

CIVIL LIBERTIES *By Harvey A. Silverglate*

One-way ticket for Elian

JUST AS "DEATH is different"—or should be—in dealing with crime and punishment, so "Cuba is different"—or should be—in dealing with political asylum and child custody.

Political fault lines have largely determined opinions of whether Attorney General Janet Reno was right to order the raid on Lazaro Gonzalez's home between Good Friday and Easter Sunday, to fetch—at gunpoint—6-year-old Elian. Yet there is an inescapable fact that has been given short shrift by the Department of Justice and the Immigration and Naturalization Service in deciding to take custody of the boy.

The assignment of custody, combined with a decision on offering political asylum status, will determine whether the lad remains here or returns to Cuba. This should be made with full awareness that Cuba, like the People's Republic of China and the former Soviet Union, but unlike the vast majority of nations of the world, including military dictatorships and other despotic regimes, does not allow its citizens to leave without a government-issued exit visa. This fact is crucial.

Possible precedents

Pundits ask whether such a fuss would be made over, for example, a little boy from Haiti. But a Haitian may "vote with his feet." In contrast, if Elian Gonzalez is returned to Cuba, he is unlikely to be able to leave that country to return to the United States. Surely, the INS should

consider this in determining custody and political asylum.

It is a factor that the federal court should consider in deciding whether the boy should be granted a political asylum hearing. It should count, as well, in any custody proceeding if the case should somehow get into a state family court where "the best interests of the child" would determine custody.

In 1980, when then-12-year-old Walter Polovchak sought the aid of the American courts to prevent his parents from taking him back to the Soviet Union, the U.S. Court of Appeals for the 7th Circuit held that the boy's views had to be considered because 12 years was at the bottom range of when a child's views should be given weight.

Presumably Elian, at 6, does not qualify. In six more years, however, he will be within that range. Given the one-way ratchet of a forced return to Cuba and legitimate questions as to whether the boy's father is expressing his freely held view or his government's view, the controversy seems more suited to resolution by the courts than by an agency that the *Polovchak* court described as "without any...special expertise" in domestic relations matters.

The decision, DOJ argues, is best left to the father, and if he wants his son with him in Cuba, traditional family values require that his view be honored. However, Cuba's restrictive exit policy again rears its ugly head. Elian's father is in this country with his new wife and infant son. However, other members of his extended family remain in Cuba, effectively hostages of the regime. Under such circumstances, it is difficult to credit with any certainty the claim by

the father that he wants his son to return to Cuba with him.

These are difficult questions that a free society reposes in an independent judiciary, rather than in administrative bureaucrats or even high political officials who may have hidden agendas. Anyone familiar with the barbaric history of the INS surely would look with skepticism on any claim that the agency has "the best interests of the child" as its guiding light.

Such mantras as "family values" and "parental rights," important though they are, take the analysis only so far in light of questions as to the father's ability to exercise free will and independent judgment when repatriating the child to Cuba is likely irreversible.

The need for a hearing

There is no substitute for an evidentiary hearing in an open courtroom. That the attorney general sought, in a closed ex parte proceeding in front of a U.S. magistrate, a search warrant to seize the boy as if he were a fugitive or hostage or some piece of stolen chattel or contraband, is remarkable. That she chose to execute the search warrant with arms, placing the life of the boy in danger, is more remarkable still.

That the father, as reported by the *New York Times*, preferred an immediate and armed raid rather than going to Miami to get his son or waiting a mere three weeks until the May 11 argument on asylum before the court of appeals, raises the question of whether Mr. Gonzalez had the best interests of his son or of his government at heart. This serious question should have been resolved by the courts. ■

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