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CHILDREN UNDER THE RADAR: THE UNIQUE PLIGHT OF SPECIAL IMMIGRANT JUVENILES

*My Xuan T. Mai*¹

INTRODUCTION

At first look, Julio Argueta was just another kid from El Salvador.² However, his childhood is fraught with a painful past.³ Julio's immigration file reveals that his father was shot to death by a wealthy landowner when Julio was one year old.⁴ Julio has no memories of his father.⁵ Subsequently, his mother passed away.⁶ Julio was only eight years old at the time.⁷ He only remembers his mother teaching him to cook eggs and tortillas, fetch firewood, and chase chickens out of the house.⁸ Following his mother's death, Julio's grandfather passed away.⁹ Julio then lived with his Aunt Rufina.¹⁰ Aunt Rufina was like a second mother to Julio, but she too died.¹¹ Distant relatives took in Julio's younger sister, but left Julio, then fifteen, to fend for himself.¹² On Julio's sixteenth birthday, he decided to walk north with a bag of clothes.¹³ The Border Patrol caught him swimming across the Rio Grande and sent him to a detention facility in Texas.¹⁴ After two months, Julio was sent to his cousin Vilma's home (also his godmother) in Arlington, Virginia.¹⁵ Vilma too had fled El Salvador when a savage civil war tore the country apart in the 1980's.¹⁶ Vilma found Julio an immigration attorney, Karla Harr, in a phone book.¹⁷ Harr recommended Julio apply for the Special Immigrant Juvenile visa.¹⁸

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2. Brigid Schulte, *A Road Less Traveled: With Nothing to Lose and a Future to Gain, a Young Orphan From El Salvador Pursues His American Dream, Legally.*, WASH. POST, Apr. 23, 2006, at C1, available at 2006 WLNR 7018786, 1.

3. *Id.* at 2-3.

4. *Id.* at 2.

5. *Id.*

6. *Id.*

7. Schulte, *supra* note 2, at 2.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* At the funeral, Julio's cousin, Vilma (Rufina's daughter), came and considered adopting Julio. However, under the current law, adoption paperwork must be completed prior to the minor's sixteenth birthday. Julio was fifteen already. At the time of Aunt Rufina's funeral, Julio was three months shy of his sixteenth birthday. Paying someone to smuggle Julio was also out of the question. Vilma subsequently flew back to the States.

12. *Id.* at 2-3.

13. *Id.* at 3.

14. Schulte, *supra* note 2, at 3.

15. *Id.*

16. *Id.*

17. *Id.* at 4.

18. *Id.* at 4. More on special immigrant juveniles, *see infra*, Parts I and II.

When they first appeared in family court, the judge was not very sympathetic.¹⁹ Returning the second time, the judge agreed to declare Julio eligible for long-term foster care.²⁰ Armed with the juvenile court's decision, Julio was able to gain an interview with the Citizenship and Immigration Service to obtain a visa.²¹ Two weeks before his eighteenth birthday, Julio had his illegal status adjusted.²² In 2011, Julio will be eligible for naturalization.²³

Across the country in Maricopa County, Arizona, Rosa Flor Diaz Godinez will also have a chance at citizenship.²⁴ Rosa fled her home country of Mexico to escape a rapist.²⁵ At the tender age of seventeen, Rosa and her cousin crossed the desert into Arizona where they were apprehended by the local sheriff's office.²⁶ The fake ID Rosa showed the police indicated her age to be 18; she was thrown into an adult jail.²⁷ While her cousin couldn't bear the jail and signed a confession, and was consequently deported, Rosa steadfastly refused.²⁸ Fortunately, Rosa's plight was discovered by one Peter Schey²⁹ and others while on routine visits.³⁰ Once her age was proven by the Mexican consulate, Rosa was transferred to Southwest Key, a nonprofit organization servicing unaccompanied, undocumented minors.³¹ With the help of *pro bono* attorneys, and numerous attempts later, Rosa was able to obtain a green card before her eighteenth birthday.³²

Every year, children with stories like Julio and Rosa enter the United States without documentation. The number of illegal immigrants, or put another way, undocumented immigrants, has seen a sharp increase since the 1980s.³³ This sharp

19. Schulte, *supra* note 2, at 5.

20. *Id.*

21. *Id.*

22. *Id.* 5-6.

23. *Id.* at 6.

24. Sarah N. Lynch, *Teen Takes Painful Path to Prized Green Card*, THE TRIBUNE, May 6, 2007, available at 2007 WLNR 8595329, 2, 4.

25. The man who raped Rosa was a relative who lived on the same block. As a result, Rosa became pregnant and gave birth to a boy. The man received only seven months in jail. When her son was three, Rosa's rapist was released from prison. Rosa left her son with her parents and fled to the United States. *Id.* at 1-2.

26. *Id.* at 1, 3.

27. Both girls were charged with conspiracy to smuggle themselves into the country. Arizona had a "coyote" law that was applicable to adults only. Minors are not charged under the law. The law is currently being challenged in federal court. *Id.* Coyotes are "for-profit human smugglers" of illegal aliens. Arizona's anti-coyote law is a mechanism designed to control the prevalence of human smuggling at the border. See Colleen DiSanto, *Alien Smuggling Along The Arizona-Mexico Border*, 43 ARIZ. ATT'Y 29 (2007); George L. Blum, *Construction and Application of Antismuggling of Aliens Statute*, 8 U.S.C.A. § 1182(a)(6)(E)(i), 15 A.L.R. FED. 2D 149 (2006).

28. By pleading guilty of smuggling herself into the United States, Rosa's cousin may never return to the United States legally. Lynch, *supra* note 24, at 3.

29. Peter Schey is the president of the Center for Human Rights and Constitutional Law. He later becomes one of Rosa's attorneys. *Id.* at 2.

30. *Id.* at 3.

31. *Id.*

32. In order to be eligible for the Special Immigrant Juvenile visa, Rosa's attorney had to prove that she was dependent on a juvenile court and had been abused, neglected, or abandoned. Because Rosa was in the legal custody of the Immigration and Customs Enforcement, Rosa's attorney had to obtain permission from the Department of Homeland Security before proceeding in state court. After obtaining the state order, Rosa must then come before an Immigration Judge, who will make the decision granting or denying her a visa. *Id.*

33. Jeffrey S. Passel, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 5 (2005), available at <http://pewhispanic.org/files/reports/46.pdf>.
<http://lawpublications.barry.edu/barrylrev/vol12/iss1/8>

increase has, in turn, resulted in a dramatic increase in the number of undocumented minors in the United States as well.³⁴ Even the Supreme Court has acknowledged the overwhelming influx of illegal immigrants in the United States, most notably children.³⁵ Thousands of undocumented juveniles are arrested each year, and an overwhelming 70% are unaccompanied.³⁶ With the advent of the Special Immigrant Juvenile statute (hereinafter "SIJ"),³⁷ however, undocumented juveniles under the age of 21³⁸ may have a chance³⁹ at permanent status.⁴⁰ Under the umbrella of the Immigration and Nationality Act,⁴¹ the SIJ provision is a unique blend of state family or juvenile court with federal immigration jurisdiction.⁴² SIJ confers a "substantive immigration benefit"⁴³ upon findings of a state juvenile court.⁴⁴ Consequently, state juvenile courts are allowed to determine the best interests and welfare of the child under this statute.⁴⁵

This note argues that the crucial involvement of state courts in determining a child's dependency status should not be upset by the Department of Homeland Security (hereinafter "DHS") ascertaining the child's best interests – something the DHS is not equipped to handle. Part I relates the history of the SIJ statute from its formation in the Immigration and Nationality Act of 1990.⁴⁶ It will also trace how the most recent 1997 amendments have changed the character of the SIJ provision in the Immigration and Nationality Act.⁴⁷ Part II of this article focuses on the implementation of the 1997 amendment to the Special Immigrant Juvenile, specifically the consent requirements of the Attorney General. Additionally, this section will discuss the federal preemption analysis of the dichotomy between federal immigra-

34. Statistics indicate the number of unauthorized children in the United States to be a staggering 1.3 million, approximately 14% of all unauthorized immigrants. *Id.* at 18.

35. *Reno v. Flores*, 507 U.S. 292, 294 (1993).

36. *Id.* at 295.

37. 8 U.S.C. § 1101(a)(27)(J) (2006).

38. 8 C.F.R. § 204.11(c)-(e) (Sept. 6, 2007).

39. In 2006, statistics indicate that only 912 individuals were granted special immigrant juvenile status by the United States Citizenship and Immigration Services (USCIS). U.S. DEPT. OF HOMELAND SEC., 2006 YEARBOOK OF IMMIGRATION STATISTICS 22 (2007), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/OIS_2006_Yearbook.pdf. Compare with 2004's figures (634 grants), U.S. DEPT. OF HOMELAND SEC., 2004 YEARBOOK OF IMMIGRATION STATISTICS 18 (2005), available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2004/Yearbook2004.pdf>; and 2005's figures (679 grants), U.S. DEPT. OF HOMELAND SEC., 2005 YEARBOOK OF IMMIGRATION STATISTICS 21-22 (2006), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf, 2006 saw a spike the number of SIJ petitions granted.

40. SPECIAL IMMIGRANT STATUS; CERTAIN ALIENS DECLARED DEPENDENT ON A JUVENILE COURT, 58 Fed. Reg. 42,843, 42,846 (Aug. 12, 1993).

41. 8 U.S.C. § 1101 (2006).

42. Angela Lloyd, *Regulating Consent: Protecting Undocumented Immigrant Children from Their (Evil) Step-Uncle Sam, or How to Ameliorate the Impact of the 1997 Amendments to the SIJ Law*, 15 B.U. PUB. INT. L. J. 237, 238 (2006).

43. Gregory Zhong Tian Chen, *Eliau or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*, 27 HASTINGS CONST. L. Q. 597, 608 (2000).

44. 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." 8 C.F.R. § 204.11 (2007).

45. David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L. J. 979, 1004 (2002).

46. 8 U.S.C. § 1101 (2006).

47. See P.L. 105-119, Title I, § 113, 111 Stat. 2460.

tion and state juvenile courts. Part III will conclude as to why the SIJ statute should be revisited by Congress to provide guidelines for specific consent.

I. HISTORY OF THE SPECIAL IMMIGRANT STATUTE

A. The Immigration and Nationality Act of 1990 §153⁴⁸

Originally passed in 1952,⁴⁹ the Immigration and Nationality Act was enacted by Congress as a means to deal with the nation's growing immigrant population and the shifting dynamics of immigration reform.⁵⁰ In response to the final report of the Select Commission on Immigration and Refugee Policy, Congress sought to rectify the nation's immigration policy⁵¹ with the Immigration Act of 1990 (aka Immigration and Nationality Act of 1990).⁵² Similar to the Violence Against Women Act (VAWA),⁵³ which provides aid to victims of domestic abuse, the SIJ statute was Congress' answer to a moral crisis involving undocumented children suffering neglect, abuse, or abandonment⁵⁴ at the hands of those closest to them – their family.⁵⁵ However, unlike VAWA, SIJ does not require that immigration authorities make independent findings of abuse, neglect, or abandonment.⁵⁶ A finding by the juvenile court that the child is in need of long-term foster care is sufficient for a determination of SIJ status.⁵⁷

Within the umbrella of the Immigration Act of 1990 was the SIJ provision.⁵⁸ From its legislative history, it appears the SIJ provision was passed with little con-

48. Section 153 of the Immigration and Nationality Act of 1990 is codified at 8 U.S.C. § 1101 (2006).

49. The Immigration and Nationality Act was codified in Title 8, Section 12 of the United States Code. While revised extensively since its passage over fifty years ago, the Immigration and Nationality Act remains a cornerstone of immigration policy in the United States. Among the most notable revisions are the 1980 Refugee Act, Pub. L. 96-212, 94 Stat. 102 (codified at 8 U.S.C. § 1525); the 1986 Immigration Reform and Control Act (IRCA), Pub. L. 99-603, 100 Stat. 3359 (codified at 8 U.S.C. §§ 1160, *et. seq.*); the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (codified at 8 U.S.C. §§ 1186b, *et. seq.*); the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. 104-208, 110 Stat. 3009-546 (codified at 8 U.S.C. §§ 1225a, *et. seq.*) and the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. 104-132, 110 Stat. 1214 (codified at 8 U.S.C. §§ 1189, *et. seq.*) both of 1996; the Legal Immigration and Family Equity Act of 2000, Pub. L. 106-553, 114 Stat. 2762, 2762A-142; the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Pub. L. 106-313, 114 Stat. 1251; and in 2001, the USA Patriot Act, Pub. L. 107-56, 115 Stat. 272 (codified at 8 U.S.C. § 1226a, *et. seq.*). Margaret McCormick, The National Institute for Trial Advocacy, COMMENTARY: OVERVIEW OF CHAPTER 12. IMMIGRATION AND NATIONALITY, 8 U.S. N.I.T.A. prec § 1101 (2007) (LEXIS).

50. See generally Miguel Lawson & Marianne Grin, *The Immigration Act of 1990*, Pub. L. No. 101-649, 104 Stat. 4978, 33 HARV. INTL. L. J. 255 (1992).

51. See H.R. REP. NO. 101-723(I) (1990), as reprinted in 1990 U.S.C.C.A.N. 6710, 6713 (citing STAFF OF SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, 97TH CONG., FINAL REPORT, ON U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 112 (1981)).

52. Pub. L. 101-649, 104 Stat. 4978, 5005 (codified at 8 U.S.C. §§ 1101, *et. seq.*).

53. Pub. L. 106-386, 114 Stat. 1491.

54. While it was the intention of Congress to provide protection to children who had been abused, neglected, or abandoned, the language of the 1990 SIJ provision did not specifically so indicate. See *Gao v. Jenifer*, 185 F.3d 548, 552 (6th Cir. 1999) (comparing the pre-1997 amendment SIJ provision with the new law signed on November 26, 1997).

55. Chen, *supra* note 43, at 605.

56. 8 U.S.C. § 1101(a)(27)(J)(i) (2006).

57. Chen, *supra* note 43, at 608.

58. 8 U.S.C. § 1101(a)(27)(J) (2006).

trovery.⁵⁹ Perhaps this was the result of growing tension between the state juvenile courts and immigration law officials regarding alien minors being adjudicated as dependent on the state.⁶⁰ Due to the expiration of the Immigration Reform and Control Act of 1986,⁶¹ many juveniles who would have gained lawful permanent status were now curtailed.⁶² Coupled with the highly restrictive nature of the Act – that the juvenile be in the United States since 1982-- many juveniles were left unable to adjust their status.⁶³

Under the 1990 provision, SIJ status was fairly straightforward. There had to be a dependency order, the immigrant child had to be deemed eligible for long-term foster care and it had to be in the child's best interests *not* to be returned to the child's country of nationality.⁶⁴ Thereafter, the juvenile was required to submit a Form I-360 along with an I-485 application for adjustment of status.⁶⁵

B. Before the 1997 Amendment to the Special Immigrant Juvenile Provision

In 1993, the Immigration and Naturalization Service (now USCIS and USICE – both under DHS) promulgated regulations to explain how state dependency law and federal immigration law could concurrently apply.⁶⁶ As originally enacted in 1990, section 153 did not exempt special immigrant juveniles from statutory requirements for adjustment of status, although they were exempt from deportation.⁶⁷ They had to additionally meet the adjustment requirements of section 245.⁶⁸ Under section 245(a), the juvenile must demonstrate that they were admitted into the United States only after having been inspected by an immigration official.⁶⁹ Further obstacles to overcome under section 245 included prohibiting adjustment for “employ[ment] without authorization, . . . not in lawful nonimmigrant status at the time the application for adjustment is filed, or have failed to continuously maintain lawful nonimmigrant status in the past.”⁷⁰ Consequently, a significant number of special immigrant juveniles became ineligible for adjustment of status to permanent residents.⁷¹ Soon after, however, Congress passed the Technical Amend-

59. 101 Bill Tracking S. 358 (1990) (Lexis).

60. Katherine Porter, *In the Best Interests of the INS: An Analysis of the 1997 Amendment to the Special Immigrant Juvenile Law*, 27 J. LEGIS. 441, 443 (2001).

61. Pub.L. 99-603, 100 Stat. 3359.

62. SPECIAL IMMIGRANT STATUS; CERTAIN ALIENS DECLARED DEPENDENT ON A JUVENILE COURT, 58 Fed. Reg. 42,843, 42,844 (Aug. 12, 1993).

63. *Id.*

64. *Id.* at 42,847. See also 8 C.F.R. § 101.6 redesignated as 8 C.F.R. § 204.11 (1993); 8 U.S.C. § 1101(a)(27)(J) (1994).

65. Porter, *supra* note 60, at 444.

66. See generally SPECIAL IMMIGRANT STATUS; CERTAIN ALIENS DECLARED DEPENDENT ON A JUVENILE COURT, 58 Fed. Reg. 42,843, (Aug. 12, 1993).

67. *Id.* at 42,844.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

ments⁷² to Section 245 on December 12, 1991, to alleviate the obstacles faced by special immigrant juveniles wishing to adjust their statuses.⁷³ The Technical Amendments added a new subsection, 245(h), which allows for the adjustment of status regardless of the minor's original mode of entry into the United States.⁷⁴

C. The 1997 Amendment to the Special Immigrant Juvenile Provision

The SIJ provisions of the Immigration and Nationality Act of 1990 were intended as a protective measure for abused, neglected, or abandoned children who entered the United States illegally.⁷⁵ Congress provided an alternative to deportation for these children. Rather than being deported along with their abusive or neglectful parents, or deported to parents who had abandoned them once in the United States, such children were permitted to seek special status to remain in the United States.⁷⁶ This rule was abused, however, by juveniles entering the United States as visiting students who would fraudulently petition for SIJ status.⁷⁷ While SIJ status had always been intended as a protective measure for abused, neglected, or abandoned children, the language as originally drafted did not limit its application to those cases.⁷⁸ Requesting that the Attorney General investigate the fraud, New Mexico Senator Pete Domenici stated that there "is a giant loophole...[E]very visiting student from overseas can have a petition filed in a state court... declaring that they're a ward and in need of foster care."⁷⁹ The 1997 amendments were enacted to address this problem.⁸⁰

The 1997 amendments made clear that the need for long-term foster care must be due to "abuse, neglect, or abandonment."⁸¹ It further added the requirement that juveniles in the actual or constructive custody of the INS (now ICE) obtain the Attorney General's consent in order to give the juvenile court jurisdiction over dependency proceedings.⁸² The revisions clarify that state courts may not exert jurisdiction to determine the status of a juvenile in the actual or constructive custo-

72. See *Miscellaneous and Technical Immigration Naturalization Amendments of 1991*, Pub. L. 102-232, 105 Stat. 1733; 58 Fed. Reg. 42,850 (codified at 8 C.F.R. § 204.11); 58 Fed. Reg. at 42,850.

73. 58 Fed. Reg. at 42,850.

74. *Id.* at 42,844-45.

75. 101 P.L. 649; 104 Stat. 4978.

76. *Id.*

77. *Yeboah v. U.S. Dep't of Justice*, 345 F.3d 216, 221 (3d Cir. 2003). See also *M.B. v. Quarantillo*, 301 F.3d 109, 114 (3d Cir. 2002) ("The legislative history demonstrates an intent to remove immigration decisions from the exclusive control of juvenile courts and the social agencies affiliated with them.")

78. C. Kevin Morrison, *At the Intersection of Immigration Law and Juvenile Justice*, 38-JUN PROSECUTOR, May/June 2004, at 16, 18 (2004).

79. *Yeboah*, 345 F.3d at 221 (citing *Attorney General Reviewing Potential Abuse of Immigration Law: Hearings on the FY '98 Budget Request of the Justice Department Before the Appropriations Subcommittee on Commerce, Justice, State and the Judiciary of the Senate. Appropriations Comm.*, 105th Cong. (1997) (Statement of Domenici, U.S. Senator)). See also INS PROVIDES INTERIM FIELD GUIDANCE ON SPECIAL IMMIGRANT JUVENILES, 75 Interpreter Releases 1445, 1445 (Oct. 19, 1998).

80. INTERIM FIELD GUIDANCE, 75 Interpreter Releases at 1446 (Oct. 19, 1998).

81. 8 U.S.C. § 1101(a)(27)(J)(i) (2006). See also Thronson, *supra* note 45, at n. 160 ("the 1990 definition of Special Immigrant Juvenile contained no requirements that the juvenile be abandoned, neglected or abused" (quoting *Yu v. Brown*, 92 F. Supp. 2d 1236, 1246 (D.N.M. 2000)).

82. 8 U.S.C. § 1101(a)(27)(J)(iii) (2006).

dy of the INS unless the attorney general gave specific consent.⁸³ These changes however, granted immigration officials even more power, allowing them to delve into a realm of law reserved to the states.⁸⁴

It is important to note that under both the original and amended statute, parents of children with SIJ status were not allowed to benefit from their child's status.⁸⁵ Logically, the purpose was to curtail families from abusing the SIJ provision for the opportunity of their children to become United States citizens.⁸⁶

II. IMPLEMENTATION OF THE 1997 AMENDMENT

A. Criteria for Establishing Special Immigrant Juvenile Status

Most children who benefit from the law are undocumented minors already present in the United States.⁸⁷ Consequently, to be eligible, a child must first be present in the United States.⁸⁸ This includes children who were detained by, and in the custody of, immigration authorities upon arrival into the United States.⁸⁹ For these children, however, there are disheartening hurdles to overcome, because DHS requires the consent of the Attorney General before a state court may exert jurisdiction over the child.⁹⁰ Physical presence aside, the child must be "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 for long-term foster care due to abuse, neglect, or abandonment."⁹¹ The term "eligible for long-term foster care" means that a determination has been made by the juvenile court that family reunification is no longer a viable option.⁹² In addition to the juvenile court's finding of long-term foster care eligibility, a juvenile judge must also determine "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."⁹³ Armed with this dependency order, a juvenile make seek SIJ status to become a permanent resident.⁹⁴

83. INTERIM FIELD GUIDANCE, *supra* note 80.

84. The Constitution provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people." U.S. CONST. amend. X. Article I, Section 10, Clause 1 provides that "no state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility." U.S. CONST. art I, § 10, cl. 1. Thereby, matters of family law and juvenile justice are specifically reserved to the states.

85. 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2006).

86. *Id.*

87. Thronson, *supra* note 45, at 1005.

88. *Id.*

89. *Id.*

90. 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2006).

91. 8 U.S.C. § 1101(a)(27)(J)(i) (2006).

92. 8 C.F.R. § 204.11(a) (2008).

93. 8 U.S.C. § 1101(a)(27)(J)(ii) (2007).

94. 8 C.F.R. § 204.11(b)-(d) (2008).

Interestingly, regulations define a juvenile as “an alien under the age of 18 years.”⁹⁵ The SIJ provision, therefore, extends eligibility for special immigrants to age 21.⁹⁶

The cooperative requirements of the SIJ statute remove from the United States Customs and Immigration Service (“CIS”) the dual responsibility of being the gatekeeper of immigrants, while also being the champion of a child’s best interests in becoming a permanent resident. Because the goals of each role are diametrically opposed, it is difficult to imagine a federal governmental agency having the ability to play both a compassionate advocate and adversary to a child. Compounding the problem were the allegations of fraudulent SIJ petitions, thereby requiring the government to become gatekeeper, champion, and investigator. Quite logically, to avoid such conflicts, it is only the state courts that are equipped to handle cases dealing with the best interests of a child.

Soon after the 1997 amendments took effect, the former INS issued field memoranda to clarify the meaning of the new SIJ provisions.⁹⁷ Two years later, it issued a second field memorandum.⁹⁸ Despite these attempts at additional guidance, the problem with these two memoranda was that INS was still required to make independent findings of abuse, neglect, or abandonment.⁹⁹ Consequently, this involved having the juvenile relive their traumatizing events before immigration officers untrained in matters of child victims.¹⁰⁰ INS should not have the power to re-adjudicate a matter a juvenile court has already determined. This creates an additional barrier for these juveniles that Congress wanted to protect with the passage of SIJ. Even INS acknowledged that “it would be both impractical and inappropriate for the Service to routinely readjudicate judicial or social service agency administrative determinations as to the juvenile’s best interest.”¹⁰¹

The third memorandum, issued in 2004, superseded all previous guidance issued¹⁰² and warned “adjudicators...not [to] second-guess the [juvenile] court rulings or question whether the court’s order was properly issued.”¹⁰³ Consequently,

95. 8 C.F.R. § 236.3(a) (2007).

96. See 8 C.F.R. § 204.11(c) (2008).

97. INTERIM FIELD GUIDANCE, *supra* note 80 (regarding Memorandum from Thomas E. Cook, Acting Asst. Comm’r, Adjudications Div., Immigration and Naturalization Service, U.S. Dep’t of Justice, INS, Regarding Special Immigrant Juveniles – Interim Field Guidance Relating to Public Law 105-119 (Sec. 113) amending Section 101(a)(27)(J) of the INA, (August 7, 1998)).

98. Memorandum from Thomas E. Cook, Acting Asst. Comm’r, Adjudications Div., Immigration and Naturalization Service, U.S. Dep’t of Justice, INS, Regarding Special Immigrant Juveniles – Memorandum #2 Clarification of Interim Field Guidance (July 9, 1999), available at http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/SIJ%20Memo%202.pdf (on file with author). See also INS ISSUES MORE GUIDANCE ON SPECIAL IMMIGRANT JUVENILE PROVISIONS OF INA § 101(A)(27)(J), 76 Interpreter Releases 1414 (Sept. 27, 1999) (*sic*) (reporting on Cook’s second memorandum on SIJ).

99. INTERIM FIELD GUIDANCE, *supra* note 80, at 1446; Cook, *supra* note 98, at 3; See also Lloyd, *supra* note 42, at 246.

100. Lloyd, *supra* note 42, at 246.

101. SPECIAL IMMIGRANT STATUS; CERTAIN ALIENS DECLARED DEPENDENT ON A JUVENILE COURT, 58 Fed. Reg. 42,843, 42,843 (Aug. 12, 1993).

102. William R. Yates, *Memorandum #3 – Field Guidance on Special Immigrant Juvenile Status Petitions* (May 27, 2004), available at http://www.uscis.gov/files/presrelease/SIJ_Memo_052704.pdf. See also USCIS MEMO CONSOLIDATES, SUPERSEDES PREVIOUS GUIDANCE ON SPECIAL IMMIGRANT JUVENILE STATUS PETITIONS, 81 Interpreter Releases 840 (June 28, 2004).

103. *Id.* at 4-5.

the state court's dependency order is the substantive evidence required for SIJ status.

While the SIJ statute brings together the state and the federal governments in order to achieve its intent, the dichotomy between state expertise in family law matters and federal immigration enforcement remains quite discernible. It is difficult to imagine a federal governmental agency having the ability to play both a compassionate advocate and fierce adversary to a child. Quite logically it is only the state courts that are equipped to handle cases dealing with the best interests of a child.

B. Consent and the Problem with Federal Immigration Preemption

As a precondition to a finding of SIJ status, the 1997 amendments added the requirement that the attorney general (now the CIS district director)¹⁰⁴ must consent to jurisdiction.¹⁰⁵ This jurisdictional consent is required in two instances. First, where the juvenile has been declared eligible for long-term foster care and it has been determined not to be in the juvenile's best interests to be returned to his parents' native country, the Attorney General¹⁰⁶ must *expressly* consent to the dependency order serving as a precondition to the grant of SIJ status.¹⁰⁷ "Express consent" means that the Secretary, through the CIS district director, has "determined that neither the dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining relief from abuse, neglect or abandonment."¹⁰⁸ Put simply, express consent is an acknowledgment by CIS that the SIJ petition is *bona fide*.¹⁰⁹ The district director is limited to "determining special immigrant status only, not for making determinations of dependency status."¹¹⁰

Second, where the juvenile is already in the actual or constructive custody of the DHS, the district director must *specifically* consent to the juvenile court exercising jurisdiction over the minor child in any dependency proceedings.¹¹¹ Such "specific consent refers to a determination to permit a juvenile court, which otherwise would have no jurisdiction over the juvenile alien, to exercise jurisdiction for purposes of a dependency determination."¹¹² While the Yates Memorandum ad-

104. Following the 1997 amendments and the passage of the Homeland Security Act of 2002, consent must now be obtained through the Secretary of the Department of Homeland Security, through the CIS District Director. Yates, *supra* note 102, at 1.

105. *Id.*

106. In addition, following the passage of the Homeland Security Act, the Immigration and Naturalization Service was disbanded and separated into two entities – the U.S. Citizenship and Immigration Service (USCIS) and the U.S. Immigration and Customs Enforcement (ICE) – both of which are under the auspices of the Department of Homeland Security. Lloyd, *supra* note 42, at n.10. Note that 8 U.S.C. § 1101(a)(27)(J)(iii) still refers to the "Attorney General." § 1101.

107. Yates, *supra* note 102, at 4-5.

108. *Id.* at 2 (quoting H.R. Rep. No. 105-405, at 130 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2941, 2981, *available at* 1997 WL 712946).

109. *Id.*

110. *Id.* at 5.

111. *Id.* at 2.

112. *Id.*

dressed the criteria for express consent in detail, it failed to address the eligibility criteria for specific consent.¹¹³ This is particularly troubling, because a juvenile dependency order obtained without the consent of the district director would be considered invalid when applying for SIJ status under current regulations.¹¹⁴ Because the criteria are undefined, many alien children face the prospect of being aged out¹¹⁵ of SIJ status. It is imperative that the DHS promulgate regulations and guidelines to alleviate ambiguities in the current law. While DHS is better suited to deal with immigration law,¹¹⁶ DHS lacks adequate resources to also permit child care services. Another suggestion is for DHS to create a presumption of consent¹¹⁷ to the state juvenile courts in order to streamline the process for these juveniles and not risk them being aged out of eligibility. Alternatively, DHS may allow the juvenile courts to exercise jurisdiction, then require that the state court notify immigration authorities, a possibility that would allow DHS to intervene.¹¹⁸

While the SIJ statute makes significant strides in the incorporation of the best interests principle into immigration law for juveniles, the specific consent requirement removes power from the state courts to properly adjudicate abuse, neglect, and abandonment claims of undocumented children. In this regard, the dichotomy between federal immigration and state juvenile courts could not be more apparent. A child's potential eligibility for SIJ status should not be compromised because the child was unable to avoid immigration custody. True to the intent of SIJ,¹¹⁹ the proper application should be whether the juvenile is deserving of proper care and attention to protect from abuse, neglect, or abandonment. If juvenile courts were forced to abandon efforts to protect undocumented children from trauma simply due to lack of consent, it would seem a paradoxical contravention of the purpose of SIJ, which is to protect survivors of abuse, neglect, or abandonment.¹²⁰

Underlying these arguments regarding consent is the controversy of federal preemption in immigration matters. Take the case of C.M.K.¹²¹ At the age of sixteen, C.M.K. left his village in China after witnessing the savage beating of his father by relatives of the village head.¹²² Desperate, C.M.K. met with smugglers who arranged for his transport into the United States.¹²³ Upon his arrival, he was transported in a refrigerated truck to a home, where he was beaten several times because he was unable to pay the \$26,000 they demanded.¹²⁴ He was moved to an apartment in New York City, which was subsequently raided by the now defunct

113. Lloyd, *supra* note 42, at 247.

114. Yates, *supra* note 102, at 5.

115. *Id.* at 6.

116. Reno v. Flores, 507 U.S. 292, 305 (1993) ("Over no conceivable subject is the legislative power of Congress more complete.")

117. Lloyd, *supra* note 42, at 248.

118. Chen, *supra* note 43, at 650.

119. 8 U.S.C. 1101(a)(27)(J) (2006).

120. Chen, *supra* note 43, at 643.

121. *In re Welfare of C.M.K.*, 552 N.W.2d 768, 768-69 (Minn. Ct. App. 1996).

122. *Id.* at 769.

123. *Id.*

124. *Id.*

INS.¹²⁵ C.M.K. was placed into INS custody because he had no parent or relative in the United States.¹²⁶ Physical custody of C.M.K. was later transferred to the Lutheran Social Services of Minnesota, which placed him into a foster home.¹²⁷ When the foster family petitioned for a dependency order and for findings necessary to obtain SIJ status, it was denied by the juvenile judge due to lack of jurisdiction.¹²⁸ C.M.K. was already under deportation proceedings; therefore, federal immigration law preempted state jurisdiction.¹²⁹ On appeal, the Minnesota Court of Appeals held that when a “statute has established rules and regulations touching upon the rights, privileges, obligations or burdens of aliens,”¹³⁰ such statute is the “supreme law of the land.”¹³¹

In another Minnesota case, Y.W. left China without permission and was smuggled by boat into the United States when he was 15.¹³² He is a wanted man in China for having participated in a rally when he was 11.¹³³ It took two months for Y.W. to arrive to the United States on the boat.¹³⁴ When he arrived, Y.W. was hidden away in house basements with other smuggled immigrants.¹³⁵ The following year, the home Y.W. stayed in was raided and he was placed into INS custody.¹³⁶ Although released into the physical custody of his foster family, deportation proceedings were pending against Y.W.¹³⁷ Y.W.’s foster family petitioned to have a juvenile judge issue the requisite orders necessary for a finding of SIJ.¹³⁸ On appeal, however, the Minnesota Court of Appeals followed the reasoning in *In re Welfare of C.M.K.* and held that federal government control over illegal aliens preempted state dependency proceedings.¹³⁹

A few years later in *Gao v. Jenifer*, the INS arrested sixteen-year-old Gao when he entered the United States unaccompanied and without documentation.¹⁴⁰ After instituting deportation proceedings, the former INS released Gao into foster care with the Lutheran Social Services of Michigan (LSSM).¹⁴¹ Thereafter, LSSM petitioned the probate court to declare that Gao was dependent, and that it was not in his best interests to be returned to China.¹⁴² While the petition was granted, the INS director denied Gao’s petition for SIJ status reasoning that the probate court

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. Under Article VI, section 1, clause 2, “law of the United States” means the “supreme Law of the Land.” Therefore, federal laws regarding immigration preempt state regulations. U.S. CONST. art. VI, § 1, cl. 2.

130. *In re Welfare of C.M.K.*, 552 N.W.2d at 770 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941)).

131. *Id.*

132. *In re Y.W.*, 1996 Minn. App. LEXIS 1302, 2 (Minn. Ct. App. 1996).

133. *Id.*

134. *Id.*

135. *Id.* at 3.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 14.

140. *Gao v. Jenifer*, 185 F.3d 548, 551 (6th Cir. 1999).

141. *Id.*

142. *Id.*

had no jurisdiction to adjudicate Gao's matter, as Gao was in the "legal custody" of the INS at the time dependency was sought.¹⁴³ Contrary to the decisions reached in the Minnesota courts, however, the Sixth Circuit found 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."¹⁴⁴

In both of the Minnesota cases the foster parents brought suit to have their young charge declared dependent on the state, but both were denied. Yet, under the Sixth Circuit's holding in *Gao v. Jenifer*, the more appropriate question is "whether a judgment for Gao would 'interfere with the public administration' or 'restrain the government from acting.'"¹⁴⁵ Despite all this, the Sixth Circuit in *Gao* only limited its ruling to a closed class of juveniles who filed for dependency status prior to the 1997 amendments of SIJ.¹⁴⁶ The Sixth Circuit failed to address the preemption analysis of juveniles who now need specific consent of DHS.¹⁴⁷ In dicta, however, the *Gao* Court noted that "[s]imilarly situated immigrants whose state dependency cases arose after November 26, 1997 are governed by the amended rule. In those cases, the Attorney General must consent for the juvenile court to have jurisdiction, and must consent for any dependency order to have its pre-amendment effect."¹⁴⁸ As a result, the Sixth Circuit's holding provides little, if any, legal clarity for juveniles in DHS custody seeking to petition for SIJ status.

While Congress amended the SIJ status to curb abuse by undeserving immigrants, nothing in the legislative history suggests that Congress' intention was to divest the juvenile court of jurisdiction in an area of law in which it has a vested interest, or to discriminate against minors simply because they are in custody – physical or legal.¹⁴⁹ In the absence of specific congressional ruling, state courts have not surrendered power to federal agencies despite the overlap between the state court's determination of the juvenile's best interests and the federal government's role in immigration. The importance of a rapid response by the state system to a child in need cannot be emphasized enough. Without clear guidelines on specific consent, this provision of the SIJ statute frustrates the state's interest in protecting these children and possibly risk the children's safety.¹⁵⁰ When a juvenile is in need of immediate services, it is unduly burdensome and extremely time-consuming to wait for jurisdictional consent from the district director.¹⁵¹

143. *Id.*

144. *Id.* at 555.

145. *Id.* at 554.

146. *Id.* at 556.

147. *Id.* at 557 (holding that the INS's interpretation of pre-amendment § 1101(a)(27)(J) depriving state juvenile courts of jurisdiction over juveniles in INS custody is an abuse of discretion).

148. *Id.* at 553.

149. Lloyd, *supra* note 42, at 255.

150. Chen, *supra* note 43, at 642.

151. *Id.*

III. CONCLUSION

No one chooses to whom, where, and how they will be born. Imagine being born into a home unwanted, born into a home where you were repeatedly abused and neglected. Unexpectedly, you lose your family. You then come to a new country to seek a better future, only to find yourself, once again, abused, neglected, and abandoned – this time, not by family, but by the hands of the government that boasts to the world to “[g]ive me your tired, your poor, your huddled masses yearning to breathe free; send these...to me; I lift my lamp beside the golden door.”¹⁵² Despite such humanitarian ideals, you find yourself plagued with even more obstacles to overcome in your quest for permanency.

Congress’ noble intentions in enacting the SIJ statute was to protect the weakest segment of society – children. The original SIJ provision was straightforward. There had to be a dependency order, the immigrant child had to be deemed eligible for long-term foster care and it had to be in the child’s best interests *not* to be returned to the child’s country of nationality.¹⁵³ Then came allegations of fraudulent petitions of SIJ, and Congress amended the statute in 1997.¹⁵⁴ The amended statute specifically applies to abused, neglected, or abandoned children only.¹⁵⁵ Therefore, parents, siblings, or family members cannot collaterally benefit from SIJ.¹⁵⁶ It is solely for the child’s benefit.

The 1997 amendment, however, is plagued with the factor of consent and ultimately, preemption. While DHS has promulgated guidelines in determining express consent for a juvenile court to exercise jurisdiction over an immigrant child, it has utterly neglected to clarify the more problematic requirement of specific consent, which arises when the immigrant child is in the legal or constructive custody of DHS. Hence, while it may be conceivably reasonable to require the federal government’s consent before a juvenile court may make dependency findings, the child’s future, however, cannot wait. A child in need of immediate and specialized state care will be jeopardized if he must wait to get permission to receive help.

In the meantime, however, states can also be proactive in assuring that unaccompanied minors are taking advantage of the SIJ statute. Los Angeles County, for example, is seen as a model nationwide in its comprehensive program.¹⁵⁷ Officials at the CIS office in Los Angeles have streamlined the process for special immigrants by recognizing that aging out of eligibility is a concrete problem faced by many undocumented minors.¹⁵⁸ As a result, CIS officials in Los Angeles have started “accepting applications directly and interviews well ahead of an applicant’s

152. Emma Lazarus, *The New Colossus* (NY 1883) (written for and inscribed on the base of the Statue of Liberty).

153. 8 C.F.R. § 204.11(c) (2008).

154. 8 U.S.C. § 1101(a)(27)(J) (2006).

155. 8 U.S.C. § 1101(a)(27)(J)(i) (2006).

156. 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2006).

157. Anna Gorman, *Green Cards Go Unclaimed by Many Youths in Foster Care: Certain Abused or Abandoned Dependents of the State are Eligible for Legal Residency, But Not All Know the Law*, L.A. TIMES, Jun. 25, 2007, at 1, available at 2007 WLNR 11915768, 2.

158. *Id.* at 4.

21st birthday.”¹⁵⁹ Furthermore, through an awareness program, advocates and government officials conduct training sessions to educate social workers, judges, immigration officials, *pro bono* attorneys, and youths.¹⁶⁰ With respect to youths, agencies in California must also educate undocumented minors in their care how to acquire and complete a SIJ application¹⁶¹ – Form I-360: Petition for Amerasian, Widow(er) or Special Immigrant.¹⁶² In addition, advocates also target rural areas where the immigrant population is not as dense,¹⁶³ and perhaps where the law has not quite reached those who can most find reprieve by it.

Until Congress takes initiative and amends or repeals the specific consent requirement, the hands of state courts remain bound under federal immigration law. The underlying preemption obstacle between state and federal law will continue to create an invisible barrier for the child. This creates a catalyst for problems, as the state court is not allowed to interfere, even where a child is in dire need of assistance. Unfortunately, for now, state courts are forced to sit idly by, awaiting reform of SIJ and abused, neglected, and abandoned children are longing for a day to become permanent residents and live a life of freedom.

159. *Id.*

160. *Id.* at 2.

161. Theo Liebman, *Undocumented Youth: Gaining Special Immigrant Juvenile Status*, 7 No. 11 N.Y. FAM. L. MONTHLY 3 (2006).

162. Form I-360: Petition for Amerasian, Widow(er) or Special Immigrant, available at http://www.usimmigrationsupport.org/form_i360.html.

163. *Id.*