO SIMILARITIES BETWEEN THE TWO CASES OTHER THAN THEY BOTH INVOLVE CHILDREN. IN THE CASE OF THE THAI CHILD, WE ARE WORKING CLOSELY WITH INS AND THE THAI GOVERNMENT TO MAKE SURE THAT THE CHILD'S RETURN IS DONE IN A WAY THAT ENSURES HIS SAFETY AND PROPER CARE. WE SHARE THE CONCERNS OF THE ADVOCATES REGARDING THE CHILD'S WELL BEING. THAT IS WHY WE ARE WORKING SO CLOSELY WITH THE THAI GOVERNMENT TO ENSURE THAT HE WILL BE IN A SAFE ENVIRONMENT.**

Question: Did State extend the visas of Elián's playmates and their parents?

Answer: **PERMISSION TO REMAIN IN THE U.S. IS GRANTED BY THE INS, NOT THE STATE DEPARTMENT. (A VISA IS SIMPLY PERMISSION TO TRAVEL TO THE PORT OF ENTRY.) WE UNDERSTAND THAT UPON THE RECOMMENDATION OF THE CHILD PSYCHIATRIST AND SOCIAL WORKER CONTRACTED BY IMMIGRATION AND NATURALIZATION**

DRAFT

**SERVICE TO MONITOR ELIÁN, INS WILL INTERVIEW THE PARENTS TO
DETERMINE IF THEY WISH TO EXTEND THEIR STAY IN THE UNITED
STATES.**

Question: What about Elián's routine? Is he attending school?

**ANSWER: THAT IS A QUESTION WHICH SHOULD BE ADDRESSED TO INS.
WE DO NOT HAVE INFORMATION ABOUT ELIAN'S DAILY ROUTINE.**

WHA Press Guidance
May 3, 2000

To: Janelle Jones
Caryn Hollis
Wendy Patten
*I need clearance now, please.

Fr: Nasty
3 pages

Cuba: Updates on Elián

Thanks

Background: Elián's Gonzalez and his family moved from Andrews Air Force Base to the Wye Farm facility on April 25. On April 27 Elián's former kindergarten teacher and 11 year-old cousin arrived, followed on April 28 by Elián's four playmates, their accompanying parents and a pediatrician. At the airport, INS admitted the three accompanied children, their parents, and the pediatrician for two weeks. The Washington Times reported yesterday that the pediatrician had attempted to enter the United States with various controlled substances and that they were seized.

Cleared

Question: Can the Elián case lead to changes in U.S.-Cuba relations?

Answer: **THE SECRETARY OF STATE AND THE PRESIDENT HAVE BEEN**

VERY CLEAR- OUR POLICY TOWARDS CUBA WILL CHANGE WHEN

CUBA UNDERTAKES FUNDAMENTAL, SYSTEMIC, DEMOCRATIC

CHANGES. IN THE MEANTIME, WE CONTINUE TO REACH OUT TO THE

CUBAN PEOPLE THROUGH PEOPLE-TO-PEOPLE PROGRAMS SUCH AS

THE RE-ESTABLISHMENT OF REMITTANCES AND DIRECT FLIGHTS AND

FURTHERING EXCHANGES BETWEEN OUR TWO PEOPLES.

Question: Have Cuban officials been given access to Wye and how is that being regulated?

Answer: **THE DEPARTMENT OF STATE HAS APPROVED SOME LIMITED**

TRAVEL TO WYE FOR THE PURPOSE OF ASSISTING THE GONZALEZ

FAMILY WHILE AT WYE. WE HAVE ALSO APPROVED TRAVEL FOR

SOME CHILDREN AND ACCOMPANYING ADULTS FROM THE CUBAN

INTERESTS SECTION TO VISIT WITH THE GONZALEZ FAMILY LAST WEEKEND.

Question: Any plans to allow the Miami relatives to visit Elián at Wye?

Answer: **I WOULD REFER YOU TO THE DEPARTMENT OF JUSTICE ON THIS MATTER.**

Question: What about the visas? Has the Department finished its review of the pending cases?

Answer: **WE HAVE ISSUED VISAS TO ELIÁN'S FATHER, STEP-MOTHER, HALF-BROTHER, 11 YEAR-OLD COUSIN, HIS FORMER TEACHER, A PEDIATRICIAN, FOUR PLAYMATES AND AN ACCOMPANYING PARENT FOR EACH OF THOSE PLAYMATES. THE REMAINING VISA APPLICATIONS REMAIN UNDER REVIEW.**

Question: How long can these family and friends stay in the United States?

Answer: **THE FOUR PLAYMATES, THEIR ACCOMPANYING PARENTS AND THE PEDIATRICIAN WERE EACH GIVEN A MAXIMUM OF TWO WEEKS STAY BY THE INS AUTHORITIES AT THE PORT OF ENTRY. THE REMAINING INDIVIDUALS MAY REMAIN IN THE UNITED STATES UP TO THREE MONTHS FROM WHEN THEY ARRIVED. INDIVIDUALS MAY SOLICIT AN EXTENSION FROM THE INS IF THEY ARE REQUIRED TO REMAIN IN THE UNITED STATES LONGER.**

Question: Will the visas be extended?

Answer: WE BELIEVE THAT A TWO-WEEK VISIT BY ELIÁN'S PLAYMATES IS ADEQUATE. IF MR. GONZALEZ WISHES TO REQUEST AN EXTENSION OF THEIR STAY, THIS WILL NOT BE A MATTER OF HAVING VISAS EXTENDED. SHOULD THOSE WHO ARE ALREADY IN THE U.S. WISH TO REMAIN BEYOND THE LENGTH OF STAY THEY WERE GRANTED WHEN THEY ARRIVED, THEY SHOULD ADDRESS REQUESTS FOR EXTENSIONS OF STAY TO THE IMMIGRATION AND NATURALIZATION SERVICE. ~~HOWEVER, I WOULD REFER YOU TO THE INS ON THE PROCEDURES FOR REQUESTING EXTENSIONS;~~ I AM NOT AWARE THAT ANY SUCH REQUESTS HAVE BEEN FILED WITH INS.

Question: What about schooling for Elián?

Answer: I WOULD REFER YOU TO JUAN MIGUEL GONZALEZ'S ATTORNEY FOR INFORMATION PERTAINING TO ELIÁN'S EDUCATION WHILE IN MARYLAND.

Question: Is it true that Customs officials at Dulles seized controlled substances from the Cuban pediatrician?

Answer: MEDICATIONS WERE NOT SEIZED FROM THE CUBAN PHYSICIAN -- THEY WERE HELD -- BECAUSE THE CUBAN DOCTOR IS NOT LICENSED TO PRACTICE MEDICINE IN THE UNITED STATES. THE MEDICATIONS WILL BE RETURNED TO HER FOR RE-EXPORT WHEN SHE LEAVES THE UNITED STATES. ALL OF THE VISITORS WERE PERMITTED TO RETAIN MEDICINES THEY NEED FOR THEIR PERSONAL USE.

6-9500

WHA Press Guidance
April 10, 2000

Cuba: Elian

Background: Juan Miguel Gonzalez met with Attorney General Janet Reno on Friday. INS and DOJ have said that the Miami relatives will have to turn Elian over to his father this week.

Question: Situation update on Elian Gonzalez and Visas?

Answer: **SIX VISAS HAVE BEEN ISSUED, THE REMAINING 22 REMAIN UNDER REVIEW.**

Question: Is a policy review on the larger issue of US-Cuba relations going to take place once the Elian case is resolved?

Answer: **NO. WHAT WE ARE DEALING WITH IS A SIX-YEAR OLD AND THE REQUEST OF HIS ONLY SURVIVING PARENT TO BE REUNITED WITH HIS SON. WITH REGARD TO RELATIONS BETWEEN CUBA AND THE U.S., WE HAVE LONG SAID THAT IF THE GOVERNMENT OF CUBA MAKES FUNDAMENTAL, SYSTEMIC CHANGES, OUR RELATIONS WILL IMPROVE; IF IT DOES NOT, RELATIONS WILL NOT IMPROVE.**

WHA Press Guidance
April 18, 2000

To: Wendy Patten
Fr: Natty Torres
Final Version

Cuba: Elián and Human Rights

Background ONLY: On April 18 the Czech/ Polish sponsored resolution condemning Cuba's human rights situation was passed. We have received inquiries as to why Elián would be sent back to Cuba if we condemn the human rights situation. However, only if the parent wanted the child returned to a country where the child would be persecuted as defined in the Refugee Convention or tortured as defined in the Torture Convention would it be appropriate to refuse that request. The Commissioner and the Attorney General satisfied themselves that there was no objective reason to think that Elián will be persecuted or tortured in Cuba. This is consistent with the fact that not every person who lives in a country where there are human rights violations is himself a victim of persecution or torture.

Question: Why are you trying to send Elián back to Cuba while at the same time condemning the deplorable human rights conditions in that country?

Answer: **THE UNITED STATES IS A COUNTRY GOVERNED BY LAWS AND WE MUST UPHOLD THOSE LAWS. WHEN ELIÁN'S MOTHER DIED THERE WAS A SURVIVING PARENT -- JUAN MIGUEL GONZÁLEZ -- WHO IS EXERCISING PARENTAL RIGHTS IN CUBA AND WHO HAS ASKED THAT ELIÁN BE RETURNED TO HIM. THE RIGHTS OF PARENTS ARE RECOGNIZED INTERNATIONALLY AND HAVE BEEN A CENTRAL TENET OF OUR WORK ON BEHALF OF AMERICANS ABROAD. WERE THERE A SIMILAR CASE TO THAT OF ELIÁN INVOLVING AN AMERICAN CHILD ABROAD, THE DEPARTMENT OF STATE WOULD EXPECT THE FOREIGN GOVERNMENT TO RETURN THE CHILD TO THE SURVIVING PARENT IMMEDIATELY.**

**WE SIMPLY CANNOT TAKE THE POSITION THAT BECAUSE THE
GOVERNMENT OF A COUNTRY DENIES ITS CITIZENS HUMAN RIGHTS A
PARENT IN THAT COUNTRY MUST LOSE HIS OR HER PARENTAL
RIGHTS.**

Answered?

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

SUITE 200 GRAND BAY PLAZA
2665 SOUTH BAYSHORE DRIVE
MIAMI, FLORIDA 33133

TELEPHONE (305) 285-0800, EXT.: 101
TELECOPIER (305) 285-0257
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KENDALL COFFEY

April 22, 2000

VIA TELEFAX - (202) 514-4317

The Honorable Janet Reno
Attorney General of the United States
United States Department of Justice
Tenth and Constitution Avenue
Washington, D.C.

David J. Kline
Deputy Director
Office of Immigration Litigation
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

Dear General Reno and Mr. Kline:

This letter is not the medium to express our shock and disgust at the enormity of this morning's events. Those circumstances are being addressed separately. This letter is written to address the clear pronouncement by the Eleventh Circuit Court of Appeals that Elian Gonzalez is not to be removed from the United States until further order of the Court, and the specific directive that the federal defendants take such reasonable and lawful measures as are necessary to prevent his removal from the United States.

We are obviously concerned about the possibility that you may be in the process of placing Elian physically into the mission maintained by the Cuban Interests Section in Washington, D.C., or into any premises of the government of Cuba. Similarly, we have reason to believe that you are submitting the child to the effective control of the Cuban government. We strongly object to any such surrender of Elian. By handing over the child to be placed into any situation in which Cuban government personnel have control or supervision over Juan Gonzalez and Elian, you would be placing him in the hands of the government from which he is presently protected.

As a result, we believe that delivering the child to the control of the Cuban government is wrongful and illegal for at least three reasons. First, it would be functionally tantamount to allowing his removal from the United States, in violation of the Court's Order. Secondly, such removal would violate your duty to take "such reasonable and lawful measures as are necessary" to prevent Elian's removal because, once entrusted to the Cuban government, there is no realistic ability to ensure that he will not be taken to Cuba. Third, it is apparent that your surrender of the child to the control of Cuba's government will likely initiate precisely the harm of indoctrination and "therapies" that Elian's asylum rights are needed to prevent.

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

The Honorable Janet Reno and David J. Kline

April 22, 2000

Page 2

Both the Cuban Interests Section building and the premises of its diplomats are controlled by the government of Cuba. They are legally inviolable, and beyond the reach of any assistance that any court of the United States may be able to render to this child. Therefore, if Elian Gonzalez is allowed to enter what is, in substance, Cuban territory, he will not only have been effectively removed from the United States, but also from the effective jurisdiction of the courts of the United States.

Under international agreements to which the United States is a party, including the Vienna Convention, the property of a foreign state is immune from the jurisdiction of United States courts except under certain circumscribed conditions. None of these conditions applies in this case because, despite the various press reports about the promise of a waiver of immunity by the Cuban government, that promise was a falsehood and no waiver was ever delivered. Significantly, mission premises covered by the Convention include both owned property and leased property, such as the house of the head of the Cuban Interests Section in Bethesda, Maryland.

The realities that follow this result are well-settled in the law. No officer, agent, or employee of the United States, or of any State, can enter the mission without the consent of the senior diplomat. In fact, the police and the courts are powerless to prevent any abusive conduct or "therapies" that might go on inside. In a well-publicized case, fire fighters had to stand helplessly outside the mission of the former Soviet Union while a fire raged, placing surrounding structures at risk, until the Soviet government could be prevailed upon to allow entry. In short, we fear that the Administration which you serve is about to render futile the power of any court to intervene on behalf of Elian Gonzalez.¹

Just as critically, there is no basis to believe that the Cuban government will respect the Court's Order. For forty-one years, Castro's government has expressed nothing but contempt for U.S. law, its institutions and its people. To suggest that obedience to U.S. law and authority here is a likelihood would be absurd. Only a few years ago defenseless U.S. citizens were murdered over international waters by Cuban MIG jets firing heat-seeking missiles. Not surprisingly, nothing in this case shows any new-found respect by Cuba for U.S. laws or individual rights. To the contrary, Castro has proclaimed many times his obsession with getting Elian back to Cuba as quickly as possible. Correspondingly, the Cuban diplomats have already conducted themselves in a lawless

¹Diplomatic immunity, whether that of a diplomat or of his residence, may not be waived by the diplomat himself, but must be waived by the diplomat's State in an express writing transmitted to the State Department. See 4 Am. Jur. 2d at 19 (1995); United States of America v. Michael K. Deaver, 1987 WL 13365 (D.C. App. 1987); Ali Feteimi v. United States, 192 A.2d 525 (D.C. App. 1963); United States v. Arizti 229 F.Supp. 53 (S.D. N.Y. 1964) (stating that "the immunity [of a diplomat] is that of his government and is not personal to him and the government's waiver of diplomatic immunity, if any existed, does not require his consent"); The People v. Juan Vallejo Corona, 211 Cal.App.3d 529 (Cal. Ct. App. 5th Div. 1989).

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

The Honorable Janet Reno and David J. Kline

April 22, 2000

Page 3

manner by attacking and beating peaceful protesters outside the Cuban Interests Section with impunity. If you allow Elian Gonzalez to cross the threshold of any property of the government of Cuba, you will have allowed him, in effect, to be placed outside the United States, because you will have rendered this great nation powerless to aid this child. Moreover, if the Cuban government chooses to remove him in the dark of night, apparently the preferred method for destroying Elian's rights and well-being, there is nothing in your power to provide safeguards that are certain to prevent that removal.

In addition, you will be negating this six-year-old's asylum claim by handing him over to the same government that is about to persecute and manipulate Elian. Especially in light of the Eleventh Circuit's ruling four days ago, it would be deplorable if Elian's asylum claim could be circumvented by letting the Cuban government work its will on this child in advance of his receiving his day in court. There is little doubt now that, with every passing hour, increasing pressure will be imposed on Elian to repudiate his American family and his rights under our asylum laws.

In addition, there are a number of questions which must be answered -- first to preserve the Court's jurisdiction over the appeal, and most importantly, to preserve Elian's well-being:

1. Do you intend to transfer Elian to any premises owned or leased by the Cuban government? If so, please tell us when the transfer is planned.
2. Do you intend to permit agents of the Cuban government, including any individuals associated with the Cuban Interests Section, to meet with or otherwise observe Elian? If so, please inform us of the contemplated timing.
3. Has Elian met with any psychiatrists or psychologists?
4. Do you intend to permit any doctors, therapists, or other medical professionals in any way affiliated with or selected by the Cuban government to meet or observe Elian? If so, please state when that will occur.
5. Elian's treating physician remains willing and able to continue Elian's treatment. When will she be allowed to see Elian?
6. As you know, Elian's Miami relatives are in Washington. The government has denied them any access to Elian. How soon do you intend to permit them to meet with Elian?
7. Is it your belief that the Castro government and its agents can be trusted concerning U.S. laws and human rights of individuals, including Elian Gonzalez?

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

The Honorable Janet Reno and David J. Kline
April 22, 2000
Page 4

We demand that these questions be answered immediately. In light of the Department's indifference toward religious holidays and observances, we see no reason why these basic questions cannot be answered by 3:00 p.m. tomorrow. In view of the foregoing, we demand that no action be taken that would place Elian Gonzalez on premises owned or leased by the Cuban government or its personnel, or otherwise delivered into the control of agents of the Cuban government, prior to the determination of Elian's appellate rights.

Very truly yours,



Kendall Coffey

cc: William J. Howard, Esq.
Dexter A. Lec, Esq.

COFFEY DIAZ & O'NAGHTEN, L.L.P.
200 Grand Bay Plaza
2665 South Bayshore Drive
Miami, Florida 33133
Telephone: 305-285-0800
Facsimile: 305-285-0257

FACSIMILE COVER SHEET

DATE: April 22, 2000

TO: The Honorable Janet Reno (202) 514-4317
David J. Kline, Esquire (202) 616-4948
Dexter A. Lee, Esq. (305) 530-7139
William J. Howard, Esquire (202) 616-4948

FACSIMILE: See above

FROM: Kendall Coffey, Esq.

RE Elian Gonzalez (0340.001)

PAGES: (including cover sheet): 5

COMMENTS: Please see attached letter.

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285-0800 AS SOON AS POSSIBLE. THANK YOU.**

Sex Slavery Flourishes In Kosovo

E. European Women Forced Into Brothels

By PETER FINN
Washington Post Foreign Service

PRISTINA, Yugoslavia—The sex-slave traffic in East European women, one of the major criminal scourges of post-communist Europe, is becoming a serious problem in Kosovo, where porous borders, the presence of international troops and aid workers and the lack of a working criminal justice system have created almost perfect conditions for the trade. U.N. police officials, NATO-led peacekeepers and humanitarian workers say.

In the past six months, U.N. police and troops have rescued 50 women—Moldovan, Ukrainian, Bulgarian and Romanian—from brothels that have begun to appear in cities and towns in Kosovo, a province of Serbia, the dominant republic of Yugoslavia. Police and aid workers say they fear that hundreds more, lured from their impoverished homelands with the promise of riches, may also be living in sexual servitude.

"These women have been reduced to slavery," said Col. Vincenzo Coppola, commander of a special unit of the Italian carabinieri, or national police, in Kosovo that has rescued 23 women on raids of brothels in Pristina, the provincial capital, and Prizren.

According to police sources and aid workers, the women—and some girls as young as 15—were transported along a well-established

See KOSOVO, A20, Col. 2

The Post on the Internet:
www.washingtonpost.com



Gonzalez and his father, Juan Miguel Gonzalez, stroll the grounds at Andrews Air Force Base.

comfort from politicians and a few local supporters who waved

REI

IN THE BEGINNING | Washington's First Century

The Longest, Hottest Summer

During Washington's bicentennial year as the U.S. capital, another in a monthly series on the people and events that shaped this city during its formative years.

By MICHAEL FARQUHAR
Washington Post Staff Writer

The sweltering languor of August in Washington gave way to a spreading panic in 1814. It was two years into America's second war with Britain and the enemy was marching ever closer to the heart of her former colonies. Local residents—having heard of the terrible destruction already inflicted by the British on a number of towns along the Chesapeake Bay—were eager to escape the coming onslaught.

The dusty roads leading out of the capital were filling with citizens carting out their most valued possessions, while the few government workers not serving in the local militia struggled at the same time to save what they could of the young republic's most vital records and



An unknown painter captured Washingtonians fleeing the city during the 1814 invasion.

irreplaceable treasures.

In this atmosphere of escalating fear and tension, Stephen Pleasonton, a State Department clerk, went to work saving the Declaration of Independence and the U.S. Constitution from destruction. With the War of 1812 es-

entially a second dependence, this interference in U eighty, Pleasonton precious document

See CENTURY, A4

Fallout From a CIA Affidavit

Rogue Ex-Agent Seeks to Overturn '83 Conviction

By VERNON LOEB
Washington Post Staff Writer

The globe-trotting exploits of Edwin P. Wilson, a rogue former CIA agent, ended in a Houston courtroom in 1983. Federal prosecutors accused him of shipping 22 tons of C-4 plastic explosives to Libya in the largest illegal arms deal in U.S. history. Wilson's only defense: He had been selling arms to Libya as cover to gather intelligence for the CIA.

At a critical point in the trial, prosecutors presented an affidavit from a top CIA official denying that Wilson had been asked "to perform or provide any services, directly or indirectly." Before convicting Wilson, the jury asked to have the affidavit reread

to them. That convinced the lone holdout. Wilson got 52 years in prison.

Now, nearly two decades later, that brief sworn statement—3½ pages signed by Charles A. Briggs, then the third-ranking CIA official—is having an explosive impact of its own.

It turns out the affidavit wasn't true. Wilson had in fact been asked to perform services for the CIA, although none of them involved the selling of C-4.

Newly declassified documents show that a CIA investigator immediately questioned the accuracy of the affidavit after Wilson was convicted. Senior attorneys at both the CIA and the Justice Department concluded

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U.N. Police Crack Down on Kosovo Brothels

KOSOVO, From A1

lished organized crime network from their East European homelands to Macedonia, which borders Kosovo to the south. There, they were held in motels and sold at auction to ethnic Albanian pimps for \$1,000 to \$2,500. The pimps work under the protection of major crime figures in Kosovo, officials said, including some with links to the former anti-Serbian rebel force, the Kosovo Liberation Army.

The women, who had been stripped of their passports, were frequently held in unheated rooms with primitive sanitary conditions in Kosovo and forced to engage in unprotected sex, sometimes up to 16 times a night, for no payment, according U.N. police officers who requested anonymity because of U.N. regulations limiting their authority to speak with reporters.

The undermanned U.N. police force is hard-pressed to cope with a variety of criminal activities in this war-scarred province, and authorities and aid workers here have been slow to respond to the burgeoning sex-slave trade. Moreover, there are limited humanitarian resources available to protect those women who are able to seek sanctuary.

In addition, officials said, the trade has flourished because of a lack of applicable law on both trafficking and prostitution and because some countries with military forces here have tended to dismiss the activity as simple prostitution. German peacekeepers in southern Kosovo, for instance, have taken a benign view of the phenomenon in part because prostitution is tolerated in Germany.

International aid workers are trying to convince them that these women are victims. "It's not classic prostitution," said one aid worker who has interviewed rescued women and is working on a draft U.N. regulation to punish people involved in the sex-slave trade. "They are not paid. They are never paid. Of the 50 women we have seen, not one has received a single deutsche mark, and they

are often held in horrendous conditions."

According to authorities, the women were told that before they could keep any of their earnings, they first had to pay the pimps for their purchase price. Often, however, they found themselves fined for such infractions as not smiling at customers, so there was no way they would ever have enough money to make the payoff. If they protested, the women said, they were beaten.

A number of the women appear to have contracted sexually transmitted diseases, officials said, and international groups are attempting to obtain treatment for them either in Kosovo or as soon as they can return to their homelands. "This is a major problem, and it is going further underground because of police raids," said one aid worker. "At first, it was very out in the open, and so-called nightclubs were popping up. But now it's moving into private dwellings, and I expect if we get a reliable phone network we'll soon see call-girl services."

International organizations recently established a safe house to protect women who escape from the brothels until they can be returned home. But it is now full, with 21 women, and police have had to suspend raids on other brothels until they can repatriate some of the former captives.

International officials declined to allow a reporter to speak to any of the rescued women. But in bars in Pristina, Gnjilane and Urosevac, there are young Moldovan and Ukrainian women who describe themselves as "waitresses" seeking economic opportunity in Kosovo. "I can earn 400 deutsche marks [\$200] a month," said a Moldovan woman at a cafe in Gnjilane, where beds are set up behind a dank front bar. Asked how much cash she had on her possession, the woman said only, "I'm okay," as an ethnic Albanian bar manager looked on.

According to the rescued women, the clientele varies from brothel to brothel, officials said. Some serve mostly ethnic Albanians;

others cater to a mixture of ethnic Albanians and international workers. Peacekeeping troops—including Americans—also were customers, the women said. U.S. officials deny that American troops visit the brothels, pointing out that soldiers are confined to base when they are off duty.

The first case of sex-slave trafficking came to light in October—four months after NATO-led peacekeepers entered the province—when French police officers raided a brothel in Kosovska Mitrovica and found two Ukrainian women, ages 21 and 22, and two Serbs, one of whom was a minor. The establishment was closed and the Serbs were released, but the French did not know what to do with the two Ukrainians, who had no travel documents, officials said.

According to sources familiar with the case, the French policemen detained the women at a military camp while they appealed, without success, to humanitarian organizations for assistance. After two weeks, fearful of a public relations disaster because of the presence of "prostitutes" at a military facility, the French policemen took the two women to the administrative boundary between Kosovo and Serbia proper and essentially expelled them. It is unclear what happened to them.

In November and December, further cases of forced prostitution came to light when U.N. policemen visited a number of bars in Pristina—bars with such names as Totos and the Miami Beach Club—and removed women who appealed to them for help.

On Jan. 22, officers with the Italian police unit entered an establishment on the outskirts of Pristina called the International Club, where they were approached by women asking for help. The club, now closed, was a crude structure with a small bar and barren rooms in the back that were

equipped with just a bed and a red light bulb. Some women were kept in an attic. The following night, the Italians raided the club and rescued 12 women, mostly Moldovans and Ukrainians, who appealed for sanctuary.

The Italians were criticized for conducting the raid without coordinating with the U.N. police and humanitarian organizations who then had to assume care of the women. But their efforts did to official recognition of the problem and the creation of the safe house in early February.

That has allowed international workers to interview the women and understand the process by which they were brought into the sex industry. In the last 10 years, according to women's advocacy groups, hundreds of thousands of women from the former Soviet republics and satellites have been trafficked to Western Europe, Asia and the United States. Kosovo, which had some local prostitution but no trafficking problem before the peacekeepers arrived after the Kosovo war ended last June, is just another new market, officials said.

Most of the women interviewed responded to newspaper ads seeking "attractive women" to work in the West and, in fact, knew they would work in the sex industry. A small minority told police they been kidnapped or were completely deceived when they applied for jobs in the West, including one Moldovan teenager who got pregnant in Kosovo, police officials said.

"The women we've spoken to left their countries of their own volition and basically knew they would work as prostitutes," said a U.N. police officer in Gnjilane. "But they thought they could earn thousands of dollars in some exotic location like Italy or Spain and then go home rich. Instead, they end up imprisoned here without a dime."

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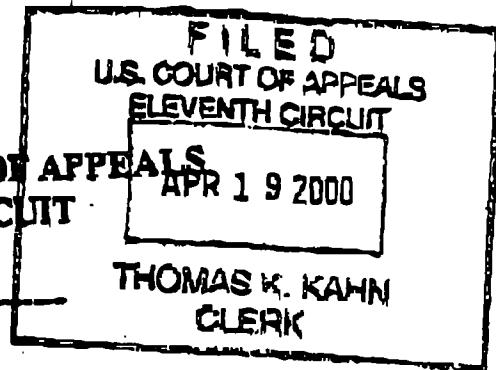
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**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**



No. 00-11424-D

D. C. Docket No. 00-206-CV-KMM

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

Plaintiff,

v.

**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**

Before EDMONDSON, DUBINA and WILSON, Circuit Judges.

BY THE COURT:

Elian Gonzalez ("Plaintiff"), a six-year-old child from Cuba, has made his way to the United States. Plaintiff, as an alien, submitted an application for asylum, pursuant to 8 U.S.C. § 1158(a), to the Immigration and Naturalization Service ("INS").¹ His father asked, in effect, that the application be withdrawn. After an investigation, the INS — deciding that Plaintiff could not apply for asylum himself and that, under the circumstances, only his father could seek asylum on Plaintiff's behalf — concluded that there was no reason not to honor the father's request and, accordingly, refused to consider Plaintiff's application. Plaintiff then brought suit in federal district court challenging on several grounds the INS's refusal to consider his application.² The district court rejected Plaintiff's claims.

¹ Several applications for asylum were actually submitted on Plaintiff's behalf. One was signed by Plaintiff himself. The others were signed by Plaintiff's great uncle and temporary custodian (selected by the INS), Lazaro Gonzalez.

² Plaintiff is a minor; Plaintiff's suit was brought by and through Lazaro Gonzalez as next friend. See generally Fed. R. Civ. P. 17(c).

Plaintiff has appealed the district court's decision to this Court.³ His appeal is scheduled to be argued orally next month. Plaintiff, however, now moves for an injunction "to preclude [Plaintiff's] physical removal from the jurisdiction of the United States during the pendency of this appeal."⁴ We conclude that Plaintiff is entitled to such an injunction and grant the motion.

In considering a motion for injunction pending appeal, we examine four factors: (1) whether the movant is likely to prevail on the merits of his appeal; (2) whether, if we do not issue an injunction, the movant will suffer irreparable harm; (3) whether, if we issue an injunction, any other party will suffer

³ This Court, on 27 March 2000, expedited Plaintiff's appeal and scheduled oral argument for the week of 8 May 2000.

⁴ A party must ordinarily first move in the district court for an injunction pending appeal. In this case, Plaintiff came directly to the appellate court. A motion for an injunction pending appeal may be made directly to the court of appeals when a party shows that moving first in the district court would be impracticable. See Fed. R. App. P. 8(a)(2). In this case, we are satisfied that Plaintiff has sufficiently shown that it would have been impracticable to move first in the district court: the time-sensitive nature of the proceedings and the possibility that we could have lost jurisdiction in the absence of an injunction support our exercise of discretion in this case. See also Michael v. INS, 48 F.3d 657, 663 (2d Cir. 1995).

On 13 April 2000, a single-judge emergency order, enjoining Plaintiff's removal from the United States, was issued until a three-judge panel had considered fully Plaintiff's motion for injunction pending appeal. We now have considered fully Plaintiff's motion, and the single-judge emergency order has served its purpose. The single-judge order, accordingly, is replaced by this Order.

substantial harm; and (4) whether an injunction would serve the public interest. See In re Grand Jury Proceedings, 975 F.2d 1488, 1492 (11th Cir. 1992). Although the first factor is generally the most important, the movant need not always show that he probably will succeed on the merits of his appeal. Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986). Instead, where the "balance of the equities weighs heavily in favor of granting the [injunction]," the movant need only show a "substantial case on the merits." Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981); see also Hilton v. Braunskill, 107 S. Ct. 2113, 2120 (1987); United States v. Hamilton, 963 F.2d 322, 323 (11th Cir. 1992); Garcia-Mir, 781 F.2d at 1453.

In this case, the balance of the equities weighs heavily in favor of enjoining the removal of Plaintiff from the United States pending appeal. And Plaintiff has made a "substantial case on the merits" of his appeal.

1. "Balance of the Equities"

The equities, in this case, weigh heavily in favor of issuing an injunction pending appeal. Apart from concerns about what might happen to this child if he is returned to Cuba (which we do not address), if Plaintiff leaves the United

States during the pendency of his appeal, his case will likely become moot.

Our failure to issue an injunction pending appeal, therefore, could strip the Court of jurisdiction over this case and deprive Plaintiff forever of something of great value: his day in a court of law. That circumstance alone presents a significant risk of irreparable harm to Plaintiff. See Michael v. INS, 48 F.3d 657, 664 (2d Cir. 1995).

In addition, we doubt that an injunction would harm the INS.⁵ Plaintiff has been in the United States for nearly five months. The INS refused to consider Plaintiff's application for asylum more than three months ago. The INS, however, has not sought to remove Plaintiff in the meantime from the United States. The suggestion that an injunction pending appeal, prohibiting the removal of Plaintiff from the United States until Plaintiff's expedited appeal is decided on the merits, will harm the INS is not compelling.

Nor do we believe that an injunction pending appeal in this case would offend the public interest. The INS, in opposition to Plaintiff's motion, invokes the well-established authority of the political branches of government in immigration affairs. We fully recognize the plenary power of Congress over

⁵Multiple Defendants are in this case. But we refer to Defendants collectively as the "INS."

immigration matters. See Jean v. Nelson, 727 F.2d 957, 965 (11th Cir. 1984) (en banc). But we fail to see how an injunction in this case infringes upon the congressional power; after all, the heart of Plaintiff's appeal is that the INS -- by refusing to consider Plaintiff's asylum application -- has disregarded the command of Congress. And we doubt that protecting a party's day in court, when he has an appeal of arguable merit, is contrary to the public interest. We, therefore, conclude that the equities weigh heavily in favor of granting an injunction pending appeal.⁶

⁶The INS also asserts that, under the equitable doctrine of "unclean hands," Plaintiff is unentitled to seek the equitable remedy of an injunction pending appeal. The INS urges that Lazaro Gonzalez's alleged failure to comply with an INS order, directing that he surrender Elian Gonzalez to the INS at a Miami airport, renders Plaintiff's hands unclean. Whether Lazaro Gonzalez failed to comply with a lawful order of the INS and whether such failure would justify invocation of the unclean hands doctrine in some cases are issues that we need not decide today. Lazaro Gonzalez is not the plaintiff in this case; Plaintiff is Elian Gonzalez. However unclean Lazaro Gonzalez's hands may be, the INS has suggested no misconduct on the part of Plaintiff, Elian Gonzalez, that would justify application of the unclean hands doctrine in this case to him.

2. "Substantial Case on the Merits"

This case is mainly about statutory construction and the proper exercise of executive discretion. Among other things, we must ultimately decide what Congress meant when it said:

Any alien who is physically present in the United States or who arrives in the United States . . . 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). Plaintiff argues that the INS's refusal even to consider his application violates 8 U.S.C § 1158(a). The INS contends that, because Plaintiff is a six-year-old child, he is incompetent to submit an application on his own behalf and that, on the facts of this case, he must have his father submit the application for him.⁷ Because his father did not do so, the INS contends that Plaintiff never actually applied for asylum and that, therefore, no application exists for its consideration. Even accepting as we do the principles of deference set out in Chevron v. Natural Resources Defense

⁷Although the INS determined that Plaintiff was incompetent to make immigration decisions, it bears repeating that the INS made this determination without having met with Plaintiff or having any evaluations done on his capacity.

Council, Inc., 104 S. Ct. 2778 (1984), we at this time have doubt, in the light of the record and Plaintiff's arguments on appeal, about the correctness of the INS's interpretation of section 1158.

In considering an agency's interpretation of a statute, we first must examine the plain meaning of the pertinent statutory language: "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." Chevron, 104 S. Ct. at 2781 (1984). The statute in this case seems pretty clear. Section 1158(a)(1) provides that "[a]ny alien . . . irrespective of such alien's status, may apply for asylum." Plaintiff appears to come within the meaning of "[a]ny alien." See 8 U.S.C. § 1101(a)(3). And the statute plainly says that such an alien "may apply for asylum." We, therefore, question the proposition that, as a matter of law, Plaintiff (unless his father consents) cannot exercise the statutory right to apply for asylum.

Congress's provision for "any alien" is not uncertain in meaning just because it is broad. See Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S.

⁸ Congress specifically and expressly excluded three groups of aliens from the meaning of "[a]ny alien." See 8 U.S.C. § 1158(a)(2). School-age children are not among the excluded groups, however. See id.

206, 211 (1998). If Congress had meant to include only some aliens, perhaps Congress would not have used the words "any alien." In addition, although the INS has the authority to issue regulations and procedures governing the submission of asylum applications, see 8 U.S.C. § 1158(d), the INS cannot properly infringe on the plain language of the statute or the clear congressional purpose underlying it. See Shoemaker v. Bowen, 853 F.2d 858, 861 (11th Cir. 1988). Nor can the INS properly narrow the scope of a statute through regulation. See Ellis v. General Motors Acceptance Corp., 160 F.3d 703, 708-09 & n.5 (11th Cir. 1998). At this time, we cannot say that "any alien" excludes Plaintiff: given the plain language of the statute, he might be entitled to apply personally for asylum. Furthermore, it seems unclear that an INS decision to treat Plaintiff's application as a nullity without an adjudication on the merits is a "procedure for the consideration of [Plaintiff's] asylum application." See 8 U.S.C. § 1158(d)(1).

⁹To some people, the idea that a six-year-old child may file for asylum in the United States, contrary to the express wishes of his parents, may seem a strange or even foolish policy. But this Court does not make immigration policy, and we cannot review the wisdom of statutes duly enacted by Congress. If Congress intended — as evidenced by the plain meaning of section 1158 — that a school-age child (such as Plaintiff) be able to file personally an application for asylum, this Court and the INS are bound to honor the policy-decision made by Congress.

Not only does the plain language of the statute seem to support Plaintiff's argument that he, despite his age, is entitled to apply personally for asylum, the present regulatory scheme created by the INS also seems to strengthen Plaintiff's position. The existing INS regulations do envision situations where a minor may act on his own behalf in immigration matters.¹⁰ Moreover, the regulations contemplate that a minor, under some circumstances, may seek asylum against the express wishes of his parents.¹¹ Also, the INS Guidelines for Children's Asylum Claims (Dept. of Justice, December 1998)

¹⁰See 8 C.F.R. § 103.2(a)(2) ("An applicant or petitioner must sign his or her application or petition. However, a parent or legal guardian may sign for a person who is less than 14 years old.") (emphasis added); 8 C.F.R. § 236.3(h) ("When a juvenile alien is apprehended, he or she must be given a [Notice of Rights and Disposition Form]. If the juvenile is less than 14 years of age or unable to understand the notice, the notice shall be read and explained to the juvenile in a language he or she understands. In the event a juvenile who has requested a hearing pursuant to the notice subsequently decides to accept voluntary departure or is allowed to withdraw his or her application for admission, a new [form] shall be given to and signed by the juvenile.")

¹¹See 8 C.F.R. § 236.3(f) ("If a juvenile seeks...any form of relief from removal, where it appears that the grant of such relief may effectively terminate some interest inherent in the parent-child relationship and/or the juvenile's rights and interests are adverse with those of the parent, and the parent is presently residing in the United States, the parent shall be given notice of the juvenile's application for relief"); Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985); cf. Johns v. Dept. of Justice, 624 F.2d 522 (5th Cir. 1980).

("Guidelines") envision that young children will be active and independent participants in the asylum adjudication process.¹²

¹²The Guidelines provide asylum officers with information about how to talk to and interview a young child about his asylum application. The Guidelines repeatedly stress that the kind of questions which should be asked and the kind of answers which should be expected varies according to the age of the applicant and that special care should be taken when interviewing young children. The Guidelines also say that "Asylum Officers should not assume that a child cannot have an asylum claim independent of the parents," and that "[w]hen a parent or parents do not appear to have an approvable claim, an Asylum Officer should routinely make an inquiry into the child's case even though the child may be listed merely as a derivative on a parent's application and may not have filed a separate [] asylum application." See Guidelines at 15. The Guidelines also say that "the age, relative maturity, ability to recall events, and psychological make-up of the child will affect the quality of the answers an Asylum Officer is able to elicit from that child. While the burden of proof remains on the child to establish his or her claim for asylum, an Asylum Officer must take these and other factors into account when assessing the credibility of a claim and must also attempt to gather as much objective evidence as possible to evaluate the child's claim." See Guidelines at 17. Above all, the INS Guidelines say that "[w]hen...it appears that the will of the parents and that of the child are in conflict, the adjudicator will have to come to a decision as to the well-foundedness of the minor's fear on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt." See Guidelines at 20 (citations omitted).

An additional point of interest is that the INS Asylum Officer Corps Training Guidelines for Children's Asylum Claims (INS January 1999) discuss the three age-based developmental stages of children (0-5, 6-12, 13-18 years old) and provide guidance for asylum officers in dealing with children in each category. Notably, the training guidelines provide an example of a statement from a six-year-old child and provide information which can be used to assess statements by children of that age. See id. at 10-18.

The INS has not pointed to (nor have we found) statutory, regulatory or guideline provisions which place an age-based restriction on an alien's ability to apply for asylum. And we have found no preexisting requirement that a minor, in submitting an asylum application, must act through the representative selected by the INS.¹³

Not only does it appear that Plaintiff might be entitled to apply personally for asylum, it appears that he did so. According to the record, Plaintiff -- although a young child -- has expressed a wish that he not be returned to Cuba.¹⁴ He personally signed an application for asylum.¹⁵

¹³The INS Guidelines cite to a number of studies and articles dealing with the ability of children to testify as witnesses in judicial proceedings. See Guidelines, at 13 n.21. At the least, this reference supports the inference that the INS envisioned that the kind of competency required for a minor to apply for asylum is competency to testify, see Maryland v. Craig, 497 U.S. 836 (1990), not legal competency to contract and so on, which is a much different standard.

Caselaw supports the inference that complete legal competency has not been the determinative circumstance for whether a minor may apply for asylum. See Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985)(allowing a 12-year-old minor to apply for asylum).

¹⁴We do not now suggest that the stated intentions of a six-year-old child are dispositive or even entitled to substantial weight in deciding whether the child ultimately receives a grant of asylum. Still, a colorable argument exists that a school-age child's expressed wishes about where he wants to live can trigger the requirement that Plaintiff's claim for asylum be given full and fair consideration. This conclusion may be particularly true where, as here, Plaintiff has indicated to mental health professionals that he does not want to

Plaintiff's cousin, Marisleysis Gonzalez, notified the INS that Plaintiff said he did not want to go back to Cuba. And it appears that never have INS officials attempted to interview Plaintiff about his own wishes.

Even if the INS is correct that Plaintiff needs an adult, legal representative for his asylum application, it is not clear that the INS, in finding Plaintiff's father to be the only proper representative, considered all of the relevant factors -- particularly the child's separate and independent interests in seeking asylum. Cf. Polovchak v. Meese, 774 F.2d 731, 736-7 (7th Cir. 1985); Johns v. Dept. of Justice, 624 F.2d 522, 524 (5th Cir. 1980) (recognizing in the context of a deportation hearing that the mother's interests are not necessarily the same as her four-year-old child's). It does not appear that the INS ever spoke to or interviewed Plaintiff before making this determination. And Lazaro Gonzalez, Plaintiff's great uncle, is no stranger to Plaintiff. The

return to Cuba, and where those mental health professionals have said that he understands what he is saying. These statements might ultimately not be of great weight in determining Plaintiff's application for asylum, but we are not sure that they can be summarily dismissed as having no weight at all.

¹⁵Plaintiff's application was complete. To date, none of Plaintiff's applications were returned by the INS for being incomplete. According to its own regulations, the INS "shall adjudicate the claim of each asylum applicant whose application is complete within the meaning of § 208.3(c)(3)." 8 C.F.R. § 208.9(a) (emphasis added).

INS placed Plaintiff in Lazaro's care upon Plaintiff's arrival in this country, and Lazaro is a blood relative. When Lazaro submitted applications for asylum on Plaintiff's behalf, Lazaro was the INS's designated representative to take care of Plaintiff and to ensure his well-being. See 8 C.F.R. § 236.3(b)(4) (stating that where a minor is paroled to someone other than the parent or legal guardian, "such person must execute an agreement to care for the juvenile"). Lazaro's interests, to say the least, are not obviously hostile to Plaintiff's interests. So, for now, we remain unconvinced that the asylum application submitted by Lazaro on behalf of Plaintiff necessarily was ineffectual under the law.

For these reasons and in these circumstances, we believe that Plaintiff has presented a substantial case on the merits.

CONCLUSION

By its nature, this Order sets out more questions than answers. We have not attempted to address every point advanced by both sides, but we have attempted to explain our decision to grant the injunction. No one should feel confident in predicting the eventual result in this case.

The true legal merits of this case will be finally decided in the future. More briefing is expected. We intend to hear oral argument. We need to think more and hard about this case for which no sure and clear answers shine out today. Still, because of the arguments presented as well as the potential inconsistencies of the INS's present position with the plain language of the statute and with the INS's own earlier interpretations of the statute in INS regulations and guidelines, and because of the equities in this case, we conclude that Plaintiff is entitled to an injunction pending appeal.¹⁶

Therefore, it is ordered that:

- (1) Plaintiff, Elian Gonzalez, is ENJOINED from departing or attempting to depart from the United States;

¹⁶The INS, in its response to Plaintiff's motion, said it would consent to an injunction requiring the INS to bar Plaintiff's departure from the United States if this Court also entered an order directing Lazaro Gonzalez to present Plaintiff to the INS, as directed by the INS, for transfer of care to Plaintiff's father. We decline to proceed in that manner.

To decide Plaintiff's motion and to preserve his right to a day in court, we need only address the issue of Plaintiff's removal from the country. We need not decide where or in whose custody Plaintiff should remain while this appeal is pending. This Order only prevents Plaintiff's removal from this country.

- (2) Any and all persons acting for, on behalf of, or in concert with Plaintiff, Elian Gonzalez, are ENJOINED from aiding or assisting, or attempting to aid or assist, in the removal of Plaintiff from the United States;
- (3) All officers, agents, and employees of the United States, including but not limited to officers, agents, and employees of the United States Department of Justice, are ENJOINED to take such reasonable and lawful measures as necessary to prevent the removal of Plaintiff, Elian Gonzalez, from the United States.¹⁷

MOTION GRANTED.

IT IS SO ORDERED.

¹⁷Plaintiff, in his reply brief, requested that this Court order mediation in this case. Although we may direct the parties to participate in mediation, see Fed. R. App. P. 33, we choose not to do so at this time. Nevertheless, we encourage the parties to avail themselves voluntarily of this Court's mediation services.

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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]

Patten, Wendy L. (MULTI)

From: Hargis, Robert C. (WHSR)
Sent: Monday, April 24, 2000 8:28 AM
To: Patten, Wendy L. (MULTI)
Subject: Wendy -- noticed this in the Queue FYI [UNCLASSIFIED]

PRIORITY: RUSH CATEGORY: WASHINGTON DATELINE
SUBJECT: RENO: ``WE DID WHAT WE HAD TO DO" ORIG: AP/East
RECEIPT_TIME: 000424081838 a0498

^PM-Cuban Boy, 1st Ld-Writethru, a0433,900

^Reno: ``We did what we had to do"

^Eds: TOPS with 12 grafs, Reno and Podhurst interviews today; picks up graf 8, The little

^AP Photos NY107-108

^By WILL LESTER= ^Associated Press Writer=

WASHINGTON (AP) Attorney General Janet Reno today defended the federal raid that reunited 6-year-old Elian Gonzalez with his father.

``I have no regrets whatsoever," she declared.

``I tried my level best to make sure we avoided this situation and if I bent over backward, so be it," she said on NBC's ``Today."
``I'm satisfied with the result."

Armed agents broke into the Miami home of the boy's relatives early Saturday only after negotiations with the family there produced mixed signals, Reno said. ``We were told we would have a deal if we did certain things and we did it and it evaporated."

The federal government worked hard to make sure the young Cuban refugee was reunited with his father in a peaceful and voluntary way, Reno said. ``We tried and tried." In the end, ``We did what we had to do and we now need to move forward and to give this little boy and his father a chance to heal."

A longtime friend of Reno, Aaron Podhurst, was brought into the negotiations with the Miami relatives on Thursday and was on the phone with the attorney general just before the raid was carried out. ``I believe a deal was within minutes or an hour away," he told NBC. ``I was shocked, I was disappointed, I couldn't believe what I was looking at on TV."

Podhurst said he talked to Reno shortly afterward and told her of his disappointment. ``She was as sad as I've ever seen her," he said.

Elian and his father are staying at Andrews Air Force Base outside Washington, where some of their Cuban relatives are demanding a meeting. The custody battle that has made headlines around the world is also getting renewed attention from members of Congress while the family awaits the next court action on the case.

But on Easter Sunday, the boy's father, Juan Miguel Gonzalez, tried to create a hometown aura at the Air Force base.

They shared a meal of black beans and rice, walked on the grounds of the base with Elian's stepmother and half brother, even got a visit from the base's Easter Bunny.

``We're trying to re-establish a more normal routine, a less tumultuous atmosphere," Gregory Craig, lawyer for Elian's father, told The Associated Press on Sunday. ``The relatives have got to respect that."

Miami relatives pleaded Sunday to see the boy they virtually adopted after his rescue from an inner tube in the Atlantic last Thanksgiving. His mother drowned when the boat carrying them from Cuba sank off the coast of Florida.

``I will not leave until I see this boy," a tearful Marisleysis Gonzalez, a 21-year-old cousin from Miami who has been caring for Elian, told a Washington news conference. ``I know he's not OK."

The little boy with the ready smile became a political, almost religious, icon for the Cuban-American community over the last five months. And when federal agents snatched him in the pre-dawn hours Saturday, Miami's Little Havana erupted into near riots that finally calmed on Sunday.

Craig questioned the tactics of the Miami relatives, saying he had thought they would "establish a channel of communication" with the father rather than hold news conferences and make public demands.

"I think it's unfortunately been something of a disruptive cloud," he said.

Juan Miguel Gonzalez and his immediate family are considering where to move while they await resolution of their appeal now pending before the 11th Circuit Court of Appeals in Atlanta. But Craig said they have not made a final decision. He said they will stay in this country through the appeals, bound both by the father's word and numerous legal restraints.

"They will remain here until the appeals process is exhausted and the stay or injunction is lifted," Craig said. "That's why we want to bring some familiarity and normality both for the boy and for Juan Miguel."

Craig is still exploring the possibility of bringing some of Elian's classmates and their parents to this country to wait with the boy and his family. Craig said the request is still before the State Department, which he said has been a bit more receptive to the idea.

As the father was trying to calm the family atmosphere around Elian, the political climate on Capitol Hill heated up Sunday, with many lawmakers questioning the federal raid.

"This is a frightening event, that American citizens now can expect that the executive branch on their own can decide on whether to raid a home," said House Republican whip Tom DeLay of Texas. Republicans talked of congressional hearings on the raid and inviting Reno this week to discuss the case.

The Justice Department's second-ranking official said the only regret was that authorities waited as long as they did.

"We were forced into the action we took by the intransigence of that family" in Miami, said Deputy Attorney General Eric Holder. "We probably should have taken a decisive action sooner."

In a national CNN-Gallup poll taken after the seizure, nearly six in 10 respondents supported the government's actions to reunite Elian with his father. They were split on whether the government used too much force.

Miami fell quiet for the Easter celebration, but was still a city under tight police control with smaller scale demonstrations. Sergio Perez, a Miami neighbor of the family who had cared for Elian, said simply:

"We will celebrate in tears."

^=

EDITOR'S NOTE Associated Press writers Brendan Farrington in Miami and Cal Woodward and Brigitte Greenberg in Washington contributed to this story.

^=

On the Net:

Immigration and Naturalization Service: <http://www.ins.usdoj.gov>

Miami relatives: <http://libertyforelian.org>

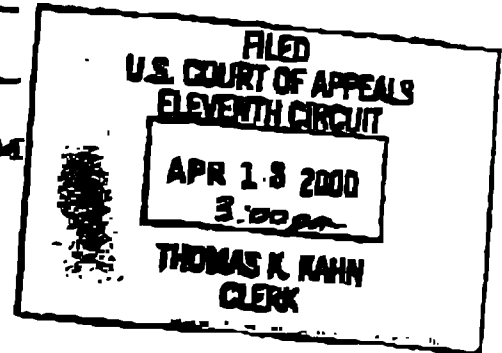
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**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 00-11424-D

D. C. Docket No. 00-206-CV-KMOM

**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 MEISNER, 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); 11th 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 (11th Cir. 1993). 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 (5th Cir. 1981); see also United States v. Hamilton, 963 F.2d 322, 323 (11th Cir. 1992); Garcia-Mir v. Mesa, 781 F.2d 1450, 1453 (11th 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

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NEWS

Published Tuesday, April 18, 2000, in the Miami Herald

Ruling on Elian's departure looms

BY JAY WEAVER, ANDRES VIGLUCCI AND KAREN BRANCH
jweaver@herald.com

A federal appeals court Monday kept Miami, Washington and Havana in suspense over whether it would issue an order temporarily barring Elian Gonzalez's removal from this country.

By day's end, the 11th U.S. Circuit Court of Appeals had not responded to a request by Elian's Miami relatives, who want the boy to remain in the United States until their pending federal appeal is concluded. The Atlanta court's decision may come today.

While everyone waited, the Miami relatives and the government continued to issue claims and counterclaims about the other sides' actions in the 5-month-old custody dispute.

Lawyers for the relatives released a statement again defending Lazaro Gonzalez against government assertions that he acted illegally in defying its order to surrender the boy last week. The lawyers contend Elian's great-uncle is not obligated to deliver the boy to the Immigration and Naturalization Service. The INS, meanwhile, released a letter by a key advisor to the government that calls the Gonzalez household in Little Havana "psychologically abusive" and urges immediate action by the government to remove Elian.

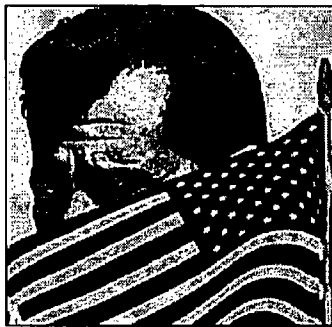
Dr. Irwin Redlener, president of The Children's Hospital at Montefiore in New York City, said that he was disturbed by the family's release of a home video in which a gesticulating Elian addresses his father and says he does not want to return to Cuba.

'HOSTAGE SITUATION'

"I got very alarmed," said Redlener, a pediatrician who has advised INS Commissioner Doris Meissner through the Elian battle. "I spoke to many experts across the country about it. It was a coached videotape reminiscent of what you see in a hostage situation.

"The videotape is the final straw and a very clear indicator that this boy is being subjected to extraordinary pressures in that household."

SEE ALSO



Al Diaz

POLICE PROTECTION: *Elian's great uncle, Lazaro Gonzalez, watches the media stationed in front of his Little Havana home. As of April 8, Miami Police had spent \$807,000 to protect the home.*

SEE ALSO

- [Bill reaches \\$1 million for Elian-related costs](#)
- [Key Latin nations resist effort to condemn Cuba](#)
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Redlener, who assembled the panel of three mental-health experts to interview Lazaro Gonzalez last week, said he was also worried by unproven, last-minute allegations by supporters of the Miami relatives that Elian's father physically abused the boy and his mother.

"We have a prolonged, painful separation from his father, and secondly, what has clearly been an unending negative diatribe about his father coming from people surrounding [Elian]," Redlener said. "He will have to resolve some very difficult emotional stresses having to do with relationship with his father."

In their statement defending Lazaro Gonzalez's actions, his attorneys suggested the government has ignored Elian's psychological needs by refusing to evaluate the appropriateness of returning him to his father. Lazaro and his family contend the boy is afraid of his father. "We emphasize the serious harm that confronts Elian if removed to Cuba and the further harm that would result from requiring Lazaro affirmatively to betray this child," the statement said.

STANCE UNCHANGED

The statement reiterated the relatives' position that it is the INS' job to come get the boy.

"Lazaro Gonzalez has not broken the law. To the contrary, he has unfailingly declared that he will not violate the law, a position he has confirmed in writing personally as well as through counsel," the statement said.

But legal experts say that, depending on how far Gonzalez is willing to carry out his defiance, he could face charges ranging from obstruction of justice to aiding and abetting and harboring an illegal alien.

Sanctions could range from civil penalties, such as mounting daily fines, to jail time.

Because Gonzalez no longer has legal custody of Elian, he might be subject to state kidnapping charges for keeping the boy over the father's objections, said Roy Kahn, a Miami criminal defense lawyer -- though he said it is unlikely prosecutors would step in.

The revocation of parole means the Miami relatives "have no right to have the child kept from immigration. They have no authority to keep the child over objections of the father," Kahn said.

But he said Lazaro Gonzalez is a thin line away from a possible obstruction-of-justice charge, which probably would apply only if he interferes with federal agents coming to pick up the boy. Gonzalez has said he would step aside if agents came to his house for Elian.

LEGAL REPERCUSSIONS

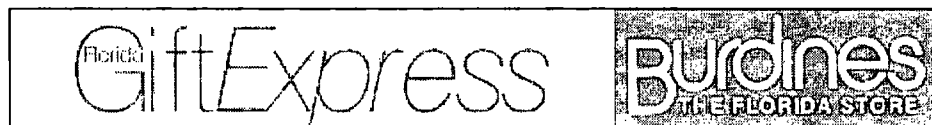
Gonzalez would not be subject to contempt-of-court charges -- another possibility the government has contemplated -- unless a judge issues an order instructing him to surrender Elian, and he does not obey, Kahn said.

The petition being weighed by the Atlanta appeals court would keep Elian's father from returning to Cuba with the boy if the INS turns Elian over to him. It would not bar the INS from reuniting the two.

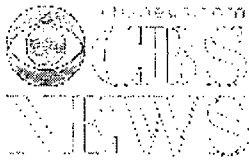
As policy, the court of appeals would not disclose the names of the three judge on a panel reviewing the petition. The 12-justice appellate court itself has a reputation as being deferential to the government on immigration matters.

Monday afternoon, as the temperatures soared into the 90s, the crowd grew to about 200 outside the Gonzalez home in north Little Havana.

The demonstrators showed their support -- and frustration. The exile group Mothers Against Repression, dressed in black, led the crowd in prayers.



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Elian's Father Speaks On 60 Minutes

- Transcript of segment featuring **Dan Rather's** exclusive interview with Juan Miguel Gonzalez

NEW YORK



AP

Juan Miguel Gonzalez tells Dan Rather the accusations of abuse are totally false.

advance, nor was there any such request from Juan Miguel or his lawyers.

The attorney for Juan Miguel said that no questions were out of bounds. And CBS News made it clear that Dan Rather would ask any and all questions he felt appropriate.

The following is the script of a 60 Minutes segment broadcast Sunday based on this interview and a separate interview with writer Ann Louise Bardach:

(CBS) Juan Miguel Gonzalez, the father of 6-year-old Elian Gonzalez, sat down with CBS News Anchor Dan Rather for his first and only television interview since coming to the United States two weeks ago to claim his son.

When the interview was conducted, there were no Cuban government personnel in the room, in the house, or on the grounds — only Juan Miguel and the CBS News crew.

Consistent with CBS News practice, no questions or areas of questions were submitted in

**"Why do you have to m
Castro into all of this. I
claiming my son. It's m
not Fidel Castro
Juan Miguel Gonza**

Multimedia



Segment of Dan Rather's ex
with Elian's father

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RATHER:

How is your son? How is Elian?

JUAN MIGUEL:

Actually, all I can tell you at this point is what I have been able to see on television. Because, despite the fact that I have been here for 10 days, I have only been able to speak to him on the telephone on 2 occasions.

RATHER:

Do you consider that he has been kidnapped?

JUAN MIGUEL:

Yes... and the law hasn't done anything about it.

NARRATION:

Juan Miguel Gonzalez is still upset by the videotape that he saw on TV last week.... a tape released by the Miami family members who are holding Elian... in which the boy tells his father he doesn't want to go back with him to Cuba.

RATHER:

I know you've seen this videotape, but with your permission I want to show it to you again. Have you watch it, and tell us your reaction to the videotape please.

JUAN MIGUEL:

This is child abuse and mistreatment what they're doing to this boy. And it is something that has been induced because these aren't the boy's true feelings. That's not the way this boy feels. And I know I'm right in saying that we have to take him back immediately because what they're doing is making this child suffer. The way they're abusing him, turning him against his father.

RATHER:

Tell me what you felt, not just in your head but also your heart when you saw and heard on that videotape your son say, "Papa, you can stay here but I don't want to go to Cuba."

JUAN MIGUEL:

Well, I can tell you that above all, despite everything I was feeling, and everything I was suffering at that moment, I saw the betrayal inside my boy -- that they made him do these things. Actually, he's suffering more here amongst them than he suffered in the sea.

RATHER:

I want to ask you something man to man. After you saw that videotape for the first time, did you weep?

JUAN MIGUEL:

I'm going to tell you the truth. I don't have any tears left. I've cried too much. During this whole period of time, I've cried a lot and suffered greatly and I'm still in pain. To tell you the truth, I have no tears left. I have -- I don't know -- I've run dry.

RATHER:

Ah, but a father never dries up?

NARRATION:

The last time Juan Miguel saw his son in person was the day before his former wife Elizabeth took him in a small, leaky, aluminum boat with 12 other Cubans so she could start a new life in the United States -- a trip Juan Miguel says he knew nothing about. Eleven people didn't make it, including Elian's mother Elizabeth.

RATHER:

What has your son told you about the boat trip?

JUAN MIGUEL:

On the 26th, when he left the hospital he told me Daddy, Dad, I saw when Mom was lost, I saw it when she died, I saw it when she disappeared in the sea. And I lost my books, I lost my backpack with my school books in it and my uniform and I said to him, little guy, the backpack with the school books and the uniform -- I'm keeping those safely at home so that when you return you can go back to school. Don't worry.

NARRATION:

But because of the soap opera and media circus swirling around Elian, Juan Miguel says his son is confused and lost. And he blames his Miami relatives.

JUAN MIGUEL:

He hasn't had time to mourn for and to feel for the death of his mother. The first thing that a psychologist would say to a child who has gone through something like this would be that you have to experience the reality -- what happened. The way they've manipulated him and handled it and he holds the belief -- so that he doesn't want to go back to Cuba and he holds the belief that his mother is someplace around here, that someday she'll appear here. That's abusive. Everything they've done with him has been abusive.

NARRATION:

Probably no North-American reporter knows as much about the Gonzalez family as writer Ann Louise Bardach, who spent time with them in Cuba. In the new issue of George Magazine she writes about the reason she says Elian's mother Elizabeth was leaving Cuba -- to be together with her boyfriend in Miami.

RATHER:

When Elian's mother sought to come to the United States, how much, if anything, did that have to do with politics?

BARDACH:

I don't get the feeling it had much at all to do with that and I base that on a letter that, a five-page letter that was found after everybody drowned.

RATHER:

And this five-page letter, basically a love letter.

BARDACH:

Yes it is, it is.

RATHER:

There are any number of people who say, listen, Juan Miguel, whatever else you think about him, he is a loving caring father. And then there are those who say don't kid yourself. This guy's an apologist quote unquote for Fidel Castro, a true believer in the revolution and he's being puppeteered by Fidel Castro. Where is the truth in all that?

BARDACH:

Well, there's no question that Fidel Castro runs that island. I think what happened here is that a kind of regular normal guy who's fairly unpolitical -- has been politicized by this drama.

RATHER:

Let me ask you about the Miami relatives. However one describes them, the Miami relatives say that they are representing the best interests of the deceased mother and of the child. And, they speak for them. What do we make of that?

BARDACH:

Well, it's a little odd, because according to the friends and family of Elizabeth, Elizabeth never met the Miami relatives. She never laid eyes on them.

RATHER:

None of them?

BARDACH:

None of them. Ever. That's what the friends and family say. That she had no idea. And never in 1000 years was she going to come and call them or contact them.

NARRATION:

Those same relatives, says Juan Miguel Gonzalez, are now trying to destroy his reputation with lies and slander.

RATHER:

Yesterday and today the relatives who are keeping Elian in Miami at the moment put out information that you had abused his mother and you had abused him. I want to give you a chance to respond to that. Is there any truth to that and if so tell me about it.

JUAN MIGUEL:

Well, I'm not saying that as a father -- that with my son -- at certain times every father -- when a child does something mischievous, well you could always spank your own son. But hurt him, I never hurt him and I never hurt his mother either.

RATHER:

Are you or are you not saying these are lies?

JUAN MIGUEL:

They are lies totally.

NARRATION:

Juan Miguel says he will remain in the United States with his new wife and their baby until he gets Elian back. He says this is about family, not politics.

RATHER:

Then why are they saying these things?

JUAN MIGUEL:

Well, imagine, I'm explaining it to you. They're describing me that

way to achieve their objective -- which is to keep the child. It's nothing else.

RATHER:

Let me give you the argument that these relatives in Miami and other people make. They say, number one, you're not your own man. That you are a puppet at the end of Fidel Castro's strings. That's one of the accusations they make.

JUAN MIGUEL:

Why do you have to mix in Fidel Castro into all of this. It's just me claiming my son. It's my son and not Fidel Castro's. It's a way of bringing in Fidel Castro and making it political.

NARRATION:

Juan Miguel says he wants to take Elian back to his home in Cardenas, a small working class town with dirt streets and horse-drawn carriages. It is a poor community, but Juan Miguel, who is a member of the Communist party, makes a decent living there as a cashier at a nearby resort.

RATHER:

Tell me why it wouldn't be best for you to say okay I'll, I'll stay in the USA, I'll stay here with my child, where there is freedom and may be more opportunity for him. Why not do that in the best interest of the child?

JUAN MIGUEL:

Well, what do you call freedom and opportunity?

RATHER:

But the question is, what do you consider to be liberty and opportunity?

JUAN MIGUEL:

I ask you what's freedom? Well, freedom is for example, in Cuba, where education and health care is free. Or is it the way it is here? Which of the two is freedom? For example, here when parents send their children to school they have to worry about violence. A child could be shot at school. In Cuba, things like that don't happen. So you can go to work and not worry. Which of the two is freedom?

BARDACH:

There's no disputing the fact that this Elian Gonzales is a gift from God to Fidel Castro. I mean this has been a tremendous boon to him and that's indisputable. Previous to this, he was dealing with dissident issues, human rights issues, economic problems. Suddenly he's got all this international support, all of Latin America. I think Fidel Castro is a very savvy shrewd long-term player. He recognized early on this could be a big win for him and he's played it for everything it has.

RATHER:

The child himself? Do you put the child in the winners' category or loser's category?

BARDACH:

The child, I think, is a big loser. Here's a completely traumatized child who has just watched his mother drown- has survived a terrible ordeal. You'd think he should be reunited with the surviving parent immediately for stability. And he's living in a house which at best we could call the *Truman Show* of Elian Gonzalez. Where he has cameras on him 24 hours a day and he has people outside the house chanting, you know, anti-Castro, anti-Cuba and even anti-father things. So he's being filled with strident passions, rather than people. You know, saying let's work this out.

RATHER:

Many of the Cubans in Miami say that your wife died so Elian could live in the United States. Do you think that's true and if so what do you think about that?

JUAN MIGUEL:

That's not the reality, that's not true. First of all, none of the people that are saying that know the boy's mother. Who better than I, who knew his mother specifically, could say that. None of those that are

speaking in her name knew her.

RATHER:

I want to ask you this, are you convinced that your son wants to go back to Cuba?

JUAN MIGUEL:

Of course.

RATHER:

Has he told you that?

JUAN MIGUEL:

He's told me so. What they're doing is putting a bunch of toys in front of a 6 year old. He can't decide for himself. The one that decides for him is me -- his father. Unfortunately, he lost his mother, the only one that can speak for him, and the only one that truly knows him -- is me. I'm his father. I'm the one who truly knows him. The only one who can say who my son is what he likes and what he dislikes. That's me. None of them have the right to speak for him.

RATHER:

And, if little Elian is watching and listening to the broadcast what do you want to say to him?

JUAN MIGUEL:

Well, give him a big kiss and tell him not to worry -- he'll be with me soon. That I love him very much. He will be with me soon and he shouldn't worry.

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IN THE CIRCUIT COURT OF THE 11TH 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.

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.

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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.

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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.

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*See, memorandum of law at l., page 7.*¹

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 Lazaro 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

¹"...[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.*

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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

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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.

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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. 1st 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. 3rd 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. 2nd 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. 1st 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

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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. 3rd 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. 1st 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

Elian 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 SCT. 1713, 1721, 75 L.Ed 2nd 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

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"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. ²

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

² 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 *balseros* at sea remains a difficult issue, and current immigration detente with Cuba was reached only after apparently difficult negotiations. Foreign policy toward Cuba continues to shape local issues.

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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.³ 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, Jagiella v. Jagiella*, 647 F.2d 561 (5th 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

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

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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 (5th 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 (6th 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 (8th 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

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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

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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:

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(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 Rev., 571 So.2d 527, 528 (Fla. 3rd DCA

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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. 3rd DCA 1996). The title of the act is important. Carliile 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 Satement 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

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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.

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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. 3rd 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 L.Ed.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.

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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. 2nd 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

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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.

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Equally worthy of respect are those who have reached the opposite conclusion about where Elian 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

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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. 4th 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 13th day of April, 2000 at 12:02 p.m.

Circuit Court Judge Jennifer D. Bailey

Cc:
Service List & U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Petitioners/Plaintiffs,

v.

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

Respondents/Defendants.

No. 00-

DEFENDANTS' OPPOSITION
TO PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING
ORDER

Defendants Janet Reno, *et al.* by and through their undersigned counsel, hereby
oppose Lazaro Gonzalez's motion for a temporary restraining order prohibiting the
government from transferring Elian Gonzalez to his father's care and custody and
preventing Elian's return to Cuba. The Court should deny plaintiff's motion.

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I. BACKGROUND

Elian Gonzalez is a six-year-old Cuban national whose mother perished after setting out from Cuba in a small boat headed for the United States. *See* Exhibit A, "*How It Happened*." He was found floating on an inner tube in the Atlantic Ocean, taken to a hospital, and then given an Immigration and Naturalization Service ("INS") parole into the temporary care of his great uncle Lazaro Gonzalez.

The INS has handled this case in a cautious, deliberate, and humane manner from the outset. After a thorough investigation, it determined that only Juan Gonzalez could speak for Elian concerning his immigration status. Accordingly, it honored Juan's requests that Elian's application for admission and the asylum applications submitted in his behalf by Lazaro be withdrawn. *See* Exhibit B, Memorandum of the INS Office of General Counsel. Based on those careful determinations, the INS sought Lazaro's cooperation in bringing about Elian's transfer to his family in Cuba. *See* Exhibit C, Letter of Michael Pearson. Rather than cooperating with the INS, Lazaro sought intervention by a state family court which granted a Temporary Protective Order directing that the status quo be preserved, and that Elian could not be removed from its jurisdiction. *See* Exhibit D, Temporary Protective Order.

After the Attorney General determined both that the INS had correctly determined that Juan spoke for Elian and that the family court's order had no bearing on the federal immigration matter (*see* Exhibit E, Letter of the Attorney General), Lazaro filed suit in

the United States District Court for the Southern District of Florida seeking an order that the INS accept and adjudicate the asylum applications Lazaro submitted on Elian's behalf. After hearing argument on the case, the District Court for the Southern District of Florida dismissed the lawsuit and cautioned that "each passing day is another day lost between Juan Gonzalez and his son" *See Gonzalez v. Reno, et al.*, 86 F. Supp.2d 1167, 1194 (S.D. Fla. 2000).

When plaintiff appealed that decision to the United States Court of Appeals for the Eleventh Circuit, the government offered to forego exercising its authority to remove Elian from plaintiff's care on the condition he provide written assurance that Elian promptly would be surrendered once the appeals process was exhausted. Under the pertinent regulations, the INS normally seeks similar assurances from any person into whose care a juvenile alien is paroled. *See* 8 C.F.R. §§ 212.5(c); 236.3. However, Lazaro Gonzalez once again refused to cooperate with the government.

After a four-and-a-half month separation from his son, Juan Gonzalez traveled to the United States to reunite with Elian and return to Cuba. His arrival brought about the INS's decision to transfer Elian's parole from plaintiff to Juan Gonzalez. *See* Exhibit F, Letter of Michael Pearson. Seeking a smooth and peaceful transfer of Elian into Juan's care, the INS consulted two eminent psychiatrists and an eminent child psychologist, each of whom recommended that the reunion between father and son should occur sooner rather than later. *See* Exhibit G, Declaration of Dr. Paulina Kernberg;

concurrences of Dr. Jerry M. Weiner; Exhibit H, and Dr. Lourdes Rigual-Lynch, Exhibit I. The INS's further efforts to reach an agreement with Lazaro for a prompt and orderly transfer of Elian into his father's care were rebuffed. Instead, Lazaro returned to the family court and sought an emergency hearing and order blocking the INS's efforts to bring about a reunion of father and son. Lazaro's efforts failed when the family court dismissed plaintiff's petition for temporary custody, finding that the suit was defective both because Lazaro lacked standing to sue and because the suit was federally preempted. *See Exhibit J, Gonzalez v. Gonzalez*, No. 00-00479-FC-28 (Apr. 13, 2000). In dismissing Lazaro's suit, the Circuit Judge commented that Elian

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 the this case is, his days are filled with uncertainty.

* * *

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.

Id. at 21.

In an effort to bring a final and peaceful reunion between father and son, the Attorney General herself traveled to Miami for face-to-face negotiations. Lazaro Gonzalez still refused to transfer Elian into the care of his father. Accordingly, the INS ordered Lazaro Gonzalez to deliver Elian to its officials in Miami so that he could be brought to Washington, D.C. and reunited with his father. *See Exhibit K, Letter of*

Michael Pearson. Lazaro Gonzalez refused to comply with that order.

Now, having lost in both his home state and federal courts, Lazaro Gonzalez comes to Washington, D.C., searching for a forum which he hopes will authorize his continued refusal to reunite a son with his father. This Court too should refuse to sanction Lazaro's efforts to separate father from son. Not only should his motion for a temporary restraining order be denied because of simple notions of humanity, but it should be denied because Lazaro (1) lacks standing to sue on Elian's behalf; (2) his case is not justiciable; (3) the present action is barred by the doctrine of *res judicata*; and (4) the decisions of the INS in this matter comport with the obligations of the United States under international law.¹⁷

ARGUMENT

THIS COURT SHOULD DENY PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

A. STANDARD FOR ISSUANCE OF TEMPORARY RESTRAINING ORDERS

In the District of Columbia Circuit, when a party moves for a temporary restraining order, the standard to be applied is the same as if the party had moved for preliminary injunction. To demonstrate entitlement to a preliminary injunction, the

¹⁷ On April 13, 2000, the Eleventh Circuit Court of Appeals granted a temporary injunction pending appeal which precluded Elian's leaving the United States until further order of the Court. It also ordered the government to respond to Lazaro Gonzalez's motion for injunction pending appeal no later than 9:30am, April 14, 2000.

moving party must show: (1) a substantial likelihood of success on the merits; (2) that he would suffer irreparable injury if the injunction is not granted; (3) that an injunction would not substantially injure other interested parties; and (4) that the public interest would be furthered by the injunction. *See, e.g., Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998); *City Fed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995). In deciding whether to grant an injunction, the court must balance the moving party's showings in all four areas. *City Fed Financial Corps*, 58 F.3d at 747.

**B. PLAINTIFF HAS FAILED TO ESTABLISH A SUBSTANTIAL
LIKELIHOOD OF SUCCESS ON THE MERITS**

**1. PLAINTIFF LACKS STANDING TO RAISE ANY CLAIM ON
ELIAN'S BEHALF**

Generally, a litigant may only assert his or her own rights and cannot pursue a claim for relief based upon the legal rights or interests of a third party. *Department of Labor v. Triplett*, 494 U.S. 715, 720 (1990); *Singleton v. Wulff*, 428 U.S. 106, 112-13 (1975). However, the courts have long permitted a "next friend" to proceed on behalf of a person who is unable to seek relief himself. *Donnelly v. Parker*, 482 F.2d 402, 406-07 (D.C. Cir. 1972); *Lonchar v. Zant*, 978 F.2d 637, 640 (11th Cir. 1993). A next friend does not himself become a party to the action in which he participates, but rather, merely presses forward with the cause action on behalf of the allegedly injured person, who remains the real party in interest. *Morgan v. Potter*, 157 U.S. 195, 198 (1895). Yet this

is not say that next friend standing is automatically granted or is without limits.

In *Whitmore v. Arkansas*, 495 U.S. 149 (1990), the Supreme Court stressed that a next friend must first prove that the real party in interest cannot pursue his own cause due to some disability such as mental incompetence or lacking access to the courts. 495 U.S. at 163-65; *see also Lonchar*, 978 F.2d at 641. Second, the next friend must demonstrate some relationship or bring forth some other evidence that establishes the next friend is truly dedicated to the "best interests" of the person on whose behalf he seeks to litigate. *Whitmore*, 495 U.S. at 163-64; *Lonchar*, 978 F.2d at 641; *Morris v. United States*, 399 F. Supp. 720, 722 (ED Va.1975). Ultimately, "[t]he burden is on the 'next friend' clearly to establish the propriety of [their] status, and thereby justify the jurisdiction of the court." *Whitmore*, 495 U.S. at 164.

Noting that the Supreme Court did not define the bounds of the relationship between the real party in interest and the putative next friend, the United States Court of Appeals for the Seventh Circuit cautioned that an action filed by a person claiming to be a next friend of the real party in interest should not be accepted on blind faith. *T. W. & M.W. v. Brophy*, 124 F.3d 893, 895 (7th Cir. 1997). "[A]ppointed or not, . . . [the putative next friend] can be challenged as not being a suitable representative, just as a guardian ad litem can be." *Id.*; *see also Garrick v. Weaver*, 888 F.2d 687, 693 (10th Cir. 1989).

Fed. R. Civ. Pro. 17(c) begins by with a primary proposition that whenever an

infant "has a representative, such as a general guardian" the representative may sue on the behalf of the infant. The United States Court of Appeals for the Eleventh Circuit has determined that in the context of Rule 17(c), the term "representative" includes a child's parents. *See Devine v. Indian River County School Board*, 121 F.3d 576, 581(11th Cir. 1997); *Croce v. Bromley Corp.*, 623 F.2d 1084, 1093 (5th Cir. 1980) (same). The notion that parents are the natural choice to represent infants in court proceedings was stated by the Supreme Court more than one-hundred fifty years ago in *Bank of United States v. Ritchie*, 33 U.S. 128 (1834).²⁷

Rule 17(c) then goes on to provide a subordinate proposition that in the event a duly appointed representative is lacking, an infant may then "sue by a next friend" Fed. R. Civ. Pro 17(c); *Brophy*, 124 F.3d at 894.²⁸ Recognizing that a suit by a next friend occurs only in the absence of a qualified representative, the Seventh Circuit determined that a general representative should not be "bypassed by appointing [or allowing] a special representative to litigate on behalf of a ward." *Brophy*, 124 F.3d at

²⁷ While the *Ritchie* court did not find error in the lower court's appointment of non-parental guardian for an infant litigant, the Court did comment that such actions were "calculated to awaken attention . . . [when] the record shows . . . [the child has] parents living" 33 U.S. at 144.

²⁸ See, e.g., *United States v. 30.64 Acres of Land*, 795 F.2d 796 (9th Cir. 1986); *Developmental Disabilities Advocacy Center, Inc. v. Mellon*, 689 F.2d 281 (1st Cir. 1982); *Hafford v. General Motors Corp.*, 656 F.2d 161 (5th Cir. 1981), *cert. denied*, 456 U.S. 961 (1982).

895. ⁴ Similarly, the United States Court of Appeals for the Second Circuit has held that when an infant's representative "is unable, unwilling or refuses to act, or has interests which conflicts with that of the infant, a court may appoint a 'next friend' to ensure that the infant's rights are protected in a court of law." *Ad Hoc Committee of Concerned Teachers on Behalf of Minor and Under-Age Students Attending Greenburgh Eleven Union Free School Dist. v. Greenburgh No. 11 Union Free School District*, 873 F.2d 25, 30 (2d Cir. 1989). In short, a next friend may neither be appointed nor unilaterally act for a minor who is already adequately represented. See *Susan R.M. v. Northeast Independent School District*, 818 F.2d 455, 457 (5th Cir. 1987).

As Elian's surviving parent, Juan Gonzalez is the natural choice to serve as the boy's general representative. See *Ritchie*, 33 U.S. at 144. Under Fed. R. Civ. P. 17(c), Lazaro Gonzalez cannot act as Elian's next friend unless Juan Gonzalez is unable, unwilling or refuses to act, or has interests which conflicts with those of the Elian. Juan Gonzalez has made it very clear that he does not want Elian to seek any immigration benefits. Moreover, has even traveled to the United States so that he can be reunited with Elian. Through his travel to the United States and his efforts at reuniting with his son, Juan Gonzalez has demonstrated his willingness to represent Elian and take actions

⁴ The *Brophy* court also considered who would be best suited to represent an infant as a next friend. The Court stated that the "proper rule is that the next friend must be an appropriate alter ego for a plaintiff who is not able to litigation in his own right" *T. Brophy*, 124 F.3d at 897. The Court further opined that eligible next friends should be limited to the "plaintiff's parents, older siblings (if there are no parents), or a conservator or other guardian" *Id.*

on the child's behalf. Finally, there is no evidence that Juan Gonzalez's interests conflict with Elian's. Juan Gonzalez is adequately representing Elian's and, thus, Fed. R. Civ. P. 17(c) does not authorize Lazaro Gonzalez to act as Elian's next friend.⁹

Additionally, the Florida family court has determined that Lazaro Gonzalez lacked standing under Florida law to maintain his petition for temporary custody and other relief. *See*, Exhibit H, *Gonzalez v. Gonzalez*, No. 00-000479 FC 28 at 12-18. Based on that ruling, the Temporary Protective Order, which purported to authorize Lazaro Gonzalez to assert and protect whatever rights Elian may have under the immigration laws of the United States, has been terminated. *Id.* at 21-22. Contrary to his assertions before this Court, Lazaro Gonzalez has no legal authority to act as Elian's temporary legal custodian and, thus, he lacks standing to maintain the present action.

**2. PLAINTIFF'S REQUEST FOR A TEMPORARY
RESTRAINING ORDER IS NOT JUSTICIABLE**

Plaintiff asks this Court to issue a temporary restraining order precluding the government from "deporting and/or returning Elian Gonzalez and/or from taking any steps to participate in and/or aid in the deportation of Elian Gonzalez and further, requiring that deportation proceedings against Elian be enjoined" Motion at 2, 18.⁹

⁹ It should also be noted that the INS has revoked Elian's parole to Lazaro Gonzalez and, therefore, he is wholly without authority to speak for Elian before this Court.

⁹ The Immigration and Nationality Act has been amended so that immigration proceedings begun after April 1, 1997, are not *deportation* proceedings. *See* Sections 304(a)(3) & 309(a) of the Illegal Immigration Reform and Immigrant Responsibility Act

The government's current activities are not directed at returning Elian to Cuba, but directed at reuniting Elian with his father, while at the same time ensuring the conditions of his immigration parole comply with INS regulations. Once Juan Gonzalez has custody of Elian, the decision as to when, if ever, Elian leaves the United States will be his to make. Thus, plaintiff is wrongly attempting to enjoin the government from performing an action which is not its own but the father's.

In addition to Lazaro's suing the wrong party relating to any decision relating to Elian's return to Cuba, he sues to prohibit the transfer of parole to the father. This is a discretionary decision, and one which is barred to this Court's review.

a. Plaintiff's Request for a Restraining Order Is Not Ripe

There are at present no removal, deportation, or exclusion proceedings pending or anticipated against Elian Gonzalez. Nevertheless, plaintiffs request an order from this Court enjoining the defendants from "deporting and/or returning Elian Gonzalez and/or taking any steps to participate in and/or aid in the deportation of Elian Gonzalez and/or continue with the deportation proceedings of Elian Gonzalez . . ." Plaintiff's [Proposed] Order at 1-2. Because the INS has not commenced a removal proceeding against Elian Gonzalez (and has no intention of doing so), plaintiff's request is not justiciable. It is not ripe.

of 1996 ("ARERE"), Pub. L. No. 104-208, 110 Stat. 3009-626 (Sept. 30, 1996). The proceedings by which aliens may be repatriated to their homelands are now referred to as removal proceedings. ARERE § 304(a)(3).

The Supreme Court has stated that the "basic rationale [of the ripeness doctrine] is to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). Furthermore, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985)). In assessing whether a claim is ripe "the court must 'evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Pfizer Inc. v. Shalala*, 182 F.3d 975, 978 (D.C. Cir. 1999) (quoting *Texas*, 523 U.S. at 301). This case is neither fit for judicial decision nor is there a hardship to the parties if the court withholds consideration.

Simply because a case presents a legal issue does not make it fit for judicial decision. On the contrary, the Court of Appeals for the District of Columbia has concluded that "[e]ven where the issue presented is a purely legal one and presumptively fit for review . . . the Supreme Court has observed that such an issue may be deemed unfit for review, . . . for example, 'further administrative action is needed to clarify the agency's position.'" *Aulenback, Inc. v. Federal Highway Administration*, 103 F.3d 156, 167 (D.C. Cir. 1997) (citations omitted).

In this case further administrative action is necessary before Elian could be "deported" by the INS from the United States. Under the Immigration and Nationality Act (INA), the INS may only "deport" a person like Elian by commencing removal proceedings under INA § 240, 8 U.S.C. § 1229a. The INS commences removal proceedings through the issuance of a Notice To Appear under INA § 239, 8 U.S.C. § 1229. As a matter of law, the Notice To Appear must include specific information including, but not limited to, the legal authority for conducting the proceedings, the alleged violation of law, and notice that the person may be represented by counsel. 8 U.S.C. § 1229(a)(1)(A-G). In addition, a person charged as removable must appear before an immigration judge who determines inadmissibility and deportability. 8 U.S.C. § 1229(a)(1). Furthermore, a person may appeal an immigration judge's determination to the Board of Immigration Appeals which has appellate jurisdiction over such decisions. 8 C.F.R. § 3.1(b)(1). Decisions of the Board of Immigration Appeals (which are final administrative decisions) are reviewable in the courts of appeal. 8 U.S.C. § 1252.

The point is that there is an administrative process that the government must abide by when it wants to "deport" someone from the United States, and plaintiff is asking for an injunction regarding a process that has not yet begun and that the government does not intend to commence. Accordingly, this case falls squarely within the admonition in *Abbott Laboratories* that courts should refrain from "entangling themselves in abstract disagreements over administrative policies" at least until "an administrative decision has

formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories*, 387 U.S. at 148. Because the INS has not commenced proceedings against Elian Gonzalez this case "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300.

Plaintiff also fails to meet the second part of the standard since there will be no hardship for plaintiffs if the court withholds decision. This case is limited to whether the government should be enjoined from "deporting" Elian from the United States. As stated at the outset, the government has no intention of placing Elian in removal proceedings.

On the other hand, once Juan Gonzalez has custody of Elian, he will be able to decide when, if ever, Elian is to leave the United States for Cuba. Since Elian's application for admission to the United States has been withdrawn, no further administrative action on the government's part would be necessary for Elian to return to Cuba in the company of his father. Hence, if Lazaro Gonzalez is here seeking relief from the wrong parties. His motion for a temporary restraining order should be denied for that reason alone.

b. Recent Amendments To The INA Preclude Judicial Review Of The Commissioner's Discretionary Decisions

By enacting IIRIRA § 306(b), Congress repealed the judicial review provisions outlined in former Section 106 of the INA, 8 U.S.C. § 1105a (1994). To fill the void left by this repeal, Congress also enacted Section 306(a) of IIRIRA which established a new judicial review procedure in the form of new INA § 242, 8 U.S.C. § 1252.

Section 242 begins simply enough by directing that "[j]udicial review of a final order of removal . . . is governed only by chapter 158 of title 28 to the United States Code." INA § 242(a)(1). Commonly known as the Hobbs Act, and titled "Orders of Federal Agencies; Review," Chapter 158 plainly states that jurisdiction to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . ." final orders issued by federal authorities rests with the courts of appeal. 28 U.S.C. § 2342. This statute makes no provision for the review of administrative orders by federal district courts.

Additionally, INA § 242 provides that "[n]otwithstanding any other provision of law, *no court* shall have jurisdiction to review any . . . decision or action of the Attorney General the authority for which is specified under . . . [Title II of the INA] to be in the *discretion of the Attorney General . . .*" (emphasis added). INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii).

c. *Section 242(a)(2)(B)(ii) Of The INA Precludes Judicial Review Of The Commissioner's Decision To Transfer Elian's Parole To Juan Gonzalez*

When an arriving alien is suffering from a disability that renders it impractical to proceed with an inspection, the inspection is deferred for such a time and under such conditions as the district director may prescribe. 8 C.F.R. § 235.2(e). In addition, the deferral of an inspection is to be accomplished pursuant to the provisions of INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A). 8 C.F.R. § 235.2(c). Section 212(d)(5)(A) in

turn permits the Attorney General to parole an alien into the United States for humanitarian reasons "*under such conditions as [s]he may prescribe . . . on a case by case basis . . .*" 8 U.S.C. § 1182(d)(5)(A) (emphasis added).

When the INS encountered Elian at the hospital, he was in no condition to undergo an immigration examination. 8 C.F.R. § 235.2(e). Consequently, Elian's inspection was deferred and he was paroled into the United States pursuant to Section 212(d)(5)(A). Because Elian is a juvenile (*see* 8 C.F.R. § 236.3(a)), his care-giver is determined by reference to 8 C.F.R. § 236.3(b)(1). Under this regulation, a juvenile alien who is paroled into the United States, will be released, in order of preference, to: (i) a parent; (ii) a legal guardian; or (iii) an adult relative (brother, sister, aunt, uncle, grandparent) who is not presently in Service detention. 8 C.F.R. § 236.3(b)(1)(i)-(iii).

When Elian arrived in the United States, his sole surviving parent, Juan Gonzalez, was in Cuba. As he had no legal guardian in America, Elian was released to his great-uncle, Lazaro Gonzalez. 8 C.F.R. § 236.3(b)(1)(iii). However, Elian's father, Juan Gonzalez, has entered the United States. This turn of events naturally led to a reevaluation of Elian's parole status. Applying the standards in 8 C.F.R. § 236.3(b)(1), the INS has revoked Elian's parole and ordered him delivered to its officials at a neutral site so that he can be placed into the care of his father.

INA § 212(d)(5)(A) clearly grants the Attorney General the "discretion" to parole aliens into the United States under conditions she "may prescribe" on a case by case

basis. Hence the INS Commissioner, as the Attorney General's designee, has the discretion to modify the conditions of Elian's parole by transferring him into Juan Gonzalez's care. Since INA § 212(d)(5)(A) appears in Title II of the INA, the discretionary decisions made with regard to the conditions of Elian's parole are protected from judicial review by Section 242(a)(2)(B)(ii). It follows that the Court lacks jurisdiction to review the INS's decision to parole Elian into the care of his own father.

**3. PLAINTIFF'S CAUSE OF ACTION IS BARRED BY THE
DOCTRINE OF RES JUDICATA**

This Court is precluded from hearing plaintiff's lawsuit, including his motion for a temporary restraining order, by the doctrine of *res judicata*. As long recognized by the Supreme Court, honoring the prior judgment of a competent court ensures

the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination [E]nforcement [of a prior decision] is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals.

Southern Pacific Railroad v. United States, 168 U.S. 1, 49 (1897). The doctrine of *res judicata* provides that when judgment has been rendered in a case,

[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

Cromwell v. County of Sacramento, 94 U.S. 351, 352 (1876). The final "judgment puts an end to the cause of action, which cannot again be brought into litigation between the

parties upon any ground whatever." *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 375 (1940).

The inquiry as to whether a particular case is barred by the doctrine of *res judicata* turns on two factors. First, it must be determined whether the instant lawsuit is the same cause of action previously asserted before another tribunal. *Nevada v. United States*, 463 U.S. 110, 130 (1983). Second, this Court must decide whether the parties in the instant proceeding are identical to or in privity with the parties to the previous action. *Id.*

Under the first Restatement of Judgments § 61 (1942), two causes of action were deemed the same "if the evidence needed to sustain the second action would have sustained the first action." However, the Restatement (Second) of Judgments (1982) took a more pragmatic approach where causes of action were considered the same if they arose from the same "transaction." Restatement (Second) of Judgments § 24 (1982). Whether the two proceedings were products of the same "transaction" was to be determined by "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.* While the Supreme Court has applied the former "same evidence" test (see *United States v. The Haytian Republic*, 154 U.S. 118, 125 (1894)), it is not the only standard by which the "same cause of action" question has been measured. See *Nevada v. United States*, 463 U.S. at 131 n.12. For example, the Court has held that

[a] cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. 'The thing, therefore, which in contemplation of law as its cause, becomes a ground for action, is not the group of facts alleged in the declaration, bill, or indictment, but the result of these in a legal wrong, the existence of which, if true, they conclusively evince."

Baltimore Steamship Co. v. Phillips, 274 U.S. 316, 320 (1927) (quoting *Chobanian v. Washburn Wire Company*, 33 R.I. 289, 302, 80 A. 394, 400 (Ann. Cas. 1913D, 730)).

Once a matter is raised and determined by a court of competent jurisdiction, "it is the entire issue that is precluded, not just the particular arguments raised in support of it in the first case." See *Yamaha Corp. of America, v. United States*, 295 961 F.2d 245, 254-55 (D.C. Cir. 1992) (citing *Securities Indus. Ass'n v. Board of Governors*, 900 F.2d 360, 364 (D.C. Cir.1990) (plaintiff may not raise new argument in second proceeding even though it was never made in first proceeding; so long as argument could have been made, it is precluded); Restatement (Second) of Judgments § 27 at 253 (1982) (if previously litigated "issue was one of law, new arguments may not be presented to obtain a different determination of that issue"))).

"A fundamental requisite of [*res judicata* or claim] preclusion is an identity of the . . . [claim] decided in the earlier action and that sought to be precluded in a later action."

See *Clark-Cowlitz Joint Operating Agency v. F.E.R.C.*, 826 F.2d 1074, 1079 (D.C. Cir. 1987). Next, "it must be shown that the claim was (or could have been) raised in a prior proceeding." *Id.* (citing *Gould v. Mossinghoff*, 711 F.2d 396, 398-99 (D.C. Cir.1983)). These related issues are important because "[t]he principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so." *Clark-Cowlitz*, 826 F.2d at 1079 (quoting Restatement (Second) of Judgments at 6).

In the action he filed before the Southern District of Florida, plaintiff sought to challenge the INS Commissioner's determination that the Service did not have to accept and adjudicate an asylum application filed by a third party on behalf of an incompetent minor alien over the objections of the child's surviving parent. After rejecting plaintiff's constitutional challenges to the INS Commissioner's decision, Judge Moore held that plaintiff's statutory and regulatory claims failed because the INS Commissioner's interpretation of the immigration laws warranted *Chevron* deference. See *Gonzalez*, 86 F. Supp.2d at 1193. In essence, plaintiff's claim before the Southern District of Florida was that the INS Commissioner's decision was wrong as a matter of law. In that action, plaintiff's position was that the Commissioner's decision violates domestic law. The only manner in which plaintiff's action before this Court differs from the lawsuit he presented to the Florida court, is that he now contends the Commissioner's decision violates international law.

Plaintiff's current action is, for *res judicata* purposes, not materially different from his prior action in the Southern District of Florida. In both lawsuits he claims that the INS Commissioner's decision was incorrect as a matter of law. Moreover, plaintiff could have challenged the Commissioner's decision based on international law while before the Southern District of Florida, but, for some unexplained reason, he failed to do so. It follows that plaintiff has presented this Court with the "same cause of action" he filed before the Florida court and, thus, the first prong of the *res judicata* inquiry has been satisfied. *See Nevada v. United States*, 463 U.S. at 130.

As for the second prong of the *res judicata* inquiry, Lazaro has brought this action against the Attorney General, the INS Commissioner, the Miami INS District Director, the Department of Justice, and the INS. The parties to the instant case are identical to the parties in the action dismissed by the Southern District of Florida. Plaintiff has filed the same cause of action against the same parties before successive tribunals. Lazaro's motion for a temporary restraining order should be denied because his entire suit is defective and barred by the *res judicata* doctrine.

**4. THE COMMISSIONER'S DECISIONS ARE IN KEEPING
WITH THE OBLIGATIONS OF THE UNITED STATES
UNDER INTERNATIONAL LAW**

Even if the Court had jurisdiction over Lazaro's suit, it would have to deny his motion for temporary restraining order. This is so because the INS's actions in attempting to reunite Elian with his father comply with the international obligations of

the United States. In his motion for a temporary restraining order, plaintiff argues that the United States' "obligations arising under international agreements" provide a basis for the requested injunctive relief. TRO Motion at 2. He claims that the United States will violate its international obligations by "deporting" Elian to Cuba because Cuba has a record of serious human rights violations, as documented by State Department Reports. *Id.* Plaintiffs ask this Court for an order enjoining Elian's deportation until such time that the State Department amends its country reports and/or certifies to Congress and/or provides an advisory opinion to the INS that Cuba is in compliance with the Universal Declaration of Human Rights, that the government of Cuba is no longer engaging in human rights violations and that Elian may return to Cuba "with the assurance that his human rights will be respected." *Id.* at 3.

As a preliminary matter, it is noted that Lazaro's international law claims are unpersuasive because there is no likelihood that Elian will be deported or removed to Cuba. As discussed above, the INS had not placed Elian in removal proceedings and has not indicated any intention to do so. Moreover, since Elian's application for admission to the United States has been withdrawn, he is free to leave the United States without undergoing any form of removal proceedings. *See* INA § 235(a)(4), 8 U.S.C. § 1225(a)(4). Under these circumstances, there can be no violation of international law. Furthermore, as demonstrated below, Lazaro is simply incorrect in arguing that the United States' international agreements preclude it from deporting Elian to Cuba, even if

it had any intention of doing so.

Plaintiff asserts rights under the Protocol Relating to the Status of Refugees (Protocol), *entered into force for the United States*, Nov. 1, 1968, 19 U.S.T. 6223, 606 U.N.T.S. 267; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), *entered into force for the United States*, Nov. 20, 1994, S. Treaty Doc. No. 100-20 (1988); and the Universal Declaration of Human Rights. The relevant provisions of these treaties cannot form the basis for a claim because they are not self-executing.

Treaties are agreements between sovereign nations and do not generally create privately enforceable rights. *Head Money Cases*, 112 U.S. 580 (1884). Privately enforceable rights arise *only if* the underlying treaty is self-executing. *Committee of U.S. Citizens v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988). Self-executing treaties are those international agreements which "require no legislation to make them operative" and therefore "have the force and effect of legislative enactment." *British Caledonian Airways Limited v. Bond*, 665 F.2d 1153, 1160 (D.C. Cir. 1981) (citation omitted). Treaties that are not self-executing do not give rise to privately enforceable rights. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985); *see also Head Money Cases*, 112 U.S. 580, 598-99. When a treaty is not self-executing, its provisions cannot be enforced in the courts of the United States except "pursuant to legislation to carry [those terms] into effect." *British Caledonian*, 665 F.2d at 1160.

Courts have found that the pertinent provisions of the Protocol are not self-executing. *Haitian Refugee Center v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991), *cert. denied*, 502 U.S. 1122 (1992); *Bertrand v. Sava*, 684 F.2d 204, 218-19 (2d Cir. 1982). Indeed, the treaty itself demonstrates that they are not self-executing. It states that "the signatories were to communicate to the United Nations the 'laws and regulations which they adopt to ensure the application of the present Protocol.'" *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396, 1406 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987). This provision in the treaty makes clear that implementing action by signatory states was necessary before the treaty could become effective in those states.

Likewise, the Torture Convention is not a self-executing treaty. *See* S. Treaty Doc. No. 100-20 (1988) (reservations and declarations of the United States Senate in ratifying the Torture Convention: "The Senate's advise and consent is subject to the following declarations: (1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing."); *see also* 136 Cong. Rec. S17486-01, 1990 WL 168442 (daily ed. Oct. 27, 1990). This is a clear manifestation of the Senate's intent in ratifying the Convention, and this Court should defer to the Senate's express announcement. *See Restatement (Third) of Foreign Relations Law*, § 111(h) (1987). As such this Court has no jurisdiction to consider an individual's claim for protection under the treaty and no individual is provided with a right of action. *Khourassany v. INS*, ___ F.3d ___, 2000 WL 347167 (9th Cir. April 5, 2000); *Diakite v.*

INS, 179 F.3d 553, 554 (7th Cir. 1999); *see Head Money Cases*, 112 U.S. at 598-99.

Because the Protocol and Torture Convention are not self-executing, they do not confer any rights upon persons beyond those granted by the implementing domestic legislation. The United States has implemented its obligation under the Protocol by providing aliens with an opportunity to apply for withholding of removal under INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). That provision prohibits the removal of an alien to a country where the alien's life or freedom would be threatened. An application for asylum is also deemed to be an application for withholding of removal and for relief under the Torture Convention. 8 C.F.R. § 208.13 (1999).

In this case, the INS Commissioner has already made a determination that Elian is not competent to demonstrate an "intention to apply for asylum," and therefore not competent to submit an application for withholding of removal or for relief under the Torture Convention. *Gonzalez v. Reno*, 86 F. Supp.2d 1167, 1189 (S.D. Fla. 2000). The INS has concluded that "under universally accepted legal norms," Elian's father should speak for Elian. *Id.* Before reaching her decision, the Commissioner considered several factors including the fact that the INS had conducted two in-person interviews with the father and found no evidence of abuse. *Id.* at 1989. The INS does not rule out the possibility of a case in which it would accept an asylum application of a young child against the wishes of a parent. *See*

Exhibit K, Letter of the Attorney General at 3. The Attorney General indicated that the INS would provide for a review of "objective circumstances relating to possible torture or persecution in the child's home country" if the child is too young to express a view on this matter. *Id.* In fact, as the Attorney General stated in her decision, the INS reviewed the asylum application filed on Elian's behalf and all other relevant available information and "found no credible information indicating that the [Elian] would be at risk of torture or persecution if returned to his father." *Id.*

The Attorney General's decision has been upheld by a district court in Miami which determined that her conclusion is "controlling, conclusive, not manifestly contrary to law, and not an abuse [of] other congressionally delegated discretion." *Id.* at 1188. Plaintiff, in essence, seeks to circumvent the adverse district court decision in Miami by raising Elian's persecution claim in this Court. As argued earlier, Lazaro should have raised this claim in the Miami district court and on appeal to the Eleventh Circuit, which appeal currently is pending.

Similar to the Protocol, the only enforceable rights that an alien has with regard to the Torture Convention are those afforded under this nation's domestic law. In 1998, Congress passed the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, 112 Stat. 2681-822 (appearing as a note to 8 U.S.C. § 1231), authorizing the promulgation of regulations implementing the Torture

Convention and expressly limiting the jurisdiction of any court to review decisions on claims for protection under those rules. *See* FARRA § 2242. Specifically, in FARRA § 2242(d), Congress provided that federal courts could review claims under the Torture Convention only as permitted by INA § 242, 8 U.S.C. § 1252, IIRIRA's permanent provision governing the jurisdiction of federal courts over cases arising under the immigration laws. Under FARRA's limited grant of jurisdiction, the Court may not consider any claim regarding Elian's application for relief under the Torture Convention. Instead, a torture claim must be considered administratively through the filing of an asylum application. *See* 8 C.F.R. § 208.13. As discussed above, the Attorney General already has made a determination that Elian is not competent to demonstrate an "intention to apply for asylum." *Gonzalez*, 86 F. Supp.2d at 189. Accordingly, the Attorney General has already concluded that Elian is not competent to submit an application for relief under the torture convention. Petitioners may not collaterally attack that determination in these proceedings.

Finally, petitioners arguments based on the Declaration Of Human Rights are without merit. Petitioners argue that the return of Elian to Cuba would violate the United States' "obligations" under the Declaration of Human Rights, G.A. Res. 217(III) (A) (Dec. 10, 1948). Motion. at 12. The Declaration of Human Rights, however, is not even a treaty but rather is a "non-binding resolution" adopted by the

United Nations General Assembly in 1948, *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 816 n. 17 (D.C. Cir. 1987), and therefore cannot support the petitioners' argument.

C. PLAINTIFF HAS NOT SHOWN HE WILL SUFFER IRREPARABLE DAMAGE

Lazaro Gonzalez cannot meet the burden of proving that Elian will suffer irreparable damage if the Court denies his request for a temporary restraining order. The District Court for the Southern District of Florida noted that "Even this well-intended litigation has the capacity to bring about unintended harm. *Gonzalez*, 86 F. Supp.2d at 1194. The Miami District Court's observations respecting "the Attorney General's clearly articulated views on the matter of whether Elian should return home, [and] the reality that each passing day is another day lost between Juan Gonzalez and his son" (*id.*) go to the heart of this question. Since November 22, 1999, over 140 days have been lost between Elian and Juan Gonzalez. It is time to staunch that loss.

The Court should deny Lazaro Gonzalez' request for a temporary restraining order because Elian will suffer irreparable harm if the Court grants it. Dr. Paulina Kernberg, who together with Dr. Jerry M. Weiner and Dr. Lourdes Rigual-Lynch, interviewed Juan Gonzalez and his wife, as well as Lazaro Gonzalez (on April 9 and

April 10, 2000, respectively), opined to INS Commissioner Meissner concerning the "impact of a continued delay in the transfer of Elian Gonzalez into the custody of his father, Juan Gonzalez." See Exhibits G, H, and I. It was Dr. Kernberg's opinion that it was important for Elian to be clear about who has authority for him. She continued, "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." See Exhibit G at 2. She stated, "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 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." *Id.* at 3. She opines that "a transfer in a neutral setting would be preferable," but "the most important consideration at this time is Elian's immediate and unambiguous reunion with his father." *Id.*

This is not an action filed by Elian, but rather, a lawsuit filed by Lazaro, who insists on vindicating his own asserted rights through collateral attacks. All parents would be greatly upset by the prospect of a distant relative asserting rights on behalf of their child despite that the parents made known their contrary desires. Ultimately, the

purpose of the temporary restraining order is to prevent the defendants from reuniting Elian with his father. The expert medical opinions obtained by the defendants clearly indicate that a definitive and unambiguous transfer of Elian's custody to his father works to Elian's benefit, not to his irreparable harm. Those same experts opine that any actions taken to delay the reunion between Juan Gonzalez and Elian, particularly because Juan Gonzalez is in the United States and Elian is aware of that fact, will signal continued conflict among the adults in Elian's life, and will complicate the child's psychological situation. *See Exhibits G, H, and I.*

Additionally, it must be kept in mind that Lazaro Gonzalez is ultimately seeking to have the INS accept and adjudicate an asylum application he file on Elian's behalf. Motion at 18. If this Court were to deny Lazaro Gonzalez the order he seeks, Elian would suffer no harm because in the event Lazaro Gonzalez's ultimately prevails either on appeal or before this Court, there is little possibility, if any, that Elian's eligibility for political asylum will change. Stated another way, when it comes to the asylum application filed on Elian's behalf, time is not of the essence and, thus, an order precluding the government from simply transferring Elian's parole to his father will no way harm Elian.

D. THE GOVERNMENT WILL SUFFER SUBSTANTIAL HARM FROM THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER

Lazaro Gonzalez has not shown that the issuance of a temporary restraining order will not the government's interests. To the contrary, a temporary restraining order would

harm the government's interests at multiple levels: it would substantially interfere with government's ability to honor Juan Gonzalez' legitimate demand that his son Elian be immediately returned to him, and Elian's interests in being reunited with his father. Concomitantly, it harms Elian's psychological condition. *See* discussion above. It substantially interferes with the Attorney General's ability to implement the immigration parole regulations that expressly require that the parole of an unaccompanied minor be to the minor's parent if that parent is in the United States. *See* 8 C.F.R. §§ 212.5, 236.3(b)(1) (1999); *Reno v. Flores*, 507 U.S. 292, 310 (1993). In addition, an injunction would harm the INS's interest in adhering to the family reunification policy that is reflected throughout the Immigration and Nationality Act and its regulations. *See* Exhibit L, Declaration of Michael D. Cronin. Moreover, a temporary restraining order would harm the INS's interest in being able to give effect to immigration decisions made by parents on their children's behalf. *Id.* Last fiscal year, INS inspectors inspected a total of 345,000,000 nonimmigrant aliens at our points of entry. *Id.* A large percentage of these aliens were children, many them children of tender years like Elian. *Id.*

E. A TEMPORARY RESTRAINING ORDER WILL NOT SERVE THE PUBLIC INTEREST

If this Court were to issue a temporary restraining order, the government would suffer harm from the standpoint of its international standing in protecting parental rights in cases involving American children wrongfully removed from this country. *See* Exhibit M, Declaration of Assistant Secretary of State for Consular Affairs Mary A.

Ryan. A restraining order would disserve the public interest by undermining the principle that parents should decide what is best for their children. It would disserve the public interest by undermining the ability of immigration inspectors to look to parents or other responsible adults to make immigration decisions for minors. And it would disserve the public interest to ignore accepted international practice in cases involving a sole surviving parent located in the United States, where we would expect the foreign country to return the child to the surviving American parent immediately. *Id.*

The admission of aliens is a sovereign power reserved to the political branches of the government. *Fong Yue Ting v. United States*, 149 U.S. 698, 707-11 (1893); *Jean v. Nelson*, 727 F.2d 957, 964 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985). The immigration laws, regulations, and policies of the United States all entail consequences that may extend beyond a particular alien to touch upon such vital government interests as international relations. *See INS v. Aguirre-Aguirre*, 119 S. Ct. at 1449 ("in the immigration context . . . officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'") (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

CONCLUSION

Based on the foregoing reasons, Lazaro Gonzalez's motion for a temporary restraining order should be denied.

Respectfully Submitted,

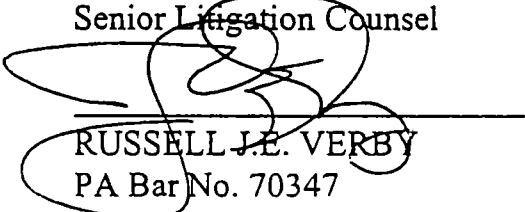
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I certify that on this 14th day of April, 2000, I caused one copy of the foregoing Opposition to Motion for Temporary Restraining Order to be served upon plaintiff's counsel by same-day delivery addressed as follows:

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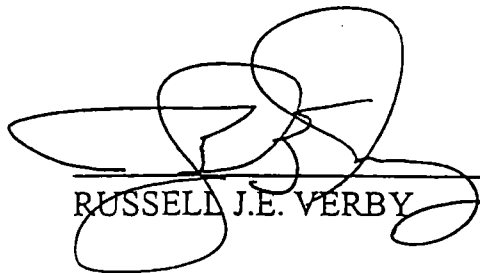
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