

Eliau or Alien?

The Contradictions of Protecting Undocumented Children under the Special Immigrant Juvenile Statute

BY GREGORY ZHONG TIAN CHEN*

On November 25, 1999, a six-year-old boy named Eliau Gonzalez was rescued off the coast of Florida after surviving an ocean voyage from Cuba.¹ Eliau, whose mother died during that journey, quickly became the subject of an intense international controversy over whether he should be returned to his father in Cuba or allowed to remain with his extended relatives in the United States.² The

* Staff Attorney/Skadden Fellow, Legal Services for Children. I want to thank Kathy Brady, Randy Hertz, Karen Jones-Mason, Martha Matthews, Chris Palamountain, Bernard Perlmutter and Judith Resnik for their guidance and assistance in the development and editing of earlier drafts of this article. I wish to acknowledge the following practitioners and advocates for sharing the accounts of their clients' lives without which this article could not have been written: Vibiana Andrade, Denise Baez, Cherylle Corpuz, Lynn Coyle, Christoph Erhardt, Behzad Ghassemi, Juanita Kirshke, Christina Kleiser, Zenobia Lai, Steven Lang, Angela Lloyd, Vanessa Melendez Lucas, Alan Mishael, Halim Morris, Christopher Nugent, Susan Schmidt, Matt Wilch, and Wendy Young. Finally, I am grateful to Joanne C. Lin for the support that made this article possible.

1. *See Gonzalez v. Reno*, No. 00-206-CIV-Moore, at 2 (S.D. Fla. 2000).

2. *See id.* The INS placed Eliau in the care of his paternal great uncle, Lazaro Gonzalez. *Id.* For examples of the controversy engendered by the case, see David Johnston, *U.S. Set to Order A Speedy Return of Boy to Father*, N.Y. TIMES, April 8, 2000, at A1 (describing the "international embarrassment" and "domestic political headache" caused by the Eliau Gonzalez case); Hearing of the House International Relations Comm., Fiscal Year 2001 State Dept. Foreign Affairs Budget February 16, 2000, Fed. News Serv. (describing testimony of Secretary of State Madeleine Albright regarding the State Department's communications with the Cuban government and the "international repercussions" that may result from the case); Anita Snow, *Cuba Government Ally Criticizes Boy Order*, ASSOC. PRESS, Jan. 10, 2000 ("Thousands of protesters [in Havana, Cuba] demanding the return of 6-year-old Eliau Gonzalez fell silent Monday upon hearing the announcement that an American [state court] judge had ordered the boy to stay in the United States."); Tom Raum, *Congress, Gore, Weigh in on Immigration Case*, ASSOC. PRESS, Jan. 10, 2000 (describing positions taken by several elected officials concerning the

United States Immigration and Naturalization Service (INS) took the position that Elian should be returned to his father, relying heavily upon U.S. family law principles regarding the importance of parental rights, family reunification, and the child's best interest.³ Despite the importance of family law principles, however, the INS asserted that it had exclusive jurisdiction over Elian and that a state family court lacked jurisdiction over the case.⁴

Although the extraordinary facts and political drama that surrounded Elian made the case unique, the conflict over Elian raised important questions about whether the federal government or a state family court had legitimate authority to determine the custody and

Elian Gonzalez case, including Vice President Al Gore, Senators Jesse Helms and Robert Torricelli, and House Representatives Benjamin Gilman and Dan Burton). On June 28, 2000, Elian was sent home to Cuba after federal agents seized him from the home of his relatives in Miami and legal appeals by the relatives failed to reverse the INS's decision.

3. See Doris Meissner, Commissioner INS, *INS Decision in the Elian Gonzalez Case* (visited Jan. 5, 2000) <<http://www.ins.usdoj.gov>> ("Both U.S. and international law recognize the unique relationship between parent and child, and family reunification has long been a cornerstone of both American immigration law and INS practice. . . . We urge everyone involved to understand, respect and uphold the bond between parent and child and the laws of the United States.") See also, Department of Justice and Immigration and Naturalization Service Joint Statement on Federal Court Action Regarding Elian Gonzalez, January 19, 2000 (stating that the INS decision "recognizes the bond that exists between parent and child"); Elian Gonzalez, Department of Justice INS Statement, March 28, 2000 (urging "everyone involved to . . . respect and uphold the bond between parent and child"). Indeed, family law principles were critical to the INS's decision because the INS concluded that Elian's father was the appropriate adult to represent the six-year-old's legal interests with regard to any petition for immigration status. See *Gonzalez v. Reno*, No. 00-206-CIV-Moore, at 10 (S.D. Fla. 2000) (citing Letter from Attorney General Jane Reno to Spencer Eig, Roger Bernstein and Linda Osberg-Braun of 1/12/00).

4. See Peter T. Kilborn, *I.N.S. Extends Boy's Stay in Miami as Judge's Links to Case are Questioned*, N.Y. TIMES, Jan. 12, 2000, at A12. On January 10, 2000, a Florida state court exercised jurisdiction over the case after Elian's great uncle sought a protective order and legal guardianship over Elian. See *Gonzalez v. Reno*, Case No. 00-206-CIV-Moore, at 3 (S.D. Fla. 2000) (citing Temporary Protective Order, *In re Gonzalez v. Gonzalez-Quintana*, 00-00479 FC 29 (Fla. Cir. Ct. Jan. 10, 2000)). The state court granted the uncle "limited legal authority . . . to assert and protect such rights as the child may have under United States immigration law." *Id.* On April 13, 2000, the state court issued a final order concluding that its jurisdiction was preempted by federal immigration law and dismissed the uncle's action. See Final Order, *In re Gonzalez v. Gonzalez-Quintana*, 00-00479-FC-28, April 13, 2000 at 1, 8-12. Commentators questioned the state court's initial decision exercising jurisdiction. See, e.g., Alex Veiga, *Judge To Hear Cuba Boy Arguments*, ASSOC. PRESS, Jan. 10, 2000 (describing one legal commentator's opinion that the state "judge's decision was 'politically popular,' but legally wrong"); Carol Rosenberg, *Government Can Still Reunite Elian Gonzalez with Father Friday*, MIAMI HERALD, Jan. 10, 2000 (describing immigration expert's view that "a local court has no authority to decide the custody question" over Elian).

placement status of an undocumented⁵ child. This article explores disputes between federal and state authorities over the custody and placement of undocumented minors who are abused, neglected, and abandoned.⁶

Elian was fortunate since he had a father and extended relatives willing to care for him and there was no indication that he suffered from family abuse, neglect, or abandonment.⁷ Many other undocumented children, however, are not so fortunate.⁸ Every year hundreds of undocumented children are abused, neglected, or abandoned by their parents or caregivers and therefore require the assistance of state child welfare institutions.⁹ Some of these children never receive the protection and services they need because they are detained by the INS in inadequate facilities or live in the U.S. unaware that child protective services exist.¹⁰

Because the INS and state or local child welfare agencies both have a legitimate interest in these children, conflicts have arisen regarding which government institution has the authority to

5. "Undocumented" describes the status of being physically present in the U.S. without legal permission. Some undocumented people enter the country by crossing the border illegally. Others enter the country with legal permission that subsequently becomes invalid either due to the person's conduct (such as by committing certain crimes) or by operation of law (such as the expiration of a tourist visa).

6. The term "abuse, neglect and abandonment" describes the particular set of experiences that may justify a state court's exercise of jurisdiction over a juvenile. The legal terminology varies depending on the laws of each state, but for the purposes of this article "abuse, neglect and abandonment" shall be used generally to describe this set of experiences.

7. See Meissner, *supra* note 3 ("INS has not uncovered any information that might call into question Mr. Gonzalez's parental and legal rights with regard to Elian's immigration status . . .")

8. See Lissette Corsa, *Orphans of the State*, MIAMI NEW TIMES, Mar. 30, 2000 (describing the difficult conditions many undocumented minors suffer as compared to trips to Disneyland and international "star appeal" bestowed upon Elian).

9. For example, in 1997, 430 undocumented children were granted SIJ status because they had been abused, neglected or abandoned. See 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 36 (1999).

10. Annually the INS detains several thousand undocumented minors. See Jo Becker, *The Other Immigrant Children*, MIAMI HERALD, Jan. 7, 2000 (reporting approximately 5,000 minors detained in 1999). The INS detention rates for unaccompanied children have varied significantly. In 1990, the INS reported detaining 8,500 unaccompanied minors. See *Reno v. Flores*, 507 U.S. 292, 295 (1993). In 1995 this number dropped to 2,028. See Patrick J. McDonnell, *INS Adopts Reforms on Custody of Minors*, L.A. TIMES, April 30, 1997, at B1. The INS estimates that approximately 5 million undocumented immigrants were residing in the United States in October 1996 who had not been identified by the INS. See *Statistics: Illegal Alien Resident Population* (visited on Jan. 29, 2001) <<http://www.ins.usdoj.gov>>.

determine where the children will live and how they will be treated. One example is the case of Gustavo Sanchez who was born in Honduras with severe developmental disabilities.¹¹ His father died when Gustavo was very young. Gustavo's mother physically abused him, attacking him with her hands, belts, rocks, sticks, even a machete. Gustavo fled the abusive home and eventually entered the United States, illegally and alone. He came to the attention of the Los Angeles child welfare system, was found by a state court to be abused, neglected, and abandoned, was declared a dependent of the court, and was placed in a foster home.¹² In the ensuing months a custody battle over Gustavo erupted between the INS and the Los Angeles child welfare system.

Gustavo was both an undocumented immigrant and a child survivor of family abuse and therefore qualified for a form of immigration relief called Special Immigrant Juvenile (SIJ) status.¹³ Enacted by Congress in 1990, the SIJ statute is designed to protect undocumented children who have suffered family abuse, neglect, or abandonment. To qualify for protection under the SIJ statute,¹⁴ a

11. Interview with Vibiana Andrade, Mexican American Legal Defense and Education Fund, Los Angeles, CA, (Jan. 21, 2000). The client's name has been altered.

12. The Superior Court sustained the petition filed on Gustavo's behalf pursuant to CAL. WELF. & INST. CODE § 300(a), (b), (c) and (g). *See* Minute Order, In the Matter of No. CK 31554, Hearing Date Jan. 30, 1998, Superior Court of California of Los Angeles, Juvenile Court (on file with the author).

13. *See* 8 U.S.C. §1101(a)(27)(J) (1999). The SIJ provision was originally enacted on November 29, 1990 as Sec. 153 of the Immigration Act of 1990, P.L. 101-649. On December 12, 1991, additional legislation was enacted governing special immigrant juveniles pursuant to the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991. Pub. L. No. 102-232, § 141, 83 Stat. 1733 (1991). On November 26, 1997, the SIJ provision was further amended by the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1998. Pub. L. No. 105-119 § 113, 111 Stat. 2440 (1998).

14. The other requirements for obtaining SIJ status are set forth at 8 U.S.C. § 1101(a)(27)(J) which defines a special immigrant juvenile as:

an immigrant who is present in the United States—

(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment;

(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and

(iii) in whose case the Attorney General expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status; except that—

(I) no juvenile court has jurisdiction to determine the custody status or

minor must be declared a “dependent” of a juvenile court,¹⁵ placed in the care of a child welfare agency, and deemed eligible for long-term foster care due to abuse, neglect, or abandonment. The minor is then eligible to obtain an immigrant visa and apply for lawful permanent residence.¹⁶

Under the plain language of the SIJ statute, Gustavo was eligible for SIJ relief. Yet the INS and the state juvenile dependency system clashed over which government authority had the power to determine his custody status and placement. The INS insisted it had absolute authority over Gustavo. Before Gustavo could obtain the SIJ protection, the INS took custody of him and refused to return him to the child welfare system, even after a federal court ordered him returned.¹⁷

placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction; and

(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act.

15. The SIJ statute specifies that the minor must “have been declared dependent on a juvenile court” to be eligible for the SIJ status. 8 U.S.C. § 1101(a)(27)(J). The necessary findings and orders must be made either by “that court,” or, in the case of the best interests determination regarding the minor’s return to his or her home country, in “administrative or judicial proceedings.” *Id.* The federal regulations define “juvenile court” as “a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles.” 58 Fed. Reg. 154, 42850 (1993) (codified at 8 C.F.R. § 2-4/11 (2000)).

In 1998 the INS issued a memorandum clarifying that minors in juvenile delinquency proceedings may also be eligible under the SIJ statute. Interim Field Guidance Relating to Public Law 105-19 (Sec. 113) amending Section 1101(a)(27)(J) of the INA – Special Immigrant Juveniles, August 7, 1998, Thomas E. Cook, Acting Assistant Commissioner, Adjudications Division, United States Department of Justice, INS, at 3.

Depending on the state, a “family court,” “probate court,” or “district court” may be vested with the authority to make the requisite orders for SIJ eligibility. *See, e.g.,* Gao v. Jenifer, 185 F.3d 548, 551 (6th Cir. 1999) (affirming Michigan probate court’s exercise of jurisdiction over Gao and the determination that Gao was a dependent of the court); Arteaga v. Texas Dep’t. of Protective and Regulatory Serv., 924 S.W.2d 756 (Tex. 1996) (noting that district court of Texas took jurisdiction over minor, declared her a “ward” of the court, and thus enabled her to obtain SIJ status).

16. A lawful permanent resident has the right to live and work permanently in the United States and to travel in and out of the country. Lawful permanent residents also may receive authorization to seek employment in the United States and obtain limited public benefits.

17. *See* Stipulation and Order Re: Compliance with Release Order of Immigration Judge and Dismissal of Petition for Temporary Restraining Order, No. CV 98-5575 RAP, (C.D. Cal. August 3, 1998) (ordering respondent INS to comply with order of immigration judge issued on July 1, 1998) (on file with the author).

The INS's unwillingness to cede custody of Gustavo to the state child welfare system arose, in part, from the federal government's long-standing authority over the regulation of immigrants and the INS's presumption that it has complete authority in this arena. Indeed, courts have described the federal government's power over immigration as "plenary" and "complete."¹⁸ State and local governments, however, have historically taken principal responsibility for protecting the health, safety, and welfare of children within their territories, particularly those who have experienced family abuse, neglect, and abandonment.¹⁹ Focusing on the SIJ law, this article explores precisely when, if ever, the federal government's power yields to the states' power with regard to the treatment of undocumented minors.

In Section I, this article discusses the cooperative state-federal system established by the SIJ statute. This law diverges from standard immigration policy by giving the responsibility for making certain critical eligibility determinations in SIJ petitions to state juvenile courts rather than the INS. In doing so, the SIJ statute takes advantage of existing state and local child welfare systems that have expertise and capacity to identify and address the needs of abused, neglected, and abandoned children.

While the SIJ statute draws upon the strengths of both the federal government and state child welfare institutions, it has also created conflicts between state and federal systems, which are the subject of Sections II and III. Section II describes the INS's resistance to state courts and child welfare systems becoming involved with children already detained in private or government facilities contracted by the INS. Many of these children have experienced family abuse, neglect, or abandonment and could be released to state child welfare agencies and deemed eligible under the SIJ statute. But the INS often retains custody over these children, denying them the opportunity to obtain state child welfare services or SIJ status, even though they may be eligible under federal law. Section III describes the INS's practice of investigating the personal lives of SIJ applicants, a practice that frustrates the SIJ statute's

18. See *Reno v. Flores*, 507 U.S. 292, 305 (1993) ("Over no conceivable subject is the legislative power of Congress more complete.") (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

19. This article does not take the position that there is something intrinsic about states that requires them to bear the responsibility for child welfare matters, but argues instead that states have historically taken that authority and responsibility.

requirement that the INS rely upon state courts for factual eligibility determinations regarding abuse, neglect, or abandonment. The problems described in Sections II and III illustrate the challenges of implementing a cooperative federal-state immigration program.

The remainder of this article focuses on a larger federal-state conflict arising from the cooperative structure of the SIJ statute. Sections IV and V explore whether the state or federal government should have the power to determine the custody and placement status of undocumented minors in the United States. Section IV examines court cases in which undocumented children sought protection from a state juvenile court after the INS already had obtained legal custody over them. In these cases, the INS asserted that its custody over the minor preempted a state court from exercising jurisdiction because state court jurisdiction would interfere with or obstruct federal immigration goals. While the specific holdings in these cases are no longer important (Congress amended the SIJ statute in 1997), the courts' analyses provide a valuable context for considering how state and federal government entities might share responsibility and power in the treatment of undocumented children. The article asks what jurisdictional rule should govern when both a state court and the INS have valid bases for exercising authority over an undocumented child.

Section V recounts how Congress answered this question. In response to allegations of immigration fraud, Congress amended the SIJ statute in 1997 and enacted a jurisdictional rule to govern state-federal jurisdictional conflicts.²⁰ The amendments limit state court power by removing state court jurisdiction over minors in INS custody except in cases where the Attorney General consents to jurisdiction.²¹ One consequence of the new jurisdictional rule, however, is that it potentially jeopardizes the safety and lives of undocumented children by limiting their access to vital protective services.

Section V discusses alternative federal jurisdictional rules that might achieve the same immigration fraud prevention goals that the 1997 law sought to accomplish without compromising the safety of undocumented children. This article considers jurisdictional rules that balance power between the federal government and states or, in

20. *See supra* note 14.

21. 8 U.S.C. § 1101(a)(27)(J)(iii)(I) states "no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction. . . ."

the alternative, favor greater state power over undocumented minors. In addition, Congress should reevaluate the 1997 jurisdictional rule because it may impose burdens on states that violate federalism principles. Section VI explores the applicability of federalism principles to immigration regulation and examines how a jurisdictional rule could be crafted to avoid a federalism challenge.

I. The Special Immigrant Juvenile Statute

A. A System of State and Federal Cooperation

When Congress enacted the SIJ statute, it created a unique administrative mechanism that requires the cooperation of state and local child welfare systems, state juvenile courts and the INS. In all SIJ cases, children must obtain the assistance of both the INS and the state juvenile dependency system in order to obtain protection under the statute. In this way, the SIJ statute reinforces the structure of the child welfare system. The law vests power in state courts to make important decisions regarding the minors' needs and requires that the INS rely upon those state court decisions. However, by giving state courts significant responsibility for determining minors' eligibility for this immigration benefit without clearly defining the roles of the INS and state courts in this process, Congress set the stage for conflict between the federal government and state governments.

The enactment of the 1990 SIJ statute demonstrates Congress' recognition that children who have experienced mistreatment in their families deserve special protection and are extremely vulnerable as children, immigrants, and survivors of family abuse, neglect, or abandonment. The statute allows undocumented minors to seek the protection of the juvenile dependency system and apply for lawful immigration status. In many SIJ cases, adults bring children into the country and continue to control and abuse them.²² Often parents have complete control over their child's immigration status (such as in cases of family visa petitioning), and may threaten the minor with deportation to prevent the minor from resisting and reporting the abuse.²³ In other cases, such as that of Gustavo Sanchez,²⁴ children leave their families to escape abuse and neglect and enter the United

22. See, e.g., *Arteaga*, 924 S.W.2d 756 (describing Laura, a six-year-old undocumented Mexican immigrant, who was subjected to severe and repeated physical abuse by her immigrant parents, and eventually removed from the home and granted SIJ status).

23. 8 U.S.C. § 1154 (1999) (describing petitioning procedure for family members).

24. See *supra* text accompanying notes 12-18.

States alone. Once they arrive, they have no one to care for them and the government child welfare system may be their only refuge. Like the 1994 Violence Against Women Act (VAWA), which provides relief to certain family members who are domestic violence survivors, the SIJ statute represents Congress's goal of protecting undocumented minors who have suffered family violence, abuse, neglect, or abandonment.²⁵

Children who apply for SIJ status may be categorized into two groups: those who enter the state juvenile dependency system prior to any contact with the INS and those who are first detained by the INS and later seek the protection of the dependency system. In practice, most undocumented minors receive SIJ protection after they first come to the attention of the child welfare system based on a child abuse report filed by police, social workers, or other concerned persons. If the child welfare system and the state juvenile court conclude that the minor requires government protection, the court may declare the minor a dependent of the court. Under the protection of the child welfare system, the minor can receive shelter, food, clothing, medical care, mental health counseling, and other services. After the state court has made the requisite findings, the minor is eligible to apply to the federal INS for the SIJ immigration benefit.²⁶ The INS generally does not object to state court and child welfare agency involvement in cases where children enter the dependency system prior to INS contact.²⁷

Those minors whom the INS first detains are also eligible for SIJ protection, but under much more limited conditions.²⁸ Pursuant to

25. 8 U.S.C. § 1154(a)(1)(A)(iii)(I), (a)(1)(A)(iv)(I), and (a)(1)(B)(iii) (setting forth VAWA self-petitioning requirements for spouses and children).

26. See 8 C.F.R. § 204.11 (2000).

27. In some cases, such as Gustavo Sanchez's, the INS has objected to state custody of children even though the state juvenile court had exercised jurisdiction and declared the child a dependent of the court. See *supra* text accompanying notes 12-18.

Minors who first become the subject of a juvenile delinquency petition because they are arrested for a crime or delinquent act, may have difficulty entering the juvenile dependency system and obtaining SIJ protection. In some states, such as California, minors who are the subject of a delinquency petition may be placed in the dependency system instead, if they are identified as having experienced abuse, neglect or abandonment. See, e.g., CAL. WELF. & INST. CODE § 241.1 (West Supp. 2000)(setting forth requirement that minors who "appear[]" to belong within both the dependency and delinquency systems be evaluated and placed in only one of the two systems). While the SIJ statute presents no bar to such minors obtaining SIJ status, in practice, they are less likely to be classified as juvenile court dependents and obtain SIJ status.

28. See *infra* Sections II and V (describing, respectively, INS treatment of detained minors and the 1997 statutory amendments which set forth new rules for how minors in

amendments passed in 1997, state juvenile courts no longer have jurisdiction over minors in INS “actual or constructive custody” unless the Attorney General consents to state court jurisdiction.²⁹ As of September 2000, the INS had not promulgated regulations defining how minors in the Attorney General’s “actual or constructive custody” should apply for SIJ protection.³⁰ A 1999 INS policy memorandum stated that requests for the Attorney General’s consent must be sent in writing to the local INS district director and that consent must be obtained before any state court proceedings are begun.³¹ If these requirements are not met, the state court order is deemed invalid.³² In practice, minors in INS detention are unlikely to be screened for abuse, neglect, or abandonment³³ and may not be granted permission to enter the juvenile dependency system.³⁴ Moreover, current INS policy does not explain how minors whom the

INS detention may obtain SIJ status).

29. 8 U.S.C. § 1101(a)(27)(J)(iii)(I).

30. *See infra* Section V (Regional practices differ in their procedures for granting SIJ applications to minors in the Attorney General’s “actual or constructive” custody. Most require that the petitioning minor obtain written consent from the INS local district director before taking any action in state court. A search of the Federal Register yielded no regulations interpreting the 1997 SIJ amendment).

The 1997 amendments to the SIJ statute does not define “actual or constructive custody.” As of June 2000, the INS had not yet promulgated federal regulations clarifying the meaning of this term. A July 1999 policy memorandum issued by the INS did not provide further clarification of this term. *See Special Immigrant Juveniles—Memorandum #2: Clarification of Interim Field Guidance, July 9, 1999, Thomas E. Cook, Acting Assistant Commissioner, Adjudications Division, United States Department of Justice, INS.*

31. *See* Memorandum from Thomas E. Cook, Acting Assistant Commissioner, Adjudication Division, U.S. Department of Justice, *INS on Special Immigrant Juveniles – Memorandum # 2: Clarification Guidance* (July 9, 1999)(on file with author)

32. *Id.*

33. *See infra* Section II (describing INS’s lack of screening protocols for minors in INS detention).

34. Interview with Christina Kleiser, Florida Immigrant Advocacy Center (Feb. 14, 2000). A.J.A. is an example of a minor whom the INS denied the opportunity to seek juvenile court protection because he was in INS custody. His father was murdered in 1996, and his mother and two younger siblings disappeared when war broke out in Somalia. Efforts by government and international agencies failed to locate those family members, and they are presumed dead. At the time he was detained by the INS he had no family that could provide a safe and stable home for him in either the United States or Somalia. When he sought the consent of the Attorney General to seek the juvenile court’s protection, the INS denied his request. A local officer stated that the SIJ statute was not intended to assist “arriving aliens” (such as those arriving into airports), though the SIJ statute expressly states that they are eligible for SIJ protection. The INS placed a high burden on the minor to prove to the INS, rather than a state juvenile court, that he had been abused, neglected or abandoned. *Id.*

INS releases into foster care or the care of family or other adult caregivers should apply for SIJ status.

B. The INS's Dependence on State Juvenile Courts in SIJ Cases

The different treatment accorded to INS-detained minors illustrates the tension the SIJ statute created by requiring the INS to cooperate with and depend upon state juvenile courts. Historically, the INS has borne primary responsibility for verifying the underlying facts supporting an immigrant's petition for relief.³⁵ For example, an asylum applicant who alleges political persecution may attest to the torture she experienced and submit documents demonstrating her "well-founded fear" of persecution.³⁶ The INS verifies the credibility of her statements and the strength of supporting evidence and, in doing so, may cross-examine the asylum applicant and ask her to submit additional materials. The asylum law states that the Attorney General will "determine" that the applicant qualifies as a refugee.³⁷ The law also includes, in the definition of refugee, particular elements that the applicant must establish to the INS, such as a "well-founded fear" of persecution on account of race, political opinion, or other grounds.³⁸

Congress also granted broad authority to the INS to evaluate the factual veracity of petitions under the Violence Against Women Act (VAWA), which enables certain spouses and children who have experienced family violence to petition for legal immigration status without the cooperation of the battering spouse or parent.³⁹ Under VAWA a child or spouse petitioner must demonstrate that he or she has been "battered by or has been the subject of extreme cruelty

35. See Peter Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 430 (1999) ("[T]he federal government possesses exclusive legal authority over immigration and has delegated all of that authority to one agency, the INS.").

36. See 8 U.S.C. § 1101(a)(42)(A) (1999) (setting forth "well-founded fear" basis for definition of "refugee").

37. See 8 U.S.C. § 208(b)(1) (1999).

38. See 8 U.S.C. § 1101(a)(42)(A).

39. See 8 U.S.C. § 1104(a)(1)(A)(iii)-(iv), (a)(1)(B)(ii)-(iii) (1999). VAWA enables spouses and children, who have experienced domestic violence at the hands of a spouse or parent who is a lawful permanent resident or a U.S. citizen, to petition on their own and obtain lawful permanent resident status. VAWA provides two avenues for relief: 1) domestic violence survivors who are not in removal proceedings may "self-petition" for relief; and 2) domestic violence survivors who are in removal proceedings may apply for "cancellation of removal."

perpetrated” by the spouse or parent.⁴⁰ VAWA further requires that the immigrant applicant “demonstrate[] to the Attorney General” that such battery or extreme cruelty occurred.⁴¹ Thus VAWA specifically requires that the Attorney General or her designee, the INS, verify the existence of domestic abuse. VAWA self-petitioners often submit state court orders, such as restraining orders, as evidence of the abusive relationship.⁴² The state court documents, however, only serve as proof of the abuse and are not conclusive evidence of abuse for VAWA purposes.⁴³ VAWA, like asylum law, requires that the applicant demonstrate to the INS each requisite statutory element, and the INS is the sole adjudicator of the petition.

By contrast, the SIJ statute limits the INS role to the verification of only certain information and specifically states that the INS will rely upon state juvenile courts’ findings of the history of abuse, neglect, or abandonment, and the minor’s best interests.⁴⁴ The SIJ statute defines a special immigrant juvenile as a minor who “has been declared a dependent of a juvenile court” and who has been “deemed eligible *by that court* for long-term foster care due to abuse, neglect or abandonment.”⁴⁵ The statute does not define a special immigrant juvenile as a minor who *is* or *has been* abused, neglected, or abandoned. In this way, the SIJ statute is unique because it conditions the receipt of the substantive immigration benefit upon a state court order. Unlike asylum law or VAWA, which require proof of “well-founded fear” or battery or extreme cruelty, the SIJ statute does not require the INS to make independent findings that the minor experienced abuse, neglect, or abandonment. The official comments to the 1993 SIJ regulations support this interpretation of

40. See 8 U.S.C. § 1154(a)(1)(A)(iii)(I), (A)(iv)(I), and (B)(iii).

41. See 8 U.S.C. § 1154(a)(1)(A)(iii)-(iv) and (B)(iii).

42. See 8 C.F.R. 204.2(c)(2)(iv) (2000):

Evidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. Persons who have obtained an order of protection against the abuser or have taken other legal steps to end the abuse are strongly encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women’s shelter or similar refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits. Other forms of credible relevant evidence will also be considered.

43. VAWA does not require self-petitioners to submit restraining orders as proof of domestic abuse. Other forms of evidence, including police reports, medical reports, photographs of injured victims, and the petitioner’s declaration can be submitted as proof.

44. See 8 U.S.C. §1101(a)(27)(J)(i)-(ii) (1999).

45. See 8 U.S.C. §1101(a)(27)(J)(i) (1999) (emphasis added).

the statute: “The final [regulations] state[] that the decision concerning the best interests of the child may only be made by the juvenile court.”⁴⁶

Furthermore, the express language of the statute directs the INS to rely upon the order of the state juvenile court, not the underlying factual premises that support the order.⁴⁷ While VAWA requires that the history of domestic abuse be shown, the SIJ statute limits the Attorney General’s role to “consent[ing]” to “the dependency order serving as a precondition” to SIJ status.⁴⁸ As described by the Sixth Circuit in *Gao v. Jenifer*, “the [Immigration and Nationality Act] specifically delegates determinations of dependency, eligibility for long-term foster care and the best interests of the child to state juvenile courts.”⁴⁹ Thus, the SIJ statute does not authorize federal agency review of the state court determinations. Indeed, the state court’s order *is* the substantive requirement for the immigration benefit.

C. The States’ Predominance over Child Welfare Matters

The reliance upon state juvenile courts anticipated in the SIJ statutory scheme signals Congress’ recognition that the states retain primary responsibility and administrative competency to protect child welfare. Although Congress has enacted major legislation setting regulatory standards for state and local child welfare programs,⁵⁰ the

46. See Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court, Final Rule, Department of Justice, Immigration and Naturalization Service, Supplementary Information, 58 Fed. Reg. 154, 42843 (1993) (codified at 8 C.F.R. Pts. 101, 103, 204, 205 & 245) [hereinafter *Special Immigrant Status*]. The comments also state that the INS “believes it would be both impractical and inappropriate for the [INS] to routinely readjudicate judicial or social service agency administrative determinations as to the juvenile’s best interest.” *Id.*

47. See 8 U.S.C. § 1101(a)(27)(J)(i).

48. See 8 U.S.C. § 1101(a)(27)(J)(iii).

49. 185 F.3d 548, 555.

50. For examples of major federal provisions regulating child welfare matters see Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (1997); Adoption Assistance and Child Welfare Act of 1980 (AACWA), Pub. L. No. 96-272, 94 Stat. 500 (codified at 42 U.S.C. §§ 670-679 (1994)); Child Abuse Prevention and Treatment Act of 1974 (CAPTA) Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. § 5101 et seq. (Supp. II 1996)); Indian Child Welfare Act (setting forth procedural standards regarding treatment and care of Native American children in the child welfare system). Congress has also established standards for the treatment of juvenile “status offenders,” youth who are charged with or who have committed acts that would not be criminal if committed by an adult, such as running away, violating curfew, or being found uncontrollable. See e.g., Juvenile Justice Delinquency Prevention Act of 1974, 42 U.S.C. §§ 5601-5777, Pub. L. No. 96-509 (as amended 1980).

principal federal regulatory method has been to offer federal funding incentives to encourage state participation and compliance with national child welfare standards.⁵¹ All fifty states have created administrative and judicial systems to protect the health, safety, and welfare of children.

Consequently, administrative and judicial expertise in child welfare matters resides primarily with the states and local governments. State and local agencies employ caseworkers to investigate allegations of abuse, neglect, or abandonment. Psychologists, educators, and other professionals are frequently summoned to evaluate children and provide services. State and local agencies also license and manage foster-homes, group-homes, and larger facilities that provide for the daily care of children in the dependency system. Finally, the states' judicial branch plays a critical role in the management and oversight of the child welfare system. For example, in California, whenever a child is removed from parental custody without parental consent, a juvenile court must make specific findings that placement with the family is contrary to the child's welfare.⁵² Juvenile courts must also find that the child welfare agency made "reasonable efforts" to enable the child to remain in the home or to reunify the family if removal has occurred.⁵³

51. See, e.g. Child Abuse Prevention and Treatment Act (CAPTA) (discussing how CAPTA used financial incentives to create federal standards in several areas of child welfare, including investigatory methods, confidentiality of records, and provision of legal counsel); Adoption Assistance and Child Welfare Act (AACWA) (employing financial incentives to encourage state participation, AACWA established uniform guidelines requiring state child welfare systems to create reunification plans for families, to make "reasonable efforts" at reunification, and to comply with other standards. 42 U.S.C. § 671(a)); Adoption and Safe Families Act (ASFA) (maintaining the federal funding incentive structure established in CAPTA and AACWA and establishing new standards for state child welfare systems. Significantly, ASFA clarified under what circumstances states are required to make "reasonable efforts" to reunify a family. See 42 U.S.C. § 671(a)(15)(D)).

52. See Carol S. Stevenson, Lucy S. Carter et. al., *The Juvenile Court: Analysis and Recommendations*, THE FUTURE OF CHILDREN, Vol. 6, No. 3, Winter 1996, at 16. See, e.g., CAL. WELF. & INST. CODE § 319 (grounds for continued detention) and § 361 (grounds for removal) (under § 319, one basis upon which a court may order child to be detained in custody is if a prima facie showing has been made that "there is a substantial danger to the physical health of the minor or the minor is suffering severe emotional damage, and there are no reasonable means by which the minor's physical or emotional health may be protected with removing the minor from the parents' or guardians' physical custody." Other grounds include showing of flight risk by parents, that the minor has left a placement made by the juvenile court, or that the minor is unwilling to return home due to physical or sexual abuse by someone residing in the home.).

53. See Stevenson, *supra* note 52, at 16. See, e.g., CAL. WELF. & INST. CODE § 306(b) (defining what types of services, public assistance, or other accommodations can be made

To enable a child to remain in the family's custody, caseworkers often provide counseling, child care, parenting assistance classes, and other supportive services to the family.⁵⁴ The child welfare system may also offer cash aid, transportation vouchers, and other public assistance. Finally, in order to make decisions regarding the child's best interests, a juvenile court regularly monitors the case and holds periodic hearings.⁵⁵ Thus, state juvenile courts must engage in a rigorous fact-finding process before declaring a child dependent.

The federal government's more limited regulatory role in child welfare has resulted in comparatively less operational capacity in dealing with individual child welfare cases. The federal government lacks the professional staff and administrative support to make assessments of individual children's mental and physical conditions and their welfare needs. Furthermore, within the judicial branch, federal courts have more limited jurisdiction over such matters.⁵⁶ As a result, state courts have developed greater competency for administration of child welfare matters.⁵⁷

In offering this comparison of the federal and state roles in addressing child welfare matters, this article does not argue that the existing division of roles is the way child welfare matters *ought* to be handled. While some commentators have argued that there are intrinsic benefits to delegating matters pertaining to families and children to a particular branch of government, it is not the purpose of this article to advance such a theory. Many state child welfare systems provide adequate care for children, but state systems are not a panacea for abused, neglected, or abandoned children.⁵⁸ Many

to enable child to remain in custody of parent, guardian or caretaker).

54. See e.g., CAL. WELF. & INST. CODE §§ 306, 319 and 366.

55. See, e.g., CAL. WELF. & INST. CODE § 366(a) ("The status of every dependent child in foster care shall be reviewed periodically . . . no less frequently than once every six months.").

56. See, e.g., *Room for Improvement*, CHILD LAW PRACTICE, Vol. 18, No. 12, at 192 (quoting speech given by Associate Justice Sandra Day O'Connor at the National Conference on Public Trust and Confidence in the Justice System, May 1999) ("For judges, family cases present special challenges because their role in such cases is substantially different from those in criminal and civil courts.").

57. Federal courts have noted that the subject of "domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the law of the United States." *In re Burrus*, 136 U.S. 586, 594 (1890).

58. In 1996 child welfare agencies in 21 states and the District of Columbia were under court supervision due to systemic deficiencies that placed the safety and care of children at risk. Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 121 (1997) (citing David Stoesz & Howard Jacob Karger, *Suffer the Children: How Government Fails its Most*

states might even benefit from an increased or more hands-on federal presence to ensure that children are properly protected. At the moment, however, the federal government has not taken responsibility for the direct administration of child welfare programs, and states currently have more systems in place to handle child welfare matters.

The cooperative structure of the SIJ statute removes from the INS the responsibility for making determinations of a child's "best interest," a task the INS could not effectively perform because of its conflicting interest in restricting immigration into the United States. The INS's primary mission and functions are to enforce immigration law, monitor United States borders and ports of entry, and remove individuals who do not have lawful immigration status.⁵⁹ The role of the INS is that of a gatekeeper, not a disinterested party concerned with assessing the needs of children. These functions place the agency in an adversarial relationship with respect to all child applicants for SIJ status. The INS cannot serve as both an adversary and a neutral adjudicator of a child's "best interest." By contrast, state juvenile courts and child welfare systems are specifically designed to identify a child's interests and to provide for his or her needs. In this regard, state juvenile courts are more neutral government entities and are better equipped to make "best interest" determinations for children.

Even the INS has acknowledged its limited experience in this area:

The Service does not intend to make determinations in the course of deportation proceedings regarding the 'best interest' of a child for the purpose of establishing eligibility for special immigrant juvenile classification. . . . It would be both impractical and inappropriate for the Service to routinely readjudicate judicial or social service agency administrative

Vulnerable Citizens-Abused and Neglected Kids, WASH. MONTHLY, June 1996, at 20.

59. See Strategic Plan, *Toward INS 2000: Accepting the Challenge*, U.S. Immigration and Naturalization Service, Office of Policy and Planning (approved by Commissioner Doris Meissner, November 2, 1994) at 4 (describing INS mission). The INS website lists four principal functions for the agency:

Conducts immigration inspections of travelers entering (or seeking entry) to the United States. . . . Regulates permanent and temporary immigration to the United States. . . . Maintains control of U.S. borders. . . . Identifies and removes people who have no lawful immigration status in the United States. The INS also works with other Federal, state, and local law enforcement agencies to uphold the laws of the United States.

<<http://www.ins.usdoj.gov/graphics/aboutins/inmission/index.htm>>.

determinations as to the juvenile's best interest."⁶⁰

The legislative history to the 1997 statutory amendments states that "the involvement of the Attorney General is for the purpose of determining special immigrant juvenile status and not for making determinations of dependency status."⁶¹

As a matter of federal and state power, the SIJ statute strikes a balance that relies upon existing state systems to handle child welfare matters while at the same time requiring the INS to perform its function of regulating immigration. By making use of state child welfare systems, the SIJ statute avoided the need to create an additional INS program to assess and provide for the needs of children who have been abused, neglected, and abandoned. The SIJ statute's adjudicatory scheme, however, presents a number of challenges that flow directly from the required cooperation between federal and state entities. Sections II and III examine problems that have arisen in the implementation of the SIJ statute.

II. The Treatment of Children in INS Custody

A. The Exclusion of INS-Detained Children from SIJ Status

Since the SIJ program came into effect, the INS has frequently denied child welfare protection to minors who are in INS legal custody, despite the fact that they could be eligible for SIJ relief. Even if these minors are physically located within a state's territory, state and local child welfare agencies have been unable to shelter or protect them after the INS asserts custody.⁶² Furthermore, the 1997 SIJ amendments limited state court jurisdiction over minors in INS legal custody and, consequently, made it even more difficult for state child welfare agencies to assist children in such cases.⁶³ As a result, minors who have suffered abuse, neglect, or abandonment often remain in INS detention or are returned to their country of origin without any opportunity to apply for SIJ status. Those children who remain in the United States may be confined in substandard, sometimes inhumane, facilities that do not provide proper care or

60. See *Special Immigrant Status*, *supra* note 46.

61. Conference Comm. Report of the Dep't of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1998. Pub. L. No. 105-119, § 113, 11 Stat. 2440 (1997) (Report on file with the author).

62. See *infra* text accompanying notes 71-76.

63. See *supra* note 21; see also *infra* Sections IV & V.

services.⁶⁴

This problem is created in part by the resistance of the INS to state and local involvement. Unaccustomed to sharing responsibility for adjudicating immigration decisions, the INS regularly obstructs state involvement with minors in INS legal custody. Despite the states' greater competency in child welfare matters and the SIJ statute's call for state-federal cooperation, minors in INS custody frequently do not benefit from state assistance. The consequences can be grave for children who have suffered abuse, neglect, or abandonment and need the protection of state and local child welfare agencies.

Although statistics showing the number of minors in INS legal custody who have experienced family abuse, neglect, and abandonment are not available,⁶⁵ interviews with immigration practitioners reveal that many detained children have suffered severe abuse, neglect, or abandonment. One practitioner described seven minors held in an INS contracted facility in Texas who were abused, neglected, or abandoned, but were not able to seek SIJ visas because their removal proceedings were expedited, as is the case for most detained minors.⁶⁶ Another Texas practitioner described four

64. See *infra* text accompanying notes 77-105.

65. Pursuant to the settlement agreement reached in *Flores v. Reno*, the INS is mandated to provide statistics regarding minors detained in INS custody for longer than 72 hours, including basic biographic information, dates of custody, placement, removal, and release, immigration status, and hearing dates. See *Flores v. Reno*, CV 85-4544-RJK 16, 17 (C.D. Cal. Sept. 16, 1996) (concerning a settlement agreement signed by INS Commissioner Doris Messner) (on file with author) (hereinafter *Flores Settlement Agreement*). These statistics do not document the minors' experiences of abuse, neglect or abandonment. *Id.* Human Rights Watch has compiled and published two reports on INS conditions of confinement of juveniles: SLIPPING THROUGH THE CRACKS: UNACCOMPANIED CHILDREN DETAINED BY THE U.S. IMMIGRATION AND NATURALIZATION SERVICE (1997) [hereinafter SLIPPING THROUGH THE CRACKS] and *Detained and Deprived of Rights: Children in the Custody of the U.S. Immigration and Naturalization Service*, Dec. 1998 [hereinafter *Detained and Deprived*].

66. Interview with Steven Lang of the South Texas Pro Bono Asylum Project, Harlingen, TX (Feb. 1, 2000) (Jose Enrique and Jose Luis were fourteen-year-old twins from Honduras whose family had physically abused them, forced them to sleep outdoors, and finally abandoned them. Another boy from Honduras (name withheld) was an illegitimate child who never knew the identity of his real father. He was beaten horribly by his stepfather, denied schooling, and eventually turned out of the house when his mother died. The fourth child was a sixteen-year-old from Honduras named Oscar whose parents were dead and who had lived on the streets on his own for more than ten years. The fifth was an eleven-year-old from Honduras (name withheld) whose mother was dead and stepfather forced him out of his home. The last two were two sixteen year old boys from El Salvador who had lost contact with their families as children and who had suffered terrible abuse while living on the streets. Each of these children would have had strong

siblings, the youngest of whom had been sexually assaulted, whose parents' whereabouts were unknown and could not be traced.⁶⁷ Other practitioners in Philadelphia and Miami offered similar accounts of children in INS detention in need of child welfare services.⁶⁸ These examples, though selective, demonstrate that many minors in INS detention have experienced family abuse, neglect, or abandonment and require more specialized services and care.

If the INS detains a minor who has suffered abuse, neglect, or abandonment, the minor is entitled to the protections afforded under the SIJ statute regardless of the manner of entry into the United States. In 1993, Congress, in an effort to ensure protection for minors experiencing family violence, added amendments to the SIJ statute, creating waivers for SIJ applicants from many of the standard bars to obtaining lawful permanent resident status.⁶⁹ Notably, a minor's

cases for entering the juvenile dependency system if they had been given the opportunity to do so.).

67. See Interview with Lynn Coyle, Lawyers' Committee for Civil Rights Under Law of Texas, El Paso, TX (Jan. 26, 2000) (discussing that four children, three girls and one boy, ages 14 and younger, were from Honduras. Because of the children's traumatic experiences, the INS placed the children with a local church which assisted the children in obtaining child welfare services.).

68. Interview with advocate in Philadelphia, PA (name confidential) (Feb. 2, 2000) (Describing the experience of a twelve-year old boy from Jamaica who had been detained by the INS. The boy witnessed the mother and father use hatchets and knives against each other. His brother was involved in drug-related activity. He ran away from home several times.). See also Interview with Christina Kleiser, Florida Immigrant Advocacy Center, Miami, FL. (Feb. 14, 2000) (describing a seventeen-year-old boy from Somalia whose mother disappeared when he was eight years-old. His father was murdered in 1996. Neither parent or other family arranged for his care or custody, and he survived alone on the streets for approximately 4 years. Under Florida law the boy qualified as an orphan and abandoned child. He was detained by the INS and was not given an opportunity to apply for

protection from the juvenile dependency system before being removed from the United States.).

69. For example, special immigrant juveniles were given automatic waivers from the public charge ground and some documentation grounds of inadmissibility and discretionary waivers for almost all other grounds for inadmissibility. See 8 U.S.C. § 1255(h). Other categories of immigrants have access to only limited waivers for certain grounds that often require a showing of extreme hardship to family members who are United States citizens or lawful permanent residents. See, e.g., 8 U.S.C. § 1255(h), which states:

(h) Application with respect to special immigrants. In applying this section to a special immigrant described in section 101(a)(27)(J) [8 U.S.C. § 1101(a)(27)(J)]—

(1) such an immigrant shall be deemed, for purposes of subsection (a), to have been paroled into the United States; and

(2) in determining the alien's admissibility as an immigrant—

illegal entry would not bar him from obtaining SIJ status and adjusting status to permanent residency.⁷⁰ The regulations state that the purpose of the SIJ statute is to protect minors who may have been abused, neglected, or abandoned “regardless of their method of entry.”⁷¹ Generally, a border entry without INS inspection constitutes grounds for “inadmissibility” or “removal” and can result in removal.⁷² By comparison, the 1993 amendments classifies minors, who were brought illegally into the U.S. by their parents or who illegally entered the country on their own, as having been “paroled in.”⁷³ Under this classification, the minor remains eligible for SIJ status and lawful permanent residence.⁷⁴ In waiving this bar, Congress has demonstrated special solicitude for abused, neglected, and abandoned minors. The INS expressed particular concern that federal procedures not delay child welfare actions “urgently needed to ensure proper care for dependent children.”⁷⁵

Contrary to the 1993 amendments and its own regulations, the INS has excluded minors in INS detention from receiving child welfare protection and from applying for SIJ status. In 1995, the INS

(A) paragraphs (4), (5)(A), and (7)(A) of section 212(a) [8 U.S.C. § 1182(a)] shall not apply, and

(B) the Attorney General may waive other paragraphs of section 212(a) [8 U.S.C.S. § 1182(a)] (other than paragraphs (2)(A), (2)(B), (2)(C) (except for so much of such paragraph as related to a single offense of simple possession of 30 grams or less of marijuana), (3)(A), (3)(B), (3)(C), and (3)(E)) in the case of individual aliens for humanitarian purposes, family unity, or when it is otherwise in the public interest.

The relationship between an alien and the alien’s natural parents or prior adoptive parents shall not be considered a factor in making a waiver under paragraph (2)(B). Nothing in this subsection or section 101(a)(27)(J) [8 U.S.C. § 1101(a)(27)(J)] shall be construed as authorizing an alien to apply for admission or be admitted to the United States in order to obtain special immigrant status described in such section.

70. *Id.*

71. The newly-added subsection 125(h) “permits most special immigrant juveniles to become lawful permanent residents regardless of the method of original entry into the United States, unauthorized employment, or failure to maintain lawful nonimmigrant status.” *Special Immigrant Status*, *supra* note 46.

72. See 8 U.S.C. § 1182 (defining grounds of “inadmissibility,” formerly referred to as “exclusion”); 8 U.S.C. § 1225(c) (defining grounds of “removal” formerly referred to as “deportation.”)

73. Such minors are deemed “paroled” into the United States and therefore are eligible to adjust their status to lawful permanent resident without undergoing consular processing which requires a departure from the country. 8 U.S.C. § 1255(h).

74. *Id.*

75. *Special Immigrant Status*, *supra* note 46.

announced a policy excluding detained juveniles from SIJ relief.⁷⁶ The INS reiterated that policy in 1996, stating that “[a]liens who are in INS custody are not eligible for special immigrant juvenile status.”⁷⁷ Anecdotal accounts from practitioners indicate that the INS remains recalcitrant despite congressional amendments passed in 1997 which clarified that minors in INS actual or constructive custody may seek juvenile court protection and apply for SIJ protection, provided that the Attorney General consents.⁷⁸ A 1999 INS policy memorandum stated that consent “should” be granted if “it appears that the juvenile would be eligible for SIJ status if a dependency order is issued” and “the dependency proceeding would be in the best interests of the juvenile.”⁷⁹

Despite these policy statements, in 1999 an INS official in Pennsylvania stated to an advocate that he could not foresee any minors in detention at the main facility in that region becoming eligible for parole for SIJ purposes.⁸⁰ In February 2000, an advocate seeking Attorney General consent for a client was told that SIJ status was not intended to protect arriving aliens, such as minors who had arrived at an airport without documentation, who were detained by the INS.⁸¹ These policies contravene the express purpose of the SIJ statute to protect all undocumented minors, even those detained for entering the U.S. illegally.

Another problem with the INS policy regarding detained minors is its failure to provide counseling and other services to minors who are abused, neglected, or abandoned. Pursuant to the 1996 settlement agreement in *Flores v. Reno*,⁸² which governs INS detention practice nationwide, minors who have “suffered serious neglect or abuse” and require special services or treatment as a result

76. INS Legal Opinion: Foster Care Detention of Unaccompanied Juvenile Aliens, June 30, 1995.

77. INS Legal Opinion: Special Immigrant Juveniles, New Orleans, April 23, 1996, at 1.

78. See Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act Pub. L. No. 105-119, § 113 (1997).

79. See Cook, *supra* note 31.

80. Interview with Cherylle Corpuz, Nationalities Services Center, Philadelphia, PA (Jan. 10, 2000) (statement attributed to Ted Nordmark, Assistant Director for Detention and Deportation, INS regarding the Berks County Youth Center, Pennsylvania).

81. Interview with Christina Kleiser, Florida Immigrant Advocacy Center, Miami, FL (Feb. 14, 2000).

82. 507 U.S. at 295.

of the abuse are entitled to receive services.⁸³ The agreement mandates that the INS “assess minors” to determine if they have suffered serious abuse, neglect, or abandonment.⁸⁴ In practice, however, many INS-contracted facilities do not screen minors for family trauma.⁸⁵ Some facilities do not even have appropriate bilingual staff for monolingual children.⁸⁶ Many facilities do not provide therapeutic or counseling services to minors who have suffered abuse, neglect, or abandonment.⁸⁷ The poor treatment of many children in INS-contracted facilities is compounded by its frequent use of higher security detention for immigrant minors.

B. INS’s Use of Secure Detention Facilities for Immigrant Children

In 1999, the INS placed nearly 2000 minors in higher security jail-like facilities,⁸⁸ even though 78% of these minors were not chargeable with any offense, had not been adjudicated delinquent, and had not

83. *Flores Settlement Agreement*, *supra* note 65, at 5.

84. *Id.*

85. Interviews with several local practitioners indicate that the following facilities do not screen juvenile detainees for family abuse, neglect or abandonment: Los Angeles County Juvenile Hall, CA; Berks County Youth Center, PA; Liberty County Juvenile Detention Facility, TX; and Yuma County Juvenile Detention Center, CA. Interviews with Steven Lang, South Texas Pro Bono Asylum Project, Harlingen, TX (Feb. 1, 2000); advocate in Philadelphia (name confidential) (Feb. 2, 2000); Vibiana Andrade, Mexican American Legal Defense Fund, Los Angeles, CA (Jan. 21, 2000); Wendy Young, Women’s Commission on Refugee Women and Children (Jan. 11, 2000); and Vanessa Melendez Lucas, Children and Family Justice Center, Northwestern Law School (Jan. 10, 2000).

86. Interviews with local practitioners indicate that the following facilities do not have bilingual staff for many of the non-English speaking minors detained in the facilities: Yuma County Juvenile Detention Center, CA; Central Juvenile Hall, Los Angeles, CA; and Los Padrinos Juvenile Detention Center, CA. Interviews with Wendy Young and Denise Baez, Catholic Legal Immigration Network (CLINIC), Los Angeles, CA (Jan. 13, 2000). *See also* SLIPPING THROUGH THE CRACKS, *supra* note 65, at 49.

87. Local practitioners have stated that the Heartland Alliance facility in Chicago, the Southwest Key facility in Coolidge, Arizona, and the Catholic Charities Boystown in Miami offer counseling and mental health services. Interviews with Christoph Erhardt, Midwest Immigrant Refugee Center, Chicago, IL (Jan. 10, 2000); Christopher Nugent, Florence Immigrant and Refugee Rights Project, AZ (Jan. 13, 2000); and Liliana Avedano, Boystown, FL. (Feb. 2, 2000). State-operated juvenile halls such as Los Angeles Central Juvenile Hall, Liberty County Juvenile Detention Center, Texas, Berks County Youth Center, and Yuma County Juvenile Detention Center generally do not provide such services. *See* SLIPPING THROUGH THE CRACKS, *supra* note 65, at 50.

88. Examples of higher security detention facilities are the Berks County Youth Center, PA; Los Angeles Central Juvenile Hall, Los Padrinos Juvenile Detention Center, CA; and the Yuma County Juvenile Detention Center, CA. SLIPPING THROUGH THE CRACKS, *supra* note 65, at 50.

exhibited any disruptive, threatening, or violent behavior.⁸⁹ That year, 63% of the higher security detentions were for more than 72 hours.⁹⁰ Most of the higher security facilities are state or local juvenile halls where immigrant minors share living space with non-INS detained minors charged with delinquent acts or who have already been adjudicated delinquent. Generally, local juvenile hall facilities use more severe and punitive methods to control the delinquent youth population. Such facilities are inappropriate for immigrant children who may not speak English and may have experienced severe family abuse or other violence or trauma.

Under the *Flores* agreement, only minors who are flight risks, are chargeable or charged with or convicted of certain delinquent acts, have exhibited violent or disruptive behavior, or require secured detention for their own safety can be placed in secured facilities.⁹¹ However, minors whose offense or chargeable offense is a petty offense or an isolated, non-violent, and non-weapon-related offense, may not be placed in higher security detention.⁹² According to one practitioner, in 1999 the Berks County facility in Pennsylvania directly violated this rule by placing minors charged with petty offenses, such as shoplifting, in high security detention.⁹³ Since then, the facility may have reduced this practice.⁹⁴

89. *Flores Settlement Agreement*, *supra* note 65, at 12-13. In 1998 and 1999, approximately one third of all children detained by the INS were held in higher security facilities. Jo Becker, *Children in Detention Suffer Denial of Basic Human Rights*, DETENTION WATCH NETWORK NEWS, Apr./May 2000, at 4 (citing INS statistics which indicate that in 1999 federal fiscal year 34% of juvenile detention stays, nearly 2,000 children, were in secure facilities.). See *Detained and Deprived of Rights* *supra* note 65.

90. Becker, *supra* note 89, at 4.

91. See *Flores Settlement Agreement*, *supra* note 65, at 12-13.

92. The settlement agreement states that secure detention shall not apply to any minor whose offense(s) fall(s) within the following categories:

Isolated offenses that (1) were not within a pattern or practice of criminal activity and (2) did not involve violence against a person or the use or carrying of a weapon (Examples: breaking and entering, vandalism, DUI, etc. This list is not exhaustive.);

Petty offenses, which are not considered grounds for stricter means of detention in any case (Examples: shoplifting, joy riding, disturbing the peace, etc. This list is not exhaustive.)

Id. at 13.

93. Interview with advocate (name confidential), Philadelphia, PA (Feb. 2, 2000). The *Flores* agreement does not allow secured detention for minors charged with, chargeable, or convicted of, petty offenses and provides specific examples of shoplifting, joy riding, or disturbing the peace. *Flores Settlement Agreement*, *supra* note 65, at 13.

94. Electronic mail communication with advocate (name confidential) in Philadelphia, PA (June 22, 2000).

Another problem is the INS's excessive placement of minors in high security facilities when there is insufficient space in appropriate placements.⁹⁵ Even though the *Flores* agreement allows minors to be placed in secure facilities when there is an "emergency influx" of minors into the country,⁹⁶ 1999 INS statistics indicate that 44% of all secure placements made during that year, a total of 855 placements, were for reasons of overflow.⁹⁷ In effect, the INS regularly justifies the placement of children in secured detention due to its lack of proper facilities, despite the fact that these children present no other risk.⁹⁸ As early as 1985, when the *Flores v. Reno* litigation first began, advocates have been calling for the INS to provide adequate facilities for the detainment of children. Thus, the INS has continued to claim that there are "emergency" influxes of minors even though it has had many years to build adequate facilities or to contract with existing facilities to accommodate immigrant children.

Specific cases further demonstrate the serious problems with the INS policy of using high security detention facilities for immigrant children. For example, in one facility the INS detained four Pakistani children in high security detention for four months even though each child had a close relative with guardianship papers that was willing to take custody.⁹⁹ In 1999, the INS placed six Chinese children in a juvenile detention center in Portland, Oregon.¹⁰⁰ One of the children, a fifteen-year-old girl, was held for several weeks despite the fact that she had been granted asylum and her uncle living in New York was prepared to care for her.¹⁰¹ The young girl's release into foster care and the transfer of three of the Chinese boys in the Oregon facility to

95. *Flores Settlement Agreement supra* note 65, at 13-14.

96. *Id.* at 8-9.

97. INS Juvenile Detention and Shelter Program Statistics, FY 1999, as cited in Becker, *supra* note 89.

98. SLIPPING THROUGH THE CRACKS, *supra* note 65; Jo Becker, *The Other Immigrant Children*, MIAMI HERALD, Jan. 7, 2000. The Central Juvenile Hall in Los Angeles frequently operates at an "emergency influx" status, and is therefore holding kids who do not present a flight risk or danger to other children with other youthful offenders. See SLIPPING THROUGH THE CRACKS *supra* note 65, at 46; Interview with Denise Baez, Catholic Legal Immigration Network (CLINIC), Los Angeles, CA (Jan. 12, 2000).

99. *See Detained and Deprived, supra* note 65.

100. *See Smith Secures Promise of Temporary Foster Care for 15-year-old from INS Commissioner Meissner*, Congressional Press Releases, (December 16, 1999). In the Portland facility, the average length of stay for detained minors was 38 days during the 1996-97 calendar year. *Id.*

101. *Smith Secures Promise of Temporary Foster Care for 15-year-old from INS Commissioner Meissner, supra* note 100.

more appropriate shelter-care was secured only after advocates drew substantial public attention to the inhumane conditions of the children's confinement and obtained the assistance of an Oregon Senator to place pressure on the INS.¹⁰²

Conditions in some secure facilities are grossly inhumane.¹⁰³ Minors in the Los Angeles facility report that staff have used pepper spray against them and have employed severe methods of control, such as limiting use of the bathroom and forbidding detainees from turning their heads as they walk down the hallway.¹⁰⁴ As of early 2000, the Berks County facility used handcuffs and ankle shackles in the facility and to transport minors to and from immigration court.¹⁰⁵ In 1998, the staff at the Berks County facility required the children to do pushups as a method of control and discipline.¹⁰⁶ Other accounts of extreme physical abuse in the Berks County facility include instances of guards beating minors and baiting them to fight.¹⁰⁷ In the Texas Liberty County Juvenile Detention Facility, a boy named Oscar reported that guards used handcuffs and shackles regularly, struck him on several occasions in the face and mouth, and shoved his head in the toilet.¹⁰⁸ He was placed in solitary confinement for three days wearing nothing but his underwear.¹⁰⁹

These extreme cases of human rights violations illustrate the inhumanity of locking minors, who in some cases have already suffered abuse, neglect, or abandonment, in facilities that use punitive methods of control and lack proper services. For example, Oscar, the boy who was beaten in the Texas facility, had lost both parents as a child and the INS and other local government agency searches failed to locate any other family.¹¹⁰ The abuse he experienced in INS detention compounded the trauma of his parents' death.

102. *Id.*

103. *1,000 Child Immigrants Worse off than Elian*, USA TODAY, Feb. 28, 2000 (citing inhumane conditions of confinement for minors detained by the INS).

104. Interview with Denise Baez, CLINIC, Los Angeles, CA (Jan. 12, 2000).

105. Interview with Cheryl Corpuz, Nationalities Service Center, Philadelphia, PA (Jan. 10, 2000). *Detained and Deprived*, *supra* note 65. In 1998 the INS maintained that it had the authority to use restraints during the transport of minors. *Id.*

106. *Id.*

107. Interview with advocate (name confidential), Philadelphia, PA (Feb. 2, 2000).

108. Interview with Steven Lang, South Texas Pro Bono Asylum Project (Feb. 1, 2000). Mr. Lang stated that the boy's account was verified by a female guard who was later dismissed from the facility.

109. *Id.*

110. *Id.*

Undoubtedly, what he needed was counseling and a supportive structured living environment. Oscar is precisely the type of minor the SIJ statute was intended to protect; yet he will not receive this protection because of the INS's inability to provide such services and its unwillingness to make use of non-secure facilities with such services.

The mistreatment of minors in INS detention illustrates the problem of placing vulnerable children in facilities that are not equipped to provide adequate services. As Section I illustrated, state and local child welfare systems have greater capacity than the federal government to respond to matters of child abuse, neglect, and abandonment.¹¹¹ The cooperative state-federal approach of the SIJ statute takes into account this state capacity. The statute requires the INS to adjust its role and to trust state court determinations of substantive information that the INS would otherwise need to verify independently. The resistance of the INS to this change in roles was exhibited in policy statements throughout the 1990s that excluded minors in INS detention from SIJ status. Consequently, in many cases detained minors are denied the opportunity to apply for SIJ status and are either deported immediately or detained in

111. Of course, state systems are not immune from some of the problems with the INS contracted facilities. In 1996, child welfare agencies in 21 states and the District of Columbia were under court supervision due to systemic deficiencies that placed the safety and care of children at risk. Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 121 (1997) (citing David Stoesz & Howard Jacob Karger, *Suffer the Children: How Government Fails its Most Vulnerable Citizens-Abused and Neglected Kids*, WASH. MONTHLY, June 1996, at 20.) For examples of litigation that revealed widespread deficiencies in state and local child welfare systems, see *LaShawn v. Barry*, 144 F.3d 847, 849 (D.C. Cir. 1998) (citing 1991 trial court conclusions that the Washington, D.C. foster care system "had failed to comply with reasonable professional standards in almost every area of its child welfare system") (internal quotations omitted); *Baby Neal et al. v. Casey*, 43 F.3d 48, 52 (3d Cir. 1994) (noting the "severe and widespread deficiencies" in Philadelphia's child welfare system); *G.L. v. Stangler*, 873 F. Supp. 252 (W.D. Mo. 1994) (substituting consent decree to implement reforms in Missouri child welfare system); *Marisol v. Giuliani*, 929 F. Supp. 660 (S.D.N.Y. 1996) (considering motion to dismiss plaintiff class certification in litigation against New York City's child welfare system).

Nationwide about one percent of child abuse reports made each year allege abuse by state-authorized foster parents, and another two percent are made concerning residential facility staff. Richard P. Barth, *The Juvenile Court and Dependency Cases*, THE FUTURE OF CHILDREN: THE JUVENILE COURT, Winter 1996, 100, 105 (citing 1994 report from the U.S. Department of Health and Human Services, National Center on Child Abuse and Neglect).

Despite these significant problems, state and local child welfare systems on the whole are better able to address problems of child abuse, neglect and abandonment than federal agencies.

substandard facilities. This disparate treatment of children who are first detained by the INS contravenes the express purpose of the SIJ statute and its subsequent amendments.

III. A Child's Privacy and the Disclosure of Juvenile Court Records to the INS

Another problem created by the SIJ statute's cooperative state-federal system is the difficulty of protecting the minor's privacy from unnecessary re-examination by the INS. As discussed in Section I, when petitioning for SIJ status, minors must submit documentation showing that a juvenile court has made the requisite orders and findings rendering the minor eligible for SIJ status.¹¹² The SIJ statute does not require the minor to provide additional information to support the juvenile court's determinations. In practice, however, the INS has asked SIJ applicants to provide information pertaining to abuse, neglect, abandonment, or other private matters. In addition to the SIJ statute's own directive, other compelling concerns, most notably the privacy of the minor, outweigh the INS's interest in obtaining the child's personal history and juvenile court records. The need for sensitivity with regard to these private materials is recognized in federal laws that protect minors from unnecessary disclosures of information regarding abuse, neglect, and abandonment.

Although the SIJ statute only requires minors to present the requisite juvenile court orders, the INS routinely seeks additional information, either in writing or through personal interviews with the minor. The INS has asked minors to offer additional documentation about their family abuse, neglect, and abandonment, including questions regarding physical or sexual abuse. By probing into such private information about the minor's life, an INS officer may force a minor to re-live the trauma in front of a complete stranger.

Some studies indicate that insensitive, repetitive, or unskilled probing of a child's history of abuse, neglect, or abandonment during an interview may cause stress or harm to the child.¹¹³ National

112. See 58 Fed. Reg. 154 (1993) (codified at 8 C.F.R. § 204)(requiring that documentation be submitted showing that the juvenile court "has found the [minor] to be dependent upon that court" and "eligible for long-term foster care," and "that it would not be in the [minor's] best interest to be returned" to the minor's country of nationality or the parents' last residence.).

113. See GAIL S. GOODMAN, et. al., TESTIFYING IN CRIMINAL COURT IN 57 MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT 1-2 (1992) (concluding, based on two-year study of 218 children, that children may experience high

reforms have moved to reduce the number of interviews a child must undergo: federal legislation and legislation in thirty-three states requires or encourages cooperation between law enforcement and child protective services or the establishment of multidisciplinary child protection teams to consolidate interview efforts.¹¹⁴ Courts and legislatures have recognized the potential for psychological trauma to a child who is forced to testify and thus have excluded such testimony to protect the child.¹¹⁵

Although an INS officer's direct questioning of a minor may be aimed at obtaining the "truth," the officer may obtain only inaccurate information. Research over the past several decades consistently demonstrates the difficulty of interviewing children and obtaining reliable results. Compared to adults, children may be more impressionable and subject to the influence of an examiner's questioning. Research indicates that repetitive or leading questioning and unconscious signaling through non-verbal cues may affect a

levels of anxiety from testimony) (cited in John E.B. Myers, *Child Abuse: A Decade of International Legal Reform Regarding Child Abuse Investigation and Litigation: Steps Toward a Child Witness Code*, 28 PAC. L.J. 169, n.3 (1996)). "[M]ultiple interviews are thought to add stress to already vulnerable children." John E.B. Myers, et. al., *Child Abuse: Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 3, 17, 74-75 (1996).

114. John E. B. Myers, *Child Abuse: A Decade of International Legal Reform Regarding Child Abuse Investigation and Litigation: Steps Toward a Child Witness Code*, 28 PAC. L.J. 169, 178 (1996). Pursuant to 18 U.S.C. section 3509(g)(1), in cases investigated by federal law enforcement officials, a "multi-disciplinary child abuse team shall be used when it is feasible to do so."

115. See, e.g., *Maryland v. Craig*, 497 U.S. 836 (1990) (recognizing that the state has a compelling interest in protecting abused children from additional trauma and embarrassment that may result from testimony); *State v. Ford*, 626 So. 2d 1338, 1345 (Fla. 1993) (noting that the state has an "interest in protecting a child witness from the trauma of testifying in the presence of a defendant."); *In re Jennifer J.*, 8 Cal. App. 4th 1080 (1992) (holding that child's testimony was properly excluded to prevent psychological harm to child, even though child was competent and available to testify); California permits courts to exclude testimony of a witness if testifying would result in the witness' "suffering substantial trauma." CAL. EVID. CODE § 240. California law also states that in sex offense cases "the court shall consider the needs of the child victim and shall do whatever is necessary . . . and constitutionally permissible to prevent psychological harm to the child victim." CAL. PENAL CODE § 288(d). In Alabama, a court has the authority to limit the number of interviews that may be conducted upon a child under twelve who is the alleged victim of sexual abuse to protect the victim from the psychological damage of repeated interrogation. ALA. CODE § 15-1-2(a). West Virginia also allows the court to limit the number of interviews of a "victim who is eleven years old or less" to protect the mental and emotional health of the child from the psychological damage of repeated interrogation. W. VA. CODE § 61-8-13(a). Numerous courtroom reforms have been developed to accommodate the special concerns regarding child interviewing and testimony. See Myers, *supra* note 113, at n.3.

child's response.¹¹⁶ The attitude or perceived bias of the interviewer also may influence interview results.¹¹⁷ Voluminous research demonstrates that a skilled and sensitive interviewer is absolutely essential when questioning a child regarding child abuse, neglect, or abandonment.¹¹⁸ If INS officers were trained to interview children the INS could alleviate this problem, but presently the INS does not provide such comprehensive training.

Congress passed laws in response to concerns that children will be harmed from repetitive interviews, interviews conducted without proper training, and compelled disclosure of experiences of abuse, neglect, and other trauma.¹¹⁹ Federal laws mandate that states preserve the confidentiality of juvenile court dependency and child welfare agency records.¹²⁰ In 1974, Congress enacted the Child Abuse

116. See Myers, *supra* note 113, at 10-14

117. See *id.*

118. See *id.* The importance of training child interviewers has been recognized nationwide, and state and local child welfare agencies have embarked on training programs to improve interview skills of caseworkers who work with children at risk of abuse, neglect or abandonment. See Myers, *supra* note 113, at 176-177. Voluminous research and written material that has been developed regarding proper interview methods. *Id.* Pursuant to the Child Abuse Prevention and Treatment Act of 1974, federal law also encourages states to improve child welfare training and investigation methods. 42 U.S.C. §§ 5106a(5), 5106c.

119. See generally, Marcia Sprague and Mark Hardin, *Coordination of Juvenile and Criminal Court Child Abuse and Neglect Proceedings*, 35 U. OF LOUISVILLE J. OF FAM. L. 239 (1996), Emily Bazelon, *Note: Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL'Y REV. 155 (1999).

120. The Child Abuse Prevention and Treatment Act ("CAPTA"), 42 U.S.C. §5106a(b)(2)(A)(v), states, in relevant part, that every state receiving federal grants under CAPTA must provide:

methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians, including requirements ensuring that reports and records made and maintained pursuant to the purposes of this Act shall only be made available to: (I) individuals who are the subject of the report; (II) Federal, State and local government entities, or any agent of such entities, having a need for such information in order to carry out its responsibilities under law to protect children from abuse and neglect; . . . VI) other entities or classes of individuals statutorily authorized to receive such information pursuant to a legitimate State purpose.

42 U.S.C. § 5106a(b)(2)(A)(v).

The Adoption Assistance and Child Welfare Act (AACWA), 42 U.S.C. § 671(a)(8), requires that that states receiving federal funds establish a state foster care plan that "provides safeguards which restrict the use of or disclosure of information concerning individuals assisted under the State plan." AACWA allows for disclosure only for specific purposes including: purposes directly connected with the administration of the state's foster care plan; any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of the plan; the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind,

Prevention and Treatment Act (CAPTA), which mandated that participating states provide for methods to preserve the confidentiality of “all records in order to protect the rights of the child, his parent or guardians.”¹²¹ In addition to CAPTA, the 1980 Adoption Assistance and Child Welfare Act (AACWA) also set confidentiality standards requiring states to restrict “disclosure of information concerning individuals” in the foster care system.¹²² AACWA only allows release of information to another governmental agency for purposes “directly connected with the administration” of the child’s foster care plan.¹²³

Thus, federal confidentiality laws reinforce the well-established policies regarding the treatment of minors who are the subject of child abuse, neglect, or abandonment investigations. Until the INS implements a more comprehensive training program for its SIJ investigating officers, it should refrain from interviewing minors regarding their personal and family history, their experience of abuse, neglect, or abandonment, or other private matters that have already been examined and reviewed by more qualified child welfare professionals and the state juvenile court.

IV. Federal Preemption of State Court Jurisdiction

Underlying the disputes about the SIJ statute described in Sections II and III is a controversy over whether the states or the

or services, directly to individuals on the basis of need. 42 U.S.C. § 671(a)(8) AACWA does not make any provision for release of information to a federal agency not directly involved with the state foster care plan administration.

121. 42 U.S.C. §5106a. In 1992, CAPTA was amended to forbid states that receive federal foster care funding from releasing records to government agencies unless disclosure is required “to protect children from abuse and neglect” or is “statutorily authorized . . . pursuant to a legitimate State purpose.”

The legislative history of the 1992 CAPTA amendments indicates that the rules for disclosure were designed to improve communication among agencies that had information that would help protect a child at risk of abuse, neglect or abandonment. *See Child Abuse Prevention, Adoption and Family Services Act: Hearings before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 102d Cong. 126 (1992) (statement of Mary Margaret Oliver, Ga. House of Rep.).

122. *See* Marcia Sprague & Mark Hardin, *Coordination of Juvenile and Criminal Court Child Abuse and Neglect Proceedings*, 35 U. OF LOUISVILLE J. OF FAM. L. 239, 315 (Spring 1996). Laura Cohen, *Section III: Developments in the United States: Kids, Courts, and Cameras: New Challenges for Juvenile Defenders*, 18 QUINNIPIAC L. REV. 701, 717 (1999) (“Records relating to child protective, preventive, and foster care services are subject to the strict confidentiality rules of the federal Adoption Assistance and Child Welfare Act (AACWA) and the Child Abuse Prevention and Treatment Act (CAPTA).”).

123. 42 U.S.C. § 671(a)(8).

federal government have the ultimate power over the custody and placement of undocumented minors who have been abused, neglected, or abandoned.¹²⁴ Both federal and state entities have legitimate bases for asserting authority over this population of minors, thus creating the potential for competing claims for control. As a general matter, within the United States constitutional system, federal law is supreme, and a constitutional exercise of federal power preempts any state interference. Federal preemption occurs, however, only when the assertion of state power actually conflicts with or frustrates the purposes of federal law.¹²⁵ This section considers under what circumstances, if any, an actual conflict occurs between federal immigration regulation and state court jurisdiction with regard to the treatment of undocumented minors who are abused, neglected, or abandoned. By focusing on these conflicts, this section explores the boundaries separating federal and state power. This section lays the groundwork for asking an important question: when both a state juvenile court and the INS have valid bases for exercising authority over an undocumented child, which government entity should exercise final authority?

In the early 1990s after the SIJ statute was passed, the INS began denying applications for SIJ status on the ground that state courts were interfering with the federal government's exclusive authority over immigration matters.¹²⁶ A few of these cases resulted in reported court opinions. In these reported cases, the INS first detained the minors, later releasing them to state-licensed foster care agencies, which subsequently sought state juvenile court protection for the minors.¹²⁷ Even though the INS no longer had physical custody, it retained legal custody over the minors.¹²⁸ In response to the foster

124. *See, e.g.*, *In re Y.W.*, 1996 Minn. App. Lexis 1302, *8 n.4 (1996) (Randall, J., concurring) (unpublished decision) (characterizing the conflict as "a pure political turf battle" between the INS and the state juvenile court).

125. *See Michigan Canners & Freezers Assn. v Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469 (1984); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

126. *See Gao*, 185 F.3d 548; *In re C.M.K.*, 552 N.W.2d 768, 771 (Minn. Ct. App. 1996). *See also In re Y.W.*, 1996 Minn. App. Lexis 1302, *8 n.4 (1996) (unpublished decision); *In re X*, 1996 Immig. Rptr. Lexis 485; 16 Immig. Rptr. B 2-39 (INS Administrative Appeals Unit, February 9, 1996) (stating without analysis that juvenile courts have no jurisdiction to determine the custodial status or to enter dependency orders for juvenile aliens in federal custody).

127. *Id.*

128. *See, e.g., Gao*, 185 F.3d at 551 ("The contract between the INS and [Lutheran Social Services of Michigan] provides that "these minors, although released to the physical

families' action, the INS asserted that state court involvement—even the exercise of jurisdiction—violated the Supremacy Clause of the Constitution by obstructing the INS's regulation of immigration and that state court jurisdiction was therefore preempted.¹²⁹ In two cases state courts agreed with the INS,¹³⁰ but in the 1999 decision, *Gao v. Jenifer*,¹³¹ the federal Sixth Circuit Court of Appeals held that the state court's action did not obstruct the federal law's purposes of the SIJ statute.¹³²

The specific holdings in these cases are no longer important because Congress amended the SIJ statute in 1997 and enacted a jurisdictional rule to govern conflicts over minors in INS legal custody.¹³³ But the courts' discussion of preemption raises the central issue of whether a state court and the INS can share control over the custody of an undocumented child. The 1997 jurisdictional rule was Congress' answer to this question. Congress essentially concluded that state courts and the INS could not share control over a minor and restricted state court jurisdiction over minors in INS custody. In examining the disputes between state courts and federal immigration authorities, this section provides a context for evaluating whether the 1997 rule Congress enacted was necessary and whether that rule effectively delegates responsibility between the federal government and the states.

A. The Preemption Analysis of *Gao* and *C.M.K.*

In 1996, the Minnesota Court of Appeals concluded that a state juvenile court lacked jurisdiction to order dependency on behalf of a minor in INS legal custody and in deportation proceedings.¹³⁴ In *In the Matter of the Welfare of C.M.K.*,¹³⁵ the INS had detained C.M.K.

custody of LSSM, shall remain in the legal custody of the INS.”).

129. *Id.*

130. See *In re C.M.K.*, 552 N.W.2d 768, 771 (Minn. Ct. App. 1996); *In re Y.W.*, 1996 Minn. App. Lexis 1302, *8 n.4 (Minn. App. 1996) (unpublished decision).

131. 185 F.3d 548 (6th Cir. 1999).

132. See *id.*

133. See discussion *infra* Section V. Although Congress enacted the jurisdictional rule before the Sixth Circuit reached its decision in *Gao*, the Sixth Circuit held that the 1997 rule did not apply retroactively to *Gao*. 185 F.3d at 553 (“Because the threat of deportation, and the ability to avoid that threat, implicate private rights, and Congress did not explicitly dictate that the 1997 amendment should have retrospective application, we decide this case according to the law in effect at the time *Gao* sought SIJ status.”).

134. *In re C.M.K.*, 552 N.W.2d 768, 771 (Minn. Ct. App. 1996).

135. See *id.*

and released him to a foster family. The foster family asked the state court to exercise jurisdiction and protect the minor. When the state court refused to take jurisdiction, the family appealed. The appellate court determined that “federal immigration proceedings preempted state court proceedings and, therefore, the state court was without jurisdiction.”¹³⁶ Citing the United States Supreme Court, the Minnesota court concluded that federal immigration law preempts state law that interferes with the admission or exclusion of immigrants and that a state court finding of dependency would “conflict with and circumvent the immigration process.”¹³⁷ Significant to the court’s decision was its determination that the petitioners “appear to be requesting that the state court intercede and prohibit the INS . . . from deporting [the minor] to a situation which would allegedly not meet [the minor’s] basic needs as defined by state law.”¹³⁸ The Minnesota court found state court jurisdiction preempted on the ground that the petitioners sought to use state court dependency to interfere with federal immigration policy.

Three years later in *Gao*, the Sixth Circuit came to the opposite conclusion in a case involving remarkably similar facts.¹³⁹ Just as in *C.M.K.*, in *Gao* the INS also released the minor to the foster agency and retained legal custody while deportation proceedings were pending.¹⁴⁰ The major difference in *Gao*, however, was that the state court took jurisdiction and found the minor dependent after the foster agency sought state protection.¹⁴¹ Subsequently, *Gao* petitioned for SIJ status. The challenge to the state court’s jurisdiction arose when the INS denied *Gao*’s petition. When *Gao* appealed the INS’s ruling in federal court, the INS argued that the state court’s exercise of jurisdiction violated sovereign immunity and the Supremacy Clause.¹⁴² Contrary to the decision reached in *C.M.K.*, the *Gao* Court concluded that the state court’s exercise of jurisdiction “neither interferes with the public administration nor restrains the [federal] government from acting, and sovereign immunity is not offended.”¹⁴³ The state court had jurisdiction to declare *Gao* a

136. *Id.* at 770.

137. *Id.* at 770 (citing *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941)).

138. *Id.* at 771.

139. *Gao*, 185 F.3d 548.

140. *Id.* at 551.

141. *Id.* at 551-52.

142. *See id.* at 553-54.

143. *Id.* at 551-52.

dependent of the court, “notwithstanding the fact that he was in INS legal custody at the time.”¹⁴⁴ The state court’s action, the Sixth Circuit concluded, would not restrain or compel the INS with respect to deportation or any other immigration function.¹⁴⁵ Federal immigration law and the Supremacy Clause, the *Gao* Court held, “do not preempt state court jurisdiction over *Gao*.”¹⁴⁶

Typically, state action regarding immigration-related matters is deemed preempted under three possible circumstances.¹⁴⁷ First, state action in a particular area is impermissible if Congress has effected a “complete ouster of state power” by occupying the field that the state attempts to regulate.¹⁴⁸ As described in Section I, this category of preemption does not apply in the child welfare context in which states have carried significant responsibility for decades. Neither the *C.M.K.* court nor the *Gao* court suggested that Congress had “occupied” this area of regulation. In *C.M.K.*, the court did not discuss this type of preemption, but the *Gao* court noted that federal immigration law “specifically delegates” certain determinations of SIJ eligibility to state juvenile courts and is not “inhospitable to supplementation.”¹⁴⁹ Thus, with regard to the regulation of immigration and SIJ status, the Sixth Circuit concluded that Congress sought the participation and involvement of juvenile courts, rather than ousting them.

Second, state action that constitutes “regulation of immigration” is constitutionally proscribed because the power to regulate immigration is “unquestionably a federal power.”¹⁵⁰ State action has fallen into this second preemption category when states have sought to regulate foreign affairs, trade, and other matters affecting relations with other countries.¹⁵¹ In *Gao* and *C.M.K.*, the state courts’ exercise

144. *Id.* at 554 (internal quotations omitted).

145. *See id.*

146. *Id.* at 556.

147. *See De Canas v. Bica*, 424 U.S. 351, 354-356 (1976).

148. *Id.* at 357. *See also Northwest Cent. Pipeline v. State Corp. Comm’n of Kansas*, 489 U.S. 493 (1989) (inferring that a preemption is permitted when Congress “has legislated comprehensively to occupy an entire field of regulation, leaving no room for the states to supplement federal law”) (citing *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218 (1947)).

149. *Gao*, 185 F.3d at 555.

150. *De Canas v. Bica*, 424 U.S. 351, 354 & 356 (1976). *See, e.g., League of United Latin American Citizens v. Wilson*, 908 F.Supp. 755, 769-771 (C.D. Cal. 1995) (striking down classification, notification, and cooperation/reporting provision of California’s Proposition 187 as “aimed solely at regulating immigration”).

151. *See e.g., Zschernig v. Miller*, 389 U.S. 429, 441 (1968) (finding Oregon statute

of jurisdiction over the minors would not have conferred any immigration status upon the two minors who were the subject of the petitions. The exercise of jurisdiction is not even a determination of where the minor should live in the future. By exercising jurisdiction, a state court asserts authority to make decisions that affect the minor's immediate care and custody, not his or her immigration status. Thus, regardless of the decision reached by the state court, the federal government would still retain authority over the regulation of immigration. The Sixth Circuit observed that "attaining SIJ status would only entitle Gao to apply for permanent [resident] status—the actual grant is both discretionary and conditioned."¹⁵² Any real immigration benefit Gao received was based entirely on federal immigration law, not state law, the Sixth Circuit observed.¹⁵³

Although a state court cannot make a decision regarding immigration status, a state court might render an order that interferes with federal regulation of immigration. Such state interference would fall under the third category of preemption which forbids state action that "stands as an obstacle" to the accomplishment of Congress' objectives.¹⁵⁴ The Minnesota court observed that the INS had rendered an order of deportation that was being appealed. The court was concerned that C.M.K.'s foster parents, the petitioners in state court, were trying to block deportation by seeking the state court's protection.¹⁵⁵

The problem with the *C.M.K.* Court's reasoning, however, is that it anticipates a possible future conflict that has yet to occur, and in fact may never occur. In order to trigger federal preemption, an actual conflict must exist, rendering compliance with both federal and state law impossible; a potential conflict is insufficient.¹⁵⁶ A state

impermissibly regulated foreign relations and created the potential for international embarrassment); *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956) (holding that passage of a federal sedition statute precluded state from adopting complementary or supplemental legislation).

152. *Gao*, 185 F.3d at 554-55.

153. *Id.* at 554-55. "If the INS is ultimately prevented from deporting him it will be because its own rules deem him non-deportable." *Id.* at 555 (emphasis added).

154. *De Canas*, 424 U.S. at 363.

155. In the *Elian Gonzalez* case, *Elian's* great uncle sought a temporary protective order and legal guardianship in Florida family court after the INS rendered its decision that *Elian* should be sent back to Cuba to be with his father. The state court exercised jurisdiction and granted the uncle "limited legal authority" to protect *Elian*. The state court action generated enormous controversy and some commentators questioned the legitimacy of the state court's jurisdiction. *See supra* note 4.

156. *See De Canas*, 424 U.S. at 355; *Michigan Canners & Freezers Assn.*, 467 U.S. at

court's exercise of jurisdiction is a determination that the court has the authority to make decisions and declare judgment in a case. The exercise of jurisdiction is not a determination about where the child will live or who will have custody over the child.¹⁵⁷ Those decisions about placement and custody come after jurisdiction is asserted.¹⁵⁸ In *C.M.K.*, the state court could have decided that it was in *C.M.K.*'s best interest to return to China, and thereby comported with the INS's position. Indeed, the Minnesota court noted that there was evidence that *C.M.K.*'s parents would be able to adequately provide for him.¹⁵⁹ In practice, juvenile courts do return children to their parents, sometimes sending minors across state and international borders.¹⁶⁰ Thus, an actual conflict between the state court and federal law was not certain, or even likely, to occur if the state court exercised jurisdiction over *C.M.K.* The speculative possibility that a state court might obstruct a future INS deportation order is not the type of conflict that justifies preemption.¹⁶¹

An actual conflict may arise if the INS obtains a non-appealable

469. But when state regulation of undocumented persons is perceived as interfering with the conduct of foreign affairs or diplomacy it has been held preempted "even when the state law is not inconsistent with any particular federal law." 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (3d ed. 2000) (citing *Toll v. Moreno*, 458 U.S. 1 (1982); *Graham v. Richardson*, 403 U.S. 365 (1971); and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)).

157. See, e.g., CAL. WELF. & INST. CODE §§ 300-04, 355, 360-66 (West 1998). In California the determination that a juvenile court has jurisdiction focuses entirely upon whether sufficient facts have been alleged and proven showing that the minor has suffered abuse, neglect or abandonment as defined by statute. "At the jurisdictional hearing, the court shall first consider only the question whether the minor is a person described by Section 300." CAL. WELF. & INST. CODE §§ 300, 355.

158. In California, decisions regarding custody and placement of a child are governed by separate statutory provisions and are generally rendered in hearings separate from jurisdiction determinations. See CAL. WELF. & INST. CODE §§ 360-66.

159. See *In re C.M.K.*, 552 N.W.2d at 770 ("C.M.K.'s parents did not abandon him; rather he left his home of his own accord.").

160. See, e.g., *In re Adolfo M.*, 225 Cal. App. 3d 1225 (1990) (affirming juvenile court's order transferring minor to Mexican juvenile authorities); *In re Manuel P.*, 215 Cal. App. 3d 48 (1989) (upholding constitutionality of state juvenile court order sending minor who had been adjudicated delinquent returned to Mexico) *cert. denied*, *Manuel P. v. California*, 498 U.S. 832 (1990). See CAL. WELF. & INST. CODE § 738 (authorizing court to order return of minor to another state or foreign country where the minor's residence has been established). See also, *In re Stephanie M.*, 7 Cal. 4th 295 (1994) (overturning appellate court's decision to return a minor to the custody of a relative residing in Mexico).

161. See, e.g., *Arizona Farmworkers Union v. Phoenix Vegetable Distrib.*, 747 P.2d 574, 578 (Ariz. Ct. App. 1987) (citing *DeCanas* standard and concluding that state law as it applies to "illegal alien workers will not be preempted where the state regulation only has 'some purely speculative and indirect impact on immigration'").

final order of deportation against a minor and a state court orders placement within the United States to be in the minor's best interest. Under these circumstances, the state court order regarding placement would likely be preempted by the federal INS order calling for removal of the minor from the United States, unless federal law dictated otherwise. In *C.M.K.* and *Gao*, however, there was neither a final order of deportation nor a determination by the state court as to where the minor should be placed or who should have custody over the minor.¹⁶² Without a final order of deportation, the INS could not act to remove Gao from the country. Under these circumstances, a state court order placing Gao anywhere in the U.S. would not actually conflict with any federal immigration law or policy.

The *C.M.K.* ruling is further undermined by the fact that the SIJ statute calls for state court involvement in the SIJ adjudication process. The SIJ statute requires minors to enter into the dependency system first and then to apply for SIJ status. Whenever a minor who is already in the juvenile dependency system applies for SIJ status, the minor runs the risk that the INS will deny the petition and deport him or her. If the Minnesota court's analysis were correct, a state-federal conflict would occur in all cases where a state court exercises jurisdiction over an undocumented child because, at some later date when the INS learns of the child's presence in the United States, the INS might decide to deport the child. Under the reasoning of *C.M.K.*, the state court would always be preempted from exercising jurisdiction because a conflict could potentially arise in the future between the state court and the INS. This procedure, however, is exactly what the SIJ statute prescribed, and therefore the state court's jurisdiction could not be preempted.

Furthermore, with regard to minors who are in INS legal custody before a state court exercises jurisdiction, Congress clarified in 1991 that these minors could apply for SIJ status and lawful permanent resident status.¹⁶³ Congress anticipated that minors who enter the

162. See *In re C.M.K.*, 552 N.W.2d at 769. An immigration court found C.M.K. deportable on March 6, 1995. C.M.K. appealed this order to the Board of Immigration Appeals which remanded the case on September 11, 1995. In October 1995, when the foster family filed its petition in the state court, there was no final order of deportation that would authorize the INS to remove C.M.K. from the country. See *id.* In *Gao*, deportation proceedings began on February 17, 1994. 185 F.3d at 551-52. Before any final order of deportation was obtained against Gao, he petitioned for SIJ status in September 1994. See *id.*

163. See generally, Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-323 (1991) (codified at 8 U.S.C. § 1255).

country illegally may also have experienced family abuse, neglect, and abandonment, and passed legislation enabling these minors to obtain SIJ relief. As described above, the procedure for applying for SIJ status requires the minor to enter the state juvenile dependency system. Accordingly, minors in INS legal custody, like C.M.K. and Gao, were not frustrating Congress' goals by seeking the juvenile courts' assistance. In fact they were seeking federal SIJ relief pursuant to Congress' intent to protect them under the statute. A state court's exercise of jurisdiction did not conflict with Congress' immigration goals, but, in fact, comported with federal policy. By finding state court jurisdiction preempted, the Minnesota court of appeals failed to account for the purpose of the SIJ statute.¹⁶⁴

The Sixth Circuit's preemption analysis was more consistent with the Supreme Court's view that preemption should be applied reluctantly¹⁶⁵ and under conditions making "compliance with both state and federal law impossible."¹⁶⁶ Preemption only occurs if that is Congress' express purpose or if dual compliance cannot be accomplished. The Supreme Court's reluctance to preempt in the presence of ambiguity is intended to protect states' interests from unnecessary intrusion by the federal government, particularly in areas of regulation traditionally occupied by the states.¹⁶⁷ The Sixth Circuit reasoned that the state court could exercise jurisdiction while federal deportation proceedings were ongoing without creating an actual

164. Finally, the precise holding of the Minnesota Court of Appeals is unclear. The opinion begins by announcing that the state court's jurisdiction was preempted by INS legal custody and the deportation proceedings. At this point, by virtue of its own conclusion, the Minnesota court should have dismissed the petition for lack of jurisdiction. Instead it reviewed the substantive facts regarding C.M.K.'s experience of abuse and neglect and used those facts to explain why state court jurisdiction was preempted. By engaging in this additional analysis, the court obscured its holding. Under C.M.K.'s analysis, it remains unclear whether preemption is triggered simply by INS legal custody and ongoing deportation proceedings or whether something more is required. *See In re C.M.K.*, 552 N.W.2d at 770.

165. *See* Ronald D. Rotunda, *Sheathing the Sword of Federal Preemption*, 5 CONST. COMMENTARY 311, 317 (1988) (noting the Court's extreme reluctance to find preemption unless compliance with both the federal law and state action and is "physically impossible"). *See generally*, Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 462 n. 213 (1989); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

166. *Michigan Cannery & Freezers Ass'n*, 467 U.S. at 469.

167. *See Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring) ("we begin 'with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress.'"). *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 719 (1985) (regulating health and safety matters belongs traditionally to the states).

conflict. Moreover, the immigration decision rested firmly with the INS. The Sixth Circuit concluded that the state court could not grant immigration status to Gao and thus was not regulating immigration in violation of the rules of preemption.¹⁶⁸

Significant to the Sixth Circuit's ruling was the conclusion that the Supremacy Clause does not divest the state court of jurisdiction over minors "in INS custody."¹⁶⁹ Even though the federal government has complete authority over immigration regulation, it cannot oust state court jurisdiction except when an actual conflict occurs between the state and federal governmental entities. Thus, under *Gao*, when the INS detains a minor and initiates deportation proceedings, a state court may still exercise jurisdiction over the minor.¹⁷⁰

168. In 1987, in the context of labor and immigration law, the Court of Appeals of Arizona applied a similar preemption analysis as the Sixth Circuit in *Gao*. See *Arizona Farm Workers Union v. Phoenix Vegetable Distrib.*, 747 P.2d 574 (Ariz. Ct. App. 1987). In *Arizona Farm Workers Union*, the trial court granted the union's motion for a preliminary injunction ordering reinstatement of five union members who had been dismissed for engaging in union activities at Phoenix Vegetable Distributors. *Id.* at 575. The employer argued on appeal that the state court could not order the dismissed employees' reinstatement because federal law prohibited the reinstatement of undocumented workers and federal law preempts state law. See *id.* The Court of Appeal rejected the employer's preemption argument concluding that the order of reinstatement "does not actually conflict with federal law." *Id.* at 578. The court determined that a reinstatement order "does not restrain or limit the ability of the Immigration and Naturalization Service to deport illegal aliens. Although once reinstated an illegal alien worker may have a greater incentive to remain in the United States, an appropriate federal order of deportation is fully enforceable." *Id.* The court concluded that the reinstatement would "have no more than some purely speculative and indirect impact upon immigration" which is insufficient to invoke preemption. *Id.* (internal quotations omitted).

169. See *Gao*, 185 F.3d at 551.

170. *But see* Final Order, *Gonzalez v. Gonzalez-Quintana*, No. 00-00479-FC-28 (Fla. Fam. Ct., 11th Cir. April 13, 2000). In the *Elian Gonzalez* case, the uncle sought a temporary protective order from state family court to obtain "custody of the child." *Id.* at 10. The state court dismissed the action concluding that it lacked jurisdiction, in part, because federal immigration power preempted state court power. *Id.* at 8-12. Like the Minnesota court in *C.M.K.*, the Florida court was concerned that the "case is designed to keep *Elian Gonzalez* in Miami over the federal government's and his father's objection and under the name of a custody claim." *Id.* at 10. The court cited *C.M.K.* favorably for the proposition that a state court cannot make immigration decisions or interfere with the federal immigration power. *Id.* at 12. The Florida court distinguished *Gao* but did not offer an explanation as to how *Gao* was different from *C.M.K.* See *id.* at 11-12. The Florida court did not explain how an actual conflict would occur by the exercise of jurisdiction or why state court jurisdiction would constitute regulation of immigration.

The Florida court dismissed the importance of family law principles: "While the court recognizes the many, many authorities that establish that domestic relations, family law, is an area reserved to the state courts, Petitioner fails to recognize the fundamental nature of his case—it is an immigration case not a family case." *Id.* at 10. As the INS

B. Preemption in the Juvenile Delinquency Context

The Sixth Circuit decision in *Gao* also comports with the preemption analysis applied in two non-SIJ cases decided by the California Court of Appeal in the context of juvenile delinquency proceedings.¹⁷¹ While there are differences between delinquency and dependency proceedings, these two California cases are among the few reported court opinions that consider whether a state court is preempted by federal immigration law from making a custody or placement determination for an undocumented minor.¹⁷² In the absence of additional legal authority on the subject, these cases offer a point of comparison for evaluating federal preemption of state court actions in the dependency context.

In 1989, in *In re Manuel P.*, the California Court of Appeal concluded that it is a violation of the Supremacy Clause or preemption principles for a state juvenile court to order an adjudicated delinquent minor to be returned to his country of origin, so long as that order is subject to a final deportation order by the federal government.¹⁷³ Manuel P. was an undocumented minor from Mexico who had already been deported once and subsequently reentered the United States.¹⁷⁴ Soon thereafter he was arrested by the police for stealing food and was adjudicated delinquent.¹⁷⁵ The juvenile court first ordered him placed in a state juvenile facility with the expectation that he would be released to the INS when state jurisdiction terminated. The minor challenged the state court's power when, pursuant to a state arrangement with the Mexican

acknowledged, however, family law principles were critical to its determination that Elian should be returned to his father. *See supra* text accompanying notes 1-4.

171. *See In re Adolfo M.*, 225 Cal. App. 3d 1225 (1990); *In re Manuel P.* 215 Cal. App. 3d 48 (1989). *See also*, *Roberta M. v. Sandra Davis*, No. Civ 99-08451 CM, (C.D. Cal. 1999) (unpublished decision on file with the author). There does not appear to be case law in other states that addresses whether a state court violates the Supremacy Clause by placing a delinquent minor out of the United States.

172. For example, although both dependency and delinquency proceedings are technically civil proceedings, delinquency proceedings involve adjudications as to a minor's "guilt" and the "criminality" of the minor's behavior that are not involved in dependency proceedings. Another difference is that children involved in dependency proceedings are often viewed as "victims" of actions by others who need society's protection. By comparison, children in delinquency proceedings are more frequently viewed as "perpetrators" who may have harmed society.

173. *See In re Manuel P.*, 215 Cal. App. 3d at 66.

174. *See id.* at 53.

175. *See id.*

government,¹⁷⁶ the court ordered him released from the state facility into INS custody to undergo federal deportation proceedings.¹⁷⁷ Manuel P. argued that the state-negotiated agreement with Mexico violated the Supremacy Clause and the Constitution's exclusive delegation of foreign relations power to the federal government.¹⁷⁸

The *Manuel P.* Court, nonetheless, concluded that the court order did not constitute "regulation of immigration" or a "deportation process."¹⁷⁹ The court reached its decision relying upon reasoning similar to that of the Sixth Circuit in *Gao*. In both cases, the state courts' rulings – exercising jurisdiction in *Gao* and ordering return to Mexico in *Manuel P.* – still left the final immigration decision to the INS.¹⁸⁰ The *Manuel P.* Court held that the federal government, not the state court, made the immigration ruling.¹⁸¹ Furthermore, because the final decision regarding the minors' immigration status rested with the INS, the *Manuel P.* and *Gao* Courts determined that the state courts' rulings did not actually conflict with any federal law or purpose.¹⁸² Absent an actual federal-state conflict, both courts held that preemption was not required.

In 1990, in *In re Adolfo M.*, the California Court of Appeal affirmed its holding in *Manuel P.* that a juvenile court does not violate federal supremacy by ordering a minor sent out of the United States, so long as the final deportation order is reviewed and approved by federal immigration authorities.¹⁸³ This requirement that a state court first present a minor to the federal immigration authorities was further clarified in 1999 in an unreported case,

176. *See id.* at 54-56. The state program established a procedure for the return of undocumented minors to their home country. For example, the state law authorizing the procedure allows for expenditure of county funds to pay for the transport of the minor to "appropriate foreign authorities." The law also authorizes state officials to accompany minors during the transfer. CAL. WELF. & INST. CODE § 738.

177. *See id.* at 62-64.

178. *See id.* at 60-61.

179. *Id.* at 62-63 (citing the *De Canas v. Bica* standard of preemption that regulation of immigration is "essentially a determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain."); *see also id.* at 66 (internal quotations omitted).

180. *See In re Manuel P.*, 215 Cal. App. 3d at 63.

181. *Id.* at 63-64 ("Significantly the record reflects all minors (including Manuel) returned to Mexico under section 738 are first presented to the INS for processing through the federal deportation system.").

182. *See id.* at 63-64.

183. *See In re Adolfo M.*, 225 Cal. App. 3d at 1233.

Roberta M. v. Sandra Davis.¹⁸⁴ In *Roberta M.*, the state juvenile court ordered a young girl returned directly to Romania without any federal immigration review.¹⁸⁵ The federal court granted the minor's petition for a preliminary injunction, noting that the state court order, unlike the state court action in *Manuel P.*, completely bypassed the federal authorities and amounted to "de facto deportation."¹⁸⁶

Taken together, the decisions in *Roberta M.*, *Manuel P.*, *Adolfo M.*, and *Gao* illustrate that a state court has authority to decide the custody and placement status of an undocumented minor in either dependency or delinquency proceedings. The *Gao* ruling concluded that a state juvenile court has the power to make decisions that will impact an undocumented minor's immediate custody status even if the INS retains legal custody of the minor. The *Roberta M.*, *Manuel P.*, and *Adolfo M.* decisions held that a state juvenile court could, with federal approval, order an undocumented minor's return to his or her home country. Thus, in the absence of a specific congressional rule governing state and federal jurisdictional issues, these courts held that state court power was not surrendered, despite the substantial overlap that existed between the federal and state governmental roles regarding a minor's placement and custody status.¹⁸⁷

Manuel P., *Roberta M.*, and *Adolfo M.* are consistent with the position taken in *Gao* that the exercise of state court jurisdiction over a minor does not, by itself, create an actual conflict with federal immigration goals. Subsequent decisions by a state court made after jurisdiction is exercised, such as a decision to send a minor out of the United States, could actually conflict with immigration goals and might ultimately require that federal law preempt state law.

While federal preemption may not be triggered by the exercise of state court jurisdiction, this article agrees that it was necessary for

184. *Roberta M. v. Davis*, No. Civ 99-08451 CM (C.D. Cal. September 10, 1999) (decision on file with the author).

185. *Id.* at 14.

186. *See id.* at 14-15.

187. In *Adolfo M.*, the California Court of Appeal concluded that the state juvenile court could not require that the minor first obtain the juvenile court's permission prior to reentering the United States. *In re Adolfo M.*, 225 Cal. App. 3d. at 1231-33. The court stated that "state regulation affecting the determination of who should or should not be admitted into the country or placing conditions under which a legal entrant may remain, violates the exclusive power over immigration and deportation constitutionally vested solely in the federal government." *Id.* at 1232 (citing *DeCanas v. Bica*, 424 U.S. at 354-57). The court noted that it would be proper for the juvenile court to "simply echo[] existing federal requirements," but it may not require "additional state-imposed conditions on one's right to enter." *Id.* at 1233.

Congress to establish a federal jurisdictional rule. A federal rule would help avoid the tensions that arose in the 1990s between the INS and state courts over undocumented minors. In Section V, the article considers what kind of federal jurisdictional rule Congress should enact to govern state courts and the INS regarding the treatment of undocumented children who are abused, neglected, or abandoned.

V. The 1997 Amendments: Congress' Solution to the Federal-State Conflicts

Ever since the SIJ statute came into effect, the INS has resisted state court involvement, particularly in cases involving children already in INS legal custody.¹⁸⁸ Earlier sections of this article demonstrated that the SIJ statute's state-federal scheme requires the INS to rely upon state court orders and to relinquish some of the authority it usually exercises when granting immigration benefits.¹⁸⁹ The INS, however, voiced concerns that state courts were granting dependency to undocumented children who had not been abused, neglected, or abandoned. In 1997, the concerns of the INS struck a chord with Senator Pete Domenici of New Mexico, who alleged in Senate hearings that minors were fraudulently petitioning for SIJ status and asked the Attorney General to investigate the fraud.¹⁹⁰ Senator Domenici described three SIJ cases in which individuals, some of whom were more than 18 years old, sought juvenile court protection, but had been sent to the United States as foreign students. According to the Senator, these individuals should not have been able to enter the dependency system or obtain SIJ status.¹⁹¹

The Attorney General never released a report to the public regarding investigations into the alleged immigration fraud.¹⁹² By

188. See Interpreter Releases 1148 (April 23, 1996) (INS Legal Opinion) (on file with author); INS General Counsel Opinion 95-11, CO 215.2 and 232.1, June 30, 1995 (stating INS concerns about state court decisions).

189. See *supra* Sections II and III.

190. INS Provides Interim Field Guidance on Special Immigrant Juveniles, 75 Interpreter Releases 1445, No. 40 (October 19, 1998). See Hearings on the FY '98 Budget Request Before Senate Appropriations Subcommittee on Commerce, Justice, State (March 1997)(comments by Senator Pete Domenici).

191. See *id.*

192. Senator Domenici requested a Justice Department inquiry, but the Attorney General never released any report of investigations that may have been completed, and neither the 1997 amendments nor its legislative history makes reference to any such investigation. See *Pete Domenici, Senator, Senate, Attorney General Reviewing Potential Abuse of Immigration Law*, Congressional Press Releases, (March 12, 1997); Conference Committee Report, Pub. L. No. 105-119, § 113 (1997) (codified at 8 U.S.C.

themselves, the three cases the Senator cited represent a small number compared to the 430 minors granted SIJ status that year or the more than 200,000 individuals under 20 years old who were lawfully admitted under various immigration categories in 1997.¹⁹³ The Senator's remarks, however, coincided with the INS's growing concerns about immigration fraud.¹⁹⁴ To address the problem that a "loophole" might exist in the SIJ statute, Congress amended the statute by tightening the requirements for obtaining SIJ status and giving the INS greater authority over juveniles who apply for SIJ status.¹⁹⁵

Among other changes, the amended statute included a jurisdictional provision which states that "no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction."¹⁹⁶ The remainder of this article evaluates the 1997 jurisdictional provision and considers whether this rule ultimately achieves both federal child protection and immigration regulation goals. An effective rule would also need to resolve the federal-state tensions that arose in *Gao* and *C.M.K.* This section argues that the 1997 provision imposed restrictions on state court jurisdiction that may

§1101(a)(27)(J)).

193. In 1997, 430 SIJ applicants were admitted as lawful permanent residents. 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 36 (1999). In 1996, 390 SIJ applicants were admitted as lawful permanent residents. 1996 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 38 (1997). In 1997, 236,930 immigrants under the age of 20 were admitted to the United States. In 1996, 280,297 were admitted. 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 52 (1999). Note, SIJ status may be sought until an individual reaches the age of 21. See 8 C.F.R. § 204.11(c)(1).

194. See Memorandum from Thomas E. Cook, Acting Assistant Commission, Adjudications Division, United States Department of Justice, INS on Interim Field Guidance relating to Public Law 105-119 (Sec. 113) amending Section 11(a)(27)(J) of the INA – Special Immigrant Juveniles (Aug. 7, 1998) (on file with author) ("In the past, individuals who did not suffer abuse, abandonment, or neglect were known to have sought the court's protection merely to avail themselves of legal permanent resident status.").

195. See 8 U.S.C. §1101(a)(27)(J)(i) (amended on November 27, 1997).

196. 8 U.S.C. §1101(a)(27)(J)(iii)(I) (amended on November 27, 1997). The amended statute also required proof that the juvenile court rendered its decision to address abuse, neglect, or abandonment rather than to enable the minor to obtain lawful immigration status. The amendments added language to the statute requiring that the grant of an SIJ petition required the Attorney General's express consent.

"Juvenile court" is defined in 1993 federal regulations as "a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." 8 C.F.R. § 204.11(a) (2000).

jeopardize the very children whom the SIJ statute was intended to protect. The section proposes legislative or regulatory alternatives that might better accomplish federal goals.

A. The Potential Risks to the Safety of Immigrant Children

Congress enacted the 1997 amendments with minimal debate and little reported legislative history.¹⁹⁷ The rationale behind the jurisdiction-limiting provision, however, is straightforward. To address the immigration fraud concern, Congress limited state court jurisdiction over minors already in INS legal custody. In giving the INS exclusive authority over children in its legal custody, Congress sought to prevent minors from independently seeking state juvenile court protection and evading INS control over them. With the passage of the 1997 provision, a minor in INS legal custody can only obtain state court protection if the Attorney General consents, thus making the INS the effective gatekeeper to state court protective services. By establishing a bright line rule regarding state court jurisdiction, the 1997 amendments also reduced the possibility for further disputes between state courts and the INS, such as those which occurred in *Gao* and *C.M.K.*

The principal risk associated with the jurisdictional provision is that the process for obtaining the Attorney General's consent will likely be time consuming and burdensome. A 1999 INS policy memorandum states that the Attorney General's consent must be obtained by submitting a written request to the local INS district director before state court dependency proceedings are begun.¹⁹⁸ In practice, the INS has sometimes taken several weeks to respond to

197. Aside from Senator Domenici's statements to the Attorney General (*see supra* note 190 (comments of Senator Pete Domenici), the only reported legislative history for the 1997 amendments is a brief conference committee report which states that the amendments were enacted "to address several problems in the implementation" of the SIJ statute. *See* Conference Committee Report, Pub. L. No. 105-119, § 113 (1997) (codified at 8 U.S.C. § 1101(a)(27)(J)). The report reiterates that the statute was intended to protect "abandoned, neglected or abused children" and acknowledges that the "involvement of the Attorney General is for the purpose of determining special immigrant juvenile status and not for making determinations of dependency status." The report concludes by stating that "in order to preclude State juvenile courts from issuing dependency orders for juveniles in actual or constructive custody of the INS, the modified provision removes jurisdiction from juvenile courts to consider the custody status or placement of such aliens unless the Attorney General specifically consents." *Id.*

198. *See* Memorandum from Thomas E. Cook, Acting Assistant Commissioner, Adjudications Division, United States Department of Justice, INS on Special Immigrant Juveniles – Memorandum #2: Clarification of Interim Field Guidance (July 9, 1999)(on file with author).

requests for consent.¹⁹⁹ While the Attorney General is considering a minor's request for consent, the minor is forced to wait and will not be able to receive state child welfare protection and services. A delay of several weeks or even a few days could jeopardize a child's safety, even his or her life.

A social worker in the Florida Boystown facility, which holds INS detained minors, stated that the sensible course of action to take if a minor is abused inside the facility would be to contact the state or local child welfare agency. Unlike the INS, child welfare agencies are designed to respond to emergencies.²⁰⁰ On occasion, minors have run away from INS placements, particularly non-secure placements.²⁰¹ They may seek help from local police and child welfare agencies that would be unable to intervene in the absence of prior consent from the Attorney General.

The importance of having rapid response systems to child abuse need not be restated. Generally, the police and child welfare agencies have the authority to bring minors into protective custody. Within a certain statutorily prescribed timeframe, a petition must be filed and, in many states, a judicial hearing must be held in less than forty-eight hours.²⁰² If the state court cannot conduct the hearing because the Attorney General has not consented to the state court's jurisdiction, the minor would have to be released from custody. By requiring child welfare systems to wait for Attorney General approval, even for a few days, the consent requirement frustrates many state statutory deadlines and, more importantly, risks the safety of undocumented children.

199. Interview with Christina Kleiser, Florida Immigrant Advocacy Center (Feb. 14, 2000). See Catherine Wilson, *Judge Promises to Decide Somali Teen-ager's INS Case Soon*, ASSOCIATED PRESS, Feb. 17, 2000.

200. Interview with Liliana Avedano, Boystown Florida of the Catholic Charities of the Archdiocese of Miami (Feb. 2, 2000).

201. For example, a Texas attorney reported that a boy named Oscar ran from an INS foster placement because he could not adjust to the conditions of confinement in the detention facility. Interview with Steven Lang, South Texas Pro Bono Asylum Project, Harlingen Texas.

202. See SHIRLEY A. DOBBIN, ET AL., CHILD ABUSE AND NEGLECT CASES: A NATIONAL ANALYSIS OF STATE STATUTES, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (1998). The following states require the filing of a petition with the juvenile court within 12 hours of taking a minor into custody: AK and NC. Filing of petition within 24 hours: OH, MA, and NJ. Filing of petition within 48 hours: AZ, HI, SD, CA, NE, NM, WV, and MT. The following states require that an emergency hearing be held within 24 hours of taking a minor into custody or the filing of a petition: CA, MD, DC, FL, MI, MS, TX, OR, and NH. Emergency hearing within 48 hours: AK, IL, SD, WI, HI, ID, KS, NE, OK, and VT.

The INS could reduce the risks associated with the jurisdictional provision by implementing its own rapid response system to emergency requests for consent. For example, if the INS established a twenty-four-hour hotline to review consent requests, this would reduce the likelihood that a child would be further endangered. As previous sections of this article have argued, however, the INS is not presently equipped to respond to emergencies and does not have the expertise and capacity to evaluate individual cases of child abuse, neglect, or abandonment. In 1993 the INS acknowledged that it would be “inappropriate to impose consultation requirements upon the juvenile courts” or child welfare agencies because such requirements could “delay action urgently needed” to protect children.²⁰³ Creating a new federal response system would also require substantial resources, whereas states and local governments already have systems in place that can respond to emergency cases of child abuse or neglect. Unless the INS implements a better response system, it is doubtful that the INS would be able to review requests for the Attorney General’s consent in a timely fashion. In the meantime, states would be forced to abandon protection efforts on behalf of many undocumented children, ironically contravening the purpose of the SIJ statute to protect children who are survivors of abuse, neglect, and abandonment.

An additional problem with the jurisdictional provision is that, under the INS’s policy, the INS will assess the “best interest” of the minor when evaluating a request for the Attorney General’s consent. As Section I explained, assessing a child’s best interest is a task that state courts are better able to perform than the INS because of the INS’s inherent conflict of interest.²⁰⁴ The cooperative state-federal structure of the SIJ statute also supports this view that determinations of a child’s best interest and of child abuse, neglect, or abandonment should be made by state courts, not the INS. The SIJ statute removes from the INS the authority for assessing the minor’s personal experience of abuse, neglect or abandonment. The 1997 jurisdictional provision undermines this structure by requiring the INS to make difficult individualized determinations in an area where it lacks

203. Special Immigrant Status: Certain Aliens Declared Dependent on a Juvenile Court, Final Rule, Department of Justice, Immigration and Naturalization Service, Supplementary Information, 8 C.F.R. Parts 101, 103, 204, 205, and 245 (2000).

204. See Cook, *supra* note 198, at 2 (requiring the local INS district director to consent if: “1) it appears that the juvenile would be eligible for SIJ status if a dependency order is issued; and 2) in the judgment of the district director, the dependency proceeding would be in the best interest of the juvenile.”).

expertise and administrative capacity.

Finally, it is questionable whether the 1997 jurisdictional rule would prevent the type of immigration fraud that Senator Domenici described, in which foreign students were allegedly using the SIJ statute improperly to gain lawful permanent residence. Although the factual details in these cases were never provided by Senator Domenici, the foreign students he described were probably not in INS legal custody at the time they applied for SIJ status. If, in fact, the students were not in INS custody, the 1997 rule would not apply because the rule restricts state court jurisdiction only over minors in INS legal custody. Other provisions in the 1997 amendments may address the Senator's fraud concerns, but the jurisdictional provision does not.²⁰⁵

Although the jurisdictional provision may have been enacted with important goals in mind, such as the reduction of immigration fraud, the provision may hinder the INS from protecting abused, neglected, or abandoned immigrant children. In order to avoid problems with the provision, the INS could change its current practices and commit additional resources to protect abused, neglected, or abandoned, undocumented children. Alternatively, the INS or Congress could adopt a different policy that would authorize states to continue protecting immigrant children and thereby place fewer administrative burdens on the INS. Before turning to the possible regulatory and legislative alternatives, the article considers in greater detail the impact of the 1997 jurisdictional provision.

B. The Scope of the 1997 Amendments' Jurisdictional Provision

The precise scope of the jurisdictional provision—and which class of minors it impacts—remains unclear due to Congress's use of the word “constructive” to define INS custody. This term is not used elsewhere in the Immigration and Nationality Act (INA).²⁰⁶ Custody is more commonly described as “legal custody,” “physical custody,” or simply “custody.” “Actual custody” is comparable with physical custody and probably applies to minors held in federal INS facilities under the custodial care of an INS officer or in INS contracted

205. One provision which may prevent fraud requires that the state court's determination that the minor is eligible for long term foster care be “due to abuse, neglect or abandonment.” 8 U.S.C. § 1101(a)(27)(J)(i).

206. A Lexis search of the United States Code yielded no other instance in which the word “constructive” appeared within five words of “custody.” The term “legal custody” appeared approximately seven times. The term “physical custody” is used frequently in the Code.

facilities under the care of a private institution or a state or local agency.²⁰⁷ The term “constructive custody,” however, likely covers a much broader range of cases. In other contexts, such as habeas corpus jurisdiction, courts have concluded that constructive custody includes individuals released on their own recognizance.²⁰⁸ Federal caselaw also indicates that minors who are subject to a final deportation order but are not under any kind of physical detention would also fall under the definition of constructive custody.²⁰⁹ If constructive custody encompasses these cases, then minors released to their families by the INS (generally with a signed release from the family, with a bond or by parole) while INS proceedings are ongoing would also be in INS constructive custody. In each of these situations, the INS would retain some legal control over the individual, despite the absence of physical control.

As of September 2000, the INS had not issued regulations interpreting the 1997 amendments’ use of the terms “actual or constructive custody.”²¹⁰ In the absence of controlling federal regulations, INS policy has, at various times and in different regions, been inconsistent and contradictory. In 1998, the INS issued an official memorandum setting nationwide INS policy that equated “constructive custody” with foster care.²¹¹ Based on this

207. See *United States ex rel. Marcello v. District Dir. of INS*, 634 F.2d 964, 967 (5th Cir. 1981) (clarifying that the phrase “held in custody” means actual, physical custody in place of detention).

208. See *Gutierrez-Martinez v. Reno*, 989 F. Supp. 1205, 1209 (N.D. Ga. 1998) *rev’d and remanded on other grounds* *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999) (“A party released on bond following commencement of actual, physical custody in connection with a deportation proceeding satisfies the “in-custody” requirement” for habeas purposes.). See also *Cantillon v. Superior Court*, 305 F.Supp. 304, 306-07 (C.D. Cal. 1969) *remanded*, 442 F.2d 1338 (9th Cir. 1971) (describing that a Habeas corpus petitioner “is only in constructive custody . . . having been released on his own recognizance. . . . The type of custody imposed on him is analogous to . . . that of a person released on bond after being charged with being a deportable alien.”). For a definition of “constructive custody” in the context of U.S. customs custody of imported goods, see *United States v. Harold*, 588 F.2d 1136 (5th Cir. 1979) (discussing that imported goods are in constructive custody of Customs Service from moment of their arrival in United States port until their formal release by Service, regardless of whether it has actual, physical possession.).

209. See *Mustata v. United States Dept. of Justice*, 179 F.3d 1017, 1021 n.4 (6th Cir. 1999) (noting that undocumented persons were in constructive custody where their period of voluntary departure expired and they faced final order of deportation on day they filed habeas petition.).

210. As of June 2000, the INS was still in the process of drafting regulations for public comment.

211. See *Cook*, *supra* note 194, at 2. The “revision of the [SIJ statute] clarifies that state courts do not have jurisdiction to consider the status of an alien in the actual or

memorandum, minors released into family custody are not in INS “constructive custody.” The memorandum is supported by a 1996 INS statement that minors who had been released to family are not in “INS custody” and by the 1996 nationwide settlement agreement in the *Flores v. Reno* litigation signed by the INS.²¹² Another INS memorandum issued in 1999 did not define the term “constructive custody,” but instead used the general term “INS custody.”²¹³ As long as the 1998 and 1999 memoranda remain in effect, it appears that minors who are in the custody of family or other adults are not in INS “constructive custody” and may seek protection from a state juvenile court without the consent of the Attorney General.

In March 2000, however, the INS Administrative Appeals Unit (AAU) adopted a much broader interpretation of the 1997 amendments in a Massachusetts case, *In re G.L.*²¹⁴ The case involved a 17-year-old Chinese boy, G.L., who was detained by the INS, paroled, and released into the custody of his aunt after posting a

constructive custody (foster care) of the Service. . . .” This memorandum is consistent with a previous memorandum issued prior to the enactment of the amendments which stated that minors who had been paroled to family are not in INS custody. See INS Legal Opinion, 73 Interpreter Releases 1148, 1150 (Apr. 23, 1996).

212. See INS Legal Opinion, 73 Interpreter Releases 1148 (Apr. 23, 1996); *Flores v. Reno*, No. CV 85-4544 (C.D. Cal. 1996) (stipulated settlement agreement, at 11-12).

213. See Cook, *supra* note 198, at 1-2.

The 1997 amendments to the SIJ statute included another provision discussing the need for the Attorney General’s consent. (*Compare* 8 U.S.C. § 1101(a)(27)(J)(iii) with 8 U.S.C. § 1101 (a)(27)(J)(iii)(I)). The amended statute states, in relevant part, that a minor qualifies as a special immigrant “in whose case the Attorney General expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status.” 8 U.S.C. § 1101(a)(27)(J)(ii).

Because the 1997 SIJ statute included two provisions requiring Attorney General consent, INS officers had difficulty implementing the policy consistently. See INA § 101 (a)(27)(J)(iii)(I). For example, the August 7, 1998 INS memorandum stated that state courts must obtain INS consent “as a precondition to the issuance of dependency orders.” Cook, *supra* note 194, at 1-2. This INS memorandum created confusion in the processing of SIJ applications because some INS offices believed that state courts would have to obtain the Attorney General’s consent before issuing orders even in cases where minors were *not* in INS custody. If this interpretation were correct, state courts would be stripped of jurisdiction over all undocumented minors—whether or not in INS custody—until the INS consented.

The July 9, 1999 memorandum clarified that state courts do not need to obtain INS consent to take jurisdiction over minors not in INS custody. See Cook, *supra* note 198, at 2.

214. See *In re G.L.* Admin. Appeals Unit (2000) (decision on file with the author); Interviews with Halim Moris and Zenobia Lai, Greater Boston Legal Services, Boston, MA (Jan. – Mar. 2000).

\$3000 bond.²¹⁵ After the minor came under state juvenile court²¹⁶ custody and applied for SIJ status, the INS denied the minor's SIJ petition on the ground that the INS had never formally consented to the juvenile court's jurisdiction.²¹⁷ The minor, through his counsel, argued unsuccessfully on appeal that INS consent to jurisdiction was not required because children released to family are not in INS custody.²¹⁸ In essence, the AAU decision interpreted "constructive custody" as encompassing even minors who have been released and paroled into the country. The minor's position was supported by the previous INS policy statements and the *Flores* settlement agreement. In the absence of INS regulations interpreting the 1997 amendments, one can only speculate as to whether the *G.L.* decision or the various INS policy memoranda will dictate the rule regarding minors in INS custody.

If the INS retains the interpretation adopted in *G.L.* that minors who are paroled to family are in INS constructive custody, the jurisdiction-limiting provision of the 1997 amendments would cover an expansive set of cases.²¹⁹ Specifically, the amendments would limit state juvenile court jurisdiction in cases in which the minor has been released to family and other adults, as well as foster homes and

215. See, *In re G.L.*, at 3 ("[T]he petitioner was paroled and released into the custody of his maternal aunt after the posting of an Immigration Bond in the amount of \$3000.").

216. The state court that took jurisdiction was the Massachusetts Probate and Family Court, but for the sake of consistency, this article retains the term "juvenile court" as it is defined under the federal regulations, essentially any state court with the authority to make "determinations about the custody and care of juveniles." 8 C.F.R. § 204.11(a) (2000).

217. See *In re G.L.*, at 3.

218. See *id.* The minor's counsel also argued, in the alternative, that the INS had effectively consented because he had notified the INS on three separate occasions that he was petitioning the state court to declare the minor a dependent and the INS had not objected. See *id.* at 4. Moreover, for the second notice, given three months before the state court issued its order, the minor's counsel informed the INS's "trial attorney and the immigration judge that he was pursuing a permanent guardianship in the Norfolk County Probate and Family Court, as well as a special juvenile immigrant petition with the [INS] district director." See *id.* at 5. According to the AAU's decision, the INS trial attorney did not object in any way and even agreed to continue the INS hearing specifically to allow the minor to pursue the state court guardianship. See *id.* Despite the INS trial attorney's lack of objection and willingness to continue the removal hearing, the AAU concluded that the record did not show that the Attorney General "expressly and specifically consented" to the dependency order and found consent lacking. *Id.*

219. The 1999 INS memorandum did not further clarify the meaning of "constructive custody" although it indicated that minors who were not in INS custody need not obtain the Attorney General's consent prior to juvenile court exercise of jurisdiction. See Cook, *supra* note 198.

privately run facilities. Such a broad interpretation of the 1997 amendments would carry severe consequences. Under this reading, juvenile courts would be unable to enforce state child welfare laws when a minor is released to parents or other adults who place the minor at risk of danger.

C. How the Attorney General Should Interpret the 1997 Amendments

The 1997 SIJ amendments shifted significant responsibility for protecting immigrant children from state courts and child welfare systems to the INS. Before the amendments took effect, states could be counted on to protect all children who are abused, neglected, or abandoned. With state courts barred from exercising jurisdiction over certain immigrant minors, the INS may need to increase its capacity to protect children under its legal custody. Furthermore, the 1997 amendments prevent state courts and child welfare systems from protecting children detained in INS-contracted facilities, such as local juvenile halls or foster facilities. Until the conditions in these facilities improve or the INS establishes more rigorous monitoring systems, children in these facilities will remain vulnerable. In essence, by restricting state court powers, the 1997 jurisdictional provision creates a void in protective services that the INS or another federal program will need to replace.

To address the gap in protective services, the Attorney General could promulgate regulations interpreting the 1997 jurisdictional provision to enable states to intervene in those cases in which the INS is least equipped to respond, such as when the INS has released a child to a family member or other responsible adult. State child welfare systems already have response mechanisms that can investigate reports quickly and more easily than the INS. This interpretation of the 1997 provision also comports with the *Flores v. Reno* settlement agreement reached one year prior to the amendments' enactment.²²⁰ The *Flores* settlement agreement sets out a "nationwide policy for the detention, release, and treatment of minors in the custody of the INS" and supersedes all previous INS policies on the subject but does not supersede subsequent changes in the law.²²¹ Under that agreement, minors whom the INS releases on parole, by bond, or of their own recognizance are not deemed to be

220. *Flores v. Reno*, No. CV 85-4544 (C.D. Cal. 1996)(stipulated settlement agreement).

221. *Id.* at 6.

under INS legal custody.²²² While the agreement neither expressly defines the term “constructive custody” nor considers the SIJ statute, it assumes as a general matter that release to family or another adult relinquishes INS legal custody.²²³ The agreement remains enforceable against the INS and is not contradicted by any language in the 1997 SIJ amendments.²²⁴

Under a *Flores* interpretation, the INS would limit the definition of “constructive custody” to juveniles the INS detains and places in facilities run by state or private agencies. In essence, this would include juveniles for whom the INS continues to provide and pay for shelter and care, such as foster homes or agencies, private facilities, or state-operated facilities.²²⁵ Some negative consequences would still occur under this definition of “constructive custody” as minors who need child welfare services while in an INS placement would be denied state and local child welfare services until the Attorney General’s consent could be obtained. Professionals who work with minors in these facilities have observed that these children, while detained by the INS, are not consistently receiving the kind of services or treatment necessary for abused, neglected or abandoned children.²²⁶ If the INS improved conditions in detention facilities, however, a greater number of children would be assured some form of protection and services from either the INS itself or state systems. So long as INS facilities remain at the current level of care, children in those facilities would be denied the kind of treatment they need.

Alternatively, the Attorney General could grant consent categorically when urgent and immediate state juvenile court action is necessary.²²⁷ For example, in most states, police officers or child abuse investigators are authorized to take minors into custody when they have “reasonable cause” or some other factual basis to believe

222. *See id.* at 11-12.

223. *Id.* “The INS may terminate the custody arrangements [of children placed with relatives or other adults] and assume legal custody of any minor whose custodian fails to comply with the agreement [the adult has signed]. . . . In any case in which the INS does not release a minor . . . the minor shall remain in INS legal custody.”

224. *See id.* at 22 (addressing binding nature of agreement).

225. The Court’s decision in *Reno v. Flores* clarifies that “[j]uveniles placed in these facilities are deemed to be in INS detention ‘because of issues of payment and authorization of medical care.’” *Id.* at 1445 (citing “Detention and Release of Juveniles,” Final Rule, Supplementary Information, 8 C.F.R. Parts 212 and 242, 53 F.R. 17449 (May 17, 1988)).

226. *See supra* Section II.

227. The statute allows for juvenile courts to obtain jurisdiction once the Attorney General (or her representative) “specifically consents.” 8 U.S.C. § 1101(a)(J)(27)(iii)(I).

that the minor has been abused, neglected, or abandoned, or that the minor's safety is at risk.²²⁸ If a minor who needs child welfare assistance is identified in a private INS contracted detention facility in a Florida or a Texas juvenile hall, a police officer or child welfare worker would be authorized to petition the state court to protect the minor pursuant to the state's statutory guidelines and timetables. This interpretation would reduce the risk that children would go unaided while the Attorney General reviews a request for consent. This interpretation also mitigates some of the INS's concerns about immigration fraud because a police officer or child abuse investigator would make an independent assessment of the minor's needs, rather than the minor making allegations of abuse, neglect, or abandonment on his or her own.

In other cases where urgency is not present, the INS regulations should require a minimal threshold showing, such as a *prima facie* evidentiary standard, to enable a minor to obtain Attorney General consent.²²⁹ A threshold showing would prevent cases entirely without merit from entering state court, while at the same time enabling minors who genuinely need state child welfare protection to obtain a hearing without delay. The INS could interpret the statute to allow for consent within a certain period of time *after* the juvenile court has protected the minor.²³⁰ Juvenile courts could first exercise jurisdiction

228. See, e.g., CAL. WELF. & INST. CODE § 305:

Any peace officer may, without a warrant, take into temporary custody a minor:
(a) When the officer has reasonable cause for believing that the minor is a person described in Section 300 [a juvenile court dependent under state law] and, in addition, that the minor has an immediate need for medical care, or the minor is in immediate danger of physical or sexual abuse, or the physical environment or the fact that the child is left unattended poses an immediate threat to the child's health or safety.

The California law also allows the officer to take custody without a warrant if the minor is homeless and requires remedial care or is in a hospital and release to a parent poses an immediate danger to the child's health and safety. See § 305(d).

229. In California, a child who is taken into custody by a state authorized individual, such as a police officer, cannot be detained more than 48 hours unless a petition to declare him a dependent of the juvenile court is filed within that period of time. CAL. WELF. & INST. CODE § 313. At an initial detention hearing, which must be held on the next court day after the petition is filed, a juvenile court may order continued detention if a "prima facie showing has been made that the child comes within Section 300." CAL. WELF. & INST. CODE § 319. See Catherine Wilson, *Judge Promises to Decide Somali Teen-ager's INS Case Soon*, ASSOCIATED PRESS, Feb. 17, 2000 (The attorney "who represents the youth through the Florida Immigrant Advocacy Center, charged the INS set an unreasonably high standard for the boy to meet" in order to obtain the Attorney General's consent.).

230. The statute does not state when consent must occur. See 8 U.S.C. §

and later provide notice to the Attorney General, thereby giving the INS an opportunity to intervene.

These interpretations of the 1997 amendments would reduce the risk of harm to children who need the protection the child welfare system provides and cannot wait for the Attorney General to consent before receiving protective care. These interpretations are also more faithful to the overall purposes of the SIJ statute than the various policies the INS has applied since 1997.

D. A Legislative Proposal for an Alternative Federal Jurisdictional Rule

The need for a federal jurisdictional rule to govern the division of power between state courts and the INS, particularly over minors in INS legal custody, was illustrated in *Gao, C.M.K.*, and the other cases discussed in Section IV. The preemption analysis of Section IV also highlighted two kinds of situations where a clearer jurisdictional rule would help resolve disputes between state courts and the INS: first, when a state court asserts jurisdiction over a minor already in INS legal custody and no determination has been made regarding the minor's immigration or placement status; and second, when a state court makes a determination as to the placement status of a minor that conflicts with the INS's immigration decision.

The 1997 jurisdictional rule represents one approach to addressing these conflicts and favors greater federal power over immigrant children. Driven largely by concerns about immigration fraud, Congress passed the 1997 SIJ amendments granting the INS greater authority over immigrant children and reducing the power of state courts. In this way, the 1997 law represents a shift away from the structure of the 1990 version of the SIJ statute, which relied primarily on state courts to make the substantive determinations regarding a child's experience of abuse, neglect, or abandonment. As discussed above, a shift of responsibility away from state courts may leave some immigrant children vulnerable and without protection.

Congress could enact a more balanced rule that enables state courts initially to take jurisdiction over minors in INS legal custody but that retains the INS's authority regarding a child's immigration status. The hypothetical rule could enable state and local child welfare systems to protect any immigrant child without waiting for

1101(a)(J)(27)(iii)(I). A 1999 INS memorandum states: "In the case of juveniles in INS custody, the Attorney General's consent to the juvenile court's jurisdiction must be obtained before proceedings on issuing a dependency order for the juvenile are begun." See Cook, *supra* note 198.

INS approval. Under this hybrid rule, the INS would be freed from many of the administrative burdens associated with the 1997 law and could focus on the task of immigration regulation. If the INS obtained a final removal order, the INS could deport the minor and override a state court's determination that the minor should remain in the United States. Conversely, if a state court concluded that a child should be sent out of the United States to reunify with his or her parents, for example, the state court would need final approval from the INS if the minor's immigration status were in question. With regard to SIJ petitions, the hypothetical rule need not alter the existing standards of review.

The hybrid rule improves upon the 1997 rule by increasing the likelihood that undocumented children will obtain protection and services when there is risk of abuse, neglect, or abandonment. The proposed rule is premised on the fact that states and local child welfare agencies presently have greater capacity and expertise than the INS to respond to emergency incidents involving child abuse, neglect, or abandonment. This article does not argue that state or local governments are intrinsically better equipped than the federal government to address matters pertaining to children. To the contrary, if Congress or the INS created a federal system to respond to child abuse, neglect, and abandonment, it might be unnecessary to rely upon states to perform the function of protecting immigrant children. At the present time, however, the federal branch has left this responsibility to the states, all of which have established child welfare systems. Until this state-based structure is changed, state courts and child welfare systems should retain the authority to respond to incidents of child abuse, even when the incident involves an undocumented child in INS legal custody.

A hybrid rule that requires federal deference to a state court's initial exercise of jurisdiction and protective custody would advance federal goals to protect minors who have suffered family abuse, neglect, or abandonment.²³¹ Under the 1997 rule, state courts cannot exercise jurisdiction over many minors, and the protections conferred by child welfare laws are unavailable to these children. If a deferential federal standard were applied to state juvenile court jurisdiction, state courts would not be limited in their power to protect these minors.

231. The SIJ statute and the Violence Against Women Act represent federal recognition that undocumented children should be protected from abuse and violence by family members.

Congress would also avoid unnecessary duplication by delegating the responsibility for evaluating such cases to state courts and child welfare systems. Annually, state and local child welfare systems monitor tens of thousands of children who are under the protection of state courts. By contrast, the INS granted only 430 SIJ applications in 1997 and detains a few thousand minors each year by placing them in contracted facilities. To conserve federal resources, Congress could continue to rely upon state child welfare systems instead of establishing another bureaucracy that may respond to only a few hundred abuse, neglect, and abandonment cases annually. Furthermore, if state courts retained authority over children in INS legal custody, the INS would not bear the responsibility for evaluating a child's history of abuse, neglect, or abandonment, a task which introduces conflicts of interest with its immigration regulation duty. This task is better left to state courts and child welfare systems which are specifically designed to make "best interest" determinations.

Another alternative to a strong federal rule would be a rule that favors greater state power to protect undocumented children in INS legal custody. Under a rule favoring state court authority, the INS would not only defer to a state court's initial exercise of jurisdiction and grant of protective custody but also the final placement decision. For example, if an undocumented child whom the INS placed in a private facility was deemed eligible for dependency, the state court could take the minor into protective custody, declare her dependent, and place her with a foster family. The INS would not be able to initiate immigration actions or proceedings against her until the state court terminated its jurisdiction over the minor.

This hypothetical rule favoring state court power would ensure that children who have suffered abuse, neglect, or abandonment receive not only short-term child welfare protection but also long-term protection. The rationale for providing long-term protection is similar to the justification for the SIJ statute itself. Immigrant children who are victims of child abuse, neglect, or abandonment may have no family that can support them. The SIJ statute relies upon state child welfare systems to provide what may be the only means of shelter, support, and care for these children. When they reach the age of majority or no longer require the court's protection, the INS could deport them if it chooses to initiate removal proceedings. Having received some services and protection from the dependency system, they may be better prepared as adults to adjust to a forced return to their country of origin than they would have been as a child. Again, such a rule is premised on the assumption that state child welfare

systems presently are better equipped to protect individual children than the federal INS.

Of course, a jurisdictional rule that requires greater INS deference to state juvenile courts would suspend the INS's authority to remove any child in the dependency system from the United States. The practical impact of such a rule is that an undocumented child could gain a period of reprieve from deportation. The possibility that minors would fully thwart federal immigration restrictions, however, would be no greater than in other contexts where a state court has exercised jurisdiction over an immigrant, such as in criminal prosecutions or juvenile delinquency adjudications. In practice, the INS usually waits until the period of incarceration or court protective custody is completed. Because most states terminate juvenile dependency jurisdiction when the minor reaches the age of majority (or shortly thereafter), it is unlikely that a minor would remain under state protective custody beyond the age of twenty-one. State criminal sentences, by contrast, may last for years, even decades, depending on the severity of the crime. Once state custody terminates, federal authorities may exercise control and remove the individual from the United States. Under a deferential jurisdictional rule, the immigrant ultimately does not receive any shield from federal immigration restrictions. The hypothetical strong state rule would merely suspend enforcement of immigration restrictions while significantly advancing Congress' goal of protecting abused, neglected, and abandoned children.

Both alternative jurisdictional rules offer benefits that the 1997 rule does not. Most important, the two hypothetical rules would grant state courts more authority to protect those minors in INS legal custody. Only the rule favoring stronger state court power might give minors, not otherwise eligible to remain in the United States, some reprieve from the impact of immigration restrictions. The more balanced hypothetical rule retains the INS's authority over the immigration status of undocumented children. In enacting one of the proposed rules, Congress could address immigration fraud concerns without sacrificing its goal of protecting immigrant children.

VI. Federalism, State Sovereignty, and the SIJ Statute

In the preceding sections, this article described how the 1997 amendments to the SIJ statute might place INS-detained minors who have suffered abuse, neglect, or abandonment at risk of further harm. By limiting state court jurisdiction over minors in INS custody, the

1997 jurisdictional rule also curtailed the states' power to regulate individuals within their territories. Section VI considers whether the 1997 amendments would be vulnerable to constitutional challenge on federalism and state sovereignty grounds if they impose mandatory duties, such as identification and reporting requirements, on states and local governments. This section also discusses the applicability of federalism principles to immigration regulation. Although the Supreme Court has not yet addressed this issue, the article discusses a handful of lower court decisions that have examined the issue. Based on this limited body of case law, the article argues that federal immigration laws are subject to the constraints of federalism despite the exceptionally broad authority the federal government exercises in the arena of immigration.

A. The Possible "Commandeering" Effect of the 1997 SIJ Amendments

In several cases during the past three decades, the Supreme Court has applied federalism principles to restrain federal power and thereby shield states from excessive federal intrusion.²³² Generally, Congress has the authority to encourage states to act or regulate in a specified way by offering incentives such as federal funding.²³³ Congress may also "occupy" an area of regulation and preclude states from regulating in that area unless they conform to federal requirements.²³⁴ But Congress has more limited power to mandate states to implement a federal program without offering an opportunity for states to decline involvement. The Supreme Court has found unconstitutional federal laws that "commandeer" state legislative or executive processes "by directly compelling them to enact and enforce a federal regulatory program."²³⁵

232. See, e.g., *Printz v. United States*, 521 U.S. 898, 925-35 (1997); *New York v. United States*, 505 U.S. 144, 161 (1992); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Hodel v. Virginia Mining & Reclamation Ass'n.*, 452 U.S. 264 (1981); *National League of Cities v. Usery*, 426 U.S. 833 (1976). See, generally, LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 860 (3d ed. 2000).

233. See, e.g., *South Carolina v. Baker*, 485 U.S. 505 (1988) (conditioning receipt of federal tax benefit on state compliance with requirement that bonds be issued in registered form); *South Dakota v. Dole*, 483 U.S. 203 (1987) (conditioning grant of federal funds on state adoption of a minimum drinking age requirement).

234. See, e.g., *Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)* of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2268-69 (codified at 8 U.S.C. § 1621 (1998)) (requiring states to comply with federal requirements as a condition of granting benefits to certain immigrants).

235. *New York v. United States*, 505 U.S. at 161. The "commandeering" language was first described in *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S.

With regard to the 1997 SIJ amendments, it is difficult to determine whether concerns about federalism are warranted because regulations have not been promulgated that indicate how the jurisdiction-limiting provision will impact states. The provision states that “no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction.”²³⁶ On its own, the provision does not define what state courts must do to ensure they do not improperly exercise jurisdiction over minors in the Attorney General’s custody. In 1998, however, the INS issued a memorandum stating that a “formal mechanism” will be established and that state juvenile courts and child welfare agencies will be required “to work in concert to establish formal communication links for the implementation of this statute.”²³⁷ The memorandum goes on to say that a proposed rulemaking process would be initiated that “will inform state juvenile courts of their responsibility under the new statute.”²³⁸

In comparison to the 1997 law, the 1990 SIJ statute did not require state participation or directly impose any burdens upon states. Although a minor must enter the dependency system in order to become eligible for SIJ status, the SIJ law does not require states to accept undocumented children into child welfare systems.²³⁹ Thus, only the 1997 statute may introduce new responsibilities for state child welfare systems.

Pursuant to the 1997 law, the INS could require states to identify whether minors who come to their attention are in the Attorney General’s custody. The INS could require state courts to ask minors about their immigration status or conduct an investigative search of minors’ backgrounds before the state courts exercise jurisdiction.

264, 288 (1981), in which the Court upheld a federal law because it did not commandeer the states into regulating mining. *See id.*

236. *See* 8 U.S.C. §1101(a)(27)(J)(iii)(I) (amended on November 27, 1997). The amended statute also required proof that the juvenile court rendered its decision to address abuse, neglect, or abandonment rather than to enable the minor to obtain lawful immigration status. It also added language to the statute requiring that the grant of an SIJ petition required the Attorney General’s express consent.

237. *See* Cook, *supra* note 194, at 2.

238. *See id.*

239. Other federal laws, the Constitution or state constitutions, however, may require states to provide protective services to undocumented children. *See* Carolyn S. Salisbury, *Comment: The Legality of Denying State Foster Care to Illegal Alien Children: Are Abused and Abandoned Children the First Casualties in America’s War on Immigration?*, 50 U. MIAMI L. REV 633 (1996).

Otherwise, state courts might inadvertently exercise jurisdiction over minors in INS legal custody. In addition to verification requirements, the INS may need to impose a notification requirement upon states to ensure that state courts properly return minors identified as being in the Attorney General's custody to the INS. Congress has already instituted verification requirements as a condition of receiving federal funding under the 1996 federal welfare reform law. Pursuant to the welfare law, states must verify an individual's immigration status as a condition of providing federally funded foster care to that individual.²⁴⁰ The 1996 welfare law does not, however, require states to report an individuals' immigration status to the INS.

The 1997 SIJ jurisdictional rule would be vulnerable to a federalism challenge if the INS requires state or local employees, such as police officers or child abuse investigators, to perform identification, reporting, or notification functions in order to comply with the jurisdiction-limiting provision.²⁴¹ In 1997, in *Printz v. United States*, the Supreme Court struck down the federal Brady Gun Law for impermissibly "commandeering" state law enforcement officers to perform criminal background checks and certifications for individuals seeking to purchase firearms.²⁴² The Court concluded that the federal law unconstitutionally compelled state executives to implement a

240. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 imposed verification requirements as a condition states must fulfill in order to provide federal public benefits to certain immigrants. 8 U.S.C. § 1642. The act states that the Attorney General shall define procedures "requiring verification that a person applying for a Federal public benefit . . . is a qualified alien and is eligible to receive such benefit." 8 U.S.C. § 1642(a)(1). This provision of PRWORA requires states to verify the immigration status of individuals as a condition of providing federal TANF, SSI, foster care, adoption payments and other public benefits to those individuals. 8 U.S.C. § 1641 (defining "Federal public benefit"); 8 U.S.C. § 1641 (defining "qualified alien"). I am grateful to Deena Jang, Asian Pacific Islander American Health Forum, and Tanya Broder, National Immigration Law Center, for helping me understand the effect of PRWORA.

241. Compliance with the SIJ statute may impose additional burdens upon states that are separate from PRWORA's requirements. Although PRWORA already requires states to verify the immigration status of minors who receive federal foster care benefits, PRWORA probably does not require states to verify the immigration status of a minor if they choose to pay for that minor's care with state foster care funds instead of federal benefits. Furthermore, PRWORA does not require states to report information gathered about an individual to the INS.

242. See *Printz v. United States*, 521 U.S. 898, 925-35 (1997) (striking down the Brady Handgun Violence Prevention Act). See also *New York v. United States*, 505 U.S. at 144 (invalidating a federal environmental law that required states to develop a plan for the disposal of radioactive waste generated within the state, and to take title to the waste if the state failed to dispose of it properly.).

federal program and gave states no choice regarding their participation. The Brady Law placed significant investigative and reporting burdens on state law enforcement officials that the Supreme Court determined violated state sovereignty. *Printz's* restrictions on federal power could also be applied to strike down the 1997 jurisdictional law if it requires state or local child abuse investigators to conduct detailed background checks and certifications on the immigration status of minors taken into state custody.²⁴³ As the Supreme Court noted in *Printz*, "Congress cannot circumvent the prohibition [against commandeering] by conscripting the State's officers directly."²⁴⁴

Even if states are given some flexibility in how they comply with the amended SIJ statute, mandatory state participation in a program that imposes fiscal or administrative burdens might still be vulnerable to constitutional challenge. In *New York v. United States*, the Supreme Court invalidated a federal environmental law that required states to develop a plan for the disposal of radioactive waste generated within the state, and to take title to the waste if the state failed to dispose of it properly.²⁴⁵ The Court determined that, while Congress characterized the toxic waste "take-title" provision as an "incentive" program that gave states some flexibility, states ultimately were presented with no real choice regarding their participation in the federal program.²⁴⁶ Either the states adopted the federal regulatory scheme or took title to the waste and accepted liability for its disposal - both "choices" required the states to enact a program in compliance with the federal statute.²⁴⁷ Following this reasoning, the Court concluded that the "choice" Congress presented to states "is no choice at all."²⁴⁸

243. Compare this hypothetical federal law with the federal laws upheld in the Second Circuit's decision, *City of New York v. United States*, 179 F.3d 29 (1999). See *infra* note 259. The federal laws upheld in *City of New York* did not impose reporting or verification requirements upon states or localities, but instead invalidated New York City's law that restricted city employees from voluntarily providing information about the immigration status of aliens to the INS. Federal imposition of actual duties upon states or localities would be significantly more burdensome and therefore more likely to be struck down as unconstitutional.

244. 521 U.S. at 935.

245. *New York*, 505 U.S. 144 (1992).

246. *Id.* at 174-77.

247. See *id.* at 174-75. ("A state may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress." *Id.* at 177.).

248. *Id.* at 176.

In the case of the SIJ jurisdictional provision, the law is more likely to survive constitutional challenge if states are given a viable method for opting out. Congress may create incentives for states to participate, such as conditioning funding on participation, but a law would be vulnerable to a state sovereignty challenge if it required participation. To avoid a federalism challenge, the INS could impose no specific burdens on states and allow them to develop their own methods of ensuring that their courts do not improperly exercise jurisdiction over minors in INS legal custody. The 1997 SIJ jurisdictional provision does not impose any specific burdens upon states. By contrast, the laws the Court invalidated in *Printz* and *New York* mandated that states comply with detailed regulatory schemes. One problem with allowing states to develop their own methods of ensuring the proper exercise of jurisdiction is that uniformity in state practices will be lost. Some states might voluntarily institute effective protocols for screening minors, but many would not. If a state court inadvertently exercised jurisdiction over a minor, the INS or another federal agency would have to intervene and assert federal authority over the minor.

B. The Applicability of Federalism Principles to Federal Immigration Regulation

The analysis presented above presumes that federalism principles, such as the “commandeering” rule, apply to immigration regulation just as they apply to other federal regulation. While federalism has functioned as a viable check against a broad range of federal regulations,²⁴⁹ the Supreme Court’s recent rulings restraining congressional regulation on federalism grounds have been predominantly in the area of Commerce Clause legislation.²⁵⁰ The Supreme Court has yet to consider whether federal law regulating non-citizen immigrants and their treatment in the United States could violate federalism principles.²⁵¹

There are reasons for treating federal immigration policy differently from other federal laws. For over a century, Congress’

249. During the past decade the Court has applied such principles to strike down or restrict Commerce Clause legislation regulating employment discrimination, toxic waste management, the possession of guns near schools and gun sales. *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *New York v. United States*, 505 U.S. 144 (1992); *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v United States*, 521 U.S. 898 (1997).

250. See *supra* text accompanying note 249.

251. In the nineteenth century, the Court considered a series of cases involving state taxation of foreign travelers. *The Passenger Cases*, 42 U.S. 283 (1849).

authority over the regulation of admission, expulsion, and naturalization of immigrants has been deemed “plenary” and largely immune from judicial oversight.²⁵² “Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens,” the Court proclaimed.²⁵³ Commentators have pointed out, however, that Congress’s expansive authority diminishes once it moves beyond the direct regulation of immigration and begins to regulate the behavior and treatment of non-citizen immigrants who are already within the country.²⁵⁴ On several occasions, the Supreme Court and lower courts have struck down federal immigration legislation.²⁵⁵ These decisions constitute a significant body of law where the Court has found that traditional constitutional protections must be accorded to immigrants. Nonetheless, nearly all of the decisions limiting Congress’ power with respect to immigration and alienage have been in the area of individual rights, not states’ rights.

Recognizing Congress’ broad powers to regulate immigration, one might argue that a different brand of federalism should apply when Congress legislates in this arena. Arguably, states do not even have a legitimate basis to challenge federal immigration regulation on states’ rights grounds because Congress regulates in this area to the exclusion of states. How can Congress violate state sovereignty, one might ask, when it regulates in an area over which states cannot exercise authority?

While it would be impermissible for states to regulate immigration matters *per se*, non-citizen immigrants are present within states’ territories, and states must be able to regulate their behavior. Criminal laws, child custody laws, child welfare laws, public benefit

252. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). *See also*, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953).

253. *Fiallo*, 430 U.S. at 799-800; *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (upholding various denials of immigration benefits to undocumented persons or non-citizen immigrants).

254. T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT’L L. 862, 865 (1989) (describing Congress’ power over cases “inside” and “outside” of immigration law); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 989 (applying similar distinction); Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1056-57 (describing immigration law and alienage law categories).

255. *See, e.g.*, *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (First Amendment challenge); *Alemeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) (Fourth Amendment challenge); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (Fifth and Sixth Amendment challenges); and *Equan v. INS*, 844 F.2d 276, 279 (5th Cir. 1988) (Eighth Amendment challenge).

laws, and many other state laws validly regulate these individuals. State child welfare laws clearly fall within the realm of legitimate state authority, and states regularly take undocumented minors into protective custody.²⁵⁶ Indeed, federal and state powers overlap significantly with respect to the treatment of minors who may require custody, shelter and protection.

Until the Supreme Court addresses the issue, it will remain undecided whether principles of federalism would have the same effect on congressional regulation of immigration matters.²⁵⁷ Although the Supreme Court has not directly addressed the issue, lower courts have applied the Court's federalism standards to federal immigration legislation.²⁵⁸ In *City of New York v. United States*, New York City challenged portions of the 1996 federal welfare reform and immigration laws that invalidated the city's law prohibiting government employees from voluntarily providing information about undocumented immigrants to the INS.²⁵⁹ At issue in the litigation was whether Congress could require state and local governments to assist, or at least not obstruct, federal immigration enforcement. The city argued that state sovereignty forbade Congress from interfering with a state's control over its workforce and its power to determine the

256. In fact, Florida enacted a statute requiring that the child welfare agency provide services to undocumented minors after litigation was brought alleging that the agency was discriminating against these children and denying them services. Fla. Admin. Code 65C-9.001, *et seq.* See *Doe v. Towey*, No. 94-1696-CIV (S.D. Fla. amended complaint filed Sept. 22, 1994) (challenging Florida's child welfare system's practice of excluding undocumented children from receiving child welfare protection and services) (on file with author).

257. The Supreme Court's discussion of "commandeering" in *Printz* did not indicate that the substantive area of regulation—be it immigration or gun sales—makes a difference for purposes of federalism analysis. The "commandeering" test follows the trend the Supreme Court began in 1985, focusing on the procedural aspects rather than the substantive area of the federal law being reviewed. By overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), in *Garcia*, the Court moved away from what it concluded was an unworkable method of identifying the substantive regulatory areas that might be deemed traditionally under state control. 469 U.S. 528 (1985). In *Garcia* the Court announced that procedural safeguards inherent in the federal system of government would prevent the federal government from violating state sovereignty. *Id.* at 551.

258. See *California v. United States*, 104 F.3d 1086, 1090 (9th Cir. 1997); *Arizona v. United States*, 104 F.3d 1095, 1096 (9th Cir. 1997); *Padavan v. United States*, 82 F.3d 23, 28 (2d Cir. 1996); *Chiles v. United States*, 69 F.3d 1094, 1097 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1674 (1996); *New Jersey v. United States*, 91 F.3d 463, 465 (3d Cir. 1996); *Texas v. United States*, 106 F.3d 661 (5th Cir. 1997).

259. 179 F.3d 29 (2d Cir. 1999) (reviewing challenges to Section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act and Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act which negated the effect of New York's standing Executive Order 124 issued originally by Mayor Edward Koch in 1989).

duties of state employees in handling confidential information.²⁶⁰ In rejecting the city's argument, the Second Circuit observed that the federal law was worded so that it did not require city employees to actually report to the INS, but instead forbade the city from inhibiting any *voluntary* employee from reporting. The court determined that Congress was not compelling city employees to act but was nullifying the city's law that prohibited city employees from voluntarily acting.²⁶¹

In *City of New York*, the city singled out the INS as the only agency that would be denied information.²⁶² The discriminatory targeting of the INS, the court noted, was a strong indication that the city was interfering with immigration regulation.²⁶³ Moreover, the court was troubled by the fact that the city had not alleged that any specific local policies or practices would be burdened by the federal laws.²⁶⁴ The court determined that the city's targeting of the INS and its inability to show how legitimate city practices would be harmed were strong indicators that the city was more interested in obstructing federal policy than avoiding burden to local functions.

Based on the rule articulated in *City of New York*, mandatory identification, reporting or notification requirements are at risk of violating federalism principles. In *City of New York*, the federal law did not require state or local government employees to perform any activities. The court found, therefore, that no local practices were burdened. Instead, the federal law invalidated an existing local executive order that forbid state employees from reporting on their own. The Second Circuit expressly left open the possibility that the city could mount a successful as-applied challenge that demonstrated how the federal law burdened the operation of city programs and thereby commandeered the city's employees.²⁶⁵ With regard to the 1997 SIJ amendments, the jurisdictional rule would be less vulnerable to constitutional attack if state and local employees were not required

260. *See id.* at 35-37.

261. *See id.*

262. *Id.* The court expressed concern that the city rule "singles out a particular federal policy," namely the INS's regulatory practices for non-cooperation while allowing free sharing of information with "the rest of the world." *Id.* at 37.

263. *See id.*

264. *See id.* at 37.

265. *See City of New York*, 179 F.3d at 36. The "City has chosen to litigate this issue in a way that fails to demonstrate an impermissible intrusion on state and local power to control information obtained in the course of official business or to regulate the duties and responsibilities of state and local governmental employees. . . . The City's facial challenge thus rests entirely on . . . inference." *Id.*

to engage in prescribed tasks that impose burdens on states and local governments.

What is striking about the analysis the Second Circuit applied in *City of New York* is the absence of any discussion that the federal legislation being challenged should be treated differently because it regulated the treatment of immigrants. In several cases brought during the 1990s by state litigants, courts also evaluated the challenged immigration legislation without an apparent change in the federalism analysis. During a period of increasing national anti-immigrant sentiment, states alleged that the federal government failed to properly control the influx of illegal immigrants.²⁶⁶ This failure, they argued, imposed fiscal and other burdens upon states in violation of the Tenth Amendment and other constitutional provisions.

The Ninth Circuit's analysis of California's challenge provides a representative example of the straightforward federalism analysis courts applied in reviewing the various states' claims.²⁶⁷ The court examined the alleged impact of increased immigration on the state's expenditures for Medicaid, prisons, and schools. It concluded that under the rubric of the Tenth Amendment, Congress had not compelled any state action in violation of the commandeering principle but, rather, the state had imposed the burdens on itself, either as a function of its own legislation (prison spending) or by choosing to participate in a federal funding program (Medicaid).²⁶⁸ Public education, the court noted, was mandated by the Constitution, not Congress.²⁶⁹ Under the approach adopted by the Ninth Circuit, if a federal law violated the commandeering rule, it would be struck down just like other federal laws.²⁷⁰

266. *California*, 104 F.3d at 1090; *Arizona*, 104 F.3d at 1096; *Padavan*, 82 F.3d at 28; *Chiles*, 69 F.3d at 1097, *cert. denied*, 116 S. Ct. 1674 (1996); *New Jersey*, 91 F.3d at 465; *Texas*, 106 F.3d 661. For example, the State of New Jersey alleged that "as a direct result of the federal government's failure to control its international borders and implement and abide by its laws, the State of New Jersey is improperly forced to bear the financial and administrative costs" of imprisonment and education of undocumented immigrants. *New Jersey*, 91 F.3d at 465.

267. *California*, 104 F.3d at 1090, 1092 (relying upon *South Dakota v. Dole*, 483 U.S. 203, 207-11 (1987), for federal funding analysis). See also, *Padavan*, 82 F.3d at 28-29 (applying "commandeering" analysis set forth in *New York v. United States*, 505 U.S. 144 (1992)); *New Jersey*, 91 F.3d at 466-67 (same); *Texas*, 106 F.3d at 665-67 (same)).

268. *California*, 104 F.3d at 1092. See also, *Padavan*, 82 F.3d at 28-29; *New Jersey v. United States*, 91 F.3d at 466-67.

269. See *California*, 104 F.3d at 1093.

270. The other courts hearing these cases also applied a straightforward federalism

The political question doctrine is one possible basis upon which federal immigration policy might be accorded different treatment. Several courts described the states' demands for relief to be "non-justiciable political questions," and noted that Congress has exclusive authority over matters pertaining to the admission of immigrants.²⁷¹ The courts' concern with the political question doctrine, however, was more attributable to the fact that the states had not identified any specific federal law that commandeered state action. Instead, the states articulated a generalized problem that the federal government's inaction had allowed too many immigrants to remain within the states' territories and utilize state resources. It would be difficult for a court to conclude that the federal government had commandeered states to expend their resources based solely upon the absence of federal action. The state litigants failed to demonstrate that the burdens shouldered by states were actually imposed by any federal regulations rather than by the presence of immigrants in the states.

Furthermore, the remedy sought by the states would have required the courts to overhaul an entire area of federal policy. Several courts noted that the states' claims would require the courts to evaluate the best way to implement and enforce the immigration laws, tasks that the courts considered themselves ill-equipped to perform.²⁷² These far-reaching remedies demanded by the states were another reason the courts categorized their challenges as politically non-justiciable. Thus, despite the courts' rejection of the states' claims, these decisions leave open the possibility that a more narrowly crafted federalism challenge to federal immigration policy would be deemed justiciable. A federalism challenge would also have greater likelihood of success if it targeted a specific federal law or regulation, instead of an entire area of regulation—such as immigration policy.

A common characteristic shared among the state challenges was the indication that the states were actively interfering with federal immigration goals. In these cases, the states literally asked the courts to evaluate how Congress and the INS should formulate and implement INS policy. The states had not even challenged a particular federal statute. Thus, while these state challenges to

analysis to the challenged immigration legislation. *See, e.g., Padavan*, 82 F.3d at 28-29 (applying "commandeering" analysis set forth in *New York v. United States*, 505 U.S. 144 (1992)); *New Jersey*, 91 F.3d at 466-67 (applying the same analysis).

271. *See, e.g., California*, 104 F.3d at 1093; *New Jersey*, 91 F.3d at 470; *Texas*, 106 F.3d at 664-65.

272. *New Jersey*, 91 F.3d at 470; *Padavan*, 82 F.3d at 27; *Texas*, 106 F.3d at 666-67.

federal immigration legislation were unsuccessful, the weaknesses in their challenges were not related to the fact that immigration was the substantive regulatory area being challenged. To the contrary, these cases, along with *City of New York*, support the proposition that the commandeering principle applies to federal immigration policy.

Conclusion

The beginning of this article presented the story of an immigrant boy literally lost at sea and caught between competing conceptions of federal and state power. This country's desire to protect a child in need while also guarding its national borders created an international spectacle that pitted many different parties and institutions against each other, including the federal INS and a state court. If anything, the *Elían Gonzalez* case illustrated that federal policy regarding the treatment of undocumented children is riddled with unresolved contradictions.

By focusing on the SIJ statute, this article has explored the conflicts regarding the treatment of undocumented children, in particular those who are abused, neglected, or abandoned. When Congress enacted the statute in 1990, the goal of the statute was the protection of abused, neglected and abandoned children. But other federal immigration goals, such as fraud prevention, were not always consistent with the goal of protecting children. On occasion, the actions of the INS have undermined state child welfare policies or the practices of state juvenile courts. As a result, undocumented children were sometimes trapped in the middle. The federal and state conflicts that arose compelled policymakers to consider whether the balance of power between the federal government and states had to be shifted, or at least clarified.

The 1997 amendments, and in particular the jurisdictional provision, were an attempt to address the federal and state conflicts by giving the INS significantly greater authority over minors in INS legal custody. Although the 1997 jurisdictional provision sought to eliminate SIJ fraud, it also restricted the states' ability to protect children. Indeed, by restricting state court's jurisdiction over abused, neglected or abandoned children, the 1997 amendments may jeopardize immigrant children's lives, thus contravening the goals of the SIJ statute.

This article recommends that Congress reevaluate the 1997 jurisdictional rule and consider either a more balanced jurisdictional rule or one that favors state court authority over immigrant minors.

By returning responsibility for child welfare to the states, the two alternative rules presented in Section V would offer greater protection to children who need child welfare assistance. Moreover, the alternative rules would not significantly restrain the INS's ability to prevent immigration fraud. The proposed rules would enable state courts and the federal INS to concentrate on those tasks they are best equipped to perform and thereby further Congress's goal of protecting undocumented children who are abused, neglected, and abandoned.