

Eliau: A Way Out

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Body

No one can be happy at the thought of federal agents wrenching a 6-year-old boy from the arms of caring relatives. Neither can Americans who believe in a rule of law tolerate mob action to keep a young son from the arms of a loving father.

For weeks, the parties have been tangled in "negotiations." Yet the idea that the Miami family has something to negotiate strikes us as peculiar. Eliau's tragic arrival made placement with relatives sensible. But it was solely for the purpose of caring for him while the INS made a determination under the immigration laws. The temporary arrangement imposes responsibilities, not rights, on the family. The Miami relatives, however, are acting as if possession is nine-tenths of the law.

Surprisingly, so is the INS. The commissioner's decision in January that Eliau should be reunited with his father was accompanied by neither an order nor a plan to accomplish that result. After the district court had ruled in its favor, the INS threatened to revoke the custody arrangement unless the relatives agreed to an expedited appeal and guaranteed that they would turn Eliau over once the appellate court had ruled.

The INS's demand looked coercive. More important, it was unnecessary. The attorney general has complete authority to determine the boy's placement during the immigration proceedings. Were the relatives to sign a piece of paper, they would simply be affirming what is already their legal duty: to comply with the orders of the attorney general.

The fruitless negotiations are a result of the federal government's fervent desire not to have to take Eliau by force. The relatives have exploited this by saying they would not bring Eliau elsewhere to be turned over, but would not disobey an order delivered to their door. If there were any goodwill, this would be an easy obstacle to overcome. For example, a third party--perhaps a respected religious leader--could help bring about the boy's transfer. But the Miami relatives are not seeking a compromise. They have raised new objections on an almost daily basis--the most recent being a demand that Eliau be evaluated by psychologists to determine if a transfer would be in his best interests.

The attorney general now appears poised to take decisive action, although another meeting is scheduled for tomorrow. The Justice Department must come to grips with the fact that a negotiated settlement is not possible here. Rather it must issue an order to accomplish Eliau's transfer to his father. If the order appears fair, the family will have little choice but to obey it.

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The concern of the family in Miami is that bringing Elian to his father would lead to an immediate return to Cuba, effectively ending the judicial appeal. This is a legitimate concern. The attorney general invited the family to go to federal court. To demand a transfer that could short-circuit the judicial process would seem to play into the relatives' contention that they have been denied their day in court.

Apparently, the attorney general believes that the Miami family should have to seek an injunction from the appeals court prohibiting Elian's departure. She has stated that she could not prevent Juan Miguel from taking his boy home once he had custody of him. But we believe she has adequate legal authority to maintain the status quo pending court proceedings.

The immigration laws give the attorney general the authority to prevent the departure of non-citizens in the United States. Under existing regulations, departure control orders may be granted for an alien needed in a government proceeding or where departure would be "prejudicial to the interests of the United States." Issuing such an order may appear a bit Draconian. It would be better for the INS to parole Elian to the custody of his father on the condition that neither leave the country until a final decision is rendered in the appellate court.

The INS's unwillingness to do what it has always had the authority to do--to revoke the temporary custody arrangement with the Miami family--has been based on the fear that the family might not comply. But to date the relatives have obeyed every order of the federal government, and they have repeatedly stated that they will continue to do so. Under the proposal just sketched, there would be an added incentive to do so: the family would know that Elian would not leave the United States until the federal court proceedings had ended.

The attorney general should terminate the custody of the Miami family immediately. At the same time, she should reach agreement with Juan Miguel that he not remove Elian from the United States until a court of appeals decision in his favor has been rendered.

This solution would end the unconscionable separation of father and son. And it would reaffirm an American principle as deep as family unification: the rule of law.

The writers have served as general counsel to the Immigration and Naturalization Service.

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