

**PHOTOCOPY
PRESERVATION**

144 -

ELIAN

MEMORANDUM

January 26, 2000

To: Bruce Reed
Eric Liu

From: Irene Bueno

RE: Elian Gonzalez

I. INTRODUCTION

This memo provides background on the Elian Gonzalez case and an analysis of the pending legislation. For reasons stated below, I recommend that the Administration should strongly oppose legislation to confer United States Citizenship or Lawful Permanent Resident status to Elian and at the appropriate time (i.e. when the legislation is going to the floor), the President should issue a veto threat. Also, the Administration should support a strategy to amend the legislation to raise our other immigration priorities. There is support for this strategy from Departments of Justice and State and also NSC and Maria. Please let me know if you would like to discuss further.

II. BACKGROUND

Under the Cuban Adjustment Act and agreements with Cuba (wet feet – dry feet policy), when a Cuban is interdicted on the high seas, they must be returned to Cuba. However, when a Cuban sets foot on American soil, the Cuban is eligible to be paroled in the US for one year and after that is eligible to become a legal permanent resident (LPR) and after 5 years can apply for US citizenship (USC).

In this case, Elian Gonzalez (EG) was found on the high seas by fisherman and brought to the US but without his mother who perished. If EG were an adult or arrived in the US with this mother, he would be paroled in the US, become a LPR and later a USC. EG's case is complicated one because he is an "unaccompanied minor" and has a parent in Cuba.

Generally, in cases of "unaccompanied minors", the INS looks for the next of kin to place and to care for the child until his immigration status is determined. In this case, INS found that EG had a great-uncle in Miami. Later, they learned that EG had a father in Cuba, Juan Gonzalez (JB), who divorced his mother and did not know that his mother was taking EG to the US.

The issue that was presented to INS was who **legally can speak for the child** with regard to immigration status – return to Cuba or apply for adjustment of status under the Cuban Adjustment Act or apply for asylum. In this case, the great-uncle asserts that he speaks for the child and on EG's behalf and are seeking to keep EG in the US. However, EG's father in Cuba, who claims to have been very close to his son and is capable of caring for this son asserts that he speaks for his son and should be returned to Cuba.

After interviews with the father, the INS determined on January 5, 2000, that EG's father speaks for his son. INS stated, "The INS based their decision on the facts and the law. Both US and international law recognize the unique relationship between parent and child, and family reunification has long been a cornerstone of both American law and INS practice." Since the father did not want EG to stay in the US, INS determined that EG would return to Cuba by January 14, 2000. The United States Government (USG) had discussed options with Cuba to return the EG to Cuba. INS did not want to forcibly take the child from the uncle and had hoped that he could be returned without INS intervention.

Following the INS decision, Rep. Burton issued a subpoena for EG to testify before his hearing in February and shortly thereafter, the Florida State Supreme Court granted temporary custody to EG's uncle. As a result, the Attorney General concluded that EG's return would be delayed. Also, the uncles applied for asylum in Federal Court and DOJ expects that the Federal Court will uphold its earlier decision. DOJ is expected to file their briefs today that will contain much more information about their decision.

Last weekend, EG's grandmothers came to the US to appeal to the DOJ, INS, Congress, the family in Miami and to the public that EG has a loving family in Cuba and should return. On January 25, 2000, INS issued a letter demanding, as a condition of EG's parole status that the uncles agree to allow a visit with the grandmothers today January 26, 2000.

The President has stated that he supports the INS decision and is very troubled about separating a child from a fit biological parent. On January 25, the President indicated his opposition to Congress passing legislation to grant citizenship but has left open the question of whether he would veto the legislation. The Justice and State Departments strongly recommends that the Administration oppose this legislation and is preparing letters that state their objections (this letter will be cleared before it is sent).

III. NEXT STEPS

A. Federal Court

As mentioned above, this case is pending in Federal Court and briefs will be filed soon. DOJ is hoping for an expeditious and favorable decision in support of the INS decision that EG should be returned to his father in Cuba. Even if the federal court rules in favor of the INS, there is potential that the great-uncle could appeal this case.

B. Pending Legislation

There are several bills pending in Congress that addresses this matter.

1. U.S. Citizenship

Senators Lott, Helms, Mack and Representatives McCullom, Diaz-Balart, Ros-Lehtinen and others have introduced legislation to confer U.S. Citizenship and they expect to move this legislation expeditiously. While there is some bipartisan support – Senators Torricelli, and Bob Graham, many Democratic Senators oppose this legislation including Senators Daschle, Feinstein, and Leahy and there is some opposition among Republicans. According to DOJ, this legislation would have the effect of divesting the INS of jurisdiction over this case and leaving only the custody issue that would be decided by Florida State court.

2. Lawful Permanent Resident Status (LPR)

Representative Menendez has introduced to declare EG as a lawful permanent resident. If EG were to leave the US, under this legislation he could return to the US at anytime to claim this status. Representative Menendez introduced this legislation with the hope that he could garner more support than the citizenship legislation.

3. Sense of the House Resolution Return Elian to Cuba

Lastly, Representative Rangel has introduced a Sense of Congress that EG should be returned to his father in Cuba immediately. Senators Dodd, Leahy, and Feinstein plan to introduce this resolution in the Senate.

IV. ANALYSIS

A. U.S. Citizenship Legislation

Congressional action to confer USC would divest INS jurisdiction over EG's case, leaving a Florida state court to resolve the custody case filed by the EG's great uncle. This would require the father to come to the U.S. to fight for custody of EG in Florida state court. There are number of domestic and international concerns with Congress conferring USC.

1. DOMESTIC CONCERS

a. Contrary to American Policy on Biological Parents in Custody Matters

Granting USC to EG would be contrary to our long-standing policy to give preference to biological parents unless there is clear and convincing evidence that the parent is unfit. In this case, INS has met with the father and has determined that he has a close relationship with his son and is a fit father. If EG is granted USC, this would require the father to come to the U.S. to fight for custody of EG in Florida State Court – possibly a protracted legal battle. Also, given

that the Florida State Court has granted temporary custody to the great-uncle, it may grant permanent custody as well.

b. Contrary to American Immigration Policy on Family Reunification

U.S. immigration law is based on family unity, labor needs, and humanitarian relief. Based on this policy, the Attorney General and INS determined that based on the facts of the case the father speaks for the child and should be reunited with the father.

c. Legislation Granting USC is Unusual

Passing legislation to grant USC to an individual has only been done in a few limited cases in extraordinary situations. In fact, this Republican Congress has opposed such private relief legislation. It is particularly unusual to grant USC to an individual who is not requesting it. USC was conferred upon people without their consent in the case of Puerto Ricans.

d. Fairness to other Immigrant Children and Groups

There are hundreds of unaccompanied minors who come to the U.S. every year from countries all over the world including from countries that have unstable governments or communist governments, and have very poor living conditions. Last year, most of these children were returned to their country of origin without the benefit of the legislation that has been introduced in this case.

Also, there are cases of many immigrants who have been waiting for opportunity to adjust their immigration status because of INS wrongly interpreted legislation (late amnesty class/registry date) or Congress passed legislation treating Cuban and Nicaraguans more favorably than Haitians and other Central Americans (Central American Parity Legislation). However, Congress has not yet acted on legislation to help these groups despite their compelling cases.

2. INTERNATIONAL LAW CONCERNS

The State Department strongly opposes this legislation for a variety of reasons as summarized below.

a. Violates Human Rights Principles and International Laws

The right of a child to reside with a parent is one of the most fundamental and widely respected human rights. Legislation to divest INS of jurisdiction is an obstacle to the ability of father and son of enjoying this right. By imposing USC or LPR status, the US would be seen by the international community as disregarding fundamental international and human rights principles.

International law family experts do not think that the Florida State Court should have any jurisdiction in this matter. In international custody disputes between two parents, the Hague Convention on parental child abduction requires that the child be promptly returned to their

“habitual residents”. USG is a signatory to this convention and encourages other countries to comply in cases involving American parents. In this case, EG’s habitual residence is in Cuba and his father has clearly expressed his desire to be with his son. The only legal bars under international law are the Refugee Convention or Torture Convention. In this case, there is no remotely credible allegation that EG would be persecuted under these Conventions.

b. Reciprocity/ Bad Precedent

The State Department is involved in cases to return U.S. citizen children to American parents and they are very concerned that if this legislation passes and it will undermine our ability to obtain the return of American children to their American parents. If this were an American child, we would insist on his immediate return and would object strongly if the father were forced to appear in a foreign court to establish custody or to defend a decision to bring the child back to the U.S.

Furthermore, it would be a dangerous international precedent to invite a domestic family court to second-guess a foreign parent’s decision to continue raising his child in the child’s home country, or to suggest that a domestic court should decide what is best for a foreign child when there is a surviving parent who can decide this question.

c. Contrary to U.S. Position to Involuntarily Confer Citizenship

The USG has historically taken the position that involuntary conferral of citizenship violates international law except in very limited situations not applicable in EG’s case. Citizenship not only provides rights but also imposes obligations. In this case, the father of the child should decide whether his child should be made a citizen of a foreign country with all its attendant obligations and not Congress.

B. Legislation to Confer Lawful Permanent Resident (LPR) status

The legislation to confer LPR status to EG would effectively divest INS’s jurisdiction over this case and raises similar issues as above. Conferring this status would still interfere with the father’s parental rights and would imply that we are interfering with EG’s right to return to his home and father in Cuba. The only jurisdiction that INS would maintain is the general jurisdiction it maintains over all LPRs. For example, if Elian violates immigration law (i.e. commits a felony) INS could deport him.

IV. IMMIGRATION AMENDMENTS

Democratic Senators and immigration groups are considering a strategy to amend the legislation with immigration bills that have been pending. If these amendments are successful, they could extract some agreement for consideration later this year. I support this strategy because we have had great difficulty in drawing attention to our immigration priorities including the Central

American Parity legislation and Registry Date legislation to help late amnesty class. Discussing these bills in this context would raise the profile of these issues. However, I would want to make sure that our support for this strategy in no way is interpreted as the Administration supporting the underlying bill and that amendments will not be voted on if it will risk the consideration of the bill at a later time. I would like to discuss this strategy further with WH legislative staff and the Hill but they seem to be supportive.