

# Justice Taken Too Far

By Laurence H. Tribe

Some are wildly comparing the armed seizure of Elian Gonzalez to the roundup of innocents by the Gestapo. Others think Attorney General Janet Reno showed admirable patience in dealing with a group of zealots using the boy as a pawn in its war with Fidel Castro

But the partisan squabbling over these caricatured views threatens to obscure a vital question: Where did the attorney general derive the legal authority to invade that Miami home in order to seize the child?

The fact is, even on the assumption (which I share) that under applicable legal and moral principles Elian should ultimately be reunited with his father, the government's actions appear to have violated a basic principle of our society, a principle whose preservation lies at the core of ordered liberty under the rule of law

Under the Constitution, it is axiomatic that the executive branch has no unilateral authority to enter people's homes forcibly to remove innocent individuals without taking the time to seek a warrant or other order from a judge or magistrate (absent the most extraordinary need to act) Not only

the Fourth Amendment but also well-established constitutional principles of family privacy require that the disinterested judiciary test the correctness of the executive branch's claimed right to enter and seize

Although a federal court had ordered that Elian not be removed from the country pending a determination of his asylum petition, and although a court had ruled that the Immigration

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## Reno had no right to send the agents in for Elián.

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and Naturalization Service could exercise custody and control of Elian for the time being, no judge or neutral magistrate had issued the type of warrant or other authority needed for the executive branch to break into the home to seize the child The agency had no more right to do so than any parent who has been awarded custody would have a right to break and enter for such a purpose Indeed, the INS had not even secured a judicial order, as opposed to a judicially unreviewed administrative one, compelling the Miami relatives to turn Elian over

The Justice Department points out that the agents who stormed the Mi-

ami home were armed not only with guns but with a search warrant But it was not a warrant to seize the child Elian was not lost, and it is a semantic sleight of hand to compare his forcible removal to the seizure of evidence, which is what a search warrant is for

To be sure, our courts have allowed immigration officials to obtain areawide warrants to search workplaces for illegal aliens, and Congress has by statute empowered immigration officials to search, interrogate and arrest people without warrants in order to prevent unlawful entry into the country. But no one suspects that Elian is here illegally

In fact, it's hard to see any significant immigration-related or other federal interest in whether Elian was reunited with his father now or after asylum is denied (if that is the outcome) And, should asylum be granted, Elian's father might still be granted custody and could then take the boy to Cuba with him if he so chose, asylum only means permission to stay in the United States and is not a requirement to stay

Either way, Ms Reno's decision to take the law as well as the child into her own hands seems worse than a political blunder Even if well intended, her decision strikes at the heart of constitutional government and shakes the safeguards of liberty □

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