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Ambiguity Equals Authority: The Immigration and Naturalization Service's Response in the Elian Gonzalez Case

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NOTE

AMBIGUITY EQUALS AUTHORITY:
THE IMMIGRATION AND
NATURALIZATION SERVICE'S
RESPONSE IN THE ELIAN
GONZALEZ CASE

I. INTRODUCTION

At first glance, the case of *Gonzalez v. Reno* is about a six-year-old boy caught in the midst of an international custody battle between his father in Cuba and his uncle in the United States.¹ However, the case of *Gonzalez v. Reno* is basically a test of the separation of powers between the judicial, executive, and legislative branches of the federal government.²

For Elian's family in Miami, the legal argument focused on the refusal of the Immigration and Naturalization Service (hereinafter "INS") to consider the boy's three asylum applications.³ For Janet Reno and the INS, this case centered on the fact that Elian's father unequivocally requested that his son be returned to Cuba to be with him.⁴ Amid the struggle between Elian's relatives in the U.S. and his father in Cuba, Cuban residents in Southern Florida were absorbed in the in-

¹ See *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000).

² See *id.*

³ See Immigration Nationality Act §208, 8 U.S.C § 1158(a)(1) reading:

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

⁴ See Brief of Defendant/Appellee at 7, *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000) (No. 00-11424-D).

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tense tug-o-war.⁵ Protesters blocked the Port of Miami and closed traffic in many intersections, as waves of people rallied in opposition to U.S. President Clinton's decision to return Elian Gonzalez to his father in Cuba.⁶ Many people identified with the boy and rallied behind the U.S. family in its attempt to prevent Elian's return to Cuba.⁷ Nearly every day, in newspapers and television news reports across the United States, there appeared a story about the intense battle over the custody of six-year-old Elian.⁸

In Part II, the Background of this Note will explore Cuba's recent history with foreign powers.⁹ A better understanding of this history and a look at how Fidel Castro, Cuba's current leader, came to power will shed light on why many Cuban-Americans have animosity toward the communist Cuban regime.¹⁰ First, it will discuss the struggle Cuba has had with foreign powers.¹¹ Next, it will explore the law of asylum and how this relates to child-parent relations.¹² Further, it will look at how this asylum law initially developed in the United States under the United Nations Protocol.¹³ Moreover, it will examine the relationships of child, family and state in asylum law.¹⁴

Part III will present the procedural maneuvers used by each party to convince the 11th Circuit that its conclusions were right.¹⁵ Part IV will discuss the issues the court resolved in the case.¹⁶ Part V will critique some the issues discussed in the case.¹⁷

⁵ See Lizette Alvarez, *Irate Cuban-Americans Paralyze Miami*, N.Y. TIMES, Jan. 7, 2000, at A12.

⁶ See *id.* Riot police arrested nearly one hundred and thirty five protesters as the crowd chanted, "Libertad Elian, libertad Elian." *Id.*

⁷ See *id.*

⁸ See Jim Rutenberg, *Watching Elian Gonzalez*, N.Y. TIMES, Apr. 26, 2000, at E7.

⁹ See *infra* notes 18-81 and accompanying text.

¹⁰ See *infra* notes 82-124 and accompanying text.

¹¹ See *infra* notes 19-43 and accompanying text.

¹² See *infra* notes 125-184 and accompanying text.

¹³ See *infra* notes 137-160 and accompanying text.

¹⁴ See *infra* notes 161-184 and accompanying text.

¹⁵ See *infra* notes 185-222 and accompanying text.

¹⁶ See *infra* notes 223-313 and accompanying text.

¹⁷ See *infra* notes 314-323 and accompanying text.

II. BACKGROUND

A. A BRIEF HISTORY OF FOREIGN CONTROL OF CUBA

The setting for *Gonzalez v. Reno* is directly linked to the soured relations between the United States and Cuba and the large number of Cubans and Cuban Americans who live in the United States.¹⁸ During the mid-1800's, Cubans attempted to push out Spanish rulers because of their authoritarian and repressive rule, monopoly of public offices, and imposition of burdensome taxes.¹⁹ After successfully pushing out the Spanish rulers with aid from the United States, Cuba found a new foreign presence to contend with.²⁰ This time it was its former ally, the United States.²¹ Again, during the mid to late-1800's, the United States intervened in a battle between Cuba and Spain.²² This effort was met with success and a short period of peace.²³ By the early 1890's, however, Cubans were again preparing for war with Spain.²⁴ It was at this time that Cuban separatists organized the Cuban Revolutionary Party, which launched a new war for the island's independence from Spanish control.²⁵

The island's close proximity to the United States led President William McKinley to declare that conflict in Cuba was a threat to American interests.²⁶ McKinley urged the Spanish government to either change its policy with Cuba or to abandon the island altogether.²⁷ In February 1898, determining that Americans in Cuba may need assistance, the United

¹⁸ See Joyce A. Hughes, *Flight From Cuba*, 36 CAL. W. L. REV. 39, 40 (1999). Currently there are about 1.1 million Cubans and Cuban Americans residing in the United States. *Id.* (citing Melita Marie Garza, *The Cubanization of an American City, Review of City on the Edge: The Transformation of Miami by Alejandro Portes and Alex Stepick*, CHI. TRIB., Nov. 18, 1993, at 3.)

¹⁹ See FOREIGN AREA STUDIES, AREA HANDBOOK FOR CUBA 37 (Jan K. Black ed., 1976). (hereinafter AREA HANDBOOK).

²⁰ See *id.*

²¹ See *id.*

²² See THE WORLD BOOK ENCYCLOPEDIA 1176 (2000) (hereinafter WORLD BOOK).

²³ See FOREIGN AREA STUDIES, CUBA A COUNTRY STUDY 14 (James D. Rudolph ed., 1965). (hereinafter A COUNTRY STUDY).

²⁴ See *id.*

²⁵ See WORLD BOOK, *supra* note 22.

²⁶ See *id.*

²⁷ See *id.*

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States sent its battleship Maine to Havana to protect them.²⁸ Shortly after it arrived, the Maine exploded under mysterious circumstances.²⁹ The United States cast blame for the incident on Spain, triggering the Spanish-American War.³⁰

In July of 1898, Spanish troops in Cuba surrendered.³¹ An Armistice was attained in August, and on December 10 of that year, Spain signed the Treaty of Paris, forfeiting all its rights to Cuba.³² Shortly thereafter, the United States established a military government in Cuba, destroying the Cuban goal of independence.³³

In 1901, the United States pushed Cuba to adopt a set of provisions called the Platt Amendment.³⁴ The Platt Amendment allowed the United States to intervene in Cuban affairs and limited the Cuban government's power to make treaties.³⁵ Moreover, the Platt Amendment placed restraints on Cuba's push for independence.³⁶ Following the institution of the Platt Amendment, Cuba was marked by political instability, protest and corruption.³⁷ At this time, American involvement in Cuban affairs continued to grow, as the United States began to dominate and control the island's trade.³⁸

The first president of the Republic of Cuba, Tomas Estrada Palma, was elected in 1901.³⁹ American troops left con-

²⁸ See A COUNTRY STUDY, *supra* note 23 at 14.

²⁹ See *id.*

³⁰ See *id.* The Spanish-American War, which lasted from 1895 to 1898, is called by Cuba the Spanish-Cuban-American War. *Id.* Additionally, Two hundred and sixty-six crewmembers lost their lives in the explosion that originated outside of the vessel. *Id.*

³¹ See *id.*

³² See A COUNTRY STUDY, *supra* note 23 at 21.

³³ See *id.* at 22. Further, Spain's entire overseas empire ended by the terms of the armistice. *Id.* Along with Cuba, Spain lost Puerto Rico, the Philippine Islands, and other islands in the Pacific and West Indies to the United States. *Id.*

³⁴ See *id.* at 23. The Platt Amendment stated all acts of the United States military government had to be accepted as legitimate. *Id.* In addition, Cuba had to lease land for naval stations and coal to the United States. *Id.* Under the Platt Amendment, the United States reserved the right to intervene in Cuban affairs at any time to "preserve the Cuban independence." *Id.*

³⁵ See WORLD BOOK, *supra* note 22 at 1177.

³⁶ See *id.*

³⁷ See *id.*

³⁸ See *id.*

³⁹ See A COUNTRY STUDY, *supra* note 23 at 24. Palma was a longtime resident of

trol of Cuba to the newly elected president, giving the new regime a chance to control its own destiny.⁴⁰ In 1906 these troops returned, however, when violent protests broke out over the results of a presidential election.⁴¹ The United States remained in control of the island until 1909, when they returned control of the country to the Cubans.⁴² At this turnover, the United States did not relinquish its control of naval bases on the island.⁴³

Gerardo Machado was elected president of Cuba in 1924.⁴⁴ Machado was critical of U.S. control in Cuban affairs and attacked the Platt Amendment.⁴⁵ Despite his denunciation of foreign control, Machado was ousted in 1933, after an army revolt forced him out of office.⁴⁶ Just one month later, an army sergeant named Fulgencio Batista y Zaldívar, along with a group of university students and professors, led a military revolt that overthrew this new government.⁴⁷ In its place, they put a five-man government, headed by former university professor Ramon Grau San Martin.⁴⁸ Under Grau's control, the government instituted changes designed to limit U.S. influence over domestic affairs.⁴⁹ It was not long, however, before Grau's former supporters turned against him.⁵⁰ Batista, who had led the revolt that put Grau in office, forced him to resign in 1934.⁵¹

Grau's resignation was the beginning of the first ten-year period during which Batista controlled Cuban politics.⁵² A number of Cuban presidents came into power after Grau, but Batista was the dominant figure behind each one of them.⁵³

the United States before the U.S. military government transferred power to Cuban control. *Id.*

⁴⁰ See WORLD BOOK, *supra* note 22 at 1177.

⁴¹ See *id.*

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See WORLD BOOK, *supra* note 22 at 1177.

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See WORLD BOOK, *supra* note 22 at 1177.

⁵¹ See *id.*

⁵² See AREA HANDBOOK, *supra* note 19 at 46.

⁵³ See *id.*

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Batista stamped out political opposition and increased his control with the help of established labor unions.⁵⁴

In 1938, Batista legalized the communist Popular Socialist Party (*Partido Socialista Popular*, hereinafter "PSP").⁵⁵ The PSP became part of a coalition that supported Batista's presidential candidacy.⁵⁶ In 1944, when Grau defeated Batista's candidate, Carlos Saladrigas, it was a smooth transition from one leader to another.⁵⁷ Communists, too, had supported Grau.⁵⁸ This support of Grau changed, however, during the onset of the cold war, as the communists shifted to a policy in opposition to the democratic left.⁵⁹ In 1947, Grau helped to set up a new party to rival those dominated by the communists.⁶⁰ A man named Prio Socarras, former minister of labor for Grau, won the 1948 election under a progressive yet anti-communist platform.⁶¹ So long as anti-communist sentiment was prevalent in Cuba, the United States remained mostly noninterventionist in Cuban affairs.

The 1952 elections focused on the elimination of corruption in Cuba's government.⁶² Three men were nominated for President.⁶³ One of these candidates was Batista.⁶⁴ Although another candidate held the favorable position in the campaign, Batista wanted to become the next Cuban president.⁶⁵ To reach this goal, Batista staged a bloodless coup d'etat with aid from his supporters in the Cuban military.⁶⁶ As a result, the election was cancelled, and Batista appointed himself the provisional ruler.⁶⁷ President Socarras cabinet went into exile.⁶⁸

⁵⁴ See *id.* at 38.

⁵⁵ See *id.* at 48.

⁵⁶ See *id.*

⁵⁷ See AREA HANDBOOK, *supra* note 19 at 48.

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See *id.* at 49.

⁶¹ See *id.*

⁶² See A COUNTRY STUDY, *supra* note 23 at 34.

⁶³ See *id.*

⁶⁴ See *id.* at 35.

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ See A COUNTRY STUDY, *supra* note 23 at 35.

⁶⁸ See *id.*

Batista's men quickly occupied Cuba's most important military positions.⁶⁹ Furthermore, Batista terminated the country's constitution and broke up all of its political parties.⁷⁰ Batista's control lasted for six years.⁷¹ Although this was a prosperous time in Cuba, the nation paid for its new wealth in the loss of its freedom.⁷² The less Cubans trusted Batista, the more his power grew.⁷³ The dictatorship responded by applying repression and treating its opposition cruelly.⁷⁴

Despite Batista's negative impact on Cuba, relations between the United States and Cuba improved.⁷⁵ For example, in 1934 the U.S. and Cuba signed a treaty that virtually cancelled the Platt Amendment, although the U.S. retained control of its Guantanamo base, located north of Cuba between Cuba and the United States.⁷⁶ Additionally, the U.S. recognized and supported Batista's government.⁷⁷ As a result, trade between the two nations increased dramatically.⁷⁸ During this time, American economic control over Cuban interests swelled.⁷⁹ At one point, Americans controlled 90 percent of Cuba's telephone and electrical services.⁸⁰ Furthermore, American interests also controlled about 40 percent of the nation's sugar production, one of Cuba's most important cash crops.⁸¹

In 1959, relations between the United States and Cuba deteriorated rapidly.⁸² Fidel Castro mounted a successful guerilla warfare campaign and ousted Batista.⁸³ Like other leaders, Castro was an anti-Imperialist who identified with the political left and was critical of foreign control of Cuba's trade

⁶⁹ *See id.*

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *See A COUNTRY STUDY, supra note 23 at 35.*

⁷³ *See id.*

⁷⁴ *See id.*

⁷⁵ *See WORLD BOOK, supra note 22 at 1178.*

⁷⁶ *See id.*

⁷⁷ *See AREA HANDBOOK FOR CUBA, supra note 19 at 46.*

⁷⁸ *See id.*

⁷⁹ *See WORLD BOOK, supra note 22 at 1178.*

⁸⁰ *See id.*

⁸¹ *See NICOLAS RIVERO, CASTRO'S CUBA AN AMERICAN DILEMMA 71 (1962).* (hereinafter *CASTRO'S CUBA*).

⁸² *See A COUNTRY STUDY, supra note 23 at 219.*

⁸³ *See AREA HANDBOOK FOR CUBA, supra note 19 at 50-52.*

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commodities.⁸⁴ Initial responses to Castro were positive.⁸⁵ He was heralded as a great leader who defeated the corrupt and brutal Batista dictatorship.⁸⁶ The new and inspiring leader became a folk hero to the disadvantaged groups of Latin America.⁸⁷ Cubans were promised a free and democratic Cuba, dedicated to social justice and economic growth.⁸⁸ Moreover, Castro gave faith to the Cuban people that he would institute an honest government.⁸⁹ After years of government corruption, Cubans looked forward to the things Castro had promised.⁹⁰

As early as the spring of 1959, however, Cuban leaders were becoming suspicious of Castro's ultimate goals.⁹¹ Some of those who fought with Castro to defeat Batista were not Communist, and there was growing concern about Communist infiltration in the Castro controlled army.⁹² Furthermore, many of Castro's reforms appeared to follow a communist pattern.⁹³ For example, the traditional, propertied classes were ostracized, while the revolutionary government kept its promises to the underprivileged masses.⁹⁴

One by one, the people who had helped Castro gain power began to defect to other countries.⁹⁵ Increasingly, both supporters and critics of Batista, began to oppose Castro.⁹⁶ For example, Batista supporters in the Dominican Republic attempted to gain support with some of Castro's military.⁹⁷ Ad-

⁸⁴ See A COUNTRY STUDY, *supra* note 23 at 53.

⁸⁵ See FELIX ROBERTO MASUD-PILOTO, FROM WELCOMED EXILES TO ILLEGAL IMMIGRANTS 19 (1996).

⁸⁶ See *id.*

⁸⁷ See A COUNTRY STUDY, *supra* note 23 at 38.

⁸⁸ See CASTRO'S CUBA, *supra* note 81 at 79.

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.* at 143.

⁹² See *id.*

⁹³ See CASTRO'S CUBA, *supra* note 81 at 143. See also A COUNTRY STUDY, *supra* note 23 at 40.

⁹⁴ A COUNTRY STUDY, *supra* note 23 at 40.

⁹⁵ See CASTRO'S CUBA, *supra* note 81 at 150.

⁹⁶ See *id.*

⁹⁷ See *id.* at 145. Anti-Castro elements led by General Jose Eleuterio Pedraz contacted Majors Gutierrez and William Morgan of Castro's army. They intended to ship arms from the Dominican Republic and initiate a counterrevolution against Castro. Morgan and Gutierrez informed Castro and misled the Dominican forces. Morgan

ditionally, the former commander in chief of Castro's air force, Major Diaz Lanz, came to the United States charging Communists with conducting "a certain plan of indoctrination" in Cuba.⁹⁸ He further stated that Russian agents had been present in Cuba since the beginning of the revolution.⁹⁹ Castro's police now harassed priests.¹⁰⁰ Furthermore, editors, publishers and reporters fled the country after Castro took over the newspapers.¹⁰¹

In reaction to Castro's repressive rule and Communist leadership, the United States instituted an economic blockade in October 1960, banning all exports from the United States except food and medicine.¹⁰² In November 1960, all United States ships were prohibited from carrying any cargo to or from Cuba.¹⁰³ The U.S. embargo had a tremendous negative impact on Cuba's economy.¹⁰⁴ Most critical, Cuba lost the United States as a major purchaser of sugar, the island nation's number one export.¹⁰⁵

As a result of the U.S. embargo, Fidel Castro increased Cuba's ties with the Soviet Union.¹⁰⁶ The Soviet Union replaced the United States as Cuba's number one trade companion, purchasing much of the nation's exports and providing it with economic aid.¹⁰⁷ In exchange for the benefits it conferred upon Cuba, the Soviet Union received a strategic ally in the Western Hemisphere.¹⁰⁸

even accepted \$100,000 from the Dominican consul in Miami. This enraged the Dominican dictator, who later negotiated with Castro to cease aggressive activity between the two countries. Morgan was arrested a year later by Castro's police and was eventually executed. Juan Orta, Castro's former private secretary, told friends Morgan's execution was the price Castro had to pay for the pact of non-aggression. *See id.*

⁹⁸ *See* SUBCOMM. ON INTERNAL SECURITY, 86D CONG., COMMUNIST THREAT TO THE UNITED STATES THROUGH THE CARIBBEAN, PART I 6 (Comm. Print 1959).

⁹⁹ *See id.*

¹⁰⁰ *See* CASTRO'S CUBA, *supra* note 81 at 150.

¹⁰¹ *See id.* at 151.

¹⁰² *See* A COUNTRY STUDY, *supra* note 23 at 219.

¹⁰³ *See id.*

¹⁰⁴ *See* CASTRO'S CUBA, *supra* note 81 at 71.

¹⁰⁵ *See id.*

¹⁰⁶ *See* A COUNTRY STUDY, *supra* note 23 at 206.

¹⁰⁷ *See id.*

¹⁰⁸ *See id.* at 207.

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In 1960, the Soviet Union escalated its alliance with Cuba by declaring that it would defend Cuba against any military threat.¹⁰⁹ Sparked by the fear of Communism spreading from the Soviet Union to other Latin American nations, the United States Central Intelligence Agency provided support for an anti-Castro exile group that invaded Cuba at the Bay of Pigs.¹¹⁰ This small invasion did not succeed in overthrowing Castro.¹¹¹ Rather, the invasion's failure provided a boost to Castro's regime and fueled anti-U.S. propaganda in Cuba.¹¹²

Under Castro, Cuba officially allied itself with the Soviet Union.¹¹³ This alliance was created on May 8, 1960, just three days after the Soviets announced that they had shot down an American U2 reconnaissance spy plane over Soviet air space.¹¹⁴ Two years later, Cuba was situated between the United States and the Soviet Union in the Cuban Missile Crisis.¹¹⁵ Soviet surface-to-air anti-aircraft missiles located in Cuba were deemed a direct threat to the United States' national security.¹¹⁶ On October 22, 1962, U.S. President John F. Kennedy warned Americans that a nuclear war with the Soviets appeared imminent.¹¹⁷ President Kennedy, however, and Soviet leader Nikita Khrushchev settled the nuclear situation on October 28, 1962, without any consultation with Cuban President Fidel Castro.¹¹⁸ The agreement provided that the Soviets would withdraw their missile bases from Cuba, the United States would withdraw its naval blockade, and Cuba would not face any military aggression.¹¹⁹

Since the 1960's, U.S. policy toward Cuba has been guided by a key objective to isolate the Cuban government from the

¹⁰⁹ See *id.* at 206.

¹¹⁰ See *id.* at 44. The Bay of Pigs is the name of the starting point where anti-Castro guerrillas disembarked. Though President Kennedy did not allow air support, the Central Intelligence Agency (CIA) gave military training to the anti-Castro guerrillas. See *id.*

¹¹¹ See A COUNTRY STUDY, *supra* note 23 at 45.

¹¹² See *id.*

¹¹³ See *id.* at 42.

¹¹⁴ See *id.*

¹¹⁵ See *id.* at 43.

¹¹⁶ See A COUNTRY STUDY, *supra* note 23 at 45-46.

¹¹⁷ See *id.* at 46.

¹¹⁸ See *id.*

¹¹⁹ See *id.*

rest of the world.¹²⁰ The economic embargo that was imposed at the time remains in force today, impeding the United States' secondary goal of providing support for the Cuban population.¹²¹ The U.S. efforts to isolate are sometimes counter-productive in that they generate sympathy for Castro both internationally and domestically.¹²² In Cuba, the United States has become Castro's scapegoat for his nation's internal flaw.¹²³ These flaws are rooted in the Cuban system's internal inefficiencies.¹²⁴

B. ASYLUM LAW AND CHILD PARENT RELATIONS

In addition to understanding the political relationship between the United States and Cuba, it is important to understand the law of asylum in the United States, as Elian's relatives sought asylum for him in the United States. Immigration law in the United States was virtually unrestricted during the nation's early years. In the nineteenth century, however, the United States was forced to handle the influx of large numbers of immigrants who were fleeing persecution in Europe during World War II. At that time, Congress delegated immigration authority to the Attorney General. During the 1960's, the United States modeled its immigration and asylum law after one originally developed by the United Nations. In later years, Congress executed statutory policy to refine U.S. law to better deal with the entry of refugees into the country. Additionally, as Juan Miguel Gonzalez was claiming that he had the right to speak for Elian as his biological father, the law governing parent child relations in the United States must be explored. The following discussion will probe these issues.

1. Asylum Law's Initial Stages in the United States

For purposes of U.S. law, asylum is defined as a status sought by a person in the United States or at a port of entry

¹²⁰ See *Foreign Policy In Focus* (visited June 29, 2000) <<http://www.foreignpolicy-infocus.org/briefs/v014/v4n29cuba.html>>.

¹²¹ See *id.*

¹²² See *id.*

¹²³ See *id.*

¹²⁴ See *id.*

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who has a "well-founded fear of persecution if forced to return to his or her country or nationality or last habitual residence because of race, religion, nationality, membership in a particular social group, or political opinion."¹²⁵ International law recognizes the rights of governments to offer asylum to people in flight for fear of persecution.¹²⁶ This fact does not, however, create an individual right to receive asylum from a government that is unwilling to accept a refugee.¹²⁷ It merely means that the individual may apply for asylum, but this application creates no requirement on the part of the state to accept that person.¹²⁸

In the United States, refugee immigration was virtually unrestricted until 1874.¹²⁹ Accordingly, immigration laws were almost non-existent before 1874.¹³⁰ U.S. law at that time remained largely untouched until 1948, when the U.S. faced a large entry of European immigrants fleeing the destruction of World War II.¹³¹ As a result, Congress enacted the Displaced Persons Act, which allowed for an influx of immigrants when crises requiring an immediate U.S. response erupted abroad.¹³² In 1956, the revolts against communism in Hun-

¹²⁵ See I.N.A. § 101(a)(42) and §208, codified at 8 U.S.C. § 1101(a)(42) and §1158 (2000).

¹²⁶ See G.A. Res. 217, U.N. Doc. A/810, at 71, art. 14 (1948), reprinted in 1948 Y.B. ON HUMAN RIGHTS 467 (United Nations). See generally Leslie A. Fithian, *Forcible Repatriation of Minors: The Competing Rights of Parent and Child*, 37 STAN. L. REV. 187, 195 (1984). (Explaining the background of the development of asylum law in the United States).

¹²⁷ See G.A. Res. 217, U.N. Doc. A/810, at 71, art. 14 (1948), reprinted in 1948 Y.B. ON HUMAN RIGHTS 467 (United Nations).

¹²⁸ See S. SINHA, *ASYLUM AND INTERNATIONAL LAW* 89-91 (1971).

¹²⁹ See AUSTIN T. FRAGOMEN JR. AND STEVEN C. BELL, *IMMIGRATION FUNDAMENTALS, A GUIDE TO LAW AND PRACTICE*, PRACTICING LAW INSTITUTE, 6-2 (4th ed. 1999).

¹³⁰ See *id.* Some exceptions to this include the Alien and Sedition Act of June 25, 1798, 1 Stat. 570, which permitted the President to deport dangerous persons. Additionally, there was the Act of February 19, 1862, 12 Stat. 340, which barred the entry of foreign Asian nationals for the purpose of slave labor. Congress passed additional statutes excluding certain classes of aliens. Author also discusses historical chronology of related statutes, including the Act of March 3, 1875, 18 Stat. 477; Act of May 6, 1882, 22 Stat. 58; Act of May 6, 1882, 22 Stat. 214; Act of February 26, 1885, 23 Stat. 332; Act of October 19, 1888, 25 Stat. 566; Act of March 3, 1891, 26 Stat. 1084; and Act of March 3, 1893, 27 Stat. 569. See *id.*

¹³¹ See FRAGOMEN, *supra* note 129 at 6-2.

¹³² See *id.* at 6-3.

gary created another refugee crisis.¹³³ The United States responded by enacting the Immigration and Nationality Act of 1952 (hereinafter "INA").¹³⁴ The INA gave the Attorney General authority to parole aliens for emergency reasons.¹³⁵ This parole authority was exercised in the 1960s, when large numbers of Cuban immigrants fled Castro controlled Cuba for the United States.¹³⁶

2. Development of Asylum Under the United Nation's Protocol

In 1968, the United States signed the United Nations Protocol on the Status of Refugees (hereinafter "Protocol").¹³⁷ This treaty reaffirmed the United States' historical commitment to serve as a refuge for persecuted and oppressed people.¹³⁸ The Protocol expanded refugee protection and affirmed the stance that anyone may seek and enjoy refuge from persecution.¹³⁹ This Protocol provides that no state that is a party to the protocol may expel or return a refugee to a country where his life or freedom would be endangered.¹⁴⁰ The Proto-

¹³³ See I.N.A. §212(d)(5), codified at 8 U.S.C. §1182(d)(5) (2000). See also FRAGOMEN, *supra* note 129 at 6-4.

¹³⁴ See *id.*

¹³⁵ See I.N.A. §212(d)(5), codified at 8 U.S.C. §1182(d)(5); Fragomen, Austin T. and Bell, Steven C. Immigration Fundamentals, A Guide to Law and Practice Practicing Law Institute, New York City (4th ed. 1999) at History 6-4.

¹³⁶ See FRAGOMEN, *supra* note 129 at 6-4. This parole authority precedent also affected Chinese and Czech immigrants in the middle to late 1960's, and Indochinese immigrants in the 1970's. It has a continued effect today since it shifted power and discretion to the Attorney General, codified today in current domestic immigration law. See *id.* In criminal law, parole means a conditional release. See BLACK'S LAW DICTIONARY 1273 (Henry Campbell Black ed., 1951).

¹³⁷ See FITHIAN, *supra* note 126 at 196.

¹³⁸ See Brief of Amici Curiae at 7-8, Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000) (No. 00-11424-D) (brief in support of neither party).

¹³⁹ See DEBORAH E. ANKER, THE LAW OF ASYLUM IN THE UNITED STATES; A GUIDE TO ADMINISTRATIVE PRACTICE AND CASE LAW 3, footnote 13 (2d ed. 1991) discussing the Protocol Relating to the Status of Refugees, opened for signature on Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267. By reference the Protocol incorporated articles 2-34 of the 1951 Convention Relating the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137. *Id.*

¹⁴⁰ See FRAGOMEN, *supra* note 129 at 6-2. The United States declined to ratify the Convention. *Id.* Articles 2-34 referred to above only appear in the Convention. *Id.* The Convention defined "refugee" and set standards for the acceptance of refugees by nations acceding to the Convention. *Id.*

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col further defined a refugee as an individual who, "owing to a well-founded fear of being persecuted for reasons of race, nationality, membership of a particular social group or political opinion," is unwilling or unable to return to his former country of residence.¹⁴¹

In 1980, Congress passed the Refugee Act (hereinafter "1980 Act"), thereby codifying the Protocol into U.S. law.¹⁴² This codification implemented a policy and created a statutory device to process refugee applications from outside and within the United States.¹⁴³ Before the 1980 Act, the United States had no systematic way of implementing the U.N. Protocol for aliens abroad, at the border, or within the United States.¹⁴⁴ The 1980 Act gave the Attorney General power to grant asylum to an alien who has followed certain procedures in applying for asylum if he or she is a "refugee" as defined in section 1101(a)(42)(A).¹⁴⁵ Further, the 1980 Act amended current law to adopt the Protocol's principle of *nonrefoulement*.¹⁴⁶

At the time the 1980 Act was adopted, large numbers of Cubans and Haitians were flooding into the United States.¹⁴⁷ Nearly 125,000 Cubans entered the United States in 1980 as part of the Mariel boatlift.¹⁴⁸ With such a large number of immigrants putting pressure on social welfare programs, the INS created a special category to deal with the situation.¹⁴⁹

¹⁴¹ See Anker, *supra* note 139 at 3.

¹⁴² See Refugee Act of 1980, 8 U.S.C. §1101-1157 (2000).

¹⁴³ See Anker, *supra* note 139 at 11.

¹⁴⁴ See *id.*

¹⁴⁵ See I.N.A. §208(b)(1), codified at 8 U.S.C. §1158(b)(1) (2000). The exact language reads:

The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

Id.

¹⁴⁶ See FRAGOMEN, *supra* note 129 at 6-5, defining nonrefoulement as the obligation of participating states not to force people to return to the country of persecution.

¹⁴⁷ See *id.* See also Lisandro Perez, *Cubans in the United States*, 467 ANNALS 126, 130 (1986). See also Joyce A. Hughes, *Flight From Cuba*, 36 CAL. W. L. REV. 39, 40. Mariel is the name of the port Fidel Castro opened in 1980, which helped initiate the large numbers of Cubans to leave Cuba for the United States. *Id.*

¹⁴⁸ See *id.*

¹⁴⁹ See FRAGOMEN, *supra* note 129 at 6-5.

This special category labeled the refugees as “entrants,” who were denied social benefits.¹⁵⁰ Congress reacted to the ambiguous standing of entrants in the Immigration Reform and Control Act of 1986, and gave them permanent residence.¹⁵¹ Fearing an onslaught of other entrants seeking refuge in the United States, administrative adjudicators interpreting the 1980 Act were pressured to minimize the number of asylum applications they approved.¹⁵²

Despite the restrictions imposed by the 1980 Act, the Attorney General retained the discretion to grant asylum to aliens present in the United States.¹⁵³ The Attorney General, however, may not deport an alien to a country where his life or freedom will be threatened by persecution.¹⁵⁴ Nevertheless, under the 1980 Act it is very difficult for an applicant to qualify for asylum.¹⁵⁵ Applicants must clearly establish that persecution is probable.¹⁵⁶ A mere showing that a government unduly restricts the freedom of its population as a whole or that there is widespread repression is ordinarily not enough.¹⁵⁷

If an applicant is denied asylum, he or she may challenge the administrative decision in a federal court of appeals.¹⁵⁸ The federal appeals court will review the Attorney General’s findings of fact, looking for reasonable, substantial, and probative evidence.¹⁵⁹ Absent any errors in law or unfair procedure, the Attorney General’s administrative decisions are generally upheld.¹⁶⁰

¹⁵⁰ *See id.*

¹⁵¹ *See id.*

¹⁵² *See id.* at 6-5 and 6-6.

¹⁵³ *See* I.N.A. § 208, codified at 8 U.S.C. § 1158 (2000).

¹⁵⁴ *See* I.N.A. § 243(h), codified at 8 U.S.C. § 1253(h) (2000).

¹⁵⁵ *See* FITHIAN, *supra* note 126 at 198.

¹⁵⁶ *See id.*

¹⁵⁷ *See id.*

¹⁵⁸ *See id.* at 199.

¹⁵⁹ *See id.*

¹⁶⁰ *See* FITHIAN, *supra* note 126 at 199.

3. *Striking a Balance Between the Interests of the Child, Family, and State When Minors Apply for Asylum*

Generally, legal disputes between parent and child are handled by state courts.¹⁶¹ When faced with such conflicts, courts must evaluate the values of family autonomy against the State's interest in guarding the welfare of children—its most vulnerable citizenry.¹⁶² In general, modern American society values individual autonomy and freedom, while principles of self-determination have dictated modern family law and extended constitutional protections to parents in the raising of their children.¹⁶³

For example, in *Stanley v. Illinois*,¹⁶⁴ the United States Supreme Court held that all parents “are constitutionally entitled to a hearing on their fitness before their children can be removed from their custody.”¹⁶⁵ Though the Court did not define “fitness,” it clearly stated that in order to protect a parent's due process rights the Court must consider the parent's conduct toward his child.¹⁶⁶ Additionally, in *Santosky v. Kramer*,¹⁶⁷ the U.S. Supreme Court established minimum standards before the Court may permanently dissolve a parent's rights over his child.¹⁶⁸

In *Santosky*, Justice Blackmun put forth a two-part test.¹⁶⁹ First, the Court must determine if the parent in question is unfit.¹⁷⁰ After finding the parent unfit, a court will consider what is in the best interest of the child.¹⁷¹ This two-part

¹⁶¹ See *Huynh Thi Anh v. Levi*, 586 F.2d 625, 632 (6th Cir. 1978).

¹⁶² See Bruce A. Boyer and Steven Lubet, *The Kidnapping of Edgardo Mortara: Contemporary Lessons in the Child Welfare Wars*, 45 VILL. L. REV. 245, 250-251 (2000). Also see generally Lisa A. Brunner, *Circumventing the “Best Interests of the Child” Standard: Child Custody Law in Missouri as Applied to Homosexual Parents*, 55 J. MO. BAR 200 (1999).

¹⁶³ See *id.* See also Annette R. Appell and Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 67-74 (1995).

¹⁶⁴ 405 U.S. 645 (1972).

¹⁶⁵ See *Stanley v. Illinois*, 405 U.S. 645 (1972).

¹⁶⁶ See Boyer, *supra* note 162 at 252.

¹⁶⁷ 455 U.S. 745 (1982).

¹⁶⁸ See *Santosky v. Kramer*, 455 U.S. 745 (1982).

¹⁶⁹ See *id.* at 760.

¹⁷⁰ See *id.*

¹⁷¹ See *id.*

test created a high standard for severing the legal rights of a parent, requiring that unfitness be supported by clear and convincing evidence.¹⁷² If a court finds that a parent is at least minimally adequate, the state's ability to sever a parent's rights is limited.¹⁷³

A state's *parens patriae* authority places limits on the rights of a third party to apply for custody.¹⁷⁴ The *parens patriae* authority protects fit parents and their children from being subjected to hearings on applications for custody by individuals with only casual contact with or limited responsibility for the child.¹⁷⁵ Therefore, any attempt to sever the parent-child relationship must focus on the parent in question.¹⁷⁶

If, however, a dispute involves asylum of a minor the balance of interests may change.¹⁷⁷ If a child is granted asylum in the United States, the government may protect that child from harmful repatriation, regardless of his age.¹⁷⁸ This is because parental rights do not include the right to either inflict harm upon a child or to place a child in a position where he is likely to be harmed by others.¹⁷⁹ If a parent does attempt to inflict harm or put a child in a position of harm, then the state has a duty to protect the child.¹⁸⁰

No clear law determines what interests prevail in an asylum case. If a person, regardless of age, is granted asylum because of a well-founded fear of persecution, states may not invalidate a federal grant of asylum nor may they allocate to the parents the ability to do so.¹⁸¹ If a child puts forth credible evidence to the INS and meets the exacting standard under asylum law, demonstrating a well-founded fear of persecution, he should be granted asylum.¹⁸² If the grant of asylum is in

¹⁷² See *id.* at 769.

¹⁷³ See Boyer, *supra* note 162 at 253.

¹⁷⁴ See *id.* at 254.

¹⁷⁵ See *id.*

¹⁷⁶ See *id.* at 253.

¹⁷⁷ See FITHIAN, *supra* note 126 at 211 citing *Chy Lung v. Freeman*, 92 U.S. 275 (1875), *Henderson v. Mayor of New York*, 92 U.S. 259 (1875), and *Smith v. Turner*, 48 U.S. (7 How.) 282 (1849).

¹⁷⁸ See FITHIAN, *supra* note 126 at 210.

¹⁷⁹ See *id.* at 210-211.

¹⁸⁰ See *id.*

¹⁸¹ See *id.* at 212.

¹⁸² See *id.*

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conflict with the parents' wishes, parents should be allowed to challenge the ruling in federal court by applying for a declaration of rights and injunctive relief.¹⁸³ Though U.S. law permits any individual physically present in the United States to apply for asylum, these laws do not specifically address whether a child may apply for asylum against the express wishes of a parent.¹⁸⁴

III. FACTS AND PROCEDURAL HISTORY

A. FACTS

The struggle depicted in *Gonzalez v. Reno* began in the predawn hours of November 22, 1999.¹⁸⁵ Elian Gonzalez, his mother Elizabet Brotons, his stepfather Rafael Munero, and twelve other passengers boarded a small boat, and set sail from Cuba to Florida.¹⁸⁶ Several hours into their crossing, the passengers encountered a Cuban Coast Guard vessel that tried to force the refugees to return to Cuba.¹⁸⁷ During this attempt, the government craft made a number of violent approach moves that nearly capsized the refugees' vessel.¹⁸⁸ Eventually, Elian's boat made its way to international waters, despite being closely followed by the Cuban Coast Guard.¹⁸⁹

Throughout the night, treacherous seas battered the refugees' boat.¹⁹⁰ Notwithstanding the passengers' efforts to keep the boat from sinking, it capsized and sank off the coast of Florida.¹⁹¹ In an effort to save Elian, Munero secured him to

¹⁸³ See FITHIAN, *supra* note 126 at 212.

¹⁸⁴ See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 516, 519 (2000). On January 3, 2000, INS General Counsel Bo Cooper issued a memorandum outlining who had the legal authority to speak on behalf of the Elian. He wrote that parents generally speak for their children and Cuban law reinforces parental authority. The INS commissioner later approved the findings given in Cooper's memorandum. *See id.* *See also* I.N.A. §208(a)(1), codified at 8 U.S.C. §1158 (2000).

¹⁸⁵ *See Gonzalez v. Reno*, 212 F.3d 1338, 1344 (11th Cir. 2000).

¹⁸⁶ *See id.*

¹⁸⁷ *See* Brief of Plaintiff/Appellant at 6, *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000) (No. 00-11424-D).

¹⁸⁸ *See id.*

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

¹⁹¹ *See id.*

an inner tube before returning to Brotons. Subsequently, eleven of the passengers, including Elian's mother and stepfather, died in their attempt to reach the United States.¹⁹²

For two days, Elian drifted on his inner tube alone.¹⁹³ On November 25, 1999, two fishermen spotted Elian, barely alive, afloat in the sea off the coast of Florida.¹⁹⁴ The fishermen rescued Elian and took him to the United States where he received medical treatment.¹⁹⁵

When the INS became aware of the situation, it contacted Lazaro Gonzalez, Elian's great uncle, living in Miami.¹⁹⁶ Elian was subsequently paroled to Lazaro's custody.¹⁹⁷ Soon thereafter, Lazaro filed an application for Elian's asylum, which went unnoticed.¹⁹⁸ This application was followed by a second application signed by Elian himself.¹⁹⁹ After the Florida state court awarded temporary custody to Lazaro, he filed a third asylum application on Elian's behalf in January 2000.²⁰⁰ Each application stated that Elian was "afraid to return to Cuba."²⁰¹

Each of the asylum applications claimed that Elian's well-founded fear stemmed from his family's persecution by the Castro regime in Cuba.²⁰² For example, his stepfather and two great-uncles had been imprisoned because of their opposition to the government.²⁰³ Furthermore, Elian's mother had faced intimidation by the communist authorities in Cuba for her anti-Castro beliefs.²⁰⁴ Additionally, the applications alleged that if Elian were returned to Cuba he would be used as a propaganda tool for the Castro government and would be subjected to involuntary communist indoctrination.²⁰⁵

¹⁹² See Brief of Plaintiff/Appellant, *supra* note 189 at 7.

¹⁹³ See *id.*

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

¹⁹⁶ See *id.*

¹⁹⁷ See Brief of Plaintiff/Appellant, *supra* note 189 at 7.

¹⁹⁸ See *Gonzalez v. Reno*, 212 F.3d 1338, 1344 (11th Cir. 2000).

¹⁹⁹ See Brief of Plaintiff/Appellant, *supra* note 189 at 7.

²⁰⁰ See *Gonzalez*, 212 F.3d at 1344.

²⁰¹ See *id.* None of the applications received any attention from the INS. *Id.*

²⁰² See *id.*

²⁰³ See *id.* at 1345.

²⁰⁴ See *id.*

²⁰⁵ See *Gonzalez*, 212 F.3d at 1345. Involuntary communist indoctrination is being forced to learn and subscribe to the tenants of communism. *Id.* See Order at 3, *Gonzalez v. Reno*, No. 00-206- CIV-MOORE, 200 U.S. Dist. LEXIS 3225, (S.D. Fla.

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Responding to these allegations, the INS interviewed Elian's father, Juan Miguel Gonzalez, in Cuba on December 13 and 31, 1999.²⁰⁶ According to the INS and Attorney General Reno, Juan Miguel was not coerced when stating that he wanted his son to return to Cuba.²⁰⁷ Having interviewed Juan Miguel on more than one occasion, the INS stated that it was satisfied that Elian's father was honest when he stated his concern for the well being of his son.²⁰⁸ The INS informed Lazaro Gonzalez that it concluded Juan had the authority to speak for his son in immigration matters.²⁰⁹ The INS accepted Juan's withdrawal of Elian's application for admission to the United States.²¹⁰

B. PROCEDURAL HISTORY

As the INS neither denied nor approved Elian's asylum applications, Lazaro filed suit in Federal District Court on Elian's behalf to compel the INS to consider the applications.²¹¹ He argued that the INS' refusal to consider the applications violated section 1158 of Title 8 of the U.S. Code, the statute that governs who may apply for asylum.²¹²

Mar. 21, 2000). At the same time, many anti-Castro Cuban expatriates in South Florida rallied behind Elian's Miami relatives. *Id.* The Cuban American National Foundation stated that Elian's plight symbolized the battle of all Cubans against the Castro-controlled, communist government in Cuba. See Carl Hiasen, *Pity young Elian, the trophy child*, Miami Herald, Jan. 11, 2000.; Alfonso Chardy, Gail Epstein Nieves, and Andres Viglucci, *Boy's family, Cuban exiles protest Elian's return to Cuba*, MIAMI HERALD, Jan. 6, 2000. Many people in the Cuban American community in South Florida pressured the United States and Florida governments to allow Elian to remain in the United States See Lizette Alvarez, *Irate Cuban-Americans Paralyze Miami*, N.Y. TIMES, Jan. 7, 2000, at A12.; Karen Branch, Alfonso Chardy and Jay Weaver, *Congressman urges panel to issue subpoena for boy to block his return to Cuba*, MIAMI HERALD, Jan. 7, 2000.; Lizette Alvarez, *Protesters Choke Miami in Rage over Cuban Boy*, PLAIN DEALER, Jan. 7, 2000, at A1. This pressure often took the form of protests and demonstrations outside the Miami home where Elian was living. *Id.*

²⁰⁶ See Murphy, *supra* note 186.

²⁰⁷ See Brief of Defendant/Appellee at 9, *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000) (No. 00-11424-D).

²⁰⁸ See *id.*

²⁰⁹ See Murphy, *supra* note 186 at 517.

²¹⁰ See Brief of Defendant/Appellee, *supra* note 212 at 10.

²¹¹ See Order at 3, *Gonzalez v. Reno*, No. 00-206- CIV-MOORE, 200 U.S. Dist. LEXIS 3225, (S.D. Fla. Mar. 21, 2000).

²¹² See *Gonzalez*, 212 F.3d at 1345. The 11th Circuit court cited *Jean v. Nelson*,

Additionally, on April 13, 2000, Lazaro filed a motion for an injunction to preclude the INS or Juan Miguel from physically removing Elian from the jurisdiction of the United States while the appeal was still pending.²¹³ This temporary injunction was granted in order to preserve the status quo until a panel of three judges could consider the motion.²¹⁴ On April 19, 2000, a three-judge panel enjoined Elian from departing the United States, pending further review.²¹⁵

On appeal, Lazaro argued that the district court made three errors.²¹⁶ Most importantly, Lazaro argued that the district court erred by dismissing Elian's claim under section 1158, by dismissing his due process claim, and by failing to appoint a guardian *ad litem* to represent Elian's interests.²¹⁷ The 11th Circuit Court of Appeals upheld the dismissal of the Due Process claim, concluding that the claim lacked merit. Most of the 11th Circuit's analysis focused on the issue of whether the INS violated immigration law by dismissing Elian's asylum applications as legally void.²¹⁸

The U.S. Supreme Court did not grant certiorari, nor did it grant any further injunctions requiring Elian to remain in the U.S.²¹⁹ Following the 11th Circuit's final decision, the temporary injunctions were lifted on Wednesday, June 28, 2000.²²⁰ Immediately thereafter, Elian and his father departed for Cuba.²²¹ With them on the return flight were Elian's stepmother, half-brother, and several of Elian's Cuban schoolteachers and classmates.²²²

727, F.2d 957, 968 (11th Cir. 1984) which held that aliens seeking admission to the United States do not have constitutional rights with regard to their applications. *Id.*

²¹³ See *Gonzalez v. Reno*, No. 00-11424-D, 2000 U.S. App. LEXIS 6766 (11th Cir. Apr. 13, 2000).

²¹⁴ See *id.*

²¹⁵ See *Gonzalez v. Reno*, No. 00-11424-D, 2000 U.S. App. LEXIS 7025 (11th Cir. Apr. 19, 2000).

²¹⁶ See *Gonzalez*, 212 F.3d at 1346.

²¹⁷ See *id.*

²¹⁸ See *id.* at 1346-1347. The 11th Circuit did not describe these issues in any detail. *Id.*

²¹⁹ See *Gonzalez v. Reno*, 120 S. Ct. 2737. See also David Gonzalez and Lizette Alvarez, *Justices Allow Cuban Boy to Fly Home*, N.Y. TIMES, June 29, 2000, at A1.

²²⁰ See *Gonzalez*, N.Y. TIMES, at A1.

²²¹ See *id.*

²²² See *id.*

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IV. COURT'S ANALYSIS

This section will explore the 11th Circuit Court's analysis in *Gonzalez v. Reno*. First, it will discuss whether Elian could apply for asylum in the United States.²²³ Second, it will consider whether Elian actually applied for asylum under 8 U.S.C. section 1158(a)(1).²²⁴ Finally, this section will examine the reasonableness of the INS' decision that Juan Miguel was the sole representative of his son Elian.²²⁵

A. ELIAN COULD APPLY FOR ASYLUM

Lazaro argued that 8 U.S.C. section 1158 created an absolute right to an asylum hearing.²²⁶ As section 1158 provides for "any alien" to apply for asylum, Lazaro argued that Elian met the statutory requirement to apply and have an asylum hearing.²²⁷ Moreover, he argued that because all the applications were signed and submitted by Elian and Lazaro, Elian himself had applied for asylum and, being an applicant, should have been granted an asylum hearing.²²⁸

In response, the INS stated that it had interpreted Juan Miguel's request that his son be returned to Cuba as a request to withdraw Elian's applications for asylum.²²⁹ The INS, however, insisted that it had given separate consideration to Elian's applications for admission to the United States.²³⁰ The INS further conceded that the child had a right to seek asylum independent of his parent, and explained that section 1158(a)(1) does permit any individual who arrives in the United States to apply for asylum.²³¹ The disagreement cen-

²²³ See *infra*. notes 226 - 242 and accompanying text.

²²⁴ See *infra*. Notes 243 - 262 and accompanying text.

²²⁵ See *infra*. notes 263 - 290 and accompanying text.

²²⁶ See Brief of Plaintiff/Appellant at 19, *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000) (No. 00-11424-D).

²²⁷ See *id.*

²²⁸ See *id.*

²²⁹ See *id.* at 15. This was done under rule 8 U.S.C. §1225(a)(4), which provides that any alien may, in the discretion of the Attorney General, be permitted to withdraw his application for admission and depart immediately from the United States. *Id.*

²³⁰ See Brief of Defendant/Appellee at 15, *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000) (No. 00-11424-D).

²³¹ See *id.* at 15-16.

tered on whether section 1158 created an absolute right to a hearing.²³² The INS' position was that Elian did not have a right to a hearing.²³³

Alternatively, the INS stressed that parental rights constitute a "fundamental liberty interest" under the Constitution.²³⁴ Subsequently, the INS balanced Elian's interests under the 1967 Protocol Relating to the Status of Refugees against Juan Miguel's parental rights.²³⁵ Under the 1967 Protocol, the United States was also under an obligation of nonrefoulement, which requires the United States to accept and adjudicate a child's asylum application, and provides necessary protection, despite the express opposition of the child's parent.²³⁶ Furthermore, that the question of whether the INS should grant a hearing on the asylum applications in express conflict with his father's request carried the potential for substantial interference with Juan Miguel's parental rights.²³⁷ After weighing Juan Miguel's parental rights and interests against Elian's independent interests and those of the United States, the INS chose not to process Elian's asylum applications.²³⁸ The INS followed its longstanding policy of not processing applications where the applicants are so young that they lack the capacity to understand their applications, or where no clear, objective basis exists for ignoring the applicant's parents' wishes.²³⁹

The 11th Circuit found no statutory, regulatory or guideline provisions that restrict an alien's ability to apply for asylum based on age.²⁴⁰ Because of this, a six-year-old is eligible

²³² See *id.* at 17.

²³³ See *id.*

²³⁴ See *id.*

²³⁵ See Brief of Defendant/Appellee, *supra* note 234 at 17. See also DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES; A GUIDE TO ADMINISTRATIVE PRACTICE AND CASE LAW* 3, footnote 13 (2d ed. 1991) discussing the Protocol Relating to the Status of Refugees, opened for signature on Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

²³⁶ See Brief of Defendant/Appellee, *supra* note 234 at 16.

²³⁷ See *id.* at 17.

²³⁸ See *id.*

²³⁹ See *id.*

²⁴⁰ See *Gonzalez v. Reno*, No. 00-11424-D, 2000 U.S. App. LEXIS 7025 (11th Cir. Apr. 19, 2000).

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to apply for asylum.²⁴¹ The court's inquiry then focused on the meaning of section 1158 and whether Elian had indeed applied for asylum.²⁴²

B. ELIAN APPLIED FOR ASYLUM UNDER TITLE 8 OF THE UNITED STATES CODE SECTION 1158(A)(1)

According to the 11th Circuit, the issue was whether an asylum application is void if it is filed on behalf of a 6-year-old child by the child and a non-parental relative when it is filed against the wishes of the child's parent.²⁴³ Lazaro argued that a summary rejection by the INS of Elian's applications was invalid and violated the intent of Congress as set out in section 1158(a)(1) of the U.S. Code, which governs asylum applications.²⁴⁴ The INS contended that the statute is silent about the validity of the applications.²⁴⁵ Specifically, the INS argued that the statute does not specify *how* a young child files for asylum.²⁴⁶ That is, the statute lacked a procedure that is to be followed in such a case.²⁴⁷ Further, in a new and unique situation like Elian's, the INS argued that it is free to adopt a policy to fit the circumstances.²⁴⁸ The policy the INS implemented was that any asylum application on Elian's behalf had to be filed by his father.²⁴⁹

The court stated that the issue was not whether Elian had a right to apply for asylum, but whether Elian had applied at all.²⁵⁰ The 11th Circuit began its analysis with section 1158.²⁵¹ The court found section 1158 to be ambiguous, in that

²⁴¹ See *Gonzalez v. Reno*, 212 F.3d 1338, 1347-1348 (11th Cir. 2000).

²⁴² See *id.*

²⁴³ See *id.*

²⁴⁴ See *id.*

²⁴⁵ See *id.*

²⁴⁶ See *Gonzalez*, 212 F.3d at 1347.

²⁴⁷ See *id.*

²⁴⁸ See *id.*

²⁴⁹ See *id.*

²⁵⁰ See *id.*

²⁵¹ See *Gonzalez*, 212 F.3d at 1348. The 11th Circuit cited *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *id.* The 11th Circuit also cited *INS v. Aguirre-Aguirre*, 526 U.S. 415, 119 S.Ct. 1439 (1999). See also *Jaramillo v. INS*, 1 F.3d 1149, 1153 (11th Cir. 1993) (en banc), (extending the Chevron holding to immigration statutes). The statute reads: Any alien who is physically present in the United States or who arrives in the United States (whether or not at a

although it gives *any* alien permission to apply for asylum, it does not state *how* to apply.²⁵² The court focused on what Congress left unsaid in the statute.²⁵³ Most importantly, the statute does not include a definition of the term “apply.”²⁵⁴ Additionally, section 1158 does not set out the procedures to be followed when applying for asylum, nor does it identify the necessary contents of a valid application.²⁵⁵ Essentially, the court found that section 1158 was silent on asylum application procedures, and therefore left a gap.²⁵⁶ The court stated that where Congress has not clearly stated its intentions in a statute, thus preventing the swift resolution of an issue dependent on that statute, the executive branch of the government has the discretion to fill in that gap with an appropriate policy.²⁵⁷

The 11th Circuit ultimately determined that this issue was not one for the courts, but for the executive agency charged with enforcing the code section.²⁵⁸ Because the INS was the executive agency responsible for implementing section 1158, the INS had discretion to decide how to fill the gap.²⁵⁹ The 11th Circuit, however, did not give the INS authority to make immigration policy regarding application procedure.²⁶⁰ Rather, the court gave the INS the responsibility of ensuring that the policy conform to the procedure already set out in the statute.²⁶¹ Additionally, any method adopted for the applica-

designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of his or her status, may apply in accordance with this section or, where applicable, section 1225 (b) of this title. *See also* I.N.A. §208, codified at 8 U.S.C. §1158(a)(1) (2000).

²⁵² *See Gonzalez*, 212 F.3d at 1348.

²⁵³ *See id.*

²⁵⁴ *See id.*

²⁵⁵ The 11th Circuit called the unstated portion a “gap” in the statute. *Id.*

²⁵⁶ *See id.*

²⁵⁷ *See Gonzalez*, 212 F.3d at 1348.

²⁵⁸ *See id.*

²⁵⁹ *See id.* *See also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Executive authority to fill statutory gaps is particularly great in the context of immigration policy, being that it falls in the executive’s foreign relations power. *Id.*

²⁶⁰ *See Gonzalez*, 212 F.3d at 1349.

²⁶¹ *See id.*

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tion procedure must be reasonable.²⁶²

C. THE INS POLICY WAS REASONABLE

The agency must select a reasonable policy.²⁶³ Once it adopts a policy, the only role for the courts is to check the policy to ensure it is not arbitrary.²⁶⁴ In filling this procedural gap in section 1158, the INS instituted the following provisions: First, six-year-old children lack the capacity to apply for asylum.²⁶⁵ Second, children who want to apply for asylum must be represented by an adult.²⁶⁶ Third, absent special circumstances, the only proper adult to represent a six-year-old child is the child's parent, even if the parent is not in the U.S.²⁶⁷ Finally, the fact that the parent lives in a communist-totalitarian state does not constitute a special circumstance requiring the selection of a non-parental representative.²⁶⁸

The court held that the entire four-part INS policy was reasonable.²⁶⁹ The court then stated that although a 12-year-old may apply for asylum, twelve is probably the youngest age at which a child may apply for his or her own asylum.²⁷⁰ Below that age, the court stated that the INS need not assess each child's mental capacity.²⁷¹ The court further found the INS' policy to be an acceptable approach in that it may sacrifice accuracy and flexibility for certainty and efficiency.²⁷² Moreover, since the policy presented is reasonable, the court need not determine what the best approach would be.²⁷³ As a result, the 11th Circuit found that although the method adopted by the INS to fit this case may not be the only per-

²⁶² See *id.*

²⁶³ See *id.*

²⁶⁴ See *id.*

²⁶⁵ See *Gonzalez*, 212 F.3d at 1349-1350.

²⁶⁶ See *id.* at 1350.

²⁶⁷ See *id.*

²⁶⁸ See *id.* The 11th Circuit cited the U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000), which characterizes Cuba as a totalitarian state since the Communist Party controls all aspects of Cuban life. *Id.*

²⁶⁹ See *id.* at 1351.

²⁷⁰ See *Gonzalez*, 212 F.3d at 1351. The court cited *Polovchak v. Meese*, 774 F.2d 731 (7th Cir. 1985). *Id.*

²⁷¹ See *id.* at note 18.

²⁷² See *id.*

²⁷³ See *id.*

missible approach, the judiciary need not determine a better method or policy.²⁷⁴

The decision to allow a parent to act for his six-year-old child in immigration matters is within the range of reasonable alternatives.²⁷⁵ Furthermore, in deciding this policy, the INS balanced the competing interests of the parent, child and the public good.²⁷⁶ Giving paramount consideration to the parent could not be considered unreasonable, as consideration of the parent's rights is necessary wherever children are concerned.²⁷⁷

However, the court stressed that it was not recognizing the parent-child relationship to the exclusion of other familial relationships.²⁷⁸ It merely found it to be an important interest.²⁷⁹ Although the best interest of the child and the parent may clash, the INS policy did not completely neglect the separate interests of the child, apart from his parents, when applying for asylum.²⁸⁰ If special circumstances rendered the parent inappropriate to represent the child, other persons may be permitted to speak for him on immigration matters.²⁸¹

Although the court deemed the INS policy reasonable, it recognized that the policy might deter non-frivolous claims of some six-year-old children to seek asylum.²⁸² Nevertheless, under the policy of judicial deference to executive agencies, the policy was well founded.²⁸³ Furthermore, because the INS had carefully considered the competing interests, the court found that it was unnecessary to interfere.²⁸⁴

The 11th Circuit did, however, find the last provision of the INS' four-part policy to be troubling.²⁸⁵ This provision was that a parent living in a communist-totalitarian state does not

²⁷⁴ See *Gonzalez*, 212 F.3d at 1351.

²⁷⁵ See *id.* at 1352. Another reasonable alternative being to grant the hearing that Lazaro requested for Elian. *Id.*

²⁷⁶ See *id.*

²⁷⁷ See *id.*

²⁷⁸ See *id.* at note 18.

²⁷⁹ See *Gonzalez*, 212 F.3d at note 18.

²⁸⁰ See *Gonzalez*, 212 F.3d at 1352.

²⁸¹ See *id.*

²⁸² See *id.* at 1353.

²⁸³ See *id.*

²⁸⁴ See *id.*

²⁸⁵ See *Gonzalez*, 212 F.3d at 1353.

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create a special circumstance in and of itself to justify considering a six-year-old child's asylum claim against the wishes of the non-resident parent.²⁸⁶ The 11th Circuit acknowledged that the Cuban government violates human rights and fundamental freedoms.²⁸⁷ Furthermore, the court stated that Cuba does not guarantee its own rule of law.²⁸⁸ With or without coercion, living in the United States as opposed to living in Cuba could have caused an inherent conflict between Elian and Juan Miguel.²⁸⁹ Despite this potential conflict, the court would not say that the final part of the INS policy was completely unreasonable.²⁹⁰

D. THE 11TH CIRCUIT FOUND THAT THE INS FOUR-PART POLICY WAS APPLIED PROPERLY

By interviewing Juan Miguel, the INS demonstrated that it considered the possible effect of government coercion on Juan Miguel's insistence that his son be returned to Cuba.²⁹¹ If the INS found special circumstances, such as definite coercion, then a non-parental relative may be necessary to speak for the child.²⁹² The INS did not find coercion or other special circumstance to render it necessary to appoint anyone else to speak for Elian.²⁹³ The court reiterated that the executive branch is entitled to more deference in the area of foreign affairs.²⁹⁴

Finally, the 11th Circuit determined whether the INS four-part policy had been applied arbitrarily.²⁹⁵ The INS' decision would have been invalidated had it treated Elian's asylum applications in an arbitrary fashion, or had abused its discretion.²⁹⁶ In order to substantiate his claim that the INS acted arbitrarily and abused its discretion, Lazaro argued

²⁸⁶ *See id.*

²⁸⁷ *See id.*

²⁸⁸ *See id.*

²⁸⁹ *See id.*

²⁹⁰ *See Gonzalez*, 212 F.3d at 1353.

²⁹¹ *See id.*

²⁹² *See id.*

²⁹³ *See id.*

²⁹⁴ *See id.*

²⁹⁵ *See Gonzalez*, 212 F.3d at 1354.

²⁹⁶ *See id.*

that two special circumstances negatively impacted Juan Miguel's fitness to represent Elian in immigration matters.²⁹⁷ The first special circumstance was Lazaro's allegation that the Cuban government had coerced Juan Miguel into bringing Elian back to Cuba.²⁹⁸ Secondly, that the INS had disregarded the fact that an objective basis existed for Elian's asylum claim.²⁹⁹

In addressing the first special circumstance, the court pointed out that the INS did investigate the possibility that Juan Miguel had been coerced into demanding the return of his son.³⁰⁰ The INS interviewed Juan Miguel twice.³⁰¹ As a result of those interviews, the INS determined that Juan Miguel had been honest and sincere in his desire to see Elian returned to Cuba.³⁰² Furthermore, the INS took his demeanor into account when reaching its finding that Juan Miguel truly wanted his son to return.³⁰³ For these reasons, the 11th Circuit found that the INS was not unreasonable rejecting Lazaro's accusations of coercion.³⁰⁴

With regards to the second special circumstance, the INS performed a preliminary assessment of Elian's asylum claims and concluded they lacked merit after examining the information provided in the asylum applications.³⁰⁵ Further, the INS used information obtained from Lazaro's attorneys and interviewed Lazaro in an effort to broaden its inquiry into the merits of the asylum claim.³⁰⁶ The INS nevertheless concluded that Juan Miguel's parental interest did not substantially conflict with the asylum claim that would disqualify Juan Miguel from representing his son.³⁰⁷

Here, the court pointed out that in order to make a meritorious asylum claim, the applicant must show he has a "well-

²⁹⁷ *See id.*

²⁹⁸ *See id.*

²⁹⁹ *See id.*

³⁰⁰ *See Gonzalez*, 212 F.3d at 1354.

³⁰¹ *See id.*

³⁰² *See id.*

³⁰³ *See id.*

³⁰⁴ *See id.*

³⁰⁵ *See id.* at 1355.

³⁰⁶ *See Gonzalez*, 212 F.3d at 1355.

³⁰⁷ *See id.*

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founded fear of persecution.”³⁰⁸ Elian’s asylum claim based his well-founded fear on three main points. First he would not enjoy the freedom that he had in the United States.³⁰⁹ Second, he might be forced to undergo “re-education” and indoctrination in communist theory.³¹⁰ Third, the Cuban government for propaganda purposes might use him.³¹¹ The 11th Circuit pointed out that the INS had been delegated authority by Congress to decide what “persecution” entails.³¹² Again, the court concluded that because of the steps the INS took to ensure a reasoned response, it would not say the INS had acted in an unreasonable manner.³¹³

V. CRITIQUE

The decision of the 11th Circuit Court of Appeals correctly decided that no asylum claim existed. Asylum law in the United States, as it has developed over the twentieth century, initially opened doors to all fleeing persecution.³¹⁴ This open-door policy, however, taxed the United States’ social resources.³¹⁵ As a result of certain pressures, administrative adjudicators have had to minimize the number of asylum applications they approved.³¹⁶ The finding in *Gonzalez v. Reno* is consistent with this stricter stance on asylum. Additionally, the United States judicially has had a long history of giving deference in the area of foreign affairs to the executive branch.³¹⁷ This deference stems from the Executive branch’s authority as it is derived from the United States Constitution.³¹⁸ *Gonzalez v. Reno* reaffirms the executive branch’s discretion to grant parole authority in asylum cases. What the INS did with the Elian case was the only thing it could have

³⁰⁸ See *id.* See also I.N.A. §101(a)(42), codified at 8. U.S.C. §1101(a)(42) (2000).

³⁰⁹ See *Gonzalez*, 212 F.3d at 1355.

³¹⁰ See *id.*

³¹¹ See *id.*

³¹² See *id.*

³¹³ See *id.*

³¹⁴ See AUSTIN T. FRAGOMEN JR. AND STEVEN C. BELL, IMMIGRATION FUNDAMENTALS, A GUIDE TO LAW AND PRACTICE, PRACTICING LAW INSTITUTE, 6-2 (4th ed. 1999).

³¹⁵ See *id.* at 6-5 and 6-6.

³¹⁶ See *id.*

³¹⁷ See *supra* note 265.

³¹⁸ See U.S. Const. Art. II, sec. 2.

done when it informally resolved a new situation not addressed by a statute or regulation.

Additionally, the court discussion on Cuba's "poor" human rights record acknowledges the fact that a lackluster human rights record may be a reason for the INS to investigate further before immediately denying an asylum application.³¹⁹ In fact, Cuba's poor record gave the court reason to further investigate before it would determine that the INS policy was reasonable. The court expressly mentioned that Cuba is a communist-totalitarian state that suppresses the rights that Americans hold important.³²⁰

The value of First Amendment freedoms, available in the United States, but suppressed in Cuba, is one reason why this six-year-old boy won the hearts of so many Cuban-American residents in Florida.³²¹ Many of the Cuban-Americans who live in the United States today left Cuba to ensure that their basic freedoms would thrive.³²² Reasonable people might say Elian would be better off had he been given the opportunity to live in the United States. As the court stated, even where no strong evidence of coercion is demonstrated on the part of Cuban leaders or Castro to prompt Juan Miguel to push for his son's return, a conflict of interest may exist between the parent living in a totalitarian state and the child residing in a nation that respects human rights and basic freedoms.³²³ Nevertheless, the court correctly decided on the basis of separation of powers to pronounce the INS response was correct.

VI. CONCLUSION

Overall, the United States has had a long history with Cuba.³²⁴ As a neighboring nation, Cuba's political growth has been shaped by its contact with the United States.³²⁵ Likewise, the United States has been shaped by its marked his-

³¹⁹ See *Gonzalez*, 212 F.3d at note 22.

³²⁰ See *id.* Referring to such rights as the right to free speech and freedom press. *Id.*

³²¹ See *Capitalism Magazine* (visited Nov.18, 2000) <<http://www.capitalism-magazine.com/cuba/home.html>>.

³²² See NICOLAS RIVERO, *CASTRO'S CUBA AN AMERICAN DILEMMA* 150 (1962).

³²³ See *Gonzalez*, 212 F.3d at 1353.

³²⁴ See *supra*, notes 18-81 and accompanying text.

³²⁵ See *supra*, notes 19-43 and accompanying text.

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tory with Cuba.³²⁶ U.S. asylum law reflects this entwined history between the two nations.³²⁷ The United States started out with a virtually unrestricted immigration policy.³²⁸ Starting in 1980, however, the United States was forced to minimize approval of asylum applications, making it very difficult for an applicant to qualify for asylum.³²⁹ Despite the changes in the law, however, the Attorney General retained discretion to grant asylum to aliens.³³⁰

In the United States, asylum law for children must be balanced against the interest of the parent and the state.³³¹ Despite a parents' interest, however, a state may be justified in protecting a child from repatriation, if the return of the child is harmful.³³² Though U.S. law allows for people to apply for asylum, it does not address whether a child may apply for asylum against the express desires of a parent.³³³

The 11th Circuit decision in *Gonzalez v. Reno* has somewhat clarified this previously uncertain area of law.³³⁴ Now, if a child applies for asylum against the express wishes of a parent, at the very least, the four-part policy created by the INS to handle Elian's case will govern.³³⁵ In the Elian case, because the informal INS resolution was not arbitrary, the 11th Circuit Court must uphold the decision in exercising its review authority.

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³²⁶ See *supra*, notes 19-43 and accompanying text.

³²⁷ See *supra*, note 129 and accompanying text.

³²⁸ See *supra*, notes 129-130 and accompanying text.

³²⁹ See *supra*, notes 142-144 and accompanying text.

³³⁰ See *supra*, note 145 and accompanying text.

³³¹ See *supra*, notes 162-176 and accompanying text.

³³² See *supra*, notes 177-180 and accompanying text.

³³³ See *supra*, notes 181-184 and accompanying text.

³³⁴ See *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000).

³³⁵ See *supra*, notes 291 - 313 and accompanying text.

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