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# The Case of Elian Gonzalez: Legal Basics

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## Summary

The controversial and often impassioned immigration case of Elian Gonzalez ended the afternoon of June 28, 2000, when the six-year old Cuban boy returned home with his father. Elian's departure occurred seven months after the shipwrecked boy was brought to U.S. shores and less than an hour after a temporary injunction preventing his removal lapsed.

Litigation over Elian's legal fate did not end until the day of his departure. Then, the Supreme Court declined to consider the rulings of the Eleventh Circuit Court of Appeals that allowed Elian's return. Earlier, the Eleventh Circuit had barred Elian's removal until it had had an opportunity to consider his case more fully.

Elian was brought ashore alone after his mother and others died in an accident at sea. Because of the exigencies of the case, Elian was paroled into the keeping of relatives in Florida pending a determination of his future residency and care. Subsequently, the Florida relatives sought legal custody of Elian in state court and assisted in his applying for asylum with federal immigration authorities. Elian's father, Juan Miguel Gonzalez, objected to these legal actions, and later he personally came to the U.S. from Cuba to attempt to regain custody.

As litigation progressed, Florida state courts ultimately declined to consider the case as a matter of state family law, deferring instead to federal immigration law. Meanwhile, the federal courts eventually decided that the Attorney General could terminate the right of care that had been granted to Elian's relatives and that an asylum claim for Elian could not proceed over his father's objections.

This report briefly discusses legal authority that pertained to the Elian Gonzalez case. It will not be updated. For discussion of related issues, see CRS Report RS20446, *Elian Gonzalez: Chronology and Issues,* by Ruth Wasem.

**Introduction.** Elian Gonzalez, now six years old, was rescued at sea on Thanksgiving Day 1999 and brought ashore. His mother, who died at sea, had taken Elian with her from Cuba in an attempt to come to the U.S., thereby separating Elian from his natural father and his grandparents. After his arrival and hospitalization, the Attorney

General paroled Elian into the care of relatives in Florida – most specifically Lazaro Gonzalez, a great-uncle. Subsequently, both Lazaro Gonzalez and Elian himself filed applications seeking asylum for Elian in the U.S., but the Immigration and Naturalization Service (INS) refused to accept them against the wishes of Elian's father, Juan Miguel Gonzalez.

The Justice Department, which has primary responsibility for enforcing U.S. immigration law, emphasized that Elian's ability to reside here was exclusively an issue of federal immigration law, to be determined strictly under federal legal standards and definitions. Applying these, the Attorney General eventually reunited Elian with his father in the Washington, D.C., area, thus backing the earlier position of INS Commissioner Doris Meissner that Elian's father had sole legal authority to speak for Elian in immigration matters. This stand on the unity of father and son was consistent, preceding the departure of Juan Miguel Gonzalez from Cuba and continuing after his arrival here in early April 2000.

This stand by immigration officials also was upheld by the U.S. Court of Appeals for the Eleventh Circuit in a June 1, 2000, ruling. This ruling followed an April 19, 2000, order by the Eleventh Circuit that temporarily enjoined Elian's removal from the U.S. pending its full consideration of the case on appeal from the U.S. District Court for the Southern District of Florida. Earlier, U.S. District Judge K. Michael Moore had upheld the INS position that an asylum application could not proceed against the wishes of Elian's father, thereby exposing Elian to the possibility of quick removal to Cuba.

Meanwhile, the Florida state courts also had been active in Elian's case, but later backed off. In January, Florida Circuit Judge Rosa Rodriguez issued a temporary protective order that recognized certain temporary custodial rights of Elian's relatives here to the detriment of Elian's natural father. On April 13, however, another Florida judge, Circuit Judge Jennifer Bailey, lifted the protective order, holding that Lazaro Gonzalez was too distant a relative to be seeking custody under Florida law and recognizing further that the Gonzalez case was a federal immigration matter and not a state family court matter. Judge Bailey's holding marked the end of significant state court involvement.

This report discusses selected legal issues that were implicated by the Gonzalez controversy.

**Regulation of immigration.** Informed by several constitutional provisions and ultimately resting on the inherent right of every sovereign nation to control its borders, the authority to regulate the entry of aliens and the conditions of their stay is a plenary power of the Federal Government. Congress has exercised this authority primarily through the Immigration & Nationality Act of 1952 (INA), as amended (8 U.S.C. §§ 1101 *et seq.*).

Under the INA, an alien, including an unaccompanied minor, who arrives without proper migration documents has no right to remain and, indeed, is regarded as having no constitutional rights within the immigration process. But while an arriving alien without documents is subject to summary exclusion and removal, the INA does not foreclose all possibility of remaining. For example, the Attorney General may temporarily parole an alien into the U.S. for various purposes, including receipt of medical assistance and release pending further consideration of status. An alien on parole continues under the constructive custody of the Attorney General, who can set conditions in each case and

revoke parole at will. Beyond parole, an arriving alien also may apply for asylum here on the basis of prospective individualized persecution abroad based on race, religion, ethnicity, political opinion, or membership in a particular social group.

***Cuban migration***: Congress and the Executive Branch are not obligated to give all foreign nationals equal migration rights. At least two authorities uniquely affect Cubans: the Cuban Adjustment Act of 1966 and the Joint U.S.-Cuba Communique on Migration. Originally intended to overcome procedural obstacles to adjusting to legal permanent resident (LPR) status, the Cuban Adjustment Act (P.L. 89-732, as amended) has, through administrative practice and congressional acquiescence, been used to allow any Cuban who has been paroled or admitted into the U.S. to apply for LPR status after one year. This discretionary remedy for Cubans is much more advantageous than the usual adjustment rights under the INA.

The Joint Communique on Migration (issued September 9, 1994, and reprinted in 71 Interpreter Releases 1236 (9/12/94)) followed an uncontrolled mass exodus of Cubans by sea. The agreement set out in the communique changed Cuban migration in two fundamental ways. First, the U.S. agreed to permit the annual resettlement of at least 20,000 Cubans, not counting immediate relatives of U.S. citizens. Second, the U.S. agreed to discourage the irregular, unsafe departure of Cuban boat people by discontinuing its policy of allowing Cubans rescued at sea to enter the U.S. A May 2, 1995, Joint Statement amplified this latter point: "Effective immediately, Cuban migrants intercepted at sea by the United States and attempting to enter the United States will be taken to Cuba." The new interdiction policy resulted in a "wet foot-dry foot" distinction under which Cubans at sea would be returned without possibility of favorable treatment under the Cuban Adjustment Act, while Cubans reaching shore would retain at least the possibility – but not the assurance – of parole and subsequent adjustment to LPR status.

**Asylum under the INA.** Under § 208 of the INA, "**[a]ny alien** who is physically present in the United States . . . may apply for asylum." At core issue in the Gonzalez case was whether the phrase "any alien" was sufficiently unclear to leave the Attorney General discretion to refuse to accept an asylum application by or on behalf of a minor without parental consent.

The current asylum provisions derive from the Refugee Act of 1980, which added § 208 in part as follows:

> The Attorney General shall establish a procedure for an alien physically present in the United States . . . to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a *refugee* [as defined elsewhere in the INA]. . . .

The legislative history of the asylum provisions is sparse – there is no debate on any minimum age for application, for example – but that history which does exist emphasizes the importance of establishing an asylum process that is uniform and free of geographic or ideological bias.

Congress did not significantly amend the statutory asylum provisions until the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). IIRIRA put many of the features of then recent administrative asylum reforms

in statute, rather than, as had previously been the case, leaving all the details of the asylum process to be determined through regulation. IIRIRA also went beyond ratification of administrative practice by setting forth, for the first time in statute or regulation, express grounds for refusing to accept an asylum application. These grounds include time limits, denial of a previous claim, and ability to be sent to a safe third country. Congress included the first two of these exceptions because they were perceived as curbs for abuse that could not be addressed adequately under existing law by administrative authorities. The third exception had been only a regulatory basis for denying discretionary relief under existing law, but the regulation did not purport to be a basis for refusing an application.

**Judge Moore's decision.** In a March 21, 2000, order in the case of *Gonzalez v. Reno* (86 F. Supp. 2d 1167), U.S. District Judge K. Michael Moore upheld the Attorney General against a challenge to her authority brought by Elian's Florida relatives on Elian's behalf. The complaint alleged that the Attorney General had exceeded her authority and misapplied the law by refusing to adjudicate an asylum claim filed on Elian's behalf.

Judge Moore's opinion recounts at length the efforts undertaken by immigration authorities to investigate the nature of Elian's relationship with his father and the circumstances of his life in Cuba. Based on these investigations, immigration officials concluded that there was a lack of evidence indicating a risk of prospective harm in Cuba "such that [Elian's] interests might so diverge from those of his father that his father could not adequately represent him [in asylum matters]." Consequently, the Attorney General refused to consider an asylum application filed against the wishes of Elian's father, despite statutory language that grants "any alien" in the U.S. the right to apply for asylum.

Judge Moore first dismissed the charge that the Attorney General's refusal to consider the application violated Elian's due process rights under the Constitution. An alien in Elian's posture – an alien paroled into the U.S. upon arriving without documents – simply does not have due process rights in the immigration realm, according to Judge Moore. This conclusion would appear to comport with 50 years of judicial precedent.

Next, Judge Moore upheld the refusal to consider the asylum application despite the "any alien" phrasing of the statute. In so doing, Judge Moore emphasized two factors. The first was the uniquely broad authority delegated to the Executive Branch to interpret immigration law free from outside interference. The second was the arguable ambiguity of the statutory language when read in the context of other provisions and the wide discretion of the Attorney General to resolve these ambiguities in any reasonable manner.

**The Eleventh Circuit.** In first considering an appeal of Judge Moore's decision, a three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit enjoined the removal of Elian from the U.S. until it had considered the case more fully. The Eleventh Circuit's injunction, issued April 19, appeared to suggest that the court was not as sanguine as Judge Moore about the vagueness of the INA and the scope of the Attorney General's power under that statute. Based on what it regarded as the apparently plain language granting "any alien" the right to apply for asylum, the Eleventh Circuit questioned the proposition that, as a matter of law, parental consent is required. The Eleventh Circuit also questioned whether a decision to treat Elian's application as a nullity comported with the congressional directive to establish procedures for considering asylum claims.

Nevertheless, the June 1, 2000, ruling by the Eleventh Circuit agreed with Judge Moore's legal conclusions and much of his reasoning. The court did find that the "any alien" language in the asylum provision of the INA clearly covered 6-year olds, but it also went on to state that the important question was not whether Elian could apply. Rather, according to the court, the critical question was whether Elian had applied, for purposes of the statute, when he and his Florida relatives offered applications over the express wishes of Elian's father.

The Eleventh Circuit emphasized that the INA does not command how an alien can apply for asylum, and from that gap springs executive discretion. Citing the broad discretion implementing agencies generally have in administering a statute under their charge (see *Chevron v. N.R.D.C.*, 467 U.S. 837 (1984)), and immigration authorities in particular (see *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999)), the court held that INS did not act unreasonably in deciding that 6-year olds lack capacity to seek asylum on their own and that only parents can seek asylum for them, absent special circumstances. That this policy was first adopted in the Gonzalez case and, then, during the course of informal adjudication was not persuasive to the court. Nor was the fact that the policy did not harmonize with earlier INS interpretive guidelines on child asylum cases. Instead the court stressed INS efforts to investigate the nature of Elian's relationship with his father and the conditions Elian likely would face if returned to Cuba.

The court repeatedly observed that its decision rested on the deference due INS because neither the phrase "any alien" nor any other statutory provision compelled a particular policy on accepting asylum applications from 6-year old minors. On the other hand, judicial opinions do not always accord INS such broad leeway in interpreting the INA. Instead, courts at times have read the asylum provisions to circumscribe administrative discretion. For example, § 208 directs the Attorney General to "establish a procedure for the consideration of asylum applications . . . ." Several U.S. courts of appeals have concluded that the "a procedure" language precludes the Attorney General from adopting separate asylum procedures for stowaways.

The Eleventh Circuit ended its June 1 opinion with a footnote imposing a 14-day deadline on seeking a rehearing *en banc* by the full court. Under the federal rules of appellate procedure, the court's final mandate issues 7 days after the filing period, though the mandate may be further stayed if a rehearing request is filed. It thus appeared that Elian's removal to Cuba would remain barred until at least June 22, but that longer delays would be at the discretion of the courts and administrative authorities in the context of further appellate litigation, if any.

The Eleventh Circuit had its last say in Elian's case on June 23. Then, it denied requests to consider the case further. In doing so, the court reiterated that the "informal adjudication" approach taken by INS was due judicial deference, especially because of the foreign policy considerations at stake. The court further held that its final mandate in the case, and the concomitant dissolving of its earlier injunction, would issue June 28 at 4:00 p.m., Atlanta time. The Supreme Court announced mid-day on the 28th that it would not exercise its discretion to consider the Gonzalez matter, and by 4:30 that day, Elian had departed for Cuba.

**Custody controversy.** When the Eleventh Circuit temporarily enjoined Elian's removal from the U.S. on April 19, 2000, those who supported Elian remaining in Florida

celebrated. As they celebrated, however, the Attorney General asserted that the Eleventh Circuit's injunction did not directly preclude her from seeking to reunite Elian with his father at some location in the U.S. Early on April 22 – within days of the Eleventh Circuit's ruling – armed federal agents forcibly removed Elian from the Florida house where he had been staying. Elian then was flown to Andrews Air Force Base near Washington, D.C., and entrusted into the care of his father, with whom he remained.

When Elian initially arrived in the U.S., immigration authorities, in compliance with policy on unaccompanied minors and in recognition of the exigencies in the case, decided to parole Elian into the U.S. for deferred inspection – *i.e.*, for future determination of his status under immigration law. Federal regulations on releasing minors on parole give top priority to parents for the care of the parolee, going so far as to allow a parent abroad to designate a person in the U.S. for care in certain circumstances. In unusual or compelling circumstances, however, a minor parolee may be entrusted into the care to an adult other than a close relative or guardian if the adult agrees to care for the minor and to present the minor to immigration authorities for further proceedings.

The parole authority under the INA is broad and highly discretionary. The Attorney General (or her designee) may set "such conditions as [s]he may prescribe" on release on parole. Moreover, an alien on parole remains in the constructive custody of immigration authorities, and immigration authorities retain general power to terminate parole, especially where parole conditions are violated.

In Elian's case, immigration authorities revoked his parole into the care of his Florida relatives on April 13 after they refused to return him to them at Opa-locka Airport in Florida. Thus, legal care of Elian reverted to the Government, even though he physically remained with his Florida relatives while transfer negotiations continued. After negatively judging the prospects for successful negotiations, immigration authorities obtained a search warrant for Lazaro Gonzalez' house from a federal judge on the evening of April 21, citing federal criminal rules that authorize the issuance of search warrants to seize unlawfully restrained persons. The same day, immigration authorities also issued an administrative warrant for Elian's arrest.

These steps notwithstanding, many congressional and legal observers questioned the forcible transfer of Elian to his father. One legal scholar opined that the Government failed to obtain sufficient judicial authorization. Other observers questioned whether the federal officers who seized Elian acted in an appropriately restrained manner. Still others asked whether the federal transfer of Elian to Juan Miguel could have improperly influenced the outcome of a case to which the Federal Government was a party. Nonetheless, the June 1 ruling upholding the INS requirement of Juan Miguel's consent to asylum eclipsed the controversy over Elian's seizure, and the Government's actions in regaining Elian from his relatives care were never subjected to extended judicial scrutiny.