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Discretionary Power and Normative Decision-Making

Aaron Renfro

Because Congress cannot feasibly design a law that applies in every circumstance, U.S. immigration law allows for a reasonable interpretation of many of its provisions and the exercise of discretion in appropriate circumstances.

A year ago, America's heart and mind turned toward a six-year-old Cuban boy named Elián González. He was found at sea by passing fishermen who noticed a capsized boat floating in the Florida straits. Having managed to survive for two days holding onto a life ring, the boy was brought to the United States. In the ensuing months, America became divided as to Elián's fate and the boy became part of an intense, high-profile political and legal battle. Despite attempts of the politically powerful Cuban exile community to keep the boy in the U.S., government authorities returned Elián to the custody of his father in Cuba.

This article addresses some of the important legal decisions made in determining Elián's fate and discusses important normative principles that guided government authorities in their decision-making process. It will become evident that government authorities acted in accordance with the prescribed laws of the land. However, by applying the Attorney General's discretionary power, and an alternative interpretation of relevant statutes, a different, though legally justifiable, outcome could have occurred. Because Congress cannot feasibly design a law that applies in every circumstance, U.S. immigration law allows for a reasonable interpretation of many of its provisions and the exercise of discretion in appropriate circumstances. As a result, such laws may be
interpreted to justify conclusions that oppose one another, placing an added emphasis on normative decision-making, or what “should” be the outcome. By opting to return Elián to Cuba, governmental authorities placed priority of parental rights over other legitimate concerns. This normative decision was fundamentally sound and based on morally defensible reasoning.

Upon being found, Elián was immediately turned over to the Immigration and Naturalization Service (INS), a sector of the Department of Justice overseeing and administering American immigration matters. Under the Immigration and Nationality Act (INA), the source of U.S. immigration law, Elián was considered to be an applicant for admittance into the United States. Under such circumstances, the Attorney General has discretionary authority to (1) continue to detain an arrested alien, (2) release the alien on bond, or (3) release the alien on conditional parole. Attorney General Janet Reno opted to place Elián on conditional parole by placing him in temporary custody of his Miami relatives, headed by his great-uncle Lazaro Gonzalez.

Giving parole status to Elián was the first of three occasions on which the Attorney General used her “discretionary power.” The second was the denial of the asylum applications submitted by the Miami relatives, and the third was the revoking of Elián’s parole status on April 12, 2000. Discretionary power in immigration matters is derived from Congress, which legitimately delegates much of its immigration power to the Attorney General. This power is most often used when Congress fails to spell out specific standards that apply to a given case. The Attorney General may rely on any reasonable factors in exercising this discretionary power in order to arrive at an appropriate outcome in a particular circumstance. If a decision is challenged in court, great deference is given to such discretionary authority and a decision based on its exercise will be overturned only if it is determined that the Attorney General acted unreasonably and thus abused such discretion. Thus, the discretionary power stands as the source of legal legitimacy the Attorney General uses to make his or her case if there is no applicable objective law that dictates the outcome. Inherent in this discretionary power is the freedom to make normative decisions that align with the decision-makers’ belief systems and moral perspectives.
Shortly after being granted temporary custody of Elián, his Miami relatives filed three separate asylum applications in an effort to gain permanent custody. To determine the legitimacy of these applications, the INS and the Attorney General began a legal analysis to decide who had legal authority to speak on behalf of the six-year-old. Was it Elián's father, his great-uncle in Miami, or other attorneys claiming to represent him? The INS examined U.S. immigration law, Cuban family law, and Florida state law to make its decision. Under the Immigration and Nationality Act, the general rule states, "Any alien who is physically present in the U.S. or who arrives in the U.S. (including an alien who is brought to the U.S. after having been interdicted in international or U.S. waters), irrespective of such alien's status, may apply for asylum." The phrase "any alien" is not defined by the statute. Thus, the Attorney General was required to use her discretionary power to determine if the six-year-old fell within the definition.

To gain further insight, the INS and the Attorney General turned to Cuban family law, which provides that "minors shall be under the authority of their parents and the parental authority is shared jointly by both parents. Should one parent die, the surviving parent becomes the sole individual authorized to speak for the child." These parental rights include the duty to represent the rights of the child in all legal matters. Regarding custody disputes between parents and third parties, Florida law states, "When the custody dispute is between a parent and third parties, . . . the test must include consideration of the right of a natural parent to enjoy the custody, fellowship, and companionship of his offspring. This is a rule older than common law itself." Recognizing that both Florida state law and Cuban family law emphasize parental rights, the INS and Attorney General determined that the phrase "any alien" in the INA statute did not apply to a six-year-old that had a legal parent to speak on his behalf. Taking all factors into account, the INS decided that without the formal consent of Elián's father Juan Miguel, neither his great uncle, nor any attorney had legal authority to represent Elián in immigration matters.

Required to use her discretionary power, Attorney General Janet Reno freely interpreted immigration laws and statutes in accordance with her perception of the appropriate outcome. The subjectivity
inherent in such normative decisions often creates controversy that imbues the nation's citizenry. Both those favoring Elián's return and those opposing it provided normative explanations of their own rooted in morally justifiable reasoning. However, the discretion is left to the Attorney General to determine what principles are applicable to this case. Favoring Elián's return to Cuba, the Attorney General and the INS focused on laws promoting the rights of legitimate parents over their children in immigration matters. These laws are based on the underlying principle that families are the fundamental unit of every society and deserve the utmost respect and protection from forces of disintegration. This principle should be used as a standard in immigration matters and as a guiding policy in future cases. The U.S. government has no right to interfere in viable family units that are characterized by loving relationships and mutual support. Laws must not promote the disintegration of viable family units, but instead seek to protect them.

Continuing their evaluation of the case, the INS and Attorney General interviewed Elián's father to evaluate his relationship with the boy and to determine if the Cuban government had coerced him in any way. If government authorities found evidence of coercion, they could justify a decision on Elián's behalf without regards to the father's wishes. Thus, they could reverse their previous reasoning emphasizing parental rights over their children. However, INS officials sent to interview the father determined that the Cuban government had not influenced the father's interests and instead found an endearing father-son relationship. Consequently, the government officials saw no reason to deny Elián's father his parental rights.

By our detailing some of the important events preceding the INS final decision, it is evident that government authorities interpreted both U.S. and Cuban laws in a reasonable fashion. Because no objective law was applicable to this case, a necessity arose for the Attorney General to use her discretionary power, allowing for her own values and principles to determine the outcome. These normative values promoted parental rights and family values. They considered the rights of a loving father to have custody of his child paramount to other concerns that suggested a different outcome. Without convincing evidence that a parent's interests fail to align with his or her child's legal interests, parental rights should be given priority in immigration matters.
**A Different Outcome**

Had the Elián Gonzalez case occurred during the term of a different U.S. administration, could the result have differed? The answer is “yes.” The preceding paragraphs provided an analysis of some of the important legal decisions made concerning Elián’s fate and a normative analysis used in support. Although government authorities used both U.S. and Cuban law in their interpretation, the following analysis indicates that a decision to keep Elián in the United States could also have been legally justified. However, legal justification does not necessarily signify moral justification. Normative principles must be used to determine the appropriate outcome to the case.

When government authorities denied Elián the right to apply for asylum, Elián’s Miami relatives challenged the decision in federal court, asking for a temporary restraining order on the ruling. Upon hearing the case, the Eleventh Circuit Court of appeals determined that Elián had a right to appeal for asylum and cited possible abuses of power by government authorities. Essentially, the court took a different approach to the INA general rule previously stated, “Any alien who is physically present in the U.S. or who arrives in the U.S. . . . irrespective of such alien’s status, may apply for asylum.” The Eleventh Circuit considered the phrase “any alien” broad enough to include a six-year-old boy. This broad interpretation, called the “plain language approach,” seeks to interpret laws as they are plainly written in text, disregarding inferences made from them or other laws that may skew their original intent. The court reasoned that “if Congress had meant to include only some aliens, perhaps Congress would not have used the words ‘any alien.’” Although later overturned by the U.S. Supreme Court, the Eleventh Circuit determined that neither the INS nor the Attorney General has the right to infringe on the plain language of the statute, nor could the INS narrow the scope of the statute through regulation. Any evidence of such action would be deemed an abuse of power. If the INS and the Attorney General had opted to use a plain language approach in their decision-making process, they may have considered the case to be of “special interest” in which the rights of a child to live in America outweigh the parental rights of a father living in a totalitarian/communist regime.

Because a different interpretation could have guided the case in the
opposite direction, it is important to determine if asylum could have appropriately been awarded to Elián had the Attorney General and INS accepted the applications for the reasons cited. The Immigration and Nationality Act allows the Attorney General to grant asylum or refugee status to those individuals who are (1) outside their country or nationality, (2) unable to or unwilling to return or to avail themselves of the protection of that country, (3) being persecuted or have a well-founded fear of persecution, (4) based on race, religion, nationality, membership in a particular social group, or political opinion.10

Elián could have easily met the first two tenets of the INA definition of “asylee” or “refugee.” In addition to being outside of his country of descent, evidence also existed of Elián’s desire to stay in the United States. However, attorneys would have needed a strong argument to convince the government that the remaining tenets applied to Elián's case. They would have to prove that Elián could reasonably fear greater harm than other Cubans. Attorneys could have argued that if Elián returned to Cuba, Fidel Castro would use Elián as a symbol of his regime, placing the child under life-long scrutiny.11 This scrutiny would have required that his actions follow every tenet of the Cuban Revolution, which American law deems as a form of persecution. Attorneys could have also argued that Elián feared persecution based on a social group including those exposed to the freedoms of the United States. Furthermore, arguments against Fidel Castro's human rights record and his defiling treatment of Cubans interdicted at sea may have proved convincing.

Numerous arguments could have attested to a well-founded fear of persecution awaiting Elián in Cuba. From a legal perspective, had these applications been accepted, these arguments could have easily justified a decision to grant Elián asylum. Thus, that same power used by the Attorney General to remove Elián from the United States could also have been used to grant him asylum. For that reason a different U.S. administration may have chosen an alternative destiny for Elián. Either outcome could have occurred within a reasonable interpretation of immigration laws.

Although the legal perspective would allow for the justification of either outcome, normatively speaking, it is essential to follow principles that are in the best interest of the child and the family. Those opposing
the Attorney General's decision to return Elián to Cuba argued that sending the boy back to a totalitarian/communist government was a moral crime. It was sentencing a child to a life of misery and a violation of American principles such as freedom, liberty, and the pursuit of happiness. These arguments are understandable and deserve attention. However, they support the replacing of a father with a government. Governments must never remove the agency of a parent by placing greater priority of their decisions over those of a loving parent. This is outside of the jurisdiction of any government. Juan Miguel, Elián's father, was interviewed and determined to be a loving father with genuine concern for the life of his child. Such evidence should signal to government decision-makers that the parent has the ultimate say in the matter.

Had Elián's father opted to live in the United States with his son, perhaps both sides would have been appeased. Although contrary to the beliefs of many, the decision of Elián's father to return to Cuba must be respected and protected by the government. The Attorney General and the INS acted with reasonable discretion in determining the fate of Elián. By placing priority on parental rights, their decisions were morally justifiable and established a standard to guide immigration law in the appropriate direction.

Notes

1. 8 USC 1154(a)(1)(E)(i).
2. 8 USC 1226(a)(1)(2)(3).
4. 8 USC 1158(a)(1).
7. 8 USC 1158(a)(1).
10. 8 USC 1101 (a)(42)(A).