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**GUESTS:** Larry Glick, Roger Pilon, Jose Pertierra

**BYLINE:** Greta Van Susteren, Roger Cossack, Patty Davis

**HIGHLIGHT:**

Guns, pepper gas, armed agents in the early morning raid to return Elian Gonzalez to his father. A look at whether it was excessive force or necessary action.

**BODY:**

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(BEGIN VIDEO CLIP)

**DORIS MEISSNER, INS COMMISSIONER:** What they were doing was in violation of the immigration laws. They had been out of compliance with the immigration law for more than a week. We did not arrest anybody because our object here was to reunify Elian with his father.

**SEN. BOB SMITH (R), NEW HAMPSHIRE:** This was a custody matter that should have been resolved peacefully. You don't go into a unarmed home, with weapons drawn, automatic weapons drawn, assault weapons, and take the boy out at gunpoint and scare him to death.

**JOE LOCKHART, WHITE HOUSE PRESS SECRETARY:** This was the right way to do it, and I think, as law enforcement officials will tell you, sometimes you need a small show of force to avoid using force.

(END VIDEO CLIP)

GRETA VAN SUSTEREN, CO-HOST: Guns, pepper gas, armed agents, and an early morning raid. Today on BURDEN OF PROOF: excessive force or necessary action?

ANNOUNCER: This is BURDEN OF PROOF with Roger Cossack and Greta Van Susteren.

VAN SUSTEREN: Hello and welcome to BURDEN OF PROOF.

The now-famous photograph of an INS agent with his gun pointed toward a terrified Elian Gonzalez has become a flash point for legal debate.

ROGER COSSACK, CO-HOST: Attorney General Janet Reno says she would do it again if she had to, that the actions she took and decisions she made successfully reunited Elian and his father. Her critics don't agree.

(BEGIN VIDEO CLIP)

SEN. CONNIE MACK (R), FLORIDA: I want to ask questions with respect to the use of force. Can anyone really justify the use of force, breaking into a family home at the point of a gun, ripping a little 6-year-old boy away, and then say afterwards that they're proud of the operation and that it was in the boy's best interests? Give me a break. (END VIDEO CLIP)

COSSACK: Joining us today to sort through the legal labyrinth of the Elian Gonzalez case: in Harrisburg, Larry Glick of the National Tactical Officers Association.

VAN SUSTEREN: And here in Washington, Alex Sullivan (ph), **CATO institute's** Roger Pilon, who is formerly the director of the Justice Department's Asylum Policy and Review Unit, and immigration attorney Jose Pertierra. And in our back row, Andrea Fischetti (ph), Sateen Moinatapah (ph), and Chris Roth (ph).

Larry, let me go first to you. Was the entrance into that home on Saturday morning the way to do it? Do you agree with the way it was done?

LARRY GLICK, NATIONAL TACTICAL OFFICERS ASSN.: Well, there is concern in the law enforcement community that we could have done -- or used some other tactics in this particular incident. It is unfortunate that it had to come down to sending a well-armed and equipped unit in there to take out Elian. But you know, looking back at the entire incident, if it was taking care of much earlier, it would probably not have led to this show of force.

VAN SUSTEREN: But was the show of force necessary? Did they need so many agents? Did they need those uniforms, those helmets, the pepper gas, the guns? Did they need that? Is that what you would advised doing?

GLICK: Well, in a tactical operation, when you are going to use the tactical unit, there's criteria that we go by before we call out the SWAT team, and they are very clear. It is a standard in tactical operations across the country. So, to answer your question, once we have resorted to look at it, once we looked at the tactical options, and went down through our criteria, that would make the determination to use the SWAT team.

And I think in this case, some of the criteria may not have been met fully.

COSSACK: Larry, you mentioned that some of the criteria may not have been met, and you also said earlier that other tactics could have been used. What do mean by other tactics and what criteria weren't met?

GLICK: Well, in the tactical operations community, when we are going to go out and perform a high-risk operation and we know that there may be some serious safety issues involving not only the victims or the innocent hostages inside or the occupants of a building, and even our own officers and the suspects, we look at four primary criteria: One, is the suspect or the people inside the location believed to be arm or in fact are they armed; number two, are they in a position of advantage, a fortified location, where it would be almost impossible for a normal patrol force or detective unit to make entry; the third one is probably the most critical one in some respects, do the suspects or occupants have a long history, long criminal history, have they shown any propensity for violence, have there been any assaults on police officers in their criminal record; and then the fourth, is there any hazardous condition that if we do not use the SWAT team, if we sent a detective division or patrol officers to make entry do we put them at risk. So there are the four primary criteria that have been established and in place for years.

VAN SUSTEREN: Roger, let me ask you this: This was swift, this was clear, not one person was hurt and it was successful. Anything wrong with it?

ROGER PILON, **CATO INSTITUTE**: Well, depends how you define success. Look at the image it presented to the world of the way we do things in this country. You would think...

VAN SUSTEREN: But is it the world's -- I mean, aren't we more interested not in sort of how we look, I mean that's like lawyers always worried about their reputation and what they do for their client. I mean, isn't the question whether the law was carried out and done so without bodily injury?

PILON: What law? Let's look at your lead-in from Doris Meissner. This family had been in violation of the law for nine days. What law? Her diktat, as Alan Dershowitz says...

VAN SUSTEREN: The warrant, the warrant that was issued.

PILON: ... this morning in the "Los Angeles Times" that is mere diktat, it isn't real law until the court has passed on it.

VAN SUSTEREN: Didn't she apply for a warrant?

COSSACK: besides that, I think what we he is taking, I think what we are talking about is a notion -- I think what Doris Meissner was talking about was the notion that they had ended -- the fact that Lazaro Gonzalez had the temporary custody and, in fact, therefore the boy should be returned to his father, I think that is the law...

PILON: And as the "New York Times" said editorially yesterday, the proper thing at that point would have been to go into court, and get an order demanding that he make the boy available to the INS.

With respect to the force issue, this was an outrageous use of force. You would think they were invading a crack house or a Mafia hangout. I mean, this was a peaceable family. Not one of the criteria that were just set forth were met in this case.

COSSACK: I don't agree with that.

Larry, were any of the criteria that you just articulated met? I mean, for example, they have said that they didn't

know whether or not those people were armed. There could have been a crowd outside. What do you believe?

GLICK: Well, you know, the information -- first of all, I was not part of the planning process. We do not know all the full details of the intelligence information. The government was on scene for a long period of time collecting intelligence. So they must have used some intelligence, some information regarding individuals being armed both inside or outside...

VAN SUSTEREN: Well, I think that's hopeful thinking, though, isn't it not, Larry, I mean, we have no idea whether or not they have any intelligence that there was any arms...

COSSACK: Well, we don't, but the government said that they believe -- part of this was that the government said they believed, and they had information...

VAN SUSTEREN: I don't know.

(CROSSTALK)

COSSACK: But then you just sort of work your way into victory, because you just say the government always says it, therefore, it is not true, therefore they shouldn't have done this because no one was armed.

PILON: This is the kind of boot strapping that we see around this country with these operations.

COSSACK: Boot-strapping or not, when somebody gets shot going in, it is not boot-strapping anymore.

VAN SUSTEREN: Let me stop. You know what I think the problem is, let me go to you on this, Jose, is the whole notion -- I mean, I don't have any problem with the SWAT team showing up, because they were in a position of advantage, this was a crowd, they had no idea how the crowd would react, but this whole idea of knock notice. Frankly, I'm not convinced that they really did give the knock before they rammmed the door down. What do you think of the way they actually made their entry?

JOSE PERTIERRA, IMMIGRATION ATTORNEY: Well, I think what you had, Greta, was a classic hostage situation, and in a classic hostage situation, you have to act accordingly, and think about the safety of the officers.

VAN SUSTEREN: But there was negotiations going on, you say it is a hostage situation, they were talking.

PERTIERRA: Well, in the classic hostage situations. you always negotiate with the people that are holding the hostage and the family in Miami was clearly in violation of the law. I disagree with Roger on this because the attorney general had revoked the temporary care that Lazaro enjoyed over this boy days ago, and under the law he needed to have returned the boy to the attorney general, who retained the legal custody of the boy.

VAN SUSTEREN: I agree with you on that.

COSSACK: But he already agreed to do, and once refused, and then he said I won't do it.

PILON: He didn't have to return, after all, the INS paroled this boy into the custody of the family.

VAN SUSTEREN: It was over, though, Roger.

PILON: It was not his burden to affirmatively give the boy some other place. If the INS wanted to change this,

they had full authority to go there and obtain the boy. It wasn't his affirmative duty to take the boy to Opa-Locka or any "locka" airport, as he put it.

VAN SUSTEREN: And they went and got the child.

COSSACK: Let me just interrupt all of you for a second because I'm getting orders, we've got to take a break. Elian and his father are spending their third day together, but the legal process is far from over. Going through the motions, when we come back.

(BEGIN LEGAL BRIEF)

Because four out of five jury summonses that are sent in Philadelphia are ignored, court officials will start penalizing truant jurors with fines and jail time.

(END LEGAL BRIEF)

(COMMERCIAL BREAK)

VAN SUSTEREN: Good news for our Internet-savvy viewers: You can now watch BURDEN OF PROOF live on the World Wide Web. Just log-on to CNN.com/Burden. We now provide a live video feed, Monday through Friday, at 12:30 p.m. Eastern time. If you miss that live show, the program is available on the site at any time via video-on-demand. You can also interact with our show and even join our chat room.

COSSACK: The government filed an 85-page brief yesterday with the 11th Circuit Court of Appeals in Atlanta, and today a group of senators in Washington begin questioning Attorney General Janet Reno.

All right, Roger, the 11th Circuit is going to hold a hearing on May 11th, and at that point, perhaps, we will get clearer ideas, but right now the government's position seems to be that a 6-year-old no matter what cannot apply for asylum.

PILON: Well, you look at those papers that the government filed yesterday and you see that they don't agree with the 11th Circuit, and that leads us to a very important point, Roger, and that's this...

VAN SUSTEREN: Let me stop right there on that because the 11th Circuit was very careful to point out that they were not indicating what they were ultimately going to decide, this was a temporary matter just to put things on hold.

PILON: You are absolutely right, but that's not the point I was about to make.

VAN SUSTEREN: All right. PILON: The point I was about to make was that this was a hearing on whether they could get an order prohibiting Elian from leaving the country. But in the course of writing that opinion of 17 pages, the court went into whether Elian was entitled to a hearing, which was the issue that is going -- is the issue to be decided on the 11th, and there the court made it very clear that it read the statute and it read the regulations, which I am the principle author of at the outset, and those regulations make it clear that children can apply for asylum independent of and even adverse to their parents, and yet the government is still fighting that.

VAN SUSTEREN: I'm not so sure, Roger, that the way the government has phrased the issue is a little bit different in their pleading that I am looking at. And they say, "The question here" -- this is from their 85-page brief -- "The question here is not whether Elian may apply, but whether he has applied."

Jose, you want to talk about that issue?

PERTIERRA: Yes, that's the threshold issue in this case, Greta, is whether this little boy has the legal capacity to understand an asylum claim and to sign off on an I-5-89, the form that is the basis for the asylum claim. What Lazaro Gonzalez did through his attorney was submit to the INS, an I-5-89 signed in block letters by this little boy, an I-5-89 that this little boy really is not legally capable of understanding.

PILON: Then how do you explain the regulation which distinguish three categories of potential asylum applicants: those from age zero to five, those from six to 12, and those from 13 to 18, and with instructions to asylum officers of how to question children in each of these categories. If you didn't have these that, what...

PERTIERRA: Roger raises a very good point, and those regulations speak to, Roger, cases of unaccompanied minors where there is no parent involved. This is a case where there is a living, breathing father who said that he does not want asylum for his son.

PILON: I can speak authoritatively, as the person who wrote those, that's not what we had in mind.

COSSACK: Roger, doesn't it seem a little ludicrous...

VAN SUSTEREN: I am going to interrupt you one second. We are going to go to the United States Senate gallery, where we are going to hear Senators Connie Mack and Bob Graham, both senators from the state of Florida. They have met privately this morning with the attorney general of the United States to ask her questions about procedures Saturday.

Let's listen.

SEN. CONNIE MACK (R), FLORIDA: I usually come prepared with a particular statement to make. We just finished roughly an hour and 45 minutes with the attorney general. I want to express one issue that developed in my mind this morning, as preparing for the meeting and then also the discussion that we had, that I find again very troubling. As most of you all know who have been following this, my -- I think I've been pretty constant in saying I -- what has kept me focused is the question: What is in Elian's best interest?

And so I started playing around with a question this morning that had to do with some comments made with respect to justifying the use of force, that there were statements that there could be -- that there could be weapons in the house.

One of the things that was developed today was a recognition that there apparently either on Thursday or Friday, maybe on both days, there were different teams, either Miami -- and we'll have to get you the specifics -- but the Miami Police Department or the FBI or in conjunction with have been in the house and confirmed as of some time on Friday that there were no weapons.

But again...

(CROSSTALK)

MACK: No, no, no, no, no, I didn't say that, didn't say that. I -- they were -- they asked to come in, the family let them come in, as far as I understand.

But in any event, the department made the decision that force was necessary because of their concern about what the family might do. And what that raised in my mind was that they must have concluded that there was a possibility that there would be armed conflict in the house.

So the question that I have asked: Was the father informed of the possibility of there being gunfire in the house, and was he prepared to put his son at risk a second time? And the answer I got back was, yes, that he was.

Now I must tell you, I am stunned by that. We've all questioned why the father wasn't here during the first four months, but I cannot honestly believe that during a time in which there were serious negotiations taking place -- and I say serious, based on what President Tad Foote had to say, and what attorney Aaron Podhurst had to say -- that there were serious negotiations going on that the father would in essence agree to sending armed men into a home in Miami to take his son at gun point.

Now after this discussion this morning, the various questions that were raised, I am going to recommend to the majority leader that the Senate engage in a hearing, and/or hearings, with respect to the use of force.

As I have said over the last couple of days, I am deeply troubled, horrified, as a matter of fact, that our government would use armed force in a family home to remove a 6-year-old child at gun point. I think that is a question -- the question about the justification for that, the questions related to the negotiations and why those did not lead to a peaceful resolution is something that ought to be in the interest of every citizen of the United States. And so I'm going to ask the majority leader to hold -- to ask for hearings to be held on the issue of the use of force.

Bob?

SEN. BOB GRAHAM (D), FLORIDA: The meeting had three topics: First, what were the situations on Thursday, Friday and Saturday morning of negotiations prior to the taking of the child; second, why the level of use of force; and third, where do we go from here? I have spoken extensively on points one and two. I'd like to focus on the question of, Where do we go from here?

There was one agreement which was common between the family in Miami and, as expressed in a document which was signed on Friday evening by the three principals of the Miami family, and then a counter-document which was submitted by the Department of Justice back to the family at 2:59 a.m. on Saturday morning, and that was that family reunification was a critical step in Elian's best interest and in beginning to bring together those persons who care deeply about Elian.

It has now been almost three days that Elian has been with his father. There had been an earlier indication that two days of bonding with the father would then be followed by steps toward family reunification. What we heard today was yes, there is still a belief that family reunification is in Elian's best interest, that what is being questioned now are the conditions of that reunification, and that the Department of Justice is going to be primarily relying on two unnamed experts -- I assume persons who had expertise in child psychology and psychiatry -- to make recommendations as to what should be the conditions of that family reunification.

I personally think that it is urgent that that occur immediately, and that the process of healing commence for Elian as well as for the other family members. I believe that the conditions which were outlined in the principles that are generally associated with President Tad Foote, University of Miami, represent a starting point, and I hope that they would be close to a concluding point in terms of what the standards of that family reunification should be.

I would like to comment on a couple of other issues that I think are where do we go from here.

One anticipates the sad possibility that Elian may be returned to Cuba. We've had extensive negotiations between the U.S. government and the family in Miami. Several weeks ago, I became concerned about whether there were any parallel negotiations going on between the United States government and the government of Cuba as to how this child would be treated should he be returned to Cuba.

The rationale that the United States government has for returning this child to Cuba is that his interests are best served by being with his natural father in the community in which he has been raised. If that is the rationale for the United States taking the action of returning a 6-year-old to a totalitarian government, then we ought to have some assurances that that will be respected and that the boy will not be used as a trophy-child for communism.

VAN SUSTEREN: We've been listening to two senators from the state of Florida. They met earlier this morning with the attorney general of the United States to discuss the seizure on Saturday morning of young Elian Gonzalez. One of the senators, Senator Connie Mack, a Republican, has said that he will ask the majority leader to start hearings on the issue of whether or not force should have been used on Saturday.

We now go out to Andrews Air Force Base where CNN's Patty Davis is standing by.

Patty, what can you tell us.

PATTY DAVIS, CNN CORRESPONDENT: Greta, the Miami relatives of Elian Gonzalez just tried more times -- it was actually twice in a row here within the span of about a five minutes to get into Andrews Air Force Base to see the boy. Both times, they were turned around. The police officers stopped traffic. They made the van turn around, go back out onto the main street here in front of Andrews Air Force Base.

Very tight security at the base, a 100-percent ID check being enforced. The public affairs spokesman here at the base has said that the relatives have not had permission so far to come on this base.

Now, the attorney for Elian's father says that Elian's father does not wish to see them at this point, but that could change some time in the future.

There were suggestions by a spokesman for the Miami relatives that perhaps Elian was being kept in a hospital here on the base -- we heard that earlier today -- recovering from injuries sustained during the raid on Saturday. A spokesman here at the base emphatically denies that and says, in fact, that Elian, yesterday at least, was outside playing with his father. A little rainy today, so no word on whether he's outside or not. Probably not; most likely inside his two-bedroom guest suite here at Andrews -- Greta and Roger.

COSSACK: All right, thank you, Patty Davis.

Roger, I want to go back to you. We just have a few seconds left to answer this question. Isn't it a little ludicrous the notion that a 6-year-old is going to be having a discussion with an INS agent talking about the political situation in Cuba versus the political situation in the United States?

PILON: No, I don't think it is. And if it were, that should be taken up with Congress. Congress wrote the law. We wrote the regulations pursuant to Congress' intent. I think we plainly anticipated that children would, in certain circumstances, have interests adverse to those of their parents. We haven't heard the final word from this father. We haven't heard the final word from this father. We haven't heard, if I may say so, an honest word.

COSSACK: You believe a 6-year-old knows enough to have an adverse -- to know that he has an adverse

experience different than his father? You think he understands the notion of communism versus democracy?

PILON: I think that he understand the difference between life in Cuba and life here already. He has seen enough of life here. After all, 6-years-old isn't nothing. You do have some opinions at the age of 6, and I don't think we should discount them out of hand. We don't have the authority to do that.

COSSACK: Roger, you're another Roger that gets the last word today because that's all the time we have for today.

VAN SUSTEREN: Too many Rogers.

COSSACK: Thanks to our guests and thank you for watching.

Later today on "TALKBACK LIVE," the fallout from the seizure of Elian continues. Phone, fax or e-mail your comments. It's your turn to weigh in at 3:00 p.m. Eastern, noon Pacific.

VAN SUSTEREN: And of course, we'll be back tomorrow with another edition of BURDEN OF PROOF. We'll see you then.

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