

# Smuggled Masses: The Need for a Maritime Alien Smuggling Law Enforcement Act

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*The competition [for immigrant passengers] . . . is so great, that it has been found expedient to engage runners to pick up passengers. The fellows employed for this purpose are usually a set of arrant knaves, that are wont to practice the most egregious deception on guileless and credulous emigrants.*<sup>1</sup>

## I. Introduction

At the crack of dawn on 9 June 2006, Amay Machado Gonzalez, a twenty-four-year-old Cuban citizen, embarked from the north coast of Cuba in a small Florida-registered sport boat, along with twenty-eight other migrants, for the ninety-mile voyage to the Florida Keys.<sup>2</sup> The men who operated the boat and had organized the smuggling venture had originally entered the United States illegally from Cuba but were now living legally in South Florida as “parolees”<sup>3</sup> and lawful permanent residents.<sup>4</sup>

A few hours after the voyage began, Ms. Gonzalez was dead.<sup>5</sup> She sustained a severe head trauma when the

smugglers attempted to evade and outrun a U.S. Coast Guard law enforcement vessel and subsequently died from the injury.<sup>6</sup> The smugglers’ vessel, colloquially known as a “go-fast,” had been outfitted with three high-horsepower outboard motors making the boat capable of speeds in excess of forty-five knots.<sup>7</sup> Such speeds far exceed any safe operating speed and are extremely dangerous to passengers in even the calmest of seas—doubly so when operators engage in a pell-mell effort to evade interdiction.<sup>8</sup>

The illegal maritime migrant smuggling trade puts the lives of every migrant who embarks on a smuggling boat at great risk.<sup>9</sup> Like the “runners” that the Irish Emigrant Society warned about in another century,<sup>10</sup> the modern-day maritime smuggler appeals to the overwhelming desire of prospective migrants from Cuba and other Caribbean countries to make it to the United States by any means.

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<sup>1</sup> WILEY & PUTNAM, *EMIGRANT’S GUIDE: COMPRISING ADVICE AND INSTRUCTION IN EVERY STATE OF THE VOYAGE TO AMERICA* 16 (1845) (quoting a circular of the Irish Emigrant Society warning prospective emigrants to the United States of the dangers of being taken in by “runners” employed by shipping companies to drum up business and pack the steamships of less reputable companies with passengers).

<sup>2</sup> See Kelli Kennedy & Jessica Gresko, *1 Dead, 4 Injured en Route from Cuba*, ORLANDO SENTINEL, July 9, 2006, at B5; David Ovalle, *Migrant Dead After Chase at Sea*, MIAMI HERALD, July 9, 2006, at B1. The initial news reports of this incident described all of the passengers in the boat as “migrants.” Two of the men on board were smugglers living in south Florida and a third man who embarked the smuggling vessel in Cuba was assisting the two Florida-based smugglers. See *infra* note 4.

<sup>3</sup> The Secretary of the Department of Homeland Security may grant parole to an individual present in the United States who is ineligible to enter the United States lawfully in cases of emergency or in furtherance of humanitarian or public interests. See 8 U.S.C. § 1182(d)(5)(A) (2006), 8 C.F.R. § 212.5 (LexisNexis 2010) (parole), 8 C.F.R. § 245 (LexisNexis 2010) (lawful permanent resident); see also Ortega-Cervantes v. Gonzales, 501 F.3d 1111, 1114 (9th Cir. 2007) (discussing various types of parole under U.S. immigration law); see generally Major Kenneth Basco, *Don’t Worry, We’ll Take Care of You: Immigration of Local Nationals Assisting the United States in Overseas Contingency Operations*, ARMY LAW., Oct., 2009, at 38, 42-43 (providing a short summary of humanitarian and public benefit parole procedures under U.S. immigration law).

<sup>4</sup> Cammy Clark, *The Keys: Cuban Migrant Convicted of Migrant-Smuggling Conspiracy*, MIAMI HERALD, Oct. 13, 2006, at B1 (noting that the two smugglers who were living in south Florida previously pled guilty to all charges arising from the smuggling conspiracy and a jury convicted the third man, a Cuban national who assisted the Florida-based smugglers, of migrant smuggling charges but acquitted him of charges related to his role in causing the death of Ms. Gonzalez).

<sup>5</sup> See Kennedy & Gresko, *supra* note 2 (noting that Ms. Gonzalez suffered a head injury when the smugglers attempted to speed away from the Coast Guard law enforcement vessel, lost consciousness while the Coast Guard

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provided medical attention after stopping the smuggling boat, and was pronounced dead at 8:34 a.m. local time).

<sup>6</sup> See Kelli Kennedy, *Autopsy: Cuban Died of Head Injuries*, ORLANDO SENTINEL, July 10, 2006, at B7 (quoting Monroe County (Florida) Chief Medical Examiner who determined that Ms. Gonzalez died of blunt-force head trauma consistent with her head striking surfaces in the smuggling boat). The autopsy also revealed blunt force trauma to Ms. Gonzalez’s arms, legs, and back all sustained from her violent tossing about in the smuggling boat as it attempted to outrun law enforcement. Captain P. Heyl, the U.S. Coast Guard Commanding Officer of Sector Key West, noted that “there was no way for these people [the smuggled migrants] to brace themselves against the impact of the boat slamming into the rough seas.” *Id.*; see also Kennedy & Gresko, *supra* note 2 (reporting from Coast Guard sources that the smuggling boat ignored orders to stop and attempted to ram the Coast Guard law enforcement vessel and that the seas during the interdiction were rough and choppy).

<sup>7</sup> See Ovalle, *supra* note 2.

<sup>8</sup> See, e.g., U.S. DEP’T OF TRANSP., U.S. COAST GUARD OFFICE, COMMANDANT PUB. P16754.22, RECREATIONAL BOATING STATISTICS—2008 (Aug. 9, 2009) (noting in an annual compilation of data relating to reported recreational boating accidents that of 2626 reported accidents, 774 incidents were the direct result of careless or reckless vessel operation or excessive vessel speed and that reckless or high speed vessel operation was the cause of 61 deaths and 658 significant injuries).

<sup>9</sup> See Ovalle, *supra* note 2. Alex Acosta, U.S. Attorney for the Southern District of Florida, stated, “[S]mugglers often treat migrants as if they’re human cargo without regard for life or human safety,” and Alfredo Mesa, director of the Cuban American National Foundation stated, “[L]et’s not lose sight that the ones responsible [for Ms. Gonzalez’s death] are the smugglers . . . . [T]hey’re the ones putting lives at risk.” *Id.*; see also Alfonso Chardy, *Cuban Migrants: Families Despair for 40 Lost at Sea*, MIAMI HERALD, Jan. 14, 2008, at A1 (noting that Coast Guard statistics estimate that at least 220 Cuban migrants had died at sea in smuggling ventures since January 1, 2001).

<sup>10</sup> See *supra* note 1.

Because space is limited on the typical go-fast boat, smugglers cram as many passengers as possible into every available space to maximize profits.<sup>11</sup> Smugglers ignore basic vessel and passenger safety, preferring to fill space normally occupied by safety gear with additional bodies at \$8,000 to \$10,000 per person for every trip.<sup>12</sup>

Always on alert to the presence of the Coast Guard, Customs and Border Protection, and other law enforcement agencies in the Florida Straights, smugglers place a premium on vessel speed. Often, smugglers outfit go-fast vessels with as many as five 250-horsepower outboard engines to increase their speed and shorten travel times.<sup>13</sup> A vessel capable of forty to sixty knots or more can make short work of the trip from Cuba to the Florida Keys and vastly increases the likelihood of a successful smuggling operation.<sup>14</sup> However, the combination of passenger overcrowding and highly overpowered vessels is inherently dangerous and often deadly.

Unfortunately, tragic deaths, like Ms. Gonzalez's, are not uncommon among migrants.<sup>15</sup> Every year, thousands of

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<sup>11</sup> See Clark, *supra* note 4 (noting that in the smuggling venture in which Ms. Gonzalez died, thirty-one people were crammed into a boat designed for a maximum of nine passengers); Ovalle, *supra* note 2 (noting that a video obtained by the Coast Guard after it stopped the boat on which Ms. Gonzalez was killed showed migrants "squeezed in to the point where they could barely do anything but stand in place").

<sup>12</sup> See *Hearing of H. Judiciary Subcomm. on Crime, Terrorism, and Homeland Security on Department of Homeland Security Law Enforcement Operations*, 111th Cong. (2008) (statement of Rear Admiral Wayne Justice, Assistant Commandant for Capabilities) [hereinafter RADM Justice Statement] (copy of written testimony on file with author).

<sup>13</sup> *Id.*

<sup>14</sup> Admiral Justice testified,

Go-fast smuggling vessels have replaced rafts and rusticas as the preferred mode of transportation due to their increased probability of success. We [the Coast Guard] estimate that the rate of success for a raft or rustica is never better than 50 percent and generally 25 percent or lower. By comparison, the rate of success for a go-fast vessel operated by a smuggling organization is estimated at 70 percent.

*Id.*; see also Kennedy & Gresko, *supra* note 2 (quoting Coast Guard spokesperson confirming that an overpowered go-fast vessel can make the trip from Cuba to south Florida in approximately two hours).

<sup>15</sup> See, e.g., Jacqueline Charles, *At Least 9 Haitian Migrants Dead, 79 Missing Off Turks and Caicos*, MIAMI HERALD, July 28, 2009 (reporting the death of nearly 100 Haitian migrants and the rescue of 113 migrants by the Coast Guard when a heavily overloaded "sail freighter" type smuggling vessel capsized); Andres Vignucci, *Migrant Smuggling Case: 7 From South Florida Face Alien-Smuggling Charges*, MIAMI HERALD, Sept. 30, 2008, at B3 (reporting initial charges against seven suspected migrant smugglers working in south Florida who used an overloaded go-fast and two decoy and support boats to transport thirty-two migrants; one of the migrants died after he sustained a serious head wound when the smuggling boat fled a U.S. Customs and Border Protection vessel); *Smuggling Prosecutions*, MIAMI HERALD, Apr. 13, 2008 (summary report of updates to prosecutions in seven cases in which maritime smugglers were charged with responsibility for the deaths of migrants, including one case involving a six-year-old boy who drowned beneath a go-fast boat when the overloaded vessel capsized). The risks to maritime migrants and high death toll in this

migrants put their lives in the hands of smugglers who operate in well-organized criminal syndicates with virtual impunity under existing law.<sup>16</sup> Serious injuries and deaths are reported in large numbers every year, yet the majority of smuggling operations either successfully evade detection or conclude with a dangerous chase that results in no significant injuries despite the inherent risks.<sup>17</sup> A maritime smuggling trip is essentially a roll of the dice. Most often, the smugglers and migrants win; the migrants arrive safely in the United States and the smugglers turn a huge profit. However, when the dice roll against the smugglers, people like Ms. Gonzalez can wind up dead in this gamble.

Under current law, 8 U.S.C. § 1324, maritime migrant smugglers rarely face more than an eighteen-month sentence when smuggling does not result in death or serious physical injury to any passenger.<sup>18</sup> As a result, migrant smugglers typically continue operating until they kill or seriously injure a migrant and face a significant jail sentence. What little deterrent the current law provides is seldom enough to

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trade is not limited to the Caribbean. The European Union confronts a similar maritime migration and smuggling challenge. See Andrea Fischer-Lescano, Tillmann Lohr & Timo Tohidipur, *Border Controls at Sea: Requirements Under International Human Rights And Refugee Law*, 21 INT'L J. REFUGEE L. 256 (2009) (noting that data from the International Centre on Migration Policy Development suggests that between 100,000 and 120,000 migrants from Africa, Asia, and the Middle East attempt to migrate illegally to Europe via maritime routes annually and that approximately 10,000 persons have drowned en route in the last decade).

<sup>16</sup> See Office of Law Enforcement, *Coast Guard Migrant Interdictions—Fiscal Year 1982–Present*, U.S. COAST GUARD, <http://www.uscg.mil/hq/cg5/cg531/amio.asp#Statistics> (follow "Coast Guard Migrant Interdictions—Fiscal Year 1982–Present" hyperlink) (last visited May 15, 2010); see also RADM Justice Statement, *supra* note 12. Admiral Justice testified,

Since 1980, the Coast Guard has interdicted over 350,000 illegal migrants at sea, including around 180,000 Cuban and Haitian migrants during mass migrations in 1980 and 1994. The normal flow of illegal migrants can change dramatically from one year to the next, dependent upon a variety of push and pull socio-economic and political factors related to individual countries. For example, between 2005 and 2007 the number of illegal migrants departing Cuba increased to levels not experienced in a decade, averaging almost 6,800 migrants per year.

*Id.*

<sup>17</sup> *Id.* (noting that go-fast migrant smugglers presently enjoy a success rate of approximately seventy percent).

<sup>18</sup> The U.S. Sentencing Guidelines for a garden-variety migrant smuggling case that a prosecutor charges under 8 U.S.C. § 1324 provide a base offense level of 12—a coded value that the court uses to determine the recommended sentence range. 8 U.S.C. § 1324 (2006). With no prior convictions and no aggravating or mitigation factors included in the calculation the guidelines suggest a sentence range of only ten to sixteen months. See Sentencing Guidelines for United States Courts, 75 Fed. Reg. 3525 (Jan. 21, 2010); U.S.S.G. § 2L1.1 (2010) (Smuggling, Transporting, or Harboring an Unlawful Alien); see also Telephone Interview with Lieutenant Commander Thomas "Russ" Brown, Executive Officer, U.S. Coast Guard Law Enforcement Acad. (formerly Special Assistant U.S. Attorney for the S. Dist. of Miami) (May 15, 2010) [hereinafter Brown Interview].

prevent smugglers from plying their illegal trade when the profits from even a single smuggling venture can offer a massive payday.<sup>19</sup> Thus, the legal toolkit federal prosecutors must work with is missing a critical component. What prosecutors need is a law that properly recognizes the inherent danger and criminality of maritime migrant smuggling and that offers penalties that can effectively deter and properly punish the crime.<sup>20</sup>

Congress has recognized the need for new legislation on this issue, but has failed to provide a viable solution.<sup>21</sup> In proposed revisions and amendments to the existing smuggling law, Congress specifically found that “[e]xisting penalties for alien smuggling are insufficient to provide appropriate punishment for alien smugglers” and “[e]xisting alien smuggling laws often fail to reach the conduct of alien smugglers, transporters, recruiters, guides, and boat captains . . . .”<sup>22</sup> However, Congress has yet to adopt a suitable response.

The Coast Guard, with support from the Department of Justice, has proposed a Maritime Alien Smuggling Law Enforcement Act (MASLEA) as a solution to this gap in existing law.<sup>23</sup> The MASLEA proposal involves a two-pronged approach to closing the gap. First, the proposal recommends adopting a new offense making the unique crime of maritime migrant smuggling punishable by a minimum three-year sentence in routine cases involving no significant aggravating facts and by higher penalties in cases involving aggravating circumstances. Second, the proposed MASLEA would include enhanced sentences under 18 U.S.C. § 2237, an existing law that carries a penalty of up to five years for vessel operators that knowingly fail to obey Coast Guard or other law enforcement orders to stop a vessel.<sup>24</sup>

<sup>19</sup> See Chardy, *supra* note 9 (noting that a suspected smuggler in a case where forty migrants drowned when an overcrowded vessel capsized en route to Florida stood to gain \$400,000 from the single smuggling trip); Brown Interview, *supra* note 17 (noting the migrant smugglers consider the possibility of eventually spending twelve to eighteen months in jail as a cost of doing business).

<sup>20</sup> See Brown Interview, *supra* note 18 (suggesting that sentences of three years for routine migrant smuggling cases are needed to provide an effective deterrent to prevent the rise of smuggling networks in south Florida).

<sup>21</sup> *Id.* Although Congress has recognized the need for a new law to combat maritime alien smuggling, the proposed changes to 8 U.S.C. § 1324 set forth in H.R. 1029 would significantly hamper prosecutions of maritime migrant smugglers and have an effect opposite to that which Congress intended in its expressed findings. See *infra* Part V.A.4.

<sup>22</sup> H.R. 1029, 111th Cong. § 2 (2009).

<sup>23</sup> The text of the Coast Guard’s MASLEA proposal is provided in the Appendix.

<sup>24</sup> 18 U.S.C. § 2237 (2006). At present, this law has no enhanced sentencing provisions in cases where a vessel operator’s failure to stop a vessel causes death or serious injuries, places the lives of passengers at risk, or facilitates the commission of other crimes. In most cases where violations of 18 U.S.C. § 2237 are the only charged offenses, sentences range from three to twelve months. See Brown Interview, *supra* note 18.

This article will explore the merits of the MASLEA proposal and will make the case that enacting the MASLEA is necessary to adequately respond to the threat that maritime migrant smuggling presents to the United States, to fulfill obligations under international law to effectively combat this crime, and to protect the lives and safety of maritime migrants, who will take to the sea regardless of how open or restrictive United States immigration policy may be.

## II. The Migrant Smuggling Threat

### A. The United States and Immigration—A Reversible Welcome Mat

The United States has struggled with its immigrant identity almost from the founding of the Republic.<sup>25</sup> In 1794, George Washington wrote to John Adams on the potential advantages of immigration noting in one passage that “by an intermixture with our people, [immigrants], or their descendants, get assimilated to our customs, measures and laws: in a word, soon become one people.”<sup>26</sup> However, in the same letter Washington cautioned that immigration to the new nation should be limited “except of useful Mechanics and some particular descriptions of men or professions.”<sup>27</sup> Thus, Washington summarized an underlying angst in U.S. immigration policy that has lingered for more than two centuries. Our nation embraces those who seek the freedom and opportunity that America offers—but the enthusiasm of that embrace will vary depending on the political landscape for those who are not “useful Mechanic[s]”<sup>28</sup> or professionals who brings more to the table than a mere desire to “breathe free.”<sup>29</sup>

<sup>25</sup> See Ryan Frei, Comment, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accommodating the Inevitable*, 39 U. RICH. L. REV. 1355, 1359–72 (2005) (summarizing various closed-door and open-door periods of U.S. immigration policy from the 1800s through the present).

<sup>26</sup> Letter from George Washington to John Adams (Nov. 15, 1794), reprinted in 34 THE WRITINGS OF GEORGE WASHINGTON, 1745–1799, at 78 (John C. Fitzpatrick ed., University of Virginia 1931–1944), available at <http://etext.virginia.edu/etcbin/toccer-new2?id=WasFi34.xml&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=13&division=div1> (last visited May 15, 2010) [hereinafter Washington Letter].

<sup>27</sup> *Id.*

<sup>28</sup> James Madison articulated a view similar to Washington’s in a 3 February 1790 address to Congress:

[w]hen we are considering the advantages that may result from an easy mode of naturalization, we ought also to consider the cautions necessary to guard against abuse. It is no doubt very desirable that we should hold out as many inducements as possible for the worthy part of mankind to come and settle amongst us, and throw their fortunes into a common lot with ours. But why is this desirable? Not merely to swell the catalogue of people. No, sir, it is to increase the wealth and strength of the community; and those who acquire the rights of citizenship,

The gate of U.S. immigration policy may swing wide or slam shut in response to the political winds of the day, but regardless of how open or restrictive immigration policy may be, migrants continue to embark for the land of opportunity in astonishing numbers by means legal and illegal.<sup>30</sup> Every year, thousands of migrants seek to enter the United States illegally by maritime means.<sup>31</sup> An increasing percentage of those migrants arrive on vessels operated by sophisticated migrant smuggling networks.<sup>32</sup>

## B. Smuggled Migrants—By The Numbers

The Coast Guard characterizes illegal migration via maritime routes as either “routine” (i.e., regular and predictable) or “mass” migration.<sup>33</sup> Routine illegal maritime migration typically involves relatively small numbers of migrants, usually a group of up to two-hundred persons on a

vessel lead by a smuggler or group of smugglers, or a migrant group that has collectively taken to the sea without a smuggler.<sup>34</sup> In contrast, mass migrations involve much larger groups of migrants and are events of national (or global) significance, such as the “Mariel Boatlift” that occurred between April and September 1980 and involved more than 120,000 Cuban nationals who fled Cuba for the United States in makeshift crafts and smuggling vessels.<sup>35</sup> Even in periods of “routine” maritime migration, the Coast Guard interdicts a significant number of migrants. Between fiscal years 1984 and 2009, the Coast Guard interdicted over 230,000 migrants attempting to illegally enter the United States from all over the world, although the vast majority traveled the major Caribbean smuggling routes (see Figure 1).<sup>36</sup> As shown in Figure 2, between 2003 and 2008, the Coast Guard interdicted more than 40,000 migrants from the primary Caribbean threat area for illegal maritime migration in the vicinity of Cuba, the Dominican Republic, and Haiti.<sup>37</sup>

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without adding to the strength or wealth of the community are not the people we are in want of.

*A Brief History of American Response to Immigration*, IMMIGRATION NEWS DAILY, [http://idexer.com/articles/immigration\\_response.htm](http://idexer.com/articles/immigration_response.htm) (last visited May 15, 2010) [hereinafter *Madison Address*] (quoting Madison’s address).

<sup>29</sup> EMMA LAZARUS, *THE NEW COLOSSUS* (1883), reprinted in EMMA LAZARUS: *SELECTED POEMS* (AMERICAN POETS PROJECT) 58 (John Hollander ed., Literary Classics of the U.S., Inc. 2003). Lazarus’s sonnet appears on a plaque inside the pedestal of the Statue of Liberty.

<sup>30</sup> See DHS Office of Immigration Statistics, *Annual Report: Immigration Enforcement Actions—2008*, at 1, [http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement\\_ar\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf) (August 2010) (last visited August 24, 2010). In its 2009 annual report, the Department of Homeland Security confirmed that DHS components apprehended nearly 613,000 foreign nationals attempting to enter the U.S. illegally during fiscal year 2009.

<sup>31</sup> *Id.*; see also Office of Law Enforcement, *Alien Migrant Interdiction Statistics*, U.S. COAST GUARD, <http://www.uscg.mil/hq/cg5/cg531/AMIO/FlowStats/FY.asp> (2009) (last visited May 15, 2010) [hereinafter *Alien Migrant Interdiction Statistics*] (providing detailed statistics of interdictions of undocumented aliens attempting to enter the United States from 1982 to present).

<sup>32</sup> See RADM Justice Statement, *supra* note 12 (noting that migrants are increasingly employing the services of migrant smugglers operating go-fast vessels).

<sup>33</sup> See Office of Law Enforcement, *Alien Migrant Interdiction*, U.S. COAST GUARD, <http://www.uscg.mil/hq/cg5/cg531/amio.asp> (last visited May 15, 2010) [hereinafter *Alien Migrant Interdiction*] (describing mass migration events and routine Coast Guard alien maritime interdiction operations (AMIO)).

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<sup>34</sup> *Id.*

<sup>35</sup> See *id.* (describing Mariel Boatlift between 21 April and 28 September 1980, when the Cuban Government permitted any person who wanted to leave Cuba access to passage from the port of Mariel). During the period of the Mariel Boatlift, approximately 124,000 undocumented Cuban migrants entered the United States. Most of the migrants arrived on vessels registered in Florida. *Id.*; see also Alberto Perez, Comment, *Wet Foot, Dry Foot, No Foot: The Recurring Controversy Between Cubans, Haitians, and the United States Immigration Policy*, 28 NOVA L. REV. 437, 443 (2005) (discussing mass migration of Cuban nationals to south Florida during the Mariel Boatlift).

<sup>36</sup> See *Alien Migrant Interdiction Statistics*, *supra* note 30. These figures include all nationalities of migrants and include migrants interdicted on vessels operated by smugglers or by migrants traveling without suspected smugglers on board.

<sup>37</sup> See *id.*; see also RADM Justice Statement, *supra* note 12. In calendar year 2009, the Coast Guard reported a sharp decline in the number of maritime migrants interdicted in the primary Caribbean threat vector. The Coast Guard attributes this reduction in maritime migration, in substantial part, to the decline in the U.S. economy and the emergence of the Yucatan peninsula as a new threat vector for illegal Cuban migration to the United States. With increasing frequency, maritime smugglers transport Cuban migrants to Mexico via the Yucatan Strait. Once migrants have landed in the Yucatan, other smugglers transport the migrants overland to the U.S. border with Mexico. This has become an attractive route for maritime smugglers because the Coast Guard conducts fewer patrols in this area. Telephone Interview with Commander Tim Connors, Chief, Operations Law Group, U.S. Coast Guard Headquarters, Mar. 3, 2010 [hereinafter *Connors Interview*].

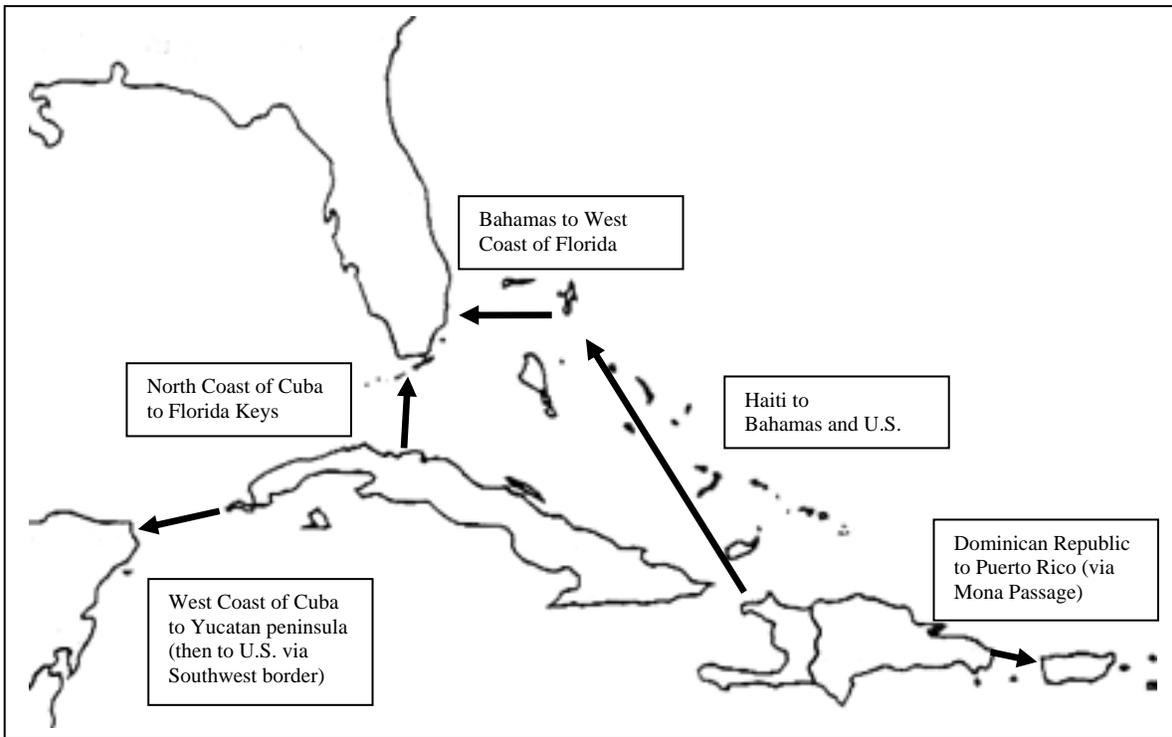


Fig. 1. Major Caribbean Migrant Smuggling Routes

<i>Year</i>	<i>2003</i>	<i>2004</i>	<i>2005</i>	<i>2006</i>	<i>2007</i>	<i>2008</i>
<b>Haiti</b>	2013	3229	1850	1198	1610	1582
<b>Cuba</b>	1555	1225	2712	2810	2868	2199
<b>Dominican Republic</b>	1748	5014	3612	3011	1469	688 <sup>38</sup>

Fig. 2. Coast Guard Maritime Alien Interdictions, 2003–2008

<sup>38</sup> The sharp drop in interdictions of migrants from the Dominican Republic en route to Puerto Rico in 2007–2008 is largely the result of the at-sea biometrics program the U.S. Coast Guard implemented in close cooperation with other Department of Homeland Security components in Puerto Rico and the U.S. Attorney’s Office for the District of Puerto Rico. *See infra* Part VI.B.

### C. Smuggling Migrants—It’s Just Good [Criminal] Business

Migrant smuggling is tailor-made for organized crime. The business of trafficking migrants to the United States offers advantages of low capital investment—the cost of a small boat and several high-horsepower outboard engines are the most significant start-up expenses—and massive potential profits. Compared with narcotics trafficking, the smuggled product—human beings—requires no cultivation, processing, or packaging, and generally transports itself to the embarkation point at its own cost. Most importantly, the legal consequences of being caught “red-handed” in a migrant smuggling venture are insignificant when compared with the penalties for smuggling drugs.<sup>39</sup> With the potential for huge financial gains, a relatively low-risk of apprehension, and a “worst case” penalty of months—not years—in jail if caught smuggling migrants where no serious injury or death is involved, existing law provides virtually no deterrent to organized migrant smuggling. Like the anti-heroes in the popular Scorsese film based on the life of mobster Henry Hill, the average migrant smuggler can “take a pinch” and do the time without complaint.<sup>40</sup>

### III. Obligations to Combat Migrant Smuggling Under International Law

#### A. Border Control Authority Under Customary International Law and the United Nations Convention on the Law of the Sea

The authority to regulate the entry of persons is a fundamental tenet of state sovereignty under international law.<sup>41</sup> A coastal state enjoys sovereignty over the area of its

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<sup>39</sup> As noted above, the sentence range under applicable U.S. Sentencing Guidelines for a migrant smuggling charge with no aggravating factors is ten to sixteen months. See *supra* note 18. Conversely, in a case involving the possession or transportation of a distribution quantity of cocaine or other drug contraband in violation of the Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70501–70507, the U.S. Sentencing Guidelines provide a base offense level of between thirty to thirty-five. Defendants with no prior conviction history typically receive sentences of ten years in prison (for defendants who plead guilty and cooperate in ongoing investigations) or up to twenty years (for defendants who receive no reduction in sentence in exchange for cooperation). See U.S.S.G. § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy); see also Connors Interview, *supra* note 37.

<sup>40</sup> GOODFELLAS (Warner Bros. Pictures 1990).

<sup>41</sup> See generally U.S. COAST GUARD MARITIME LAW ENFORCEMENT MANUAL, COMDINST M16247, series, § 6.B.1 (2008) (discussing customary international law regarding traditional rules of territorial sovereignty of states) [hereinafter MLEM]; see also *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (upholding constitutionality of Chinese Exclusion Act of 1882 and noting that Congress should be unlimited in its power to control immigration), *Frei*, *supra* note 24, at 1363–66 (discussing *Wong Wing* decision and history of Supreme Court deference to Congress on matters of immigration policy).

territorial sea under customary international law and various international conventions including the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (the 1958 TTS Convention) and the 1982 U.N. Convention on the Law of the Sea (UNCLOS).<sup>42</sup> Under customary international law and UNCLOS, coastal states may claim a territorial sea extending beyond the state’s land territory and internal waters to an area of sea adjacent to its coastline up to a limit of twelve nautical miles measured from the baseline (coastline) of the state.<sup>43</sup> In addition, customary international law and applicable conventions provide that a coastal state may exercise control within its “contiguous zone” necessary to prevent infringement of its customs, fiscal, immigration or sanitary regulations and punish infringements of those regulations.<sup>44</sup> The contiguous zone is an area of the high seas beyond a coastal state’s territorial sea that extends up to twenty-four nautical miles from the baseline of the coastal state.<sup>45</sup>

Thus, concepts of territorial sovereignty, immigration, and border control are woven into the tapestry of the international law of the sea. The high seas may be the last great global commons,<sup>46</sup> but within twenty-four nautical miles from the coast, coastal states exercise immigration and border control with nearly the same authority and sovereignty as they do at their land borders.

#### B. United Nations Convention Against Transnational Organized Crime

In 2001, the international community adopted the U.N. Convention Against Transnational Organized Crime (TOC Convention) “to promote cooperation to prevent and combat transnational organized crime more effectively.”<sup>47</sup> The United States and key Caribbean states are parties to the TOC Convention.<sup>48</sup> The TOC Convention obliges its parties

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<sup>42</sup> See Convention on the Territorial Sea and Contiguous Zone art. 1, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205 [hereinafter 1958 TTS Convention]; United Nations Convention on the Law of the Sea art. 2, Dec. 10, 1982, 21 I.L.M. 1245 [hereinafter UNCLOS].

<sup>43</sup> UNCLOS, *supra* note 42, art. 3. The United States is not a party to UNCLOS, but has always considered the navigation and overflight provisions of UNCLOS to reflect binding customary international law. See generally President Ronald Reagan Statement on Oceans Policy, 1983 PUB. PAPERS 378–79 (Mar. 10, 1983).

<sup>44</sup> 1958 TTS Convention, *supra* note 42, art. 24; UNCLOS, *supra* note 42, art. 33.

<sup>45</sup> *Id.*

<sup>46</sup> See JAMES T. CONWAY ET AL., A COMPREHENSIVE STRATEGY FOR 21ST CENTURY SEAPOWERS 14 (Oct. 2007), available at <http://www.navy.mil/maritime/ MaritimeStrategy.pdf>.

<sup>47</sup> U.N. Convention Against Transnational Organized Crime art. 1, Jan. 8, 2001, U.N. GAOR, 55th sess., Supp. No. 49, U.N. Doc. A/45/49 [hereinafter TOC Convention].

<sup>48</sup> See Status of TOC Convention, U.N. TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en) (last visited May 15, 2010) (noting that

to enact legislation to establish specific criminal offenses to combat organized crime, money laundering, and corruption. The TOC Convention further requires parties to cooperate with each other to investigate and prosecute international organized crime, seize assets connected to such criminal activity, extradite suspects to appropriate jurisdictions, and otherwise lend mutual legal assistance to other parties to combat organized crime on an international scale.<sup>49</sup> Notably for purposes of the discussion of migrant smuggling, the TOC Convention defines a “serious crime” as an “offense punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.”<sup>50</sup>

### C. The Palermo Protocols to the TOC Convention

The TOC Convention lays the groundwork for the United States’ obligation under international law to combat migrant smuggling. The 2000 Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the U.N. Convention Against Transnational Organized Crime (the Smuggling Protocol) and the 2000 Protocol to Suppress and Punish Trafficking in Persons, Especially Women and Children (the Trafficking Protocol)—collectively referred to as the “Palermo Protocols”—establish the specific obligations of the parties to combat maritime migrant smuggling.<sup>51</sup> The United States and most Caribbean states are parties to the Palermo Protocols.<sup>52</sup>

The Smuggling Protocol established that “action to prevent and combat the smuggling of migrants . . . requires a comprehensive international approach” and noted that “the significant increase in the activities of organized criminal

groups in smuggling of migrants . . . bring[s] great harm to the States concerned . . . [and] endanger[s] the lives or security of migrants involved.”<sup>53</sup> Article 6 of the Smuggling Protocol provides that each party to the Protocol shall adopt legislative and other measures necessary to establish criminal offenses for migrant smuggling, attempted migrant smuggling, and the organization of smuggling ventures.<sup>54</sup> Article 8 of the Smuggling Protocol requires that Parties to the Convention cooperate with each other in combating maritime migrant smuggling by, *inter alia*, authorizing the boarding, search, and inspection of vessels flying the flag of one party that another party reasonably suspects is engaged in the smuggling of migrants by sea.<sup>55</sup>

Similarly, the Trafficking Protocol established the need for international cooperation to combat the organized trafficking of persons. The purpose of the Protocol is to prevent such trafficking and protect the victims of that criminal trade.<sup>56</sup> The Trafficking Protocol defines trafficking as the use of force, coercion, abduction, fraud, or similar means for the purposes of exploiting the persons being trafficked.<sup>57</sup> The parties to the Trafficking Protocol are obliged to enact specific legislation to establish criminal offenses for human trafficking.<sup>58</sup> Although the Trafficking Protocol does not contain specific provisions dealing directly with maritime human trafficking, the Protocol obliges parties to strengthen border control measures to detect and deter human trafficking.<sup>59</sup>

Thus, under the TOC Convention and the Palermo Protocols, the United States undertook an obligation to combat migrant smuggling and human trafficking and the organizations that sponsor this widespread criminal activity. The United States is certainly in compliance with the letter of those obligations through the various immigration and smuggling offenses set forth in title 8 of the U.S. Code, more fully discussed below. However, the obligation under the TOC Convention and Palermo Protocols to criminalize smuggling and trafficking is utterly meaningless if the parties enact legislation that is ineffective and inadequate to effectively punish and deter smuggling and trafficking. The fundamental tenet of the Palermo Protocols is the protection of migrants and victims of trafficking, their humane treatment, and the effective investigation and prosecution of smugglers and traffickers under laws that adequately reflect the seriousness of the offenses. The delivery of meaningful consequences to traffickers and smugglers is a lynchpin in

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United States, Bahamas, Cuba, Dominican Republic, and Mexico have all ratified TOC Convention and that Haiti has signed the convention with ratification pending).

<sup>49</sup> See TOC Convention, *supra* note 47, arts. 5–18.

<sup>50</sup> See *id.* art. 2.

<sup>51</sup> Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, A/55/383 [hereinafter Smuggling Protocol]; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime, G.A. Res. 25, Annex II, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/45/49 (vol. I) (2001) [hereinafter Trafficking Protocol]

<sup>52</sup> See U.N. Office on Drugs and Crime Country List for Migrant Smuggling Protocol, <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-migrantsmugglingprotocol.html> (last visited May 15, 2010) (confirming that the United States, Bahamas, Cuba, Dominican Republic, and Mexico have all ratified TOC Convention and that Haiti has signed the convention with ratification pending); U.N. Office on Drugs and Crime Country List for Trafficking Protocol, <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html> (confirming 124 Parties to the Smuggling Protocol including the United States, Bahamas, Dominican Republic and Mexico and that Haiti has signed the protocol with ratification pending) (last visited May 15, 2010). Notably, Cuba is a Party to the TOC Convention, but not the Smuggling Protocol and Cuba is not a Party to the Trafficking Protocol.

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<sup>53</sup> Smuggling Protocol, *supra* note 51, pmb1.

<sup>54</sup> *Id.* art. 6.

<sup>55</sup> *Id.* art. 8.

<sup>56</sup> Trafficking Protocol, *supra* note 51, pmb1., art. 2.

<sup>57</sup> *Id.* art. 3.

<sup>58</sup> *Id.* art. 5.

<sup>59</sup> *Id.* art. 11.

the overall scheme of the TOC Convention and Palermo Protocols to deter illegal migration and protect the lives of migrants. As long as the United States continues to give federal prosecutors the wrong tool for the job, it will fail to meet the spirit of its obligations under these treaties.

#### D. Obligations and Authorities Under Bilateral Agreements

The Coast Guard is the executive agent for the United States in more than fifty bilateral agreements with other states relating to maritime law enforcement.<sup>60</sup> The majority of these agreements relate to partnerships between the United States and South and Central American countries to suppress maritime drug trafficking through coordinated operations, but several of the agreements relate to migrant smuggling. In particular, the United States has bilateral agreements with the governments of the Bahamas, Haiti and the Dominican Republic that allow the parties to coordinate operations to suppress maritime smuggling, including migrant smuggling, in the Caribbean region.<sup>61</sup>

Because most Caribbean states do not have substantial naval or maritime law enforcement capabilities, these bilateral agreements permit states to maximize the effect and reach of their assets by coordinating their operations with U.S. patrols. Some partner states employ “shipriders”—officers who literally “ride” on a U.S. Coast Guard or other authorized U.S. Government vessel and may authorize the vessel to conduct operations in locations where the shiprider’s state has jurisdiction (i.e., the territorial sea of the shiprider’s state) and to board vessels over which the

shiprider’s state has jurisdiction (i.e., vessels flying the same flag as the shiprider’s state).<sup>62</sup>

The agreements with the Bahamas and Dominican Republic also authorize the United States to conduct operations within the territorial seas of the Bahamas or Dominican Republic to interdict suspected migrant smuggling vessels under certain prescribed conditions.<sup>63</sup> Each agreement also contains streamlined procedures by which each party may obtain the authorization of its partners to board and search suspected smuggling vessels under the flag state authority of the partner state.<sup>64</sup> This reduces the time it takes to obtain the flag state’s authority to stop, board, and search a suspicious vessel from hours (or days) to minutes and vastly increases the capability and efficiency of these states’ maritime law enforcement patrols. These agreements ensure the flag state retains jurisdiction and authority over suspicious vessels<sup>65</sup> while providing an efficient process that allows the flag state to authorize other states to conduct a search.

The United States has invested significant political capital in generating these important bilateral agreements with partner states in the region. As noted above, article 8 of the Smuggling Protocol requires its parties to cooperate in granting permission to stop, board, and search vessels engaged in migrant smuggling. The network of bilateral agreements that the United States has established with its partners in the Caribbean institutionalizes that required cooperation. The goal of this cooperation is, of course, a reduction of criminal activity and an overall increase in the safety of persons at sea. In the end, the effectiveness of each partner nation’s interdiction efforts in the threat area will make little difference if the biggest partner prosecutes the smugglers it interdicts under a law that provides no meaningful deterrent. The lack of an effective deterrent to migrant smuggling under U.S. law is the Achilles’ heel of this entire international crime-fighting effort.

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<sup>60</sup> See U.S. Coast Guard OPLAW Fast Action Reference Materials [hereinafter FARM] (Brad Kieserman & Brian Robinson, eds., 10th ed. 2009) (For Official Use Only manual that includes text of all bilateral agreements relating to U.S. Coast Guard maritime law enforcement and homeland security operations) (copy on file with author); see also U.S. State Dep’t, Office of the Legal Advisor, Treaty Affairs, *Treaties in Force: A List of Treaties of the United States and Other Agreements In Force on January 1, 2010* (January 1, 2010), available at <http://www.state.gov/documents/organization/143863.pdf> (last visited August 24, 2010) [hereinafter *Treaties in Force*] (copy on file with the author).

<sup>61</sup> See Agreement Between the Government of the United States of America and the Government of the Commonwealth of the Bahamas Concerning Cooperation in Maritime Law Enforcement, U.S.-Bah., July 29, 2004, in FARM, *supra* note 60, at 109–115; Agreement Between the United States of America and the Republic of Haiti Concerning Cooperation to Suppress Illicit Maritime Drug Traffic, U.S.-Haiti, Sept. 5, 2002, in FARM, *supra* note 60, at 270–73; Agreement Between the Government of the United States of America and the Government of the Dominican Republic Concerning Cooperation in Maritime Migration Law Enforcement, U.S.-Dom. Rep., May 20, 2003, in FARM, *supra* note 60, at 384–89. Haiti has granted permission for U.S. Coast Guard air and surface assets to enter its territorial sea and airspace above the territorial sea, under certain circumstances, for migrant smuggling operations; however, the United States and Haiti are not parties to a formal bilateral agreement relating specifically to migrant smuggling. *Id.* at 390; see also *Treaties in Force*, *supra* note 60 (listing Bahamas, Haiti, and Dominican Republic bi-lateral agreements in force).

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<sup>62</sup> See generally Brian Robinson, *You Want Authority with That? How I Learned to Stop Worrying and Love Shipriders*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, COAST GUARD J. OF SAFETY & SEC. AT SEA 62 (Summer 2009) (discussing strategic expansion of Coast Guard shiprider programs with partner states in South and Central America, the Caribbean, the Pacific Rim, and West Africa for counter-drug, migrant smuggling, and other maritime law enforcement missions).

<sup>63</sup> Advance notice of the entry into another state’s territorial sea is required, and authority to enter is limited, in most cases to situations where no coastal state law enforcement assets are available to respond. See FARM, *supra* note 60, at 109–15, 384–89.

<sup>64</sup> *Id.* See also UNCLOS, *supra* note 42, art. 92 (“Ships shall sail under the flag of one State only and . . . shall be subject to its exclusive jurisdiction on the high seas.”).

<sup>65</sup> In appropriate cases, a state that has primary jurisdiction over a smuggling case may waive jurisdiction in favor of prosecution in another state that also has jurisdiction over the criminal activity.

E. “In Short, We’re in a Full Partnership with the Cuban Government.”<sup>66</sup>

During the early 1960s, the United States viewed the steady exodus of Cuban intellectuals and professionals from Cuba to Florida as a political victory.<sup>67</sup> As the immigration burden grew and as the Castro government began to “push” individuals it deemed counterrevolutionaries off the island to the United States, it became apparent that the United States needed to bring order to the situation. These events culminated in the passage of the 1966 Cuban Adjustment Act (CAA).<sup>68</sup> Under this law, the Attorney General was given the discretion to grant lawful permanent resident status to any Cuban migrant (or refugee) who remains physically present in the United States for at least one year.<sup>69</sup> In other words, the CAA put Cuban migrants on a fast track to U.S. citizenship—a fast track that remains in place today.

The implications of the CAA’s fast track to citizenship are significant when coupled with the so-called “feet wet, feet dry” policy, which has the practical effect of guaranteeing that Cuban migrants will get on the CAA’s “fast track” as long as they arrive by any means on United States soil. Probably no U.S. immigration policy is more misunderstood or mischaracterized than “feet wet, feet dry.” The most common misperception of the policy is that “feet wet, feet dry” applies only to Cuban migrants.<sup>70</sup> This is simply not the case. The “feet wet, feet dry” policy is really a compilation of opinions from the Department of Justice’s Office of Legal Counsel (OLC), from 1993 to 1996, that collectively concludes that undocumented aliens seeking to reach the United States, but who have not landed physically in the United States, do not have a right to certain immigration proceedings (such as removal proceedings before an immigration judge) under the Immigration and Nationality Act.<sup>71</sup> These opinions suggest that appropriate

<sup>66</sup> THE GODFATHER, PART II (Paramount Pictures 1974) (referring to fictional character Hyman Roth’s description of his planned expansion of casino operations in Havana).

<sup>67</sup> See Roland Estevez, *Modern Application of the Cuban Adjustment Act of 1966 and Helms-Burton: Adding Insult to Injury*, 30 HOFSTRA L. REV. 1273, 1274–76 (2002) (discussing six “stages” of Cuban immigration to the United States following Fidel Castro’s overthrow of the Batista government in 1959).

<sup>68</sup> See Pub. L. No. 89-732, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. § 1255 (2000)).

<sup>69</sup> *Id.*

<sup>70</sup> See, e.g. Perez *supra* note 34, at 445 (describing the feet wet, feet dry policy as a direct response of President Clinton to the Castro government’s facilitation of the Mariel Boatlift and suggesting that the policy applies solely to Cubans); Estevez, *supra* note 67, at 1291 (describing the feet wet, feet dry policy as a device used by the United States against Cubans to “circumvent” the CAA).

<sup>71</sup> See Memorandum from Doris Meissner to all INS officers, subject: Clarification of Eligibility for Permanent Residence Under the Cuban Adjustment Act (Apr. 26, 1999) (clarifying that Cubans, along with their spouses and children, who arrive at a location in the United States other than designated ports of entry, are eligible for parole, as well as eventual adjustment of status to that of permanent resident); see also Memorandum

U.S. authorities (including the Coast Guard) may directly repatriate any persons who have not “landed” physically in the United States, including persons interdicted in U.S. internal waters or territorial sea or persons on board vessels that are moored to a pier but who have not disembarked.<sup>72</sup> When any person affirmatively expresses or manifests any fear of persecution, Department of Homeland Security officers will conduct a preliminary screening to determine whether that fear is credible.<sup>73</sup> In the end, “feet wet, feet dry” is not a policy at all; it is a determination made by the President’s lawyers about how, where, and under what circumstances other immigration policies and laws apply. The courts have consistently held that the application of the “policy” is legally sound.<sup>74</sup>

For many years the United States and Cuba have been engaged in a partnership of sorts relating to joint efforts to combat migrant smuggling in the Florida Straights.<sup>75</sup> This pairing of Cold War adversaries around a shared law enforcement and border control dilemma emphasizes that the crime of maritime migrant smuggling knows little of political boundaries and respects none.<sup>76</sup> In a marriage born of necessity, the Coast Guard and Cuban Border Guard generally cooperate to identify suspected smuggling vessels departing Cuban waters for the Florida Keys<sup>77</sup> and to

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from Walter Dellinger, Assistant Attorney Gen., to Attorney Gen., subject: Immigration Consequences of Undocumented Aliens’ Arrival in United States Territorial Waters (Oct. 13, 1993); Memorandum from Walter Dellinger, Assistant Attorney Gen., to T. Alexander Aleinikoff, Gen. Counsel, Immigration & Naturalization Serv., subject: Whether the Interdiction of Undocumented Aliens Within United States Territorial Waters Constitutes an “Arrest” under Section 287(a)(2) of the Immigration and Nationality Act (Apr. 22, 1994); Memorandum from Richard L. Shiffrin, Deputy Assistant Attorney Gen., to Attorney Gen., subject: Rights of Aliens Found in U.S. Internal Waters (Nov. 21, 1996); see generally MLEM, *supra* note 41, § 6.B.2.b (discussing Office of Legal Counsel Opinions regarding the feet wet, feet dry policy).

<sup>72</sup> *Id.*

<sup>73</sup> See 8 C.F.R. §§ 205.5(b), 253.1(f) (LexisNexis 2010).

<sup>74</sup> See, e.g., Yang v. Maugans, 68 F.3d 1540, 1546–49 (3d Cir. 1995); Zhan v. Slattery, 55 F.3d 732, 754 (2d Cir. 1995) (holding alien attempting to enter the United States by sea does not satisfy the physical presence element until he has landed), *cert. denied*, 116 S. Ct. 1271 (1996) (finding alien was not fully present until he came to the beach); Chen Zou Chai v. Carroll, 48 F.3d 1331, 1343 (4th Cir. 1995) (finding alien did not enter the United States for purposes of application of INA because he was apprehended before he reached the shore).

<sup>75</sup> See Joint Communiqué of the Government of the United States of America and the Government of the Republic of Cuba, Sept. 4, 1994 [hereinafter Migrant Accords].

<sup>76</sup> In virtually every Cuban smuggling case, Florida registered sport vessels illegally enter Cuban territorial sea, beach on remote locations of the north coast of Cuba, embark migrants, and begin the return trip to the Florida keys. Entry into Cuban territorial sea by a U.S. registered vessel is illegal without a permit that the Coast Guard issues upon application. See 33 C.F.R. § 170.215 (LexisNexis 2010).

<sup>77</sup> Connors Interview, *supra* note 37 (confirming that Cuban Border Guard typically alerts U.S. Coast Guard District Seven Headquarters in Miami to last known location and course of suspected migrant smuggling vessels that evade interdiction within Cuban territorial sea).

facilitate the orderly repatriation of Cuban nationals interdicted by the U.S. Coast Guard at sea who have expressed no credible fear of return to Cuba.<sup>78</sup>

A 1994 Joint Communiqué between the Governments of the United States and Cuba, known as the “Migrant Accords,” formalizes this odd-couple relationship.<sup>79</sup> Most notably for purposes of this discussion, the Migrant Accords state,

The United States and the Republic of Cuba recognize their common interest in preventing unsafe departures from Cuba which risk loss of human life. The United States underscores its recent decisions to discourage unsafe voyages.<sup>80</sup> Pursuant to those decisions, migrants rescued at sea attempting to enter the United States will not be permitted to enter the United States, but instead will be taken to safe haven facilities outside the United States.

....

The United States and the Republic of Cuba agreed that the voluntary return of Cuban nationals who arrived in the United States or in safe havens outside the United States on or after August 19, 1994 will continue to be arranged in diplomatic channels.<sup>81</sup>

In 1995, the two governments amended the original Migrant Accords and agreed that, “effective immediately, Cuban migrants intercepted at sea by the United States and attempting to enter the United States will be taken to Cuba.”<sup>82</sup>

The merger of law and policy at the meeting point of the CAA, “feet wet, feet dry” policy, and the Cuban “Migrant Accords” is unique. Unlike any other migrant smuggling (or landing) scenario, when a Cuban migrant lands on U.S. soil

<sup>78</sup> *Id.* (process for routine repatriation of Cuban nationals to Cuba involves communication from Coast Guard to Cuban Border Guard providing identifying information for persons proposed for repatriation and confirmation of acceptance of persons for repatriation from Cuban Boarder Guard to Coast Guard followed by coordination of transfer of persons at mutually agreed location).

<sup>79</sup> Migrant Accords, *supra* note 75; FARM *supra* note 60, at 370–71 (copy on file with author).

<sup>80</sup> Migrant Accords, *supra* note 75. This passage refers to executive orders discussed below.

<sup>81</sup> *Id.*

<sup>82</sup> Joint Statement of the Government of the United States and the Government of the Republic of Cuba Regarding Migrant Accords, May 2, 1995, [hereinafter references to Migrant Accords include this Joint Statement], FARM *supra* note 60, at 370–71 (copy on file with author).

he or she has achieved the equivalent of winning the lottery.<sup>83</sup> Under the CAA, any Cuban who remains physically present in the United States may become a lawful permanent resident in only one year. Once the migrant is “feet dry,” he is entitled to the same due-process protections of the Immigration and Nationality Act as a migrant of any other nationality. However, as a practical matter, once a Cuban migrant is “feet dry,” there is no place the U.S. Government can send the individual because, under the Migrant Accords, the Cuban Government will accept the repatriation of only those Cubans who the United States interdicts “at sea.”

This predicament explains why “feet wet, feet dry” is often misunderstood as a unique U.S. policy that favors Cuban migrants above all others.<sup>84</sup> The common misperception holds that the United States made a conscious decision to create a policy that allows Cubans to remain in the United States as long as they put their toes in our sand. In reality, however, the United States cannot deport or initiate removal proceedings against Cubans once they are “feet dry” because Cuba will not accept them except in extraordinary cases.<sup>85</sup>

This is where the smugglers come in. Smugglers may not be well-versed in the legal and policy underpinnings of the CAA, the Migrant Accords, or the OLC opinions that form the “feet wet, feet dry” policy; however, every smuggler is acutely aware of the practical results of the merger of these policies and laws. With a potential return of \$250,000 to \$500,000 for every smuggling trip, and the relatively minor risk of a year and a half in jail if caught, smugglers willingly roll the dice to smuggle migrants to the United States. The lack of an effective prosecution tool creates a dangerous incentive for smugglers of Cuban migrants to run from law enforcement so that their human cargo can be safely deposited on American beaches, ensuring their own payday. With light sentences as the only

<sup>83</sup> Under the Migrant Accords, the United States also agreed to facilitate the orderly lawful migration of at least 20,000 Cuban nations each year, not including immediate relatives of persons who are already U.S. citizens. *See* Migrant Accords, *supra* note 75. The United States and Cuba further agreed to “work together” to facilitate procedures to implement such legal migration. *Id.* Cubans who wish to immigrate to the United States legally apply for an exit visa from Cuba to enter the United States under this agreement. Because the number of Cuban nationals who seek to immigrate lawfully from Cuba to the United States every year vastly exceeds the 20,000 persons that the United States agreed to accept, the selection process has become known both in popular culture and in official diplomatic channels as the “Cuban lottery” (“Sorteo” in Spanish). *See Cuban Lottery (1998)*, UNITED STATES INTERESTS SECTION, HAVANA, CUBA, [http://havana.usint.gov/diversity\\_program.html](http://havana.usint.gov/diversity_program.html) (last visited May 15, 2010) (providing instructions to applicants for the “Cuban lottery”).

<sup>84</sup> *See, e.g.,* Estevez, *supra* note 67, at 1293–94 (discussing allegations of preferential treatment to Cuban migrants under feet wet, feet dry policy).

<sup>85</sup> The controversial Elian Gonzalez case in the summer of 2000 is the most publicized case in which the Castro government agreed to facilitate the return of a Cuban national who had landed in the United States. *See Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir.), *cert. denied*, 530 U.S. 1270 (2000).

deterrent under current law, there is no incentive for any individual with a faulty moral compass *not* to play this dangerous game.

Two possible courses could change this dynamic. The United States could completely unravel more than forty years of policy, law, and diplomatic agreements with a government that one could charitably describe as “unfriendly.” Alternatively, the United States could simply pass MASLEA as a way to create meaningful consequences for would-be smugglers of Cuban migrants so that the results of apprehension and prosecution make the game much less attractive.

#### IV. Authorities and Obligations Under Domestic Law to Combat Maritime Migrant Smuggling

##### A. Border Control Under Domestic Law

The Immigration and Nationality Act (INA)<sup>86</sup> provides the President with authority to establish immigration policy and controls. Most notably, section 215(a)(1) of the INA, as amended, provides:

###### (a) Restrictions and prohibitions

Unless otherwise ordered by the President, it shall be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.<sup>87</sup>

Section 212(f) of the INA, as amended, further provides:

###### (f) Suspension of entry or imposition of restrictions by President

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.<sup>88</sup>

<sup>86</sup> 8 U.S.C. § 1185(a)(1) (2006).

<sup>87</sup> *Id.* § 1185(a)(1).

<sup>88</sup> *Id.* § 1182(f).

##### B. Evolution of Executive Policy

###### 1. Presidential Proclamation 4865 and Executive Order 12324—Suspending the Entry of Undocumented Aliens

On 29 September 1981, President Reagan issued Proclamation 4865 suspending the entry of undocumented aliens attempting to enter the United States by sea.<sup>89</sup> Proclamation 4865 announced:

The ongoing migration of persons to the United States in violation of our laws is a serious national problem detrimental to the interests of the United States. A particularly difficult aspect of the problem is the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States. These arrivals have severely strained the law enforcement resources of the Immigration and Naturalization Service and have threatened the welfare and safety of communities in that region.

As a result of our discussions with the Governments of affected foreign countries and with agencies of the Executive Branch of our Government, I have determined that new and effective measures to curtail these unlawful arrivals are necessary. In this regard, I have determined that international cooperation to intercept vessels trafficking in illegal migrants is a necessary and proper means of insuring the effective enforcement of our laws.

NOW, THEREFORE, I, RONALD REAGAN . . . in order to protect the sovereignty of the United States, and in accordance with cooperative arrangements with certain foreign governments, and having found that the entry of undocumented aliens, arriving at the borders of the United States from the high seas, is detrimental to the interests of the United States, do proclaim that:

The entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens.<sup>90</sup>

<sup>89</sup> 3 C.F.R. 50–51 (1981–1983 Comp.) (1983), 46 Fed. Reg. 48,107 (LexisNexis 2010).

<sup>90</sup> 3 C.F.R. 50–51 (1981–1983 Comp.) (1983), 46 Fed. Reg. 48107 (LexisNexis 2010).

Simultaneously with Proclamation 4865, President Reagan issued Executive Order (EO) 12324, which directed the Coast Guard to interdict and repatriate migrants attempting to enter the United States illegally.<sup>91</sup> With this stroke, the Executive established a policy of actively pushing the U.S. border out well beyond the coast to deter illegal maritime migration by interdicting migrants and smuggling vessels while they were still in transit on the water.

## 2. Executive Order 12807—Interdict and Repatriate Redux

On 24 May 1992, President Bush issued EO 12807 to provide renewed guidance and direction to the federal agencies charged with enforcing the suspension of entry of undocumented migrants in place since President Reagan issued Proclamation 4865.<sup>92</sup> In EO 12807 President Bush

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<sup>91</sup> 3 C.F.R. § 2(c)(3), at 181 (1981–1983 Comp.) (1983). President Bush’s Executive Order 12,807 in 1992, discussed below, updated and replaced Executive Order 12,324.

<sup>92</sup> Executive Order 12,807 provides, in pertinent part:

(1) The President has authority to suspend the entry of aliens coming by sea to the United

States without necessary documentation, to establish reasonable rule, and regulations regarding, and other limitations on, the entry or attempted entry of aliens into the United States, and to repatriate aliens interdicted beyond the territorial sea of the United States:

....

(3) Proclamation No. 4865 suspends the entry of all undocumented aliens into the United States by the high seas; and

(4) There continues to be a serious problem of persons attempting to come to the United States by sea without necessary documentation and otherwise illegally:

I, GEORGE BUSH, President of the United States of America hereby order as follows:

....

Section 2. The Secretary of the Department in which the Coast Guard is operating in consultation, where appropriate, with the Secretary of Defense, the Attorney General, and the Secretary of State, shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens by sea and the Interdiction of any defined vessel carrying such aliens.

....

(c) Those instructions to the Coast Guard shall include appropriate directives providing for the Coast Guard:

(1) To stop and board defined vessels, when there is reason to believe that such

vessels are engaged in the irregular transportation of persons or violations of

mandated, *inter alia*, that the Coast Guard would be the lead federal agency for interdicting illegal migrant vessels and that it would thenceforth be the policy of the United States to stop illegal migrants beyond the territorial sea of the United States when possible and repatriate migrants to their country of origin, or some third country, whenever appropriate.<sup>93</sup>

## 3. Can He Do That? *Sale v. Haitian Centers Council*

The most significant challenge to Executive policy regarding the suspension of entry of undocumented maritime migrants and repatriation of migrants that the United States interdicts at sea came in *Sale v. Haitian Centers Council*.<sup>94</sup> In *Sale*, the plaintiffs (and petitioners at the appellate level) claimed that the maritime migrants the United States interdicts at sea are entitled to certain rights under the Immigration and Nationality Act (INA) and that the policy of interdicting and repatriation of migrants at sea violated the INA and international law.<sup>95</sup>

In rejecting the petitioner’s claims, the Supreme Court ruled that Article 33 of the U.N. Convention relating to the Status of Refugees (the Refugee Convention) and section 243(h) of the INA do not apply outside the land territory of the United States.<sup>96</sup> Section 243(h)(1) of the INA<sup>97</sup> provides that

[t]he Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular

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United States law or the law of a country with which the United States has an arrangement authorizing such action.

....

(3) To return the vessel and its passengers to the country from which it came, or

to another country . . . provided, however, that the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.

57 Fed. Reg. 23,133 (1992).

<sup>93</sup> *Id.*

<sup>94</sup> 509 U.S. 155 (1993).

<sup>95</sup> *Id.* at 162–64, 166–67.

<sup>96</sup> *Id.* at 172–87.

<sup>97</sup> Amended by 8 U.S.C. § 1158(a).

social group, or political group.<sup>98</sup>

In rejecting the argument that the Refugee Convention applied to Coast Guard interdictions of maritime migrants, the Court held that “a treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.”<sup>99</sup> With respect to the INA, the Court reasoned,

all available evidence about the meaning of § 243(h) of the Immigration and Nationality Act of 1952 . . . leads unerringly to the conclusion that it applies in only one context: the domestic procedures by which the Attorney General determines whether deportable and excludable aliens may remain in the United States.<sup>100</sup>

The Court unequivocally upheld EO 12807<sup>101</sup> and thus confirmed that the United States is not required to screen all undocumented migrants at sea (i.e., while on board Coast Guard vessels) to determine whether they qualify for asylum or other immigration processing.<sup>102</sup> Although the *Sale* decision and Coast Guard migrant interdiction procedures are the subject of some scholarly criticism,<sup>103</sup> the Supreme

Court has clearly ruled that these procedures comply with domestic and international law.<sup>104</sup>

#### 4. Presidential Decision Directive 9 (1993)—*Stop Alien Smuggling and Keep It Out of Our Backyard*

Prompted in part by continued illegal maritime migration in the Caribbean and by significant increases in maritime alien smuggling of migrants from China under particularly dangerous and inhumane conditions,<sup>105</sup> President Bill Clinton issued Presidential Decision Directive 9 (PDD-9) on 18 June 1993.<sup>106</sup> This directive states that the “U.S. government will take the necessary measures to preempt, interdict, and deter alien smuggling into the U.S.,” and that U.S. policy is to “interdict and hold the smuggled aliens *as far as possible from the U.S. border* and to repatriate them when appropriate.”<sup>107</sup> The PDD-9 specifically tasks the Coast Guard to “direct U.S. interdiction efforts at sea with appropriate DOD support if necessary.”<sup>108</sup> The directive

parties obtain that authorization. *See also* Lory Diana Rosenberg, *The Courts and Interception: The United States’ Interdiction Experience and Its Impact on Refugees and Asylum Seekers*, 17 GEO. IMMIGR. L.J. 199, 209–15 (2003) (discussing the historical background of the *Sale* case and the debate over whether *Sale* effectively sanctions U.S. violations of article 33 of the U.N. Refugee Convention).

<sup>104</sup> Although the Supreme Court ruled that the Refugee Convention did not require the United States to provide screening of migrants at sea, as a matter of policy, the Coast Guard, in close cooperation with the U.S. Citizenship and Immigration Service (USCIS), conducts preliminary asylum screening at sea in any case in which an interdicted migrant verbally or physically manifests a credible fear of return to the location of proposed repatriation. In addition, the Coast Guard and USCIS provide asylum screening for all interdicted migrants who are Cuban nationals being repatriated to Cuba. *See* MLEM, *supra* note 41, § 6.D.3–4 (discussing asylum pre-screening procedures coordinated between Coast Guard and USCIS). The Coast Guard conducts all maritime migrant interdictions consistent with human rights standards and the principle of *non-refoulement*. Regardless of a state’s sovereign authority to protect its borders and enforce immigration laws, customary and conventional international law (including the Refugee Convention) affirm the obligation of states not to return (*refouler*) persons to territories where their lives or freedom would be threatened by reason of the person’s race, religion, nationality, political expression or membership in a particular social group. The Coast Guard conducts all maritime migrant interdiction and repatriation operations consistent with these principles. *See id.* § 6.B.1.a–b.

<sup>105</sup> Smugglers of Chinese migrants typically transported their human “cargo” in container ships and often enclosed migrants in sealed containers with little or no food, water, or facilities for sanitation or safety. *See generally* Office of Law Enforcement, *Alien Migrant Interdiction*, U.S. COAST GUARD <http://www.uscg.mil/hq/cg5/cg531/amio.asp> (last visited May 15, 2010) (discussing trends and tactics of various maritime migrant smugglers).

<sup>106</sup> PRESIDENTIAL DECISION DIR. 9 (June 18, 1993), *available at* <http://www.fas.org/irp/offdocs/pdd9.txt>. (last visited May 15, 2010) (portions of PDD-9 are classified so only the unclassified portion of the text is publicly available) [hereinafter PDD-9].

<sup>107</sup> *Id.* (emphasis added). Repatriation “when appropriate” incorporates the concept that USCIS will provide additional asylum screening to any migrant who manifests any credible fear of return to a point of repatriation consistent with the *non-refoulement* obligation.

<sup>108</sup> *Id.*

<sup>98</sup> 8 U.S.C. § 1253(h)(1).

<sup>99</sup> *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 183 (1993).

<sup>100</sup> *Id.* at 177.

<sup>101</sup> Executive Order 12,807 concludes with a statement that “this order [shall not be] construed to require any procedures to determine whether a person is a refugee.”

<sup>102</sup> *Sale*, 509 U.S. at 177–83.

<sup>103</sup> *See* Barbara Miltner, *Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception*, 30 FORDHAM INT’L L. J. 75, 95–97, 106–07 (2006). Professor Miltner’s critique of the *Sale* decision discusses what she characterizes as a majority view of scholars and the Inter-American Commission on Human Rights that article 33 of the U.N. Refugee Convention has no geographic boundaries. The argument confuses the notion that a state’s law enforcement authorities must affirmatively seek out potential asylum seekers whenever and wherever they are encountered outside their state’s land border (a notion that the Supreme Court rejected in *Sale*) with the concept that a state is obliged under the principle of *non-refoulement* to screen a potential asylum-seeker encountered extraterritorially when the individual affirmatively manifests a credible fear of return. Taken to its logical extreme, this argument would require law enforcement authorities to essentially escort illegal migrant smuggling vessels into port to complete the smuggling journey and facilitate immigration processing and asylum screening ashore. Professor Miltner also suggests that international cooperation in interdicting migrant and smuggling vessels through bilateral agreements “effectively dispenses with the concept of exclusive flag state jurisdiction by creating an interception-sharing scheme . . . .” International cooperation in combating smuggling is affirmatively required in the TOC Convention and its Protocols as discussed above. The existence of bilateral agreements to facilitate such cooperation is a clear affirmation—not a dilution—of the concept of exclusive flag state jurisdiction and coastal state authority. Each such agreement clearly prescribes that authorities conducting any interdiction of a suspect vessel bearing the flag of one of the parties or in waters subject to the jurisdiction of another party may only proceed with the authorization of that flag or coastal state. These agreements simply expedite the process by which

further requires the Coast Guard to “board suspect vessels when authorized” and “direct/escort them to flag states or the nearest non-U.S. port if practical and assuming host nation concurrence.”<sup>109</sup> President Clinton directed the Department of Justice to “review criminal and civil authorities and penalties for alien smuggling and recommend alternative prosecution strategies or penalty increases if appropriate.” The directive further tasked the Justice Department to “determine whether U.S. Attorneys should be instructed to prioritize prosecution of alien smuggling cases in light of limited penalties.”

Thus, early in his first term President Clinton built on and expanded the border-pushing policy that President Reagan established in 1981 and that President Bush renewed in 1992.<sup>110</sup> He did so as a direct response to the continued security threat that international criminal organizations presented. Finally, President Clinton forecast in PDD-9 that “we will seek tougher criminal penalties both at home and abroad for alien smugglers.”<sup>111</sup> The PDD-9 clarifies that a two-pronged approach to deterrence is necessary to combat the threat; interdiction and repatriation are not enough, and tougher criminal penalties are needed to deter the criminal conduct. Unfortunately, more than fifteen years later, federal prosecutors still need a purpose-built tool to combat routine maritime migrant smuggling operations in the Caribbean.

### 5. Executive Order 13276

President George W. Bush issued EO 13276 on November 15, 2002.<sup>112</sup> The order directs the Department of Defense to provide support to the Coast Guard in carrying out the duties that EO 12807 described.<sup>113</sup> Executive Order

<sup>109</sup> *Id.*

<sup>110</sup> In *Sale v. Haitian Ctrs. Council*, the Supreme Court described the development of Executive policy as follows:

In the judgment of the President's [George H.W. Bush] advisers, [removing the suspension of entry of undocumented migrants that President Reagan implemented] not only would have defeated the original purpose of the program (controlling illegal immigration), but also would have impeded diplomatic efforts to restore democratic government in Haiti and would have posed a life-threatening danger to thousands of persons embarking on long voyages in dangerous craft [citing reports of hundreds of deaths of Haitian migrants at sea during the 1981 mass migration from Haiti] . . . [o]n May 23, 1992, President Bush adopted the second choice [referring to EO 12807]. After assuming office, President Clinton decided not to modify that order; it remains in effect today.

509 U.S. 157, 163–64 (1993).

<sup>111</sup> See PDD-9, *supra* note 106.

<sup>112</sup> 67 Fed. Reg. 69,985 (Nov. 19, 2002).

<sup>113</sup> *Id.*

13276 also provides authority to maintain interdicted undocumented aliens in extraterritorial detention facilities and allocates responsibilities among the participating agencies, including the Department of Homeland Security, Secretary of State, and Secretary of Defense.<sup>114</sup>

### 6. The Paradigm Shift

The development of Executive policy that commenced with President Reagan's suspension of entry of undocumented migrants and culminated with President Bush's lane-clarifying EO 13276 is a true paradigm shift. Prior to Proclamation 4865 and EO 13234 in 1981, the Government most often apprehended maritime migrants, if at all, after they made landfall. In Proclamation 4865, President Reagan linked illegal maritime migration to national-level threats and organized crime that threatened the welfare and safety of communities where illegal landings were becoming commonplace. Although the Coast Guard had always enjoyed authority to enforce immigration laws in waters and over vessels subject to U.S. jurisdiction, President Reagan specifically charged the Coast Guard in EO 13234 with actively detecting and interdicting illegal maritime migration as part of the service's core maritime law enforcement mission. Every President since has further refined, shaped, and *expanded* that policy.

The unique nature of this Executive policy lies in its association with national, homeland, and community security. The Statue of Liberty may be the “mother of exiles,”<sup>115</sup> but the United States is no stranger to anti-immigration sentiments. Most groups that have objected to an influx of immigrants have typically based their objections on economic and social fears. More than 150 years ago, the fringe Know Nothing party complained that Irish, German, and other European immigrants were taking jobs from “real Americans” and were importing what the party fathers deemed unwanted social traits.<sup>116</sup> Government has also used economics and social policy as cornerstones in decisions to widen or close the immigration door. The Founding Fathers' belief that the new nation should direct immigration inducements to “useful Mechanics” and “the worthy part of mankind”<sup>117</sup> evolved into contemporary immigration

<sup>114</sup> *Id.* Executive Order 13,286 amended Executive Order 13,276 and substituted the Secretary of the Department of Homeland Security for “Attorney General” in section 1. 68 Fed. Reg. 10,619.

<sup>115</sup> See *supra* note 29.

<sup>116</sup> See generally CALETION BEALS, BRASS-KNUCKLE CRUSADE: THE GREAT KNOW-NOTHING CONSPIRACY, 1820–1860 (1960); see also Frei, *supra* note 24, at 1364–65 (noting that congressional floor debates in support of passage of the Chinese Exclusion Act of 1882 contained what most Americans would consider today to be disturbing racist and xenophobic viewpoints).

<sup>117</sup> See Washington Letter, *supra* note 26; Madison Address, *supra* note 28.

requirements in title 8 of the U.S. Code.<sup>118</sup>

Since 1981, the Executive Branch has taken a different tack on the threat that illegal maritime migration presents. Because of the intimate ties between maritime migrant smugglers and larger international smuggling syndicates,<sup>119</sup> and the dangers that maritime migrant smuggling presents to the migrants themselves, Executive policy specifically acknowledges that maritime migrant smuggling is not simply a violation of U.S. immigration laws; it is also a national and homeland security threat that requires the United States to push the nation's border outward and "seek tougher criminal penalties both at home and abroad for alien smugglers."<sup>120</sup> President Clinton's charge to seek tougher penalties for migrant smugglers in PDD-9 is now nearly twenty years old. In that time, maritime migrant smuggling networks have only expanded their operations and refined their tactics—in large part because existing laws prohibiting their conduct have virtually no deterrent effect.

### C. Coast Guard's Law Enforcement and Humanitarian Missions

#### 1. Coast Guard Law Enforcement Authority

The Coast Guard is the nation's premier maritime law enforcement agency empowered by Congress to enforce all U.S. laws in waters and over vessels subject to the jurisdiction of the United States.<sup>121</sup> The Coast Guard's core law enforcement authority is set forth in 14 U.S.C. 89, which provides:

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers,

<sup>118</sup> 8 U.S.C. § 1182 (Section 212 of the INA) sets forth an exhaustive list of classes of aliens not eligible for admission to the United States. Notably, a criminal history in alien smuggling or human trafficking would make an alien ineligible for admission to the United States. *Id.* § 1182(a)(2)(H); 1182(a)(6)(E).

<sup>119</sup> See PDD-9, *supra* note 106.

<sup>120</sup> *Id.*

<sup>121</sup> See U.S. COAST GUARD PUB. 1, AMERICA'S MARITIME GUARDIAN, <http://www.uscg.mil/top/about/pub1.asp> (last visited May 15, 2010); 14 U.S.C. § 2 (2006) (defining the Coast Guard's various missions to include maritime law enforcement).

and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.<sup>122</sup>

#### 2. Search and Rescue Authorities and Obligations

##### a. Customary International Law, UNCLOS, and SOLAS

It is well-settled under customary international law that masters of vessels have an obligation to render assistance to other mariners in distress.<sup>123</sup> Article 12 of the 1958 Geneva Convention on the High Seas and Article 98 of UNCLOS both provide, in pertinent part, that

[e]very State shall require the master of a ship [flying its flag] . . . (a) [t]o render assistance to any person found at sea in danger of being lost; [and] (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance . . . .<sup>124</sup>

Similarly, the 1974 International Convention for the Safety of Life at Sea (SOLAS) provides,

The master of a ship at sea which is in a position to be able to provide assistance on receiving a signal from any source that

<sup>122</sup> 14 U.S.C. § 89 (2006). The origins of the Coast Guard's law enforcement authority date back to the founding of the Revenue Cutter Service in 1798.

<sup>123</sup> See THOMAS & DUNCAN, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 213-14 (1997).

<sup>124</sup> United Nations Convention on the High Seas art. 12, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200; UNCLOS, *supra* note 42, art. 92.

persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so.<sup>125</sup>

This general obligation to render assistance applies throughout the high seas. The mariner's duty to render assistance to persons and vessels in peril even trumps state sovereignty.<sup>126</sup> It is well-settled that entry into another State's territorial sea to conduct a *bona fide* rescue of those in danger or distress at sea when the location of the person or vessel in distress is reasonably well-known is authorized under international law.<sup>127</sup>

*b. Coast Guard Search And Rescue Authority: 14 U.S.C. § 88*

Congress granted the Coast Guard extensive and broad authority to conduct search and rescue operations in 14 U.S.C. 88. The statute provides,

In order to render aid to distressed persons, vessels, and aircraft on and under the high seas and on and under the waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may:

(1) perform any and all acts necessary to rescue and aid persons and protect and save property;

(2) take charge of and protect all property saved from marine or aircraft disasters, or floods, at which the Coast Guard is present, until such property is claimed by persons legally authorized to receive it or until otherwise disposed of in accordance with law or applicable regulations,

(3) furnish clothing, food, lodging, medicines, and other necessary supplies and services to persons succored by the

Coast Guard; and

(4) destroy or tow into port sunken or floating dangers to navigation.<sup>128</sup>

Courts have construed this authority broadly. In *Thames Shipyard and Repair Co. v. United States*,<sup>129</sup> the First Circuit held that the Coast Guard's broad search and rescue authority authorizes Coast Guard personnel to conduct rescue operations even against the will of the persons rescued when lives are threatened.<sup>130</sup>

Accordingly, even absent its inherent law enforcement authority, the Coast Guard may stop and interdict migrant smuggling vessels in most cases under the authority in international and domestic law to affect rescues at sea because of the unsafe and often inhuman conditions of migrant smuggling voyages.

V. Current U.S. Law Prohibiting Maritime Migrant Smuggling Is Inadequate

A. 8 U.S.C. §1324—A Virtual Free Ride for Maritime Smugglers

The TOC Convention, discussed above, defines "serious" offenses as those for which the offender faces four years or more of confinement.<sup>131</sup> At present, the principal federal criminal statute for prosecuting alien smugglers (maritime or otherwise) is 8 U.S.C. § 1324, Bringing In and Harboring Certain Aliens.<sup>132</sup> In virtually all maritime alien

<sup>128</sup> 14 U.S.C. § 88.

<sup>129</sup> 350 F.3d 247 (1st Cir. 2003).

<sup>130</sup> In *Thames Shipyard*, the First Circuit held:

[t]he Coast Guard . . . has been granted by Congress a variety of public safety responsibilities and powers, including, of course, the specific power under discussion to rescue and aid persons and property. In exercising its rescue powers, it construes its own role as giving priority to the saving of lives over the saving of property. . . . In circumstances such as the present, Coast Guard operations are relevantly different from the situation in which a private vessel or a commercial salvor comes to the aid of a distressed vessel. Under the circumstances, we think it reasonable to assume that Congress, in granting the Coast Guard the broad authority to undertake 'any and all acts necessary to rescue and aid persons and protect and save property,' intended to confer powers analogous to those commonly possessed by state public safety officials, namely, the power to rescue a person even against his will in lifethreatening circumstances.

*Id.* at 251.

<sup>131</sup> See *supra* note 50.

<sup>132</sup> See 8 U.S.C. § 1324; Brown Interview, *supra* note 18 (confirming that 8 U.S.C. §1324 is the primary statute charged in all migrant smuggling prosecutions).

<sup>125</sup> International Convention for the Safety of Life at Sea, ch. V, reg. 10, Nov. 1, 1974, 32 U.S.T. 47, T.I.A.S. 9700, 1184 U.N.T.S. 2 (as amended) [hereinafter SOLAS]. The SOLAS does not impose obligations on warships, but the general duty of mariners to render assistance to those in distress at sea is clear.

<sup>126</sup> See e.g., UNCLOS, *supra* note 41, art. 98.

<sup>127</sup> UNCLOS, *supra* note 42, art. 98; see also THOMAS & DUNCAN, *supra* note 123, at 214–15 (discussing master's duty to render assistance, right of assistance entry into the territorial sea of another state, duty of U.S. Navy Commanders to render assistance to those in distress at sea per U.S. Navy regulations and principles of safe harbor under international law).

smuggling cases, offenses under this law only rise to the felony level if the Government can prove beyond a reasonable doubt that a smuggler obtained a profit, commercial advantage, or private financial gain; caused serious bodily injury; placed in jeopardy the life of any person or “encouraged or induced” the migrants to make an illegal voyage; or engaged in a smuggling conspiracy.<sup>133</sup>

Under existing law, federal prosecutors usually bring charges, if at all, against most migrant smugglers under a conspiracy to “encourage or induce” theory.<sup>134</sup> The maximum penalty in such cases can be up to five years in prison.<sup>135</sup> However, under applicable Sentencing Guidelines, most migrant smugglers receive sentences of between ten and sixteen months. Consequently, until Congress passes legislation that provides more significant punishments for migrant smuggling, the United States cannot credibly maintain that its domestic legislation meaningfully upholds its obligations under the TOC Convention and Palermo Protocols. To be sure, stiff sentences under 8 U.S.C. § 1324 are available for egregious cases;<sup>136</sup> however, these cases are the exception and not the rule.<sup>137</sup> As long as migrant smugglers continue to be punished lightly in “routine” smuggling cases, the criminal activity will continue.

## B. The Profit and Inducement Conundrum

Felony-level prosecutions and the imposition of significant sentences for migrant smuggling should not hinge on proof of profit, serious injury, or death. As a practical matter, proving the realization of a profit can be nearly impossible because smugglers rarely, if ever, bring their proceeds with them and do not typically confess to earning massive profits to investigators when apprehended.<sup>138</sup> Migrants aboard smuggling vessels are equally disinclined to confirm the amounts they paid because migrants who assist

law enforcement are often “blackballed” for future voyages.<sup>139</sup> In the absence of a way to prove that smugglers profited from their smuggling activities, prosecutors must rely on an “encouraged and induced” theory for felony smuggling prosecutions, which requires the Government to prove “inducement” through circumstantial evidence—or through the testimony of an undocumented migrant who must be brought to the United States for trial.<sup>140</sup> With a maximum penalty of only five years imprisonment under an “inducement” theory, prosecutors rarely obtain sentences of more than twelve to sixteen months in typical cases involving no aggravating facts.

## C. Can I Get a Witness?

The requirement to prove profit or inducement to reach a felony-level offense under 8 U.S.C. § 1324 often requires federal prosecutors to make a Hobson’s choice. To prove inducement, prosecutors may be forced to bring interdicted migrants to the United States to testify to the inducement. In doing so, prosecutors must ignore Executive directives to stop and repatriate undocumented migrants as far from the United States as possible or risk losing the case.

This need to call witnesses that have been interdicted can affect other cases, too. For example, in several high-profile smuggling cases that involved death or serious injury to migrants, prosecutors were forced to call dozens of interdicted migrants as material witnesses; a number of repatriated witnesses were deemed material and potentially exculpatory for the defense and not calling them would have put the Government’s homicide prosecution in jeopardy.<sup>141</sup> Therefore, not only is the existing migrant smuggling law an ineffective deterrent, it actually places federal prosecutors in the awkward position of having to violate Executive directives to ensure the success of the Government’s most important prosecutions.

## D. Just Add Confusion: Why H.R. 1029 Makes a Bad Situation Worse

The findings set forth in H.R. 1029 note that “[e]xisting penalties for alien smuggling are insufficient to provide appropriate punishment for alien smugglers” and “[e]xisting alien smuggling laws often fail to reach the conduct of alien smugglers, transporters, recruiters, guides, and boat captains . . . .”<sup>142</sup> However, despite good intentions, H.R. 1029 rewords 8 U.S.C. § 1324 without making any significant improvements to the law. The existing migrant smuggling

<sup>133</sup> See *id.* § 1324(a)(1)(A)(i)–(iv), (a)(1)(B)(i), (a)(1)(B)(iv) (establishing punishment of not more than five years imprisonment when offense involves “inducement”—not more than ten years if “offense was done for the purpose of commercial advantage or private financial gain”—not more than twenty years if the offense caused serious bodily injury or placed the life of any person in jeopardy - any term of years or life imprisonment if the offense resulted in the death of any person); *id.* § 1324(a)(2) (punishment limited to no more than one year imprisonment when any person who brings or attempts to bring undocumented migrant to the U.S. unless government proves additional aggravating facts, including commercial advantage or private financial gain).

<sup>134</sup> Brown Interview, *supra* note 18 (noting that encouragement and inducement theory is the most common charging theory under 8 U.S.C. § 1324).

<sup>135</sup> 8 U.S.C. § 1324(a)(1)(B)(ii).

<sup>136</sup> See *id.*; *id.* § 1324(a)(1)(B)(v) (penalty for offense resulting in death to any person is death or imprisonment for any terms of year or life).

<sup>137</sup> Brown Interview, *supra* note 18.

<sup>138</sup> See *id.* (describing difficulties in proving profit or financial gain element of offense under 8 U.S.C. § 1324(a)(1)(B)(1) and (a)(2)(B)(ii)).

<sup>139</sup> See *id.*

<sup>140</sup> 8 U.S.C. § 1324(a)(1)(A)(iv).

<sup>141</sup> Brown Interview, *supra* note 18.

<sup>142</sup> H.R. 1029, 111th Cong. § 2 (2009).

law is already complex and confusing, as discussed above. The attempt to rework the law into a statute that will work well in maritime smuggling prosecutions is akin to rearranging the deck chairs on the Titanic as an emergency response plan for an iceberg strike. What is needed is new law that specifically addresses the unique challenges of maritime migrant smuggling prosecutions and that provides for penalties that properly reflect the serious nature of the crime.

Although H.R. 1029 is supposed to address alien smuggling networks, it falls short of making changes that would significantly help federal prosecutors and law enforcement hold these networks accountable. Numerous provisions of H.R. 1029 would actually be a step backwards if the bill became law. For example, findings in section 2 of H.R. 1029 imply that 8 U.S.C. § 1324 does not apply extraterritorially.<sup>143</sup>

More critically, section 4 of H.R. 1029 appears to reduce the punishment for alien smuggling from a felony to misdemeanor for transporting aliens (on land or sea) if at least one person in the “load” is a member of the alleged smuggler’s family.<sup>144</sup> Apparently this provision’s intent is to reduce the culpability a smuggler who is attempting to reunite or otherwise keep together his own family. Unfortunately, the wording of section 4 could have a devastating effect on the vast majority of migrant smuggling prosecutions. The Department of Justice takes the view that, as Congress has presently drafted the bill, an individual could be operating a massive smuggling ring that brings in thousands of migrants a year and reaps millions of dollars in illegal profits, yet prosecutors would not be able to charge him with anything more than a misdemeanor offense if at least one family member served as a partner on each voyage because courts might construe the presence of that single

family member as limiting the punishment to a one-year misdemeanor.<sup>145</sup>

In addition, the need to disprove familial claims would place an unwarranted burden on the Government. The Coast Guard and other government agencies would be forced to gather evidence about the *lack* of family relationships among suspected smugglers and the migrants on board, requiring that the Coast Guard to keep migrants on sea for interviews and other evidence gathering. Interviewers, interpreters, and perhaps lawyers might be required on Coast Guard vessels to complete this process. The massive strain this would place on limited interdiction resources would likely result in a dismantling of maritime interdiction operations in the primary threat area.

Ultimately, if H.R. 1029 becomes the “new” migrant smuggling law, smugglers will have won the lottery. Every smuggler who falsely asserts that even one migrant on a smuggling vessel is a family member will be rewarded for that lie with only misdemeanor punishment—or no punishment at all because of burden it will place on the already limited resources of prosecutors.

## VI. The Right Tool For The Job

### A. Keep It Simple

The proposed MASLEA dramatically simplifies the offense for maritime migrant smuggling. The text of 8 U.S.C. §1324 is a complicated nest of cross-references and confusion that occupies several pages and creates multiple different offenses including bringing aliens from outside the United States into the country, transporting aliens from point A to point B within the United States to evade detection, harboring aliens who have entered the country illegally, shielding aliens from detection, and other similar conduct. This is one of the core infirmities in the existing statute: It is an attempt to stuff half a dozen different criminal immigration offenses into one basket. The effort to make 8 U.S.C. §1324 an omnibus immigration smuggling (and everything else) law has made it an unworkable statute—and an unworkable statute with no teeth.

The MASLEA, in contrast, is a one-trick pony. The text of the proposed offense in the MASLEA is Spartan compared to prolix text of 8 U.S.C. §1324. The MASLEA proposes “any person who knowingly transports, harbors, or conceals an alien on board a vessel described in subsection (d) of this section, knowing or in reckless disregard of the fact that such alien is attempting to enter the United States unlawfully, shall be punished as provided in section

<sup>143</sup> *Id.* § 2. The findings include the following statement: “[m]uch of the conduct in alien smuggling rings occurs outside of the United States. Extraterritorial jurisdiction is needed to ensure that smuggling rings can be brought to justice for recruiting, sending, and facilitating the movement of those who seek to enter the United States without lawful authority.” This could be misconstrued to suggest that Congress hold the view that 8 U.S.C. § 1324 does not presently apply extraterritorially.

<sup>144</sup> *Id.* § 4. This section contains a modified offense with the following text: “(vii) if the offense involves the transit of the defendant’s spouse, child, sibling, parent, grandparent, or niece or nephew, and the offense is not described in any of clauses (i) through (vi), be fined under title 18, United States Code, or imprisoned not more than 1 year, or both.” Clauses (i) through (vi) of the revised proposed law deal with (i) causing death or serious injury, (ii) kidnapping, (iii) knowledge that a migrant entering the United States is a terrorist, (iv) placing the life of the migrant in jeopardy, (v) knowledge that the migrant is entering the United States for the specific purpose of committing a felony in the United States or (vi) the voyage was for profit or financial gain. Thus, unless prosecutors can prove these egregious facts, the revisions that H.R. 1209 proposes would be counter-productive. Although it would be a tortured construction of Congress’ expressed intent, the language of H.R. 1209 leaves open the possibility that smugglers could ensure nothing more than a misdemeanor prosecution by bringing a family member on every smuggling voyage.

<sup>145</sup> See *id.*; see also e-mail from Michael Surgalla, U.S. Dep’t of Justice, Criminal Div., and author (Dec. 2008–Mar. 2009) (on file with author) (discussing various objections of DOJ to H.R. 1209).

70702.”<sup>146</sup> This is a simple offense that gets straight to the heart of the criminal conduct: using a vessel to knowingly transport an alien who is attempting to enter the United States illegally.

Proving the offense would require evidence gathered by the Coast Guard or other law enforcement demonstrating that the suspected smugglers were operating the vessel and that aliens who had no authorization to enter the United States at a legitimate port of entry were on board. Intent to enter the United States illegally could be shown through circumstantial evidence, including the vessel’s registration in the United States, the vessel’s anticipated landing point based on its trajectory for the United States, and similar evidence. The ability to use circumstantial evidence would also reduce the need to transport undocumented migrants to the United States as potential material witnesses, because they would no longer be needed to prove “inducement” or “profit.”

## B. Build the Consequences, and They Won’t Come

The Coast Guard has already proven that a multi-agency approach to prosecutions can have dramatic effects on illegal migration. Beginning in 2006, the Coast Guard, in close cooperation with other components of the Department of Homeland Security and the U.S. Attorney’s Office in San Juan, Puerto Rico, commenced a biometrics-at-sea program to combat rampant migrant smuggling between the Dominican Republic and Puerto Rico through a ninety mile stretch of ocean known as the Mona Passage.<sup>147</sup> This interagency partnership organized into the Caribbean Border Interagency Group (CBIG) and agreed on a set of standard operating procedures for the efficient interdiction and, in appropriate circumstances, prosecution of persons attempting to enter the United States illegally via the Mona Passage.<sup>148</sup>

Notably, the U.S. Attorney’s Office agreed to prosecute misdemeanor offenses under 8 U.S.C. §1325<sup>149</sup> in cases of repeat offenders who had previously attempted to enter the United States illegally. The Coast Guard deployed mobile

biometrics equipment on its cutters operating in the Mona Passage and was able to capture digital fingerprint records of interdicted migrants, records which were identical in all practical respects to the scanned fingerprints collected at Customs and Border Protection stations at airports and other border locations. Armed with this new capability, the Coast Guard and its interagency partners were able to identify repeat immigration law offenders, suspected migrant smugglers, and persons with prior criminal histories in the United States who were attempting to re-enter the country after having been deported.<sup>150</sup>

The majority of prosecutions under this program have been misdemeanor cases under 8 U.S.C. §1325, which typically carry jail sentences of between one to twelve weeks in guilty-plea cases.<sup>151</sup> Conviction under this law, however, also carries with it deportation from the United States as an administrative consequence of the offense and conviction. Once deported, it is virtually impossible for an alien convicted under the statute to immigrate to the United States legally.<sup>152</sup> Between the fall of 2006, when the program commenced, and March 2010, the U.S. Attorney’s Office in San Juan has prosecuted well over 250 cases; prior to the program, the office prosecuted virtually no immigration cases relating to interdictions in the Mona Passage.<sup>153</sup>

The CBIG partnership understood that existing laws to prosecute migrant smugglers did not deter the smugglers from continuing their dangerous operations. However, unlike other threat areas, the consequences of misdemeanor convictions and final orders of deportation on migrants from the Dominican Republic were very significant. By focusing on “the customers” of the smugglers operating in the Mona Pass the CBIG partnership was able to drastically reduce the illegal conduct. The results of this program and the numerous prosecutions have been dramatic. Traditionally, illegal migration in the Mona Passage accounted for approximately forty percent of all Coast Guard migrant interdictions annually.<sup>154</sup> Following implementation of the biometrics-at-sea program in 2006 and the first prosecutions under the program, the flow of illegal migrants in the Mona Passage declined dramatically. In 2004, the Coast Guard interdicted 5014 migrants who departed the Dominican

<sup>146</sup> See Appendix, § 70701.

<sup>147</sup> See DOD Biometrics Task Force, *Coast Guard Employs Biometrics Advantage*, [http://www.biometrics.dod.mil/Newsletter/issues/2009/Apr/v5/issue2\\_PM.html](http://www.biometrics.dod.mil/Newsletter/issues/2009/Apr/v5/issue2_PM.html) (last visited May 15, 2010) [hereinafter *Biometrics Advantage*] (discussing history and results of Coast Guard biometrics-at-sea program); see also Stew Magnuson, *Coast Guard Biometrics Program Expands*, NAT’L DEF. MAG. (Jan. 2009).

<sup>148</sup> The author was a participant in the interagency working group that produced the first collection of CBIG standard operating procedures. The text of the CBIG standard operating procedures is a For Official Use Only document. See FARM, *supra* note 60, at 391–93 (copy on file with author).

<sup>149</sup> See *id.*; see also 8 U.S.C. § 1325 (2006). This law creates a misdemeanor offense for attempts to enter the United States without prior authorization at a place other than a port of entry.

<sup>150</sup> See *Biometrics Advantage*, *supra* note 147.

<sup>151</sup> Connors Interview, *supra* note 37.

<sup>152</sup> See 8 U.S.C. § 1326 (felony offense for alien previously deported to attempt to re-enter the United States); see also *United States v. Hernandez-Guerrero*, 147 F.3d 1075 (9th Cir. 1998), *cert. denied* 525 U.S. 976 (holding that statute criminalizing re-entry into United States by previously deported aliens was permissible exercise of Congress’s sweeping power over immigration matters), *United States v. Cooke*, 850 F.Supp. 302 (E.D. Pa. 1994), *aff’d* 47 F.3d 1162 (3d Cir. 1994) (purpose of statute prohibiting reentry after deportation is to deter aliens who have been forced to leave the United States from reentering the country without prior consent of Attorney General and to provide for varied maximum terms of imprisonment from undeterred aliens, depending on the convictions prior to deportation).

<sup>153</sup> Connors Interview, *supra* note 37.

<sup>154</sup> See *Alien Migrant Interdiction Statistics*, *supra* note 30.

Republic for Puerto Rico.<sup>155</sup> By 2009 that figure dropped to 757—a reduction in the flow of illegal maritime migration of over 80% from 2004, its recent statistical zenith.<sup>156</sup> In the first three months of 2010, the Coast Guard interdicted only fifty-seven illegal migrants in the Mona Passage.<sup>157</sup> By all accounts, the consequence delivery engine that the CBIG partnership designed is largely responsible for the decline. Migrant smuggling in that region is at an all-time low, not because the penalties on smugglers are any different, but because the CBIG partners eliminated the “market” for smugglers by penalizing and discouraging the persons who employ them.

The core concept for the MASLEA is essentially the same: criminal activity will decline when the consequences of prosecutions are meaningful to the individuals prosecuted. However, unlike the Mona Passage, the United States cannot build its consequence delivery engine around misdemeanor prosecutions. If the United States began bringing Cuban migrants to the United States to prosecute misdemeanor offenses under 8 U.S.C. §1325, the likely result would be another Cuban mass migration.

Because the Cuban Government typically refuses to accept the return (by deportation or otherwise) of any Cuban who has “landed” in the United States, bringing a Cuban interdicted at sea to the United States for prosecution would be equivalent to giving that migrant a lifetime pass to reside in the United States. Unlike illegal migrants from the Dominican Republic, who the United States will deport to the Dominican Republic following conviction under 8 U.S.C. §1325, the United States cannot deport illegal Cuban migrants to Cuba because the Cuban Government’s policy. That being the case, if the United States brought Cuban migrants ashore for misdemeanor prosecutions it would have the unintended result of encouraging more Cubans to come because there is no risk of final deportation. Accordingly, when it comes to establishing consequences for Cuban migrant smuggling, the only viable option is to penalize the smugglers.

However, as discussed above, the penalties under existing law are simply inadequate to provide any meaningful deterrent to migrant smugglers who operate from south Florida. Prosecutors in that region believe that sentences of three years or more are the minimum required in “routine” cases to deter most prospective or practicing migrant smugglers.<sup>158</sup> Therefore, the MASLEA proposes a mandatory minimum sentence of three years for the maritime migrant smuggling offense with enhanced sentences for cases involving aggravating factors.

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Brown Interview, *supra* note 18.

### C. I Think I’ve Seen You Somewhere Before: The Successful Maritime Drug Law Enforcement Act Is the Model for MASLEA

In the 1980s the Coast Guard and Department of Justice were struggling to combat massive maritime drug smuggling from Colombia and other South and Central American countries.<sup>159</sup> Existing drug trafficking laws under title 21 of the U.S. Code were not well-suited to proving drug smuggling offenses arising from the multi-ton cocaine seizures that Coast Guard cutters and Navy vessels with Coast Guard Law Enforcement Detachments were making at the time.<sup>160</sup> Congress addressed this problem in 1986 when it passed, with the urging of the Department of Justice and Coast Guard, the Maritime Drug Law Enforcement Act (MDLEA).<sup>161</sup> Congress recognized that law enforcement at sea is unique and passed the MDLEA to establish specific new offenses for maritime drug smuggling.<sup>162</sup> The MDLEA incorporated specific provisions for extraterritorial application (the applicability of title 21 drug possession and transportation offenses outside the borders of the United States was a subject of debate at the time), established jurisdiction over vessels, and addressed other unique challenges associated with combating crimes in the unforgiving environment of the high seas.<sup>163</sup>

The MDLEA has proven invaluable in combating maritime drug smuggling with a near 100 percent conviction rate.<sup>164</sup> Sentences for cooperating witnesses convicted under the MDLEA are approximately ten to eleven years, while non-cooperating defendants convicted under the law often face twenty-year sentences.<sup>165</sup> As a result, the majority of drug smugglers become cooperating witnesses upon

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<sup>159</sup> See Office of Law Enforcement, *Drug Interdiction*, U.S. COAST GUARD, [http://www.uscg.mil/hq/cg5/cg531/drug\\_interdiction.asp](http://www.uscg.mil/hq/cg5/cg531/drug_interdiction.asp) (providing an overview and history of the Coast Guard drug interdiction mission).

<sup>160</sup> MLEM, *supra* note 41, § 5.C (discussing origins of Maritime Drug Law Enforcement Act as primary federal statute prohibiting and punished maritime drug trafficking); telephone interview with Wayne Raabe, U.S. Dep’t of Justice, Criminal Div. (Mar. 3, 2010) (discussing history of maritime drug law enforcement prosecutions prior to passage of the MASLEA, DOJ difficulties in applying title 21 offenses to major drug interdiction cases in the “transit zones” in the Eastern Pacific ocean and Caribbean, and the joint DOJ-Coast Guard effort to encourage Congress to pass the MDLEA as a law dedicated to the unique nature of maritime drug trafficking).

<sup>161</sup> 46 U.S.C. §§ 70501–70507 (2006).

<sup>162</sup> *Id.* § 70503(a).

<sup>163</sup> *Id.* § 70502 (provisions defining vessels of the United States and vessels subject to the jurisdiction of the United States including procedures for confirming that certain vessels are stateless or subject to assimilation to stateless status), 70503(b) (establishing extraterritorial application of the law), § 70504 (jurisdiction and venue), § 70507 (establishing criteria for seizure of smuggling vessel based on *prima facie* evidence of maritime smuggling).

<sup>164</sup> See RADM Justice Statement, *supra* note 12.

<sup>165</sup> Connors Interview, *supra* note 37.

apprehension.<sup>166</sup> The information these individuals provide to law enforcement has contributed to the progressive dismantling of major drug cartels in Colombia and other drug exporting countries and the growth and success of the Department of Justice's Organized Crime Drug Enforcement Task Force (OCDEF) investigations.<sup>167</sup>

The Coast Guard constructed its proposal for the MASLEA in close cooperation with the Department of Justice using the MDLEA as a model. The MASLEA incorporates and cross-references many of the unique provisions of the MDLEA with respect to extraterritorial application of the law and the jurisdiction of U.S. law enforcement over "vessels of the United States" and "vessels subject to the jurisdiction of the United States."<sup>168</sup> In addition to borrowing the established text and provisions of the MDLEA where appropriate, MASLEA is the natural next step in the development of smuggling laws that are uniquely tailored to the maritime environment. The success of the MDLEA has demonstrated that providing federal prosecutors the right tool to combat a unique criminal enterprise can pay substantial dividends. Congress should adopt the same approach to the problem of maritime migrant smuggling and pass the MASLEA.

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*; see also *Before the House Government Reform Subcommittee on Criminal Justice Drug Policy, and Human Resources "Interrupting Narco-Terrorist Threats on the High Seas: Do We Have Enough Wind in Our Sails, June 29, 2005*, <http://www.justice.gov/dea/pubs/cngrtest/ct062905.html> (last visited May 15, 2010) (statement of Thomas M. Harrigan, Chief of Enforcement Operations Drug Enforcement Administration). In his statement to Congress, then DEA chief Harrigan noted,

*Operation Panama Express* [is] a multi-agency Organized Crime Drug Enforcement Task Force (OCDEF) investigation that began in the mid 1990s. Panama Express has had a measurable impact on the cocaine transportation industry, and law enforcement in general, outside of the statistical accomplishments of arrests and seizures and dismantlement of the cocaine organizations. Panama Express has had a significant impact on many factors related to task force operations, intelligence gathering, the deployment of naval and air assets dedicated to the interdiction of smuggling ventures, the development of technology used to target drug transportation and prosecution of cases resulting from . . . interdictions. The impact of Operation Panama Express is evident in the fact that not only have drug trafficking organizations (DTO) generally reduced the size of the cocaine loads they are smuggling by fishing vessel to an average of 3,000 kilograms, but also through Panama Express, more than 500 mariners have been arrested, significantly diminishing the supply of experienced mariners to operate the fishing vessels and go-fast boats used to smuggle cocaine. These factors resulting from the impact of Operation Panama Express have imposed significant hardships on the operating procedures of drug traffickers.

<sup>168</sup> 46 U.S.C. 70502.

## D. The Need for Tougher Sentences Under 18 U.S.C. § 2237

In 2006, Congress passed 18 U.S.C. §2237, which provides criminal penalties for operators and passengers of vessels that fail to obey Coast Guard orders to stop or that engage in other activity to obstruct Coast Guard law enforcement activities.<sup>169</sup> This new law created three separate offenses, making it unlawful (1) for a master or person in charge of a vessel of the United States or subject to the jurisdiction of the United States to knowingly fail to obey an order to stop by an authorized Federal law enforcement officer to heave to (stop) that vessel,<sup>170</sup> (2) for any person on board to resist or interfere with a boarding or other law enforcement action,<sup>171</sup> and (3) for any person to provide materially false information to law enforcement officers during a vessel boarding.<sup>172</sup> The penalty for any of the three offenses includes imprisonment for not more than 5 years.<sup>173</sup>

Prosecutors have used this failure to heave to law in cases where migrant smugglers have attempted to flee Coast Guard and Customs and Border Protection interdiction assets. Prosecutors often charge this as a secondary offense in migrant smuggling cases and as a "stand alone" prosecution when migrant smuggling or other offenses are not tenable.<sup>174</sup> While prosecutors have used this law to punish migrant smugglers who might otherwise avoid prosecution altogether because of the problems with 8 U.S.C. §1324 noted above, the penalties under the law should include more significant sentences for aggravating factors. As part of its MASLEA proposal, the Coast Guard has advocated sentence enhancements under 18 U.S.C. §2237 for cases involving serious risk to the lives of any person on board, serious bodily injury to any person on board the vessel, or that result in the death of any person.<sup>175</sup> These simple changes would ensure that smugglers that injure or place migrants at significant risk of injury while attempting to outrun law enforcement would face significant punishment for the aggravated nature of their offense.

## VII. Conclusion

The United States has invested tremendous political and economic capital in combating maritime migrant smuggling. For nearly thirty years, Presidents have charged the Coast

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<sup>169</sup> 18 U.S.C. § 2237.

<sup>170</sup> *Id.* § 2237(a)(1).

<sup>171</sup> *Id.* § 2237(a)(2)(A).

<sup>172</sup> *Id.* § 2237(a)(2)(B).

<sup>173</sup> *Id.* § 2237(b).

<sup>174</sup> See Brown Interview, *supra* note 18.

<sup>175</sup> See Appendix, § 70707.

Guard with interdicting migrant smuggling vessels bound for the United States as far from U.S. land territory as possible and repatriating undocumented aliens discovered on board whenever possible. The United States has ratified numerous international conventions that obligate parties to apprehend and punish migrant smugglers, human traffickers, and the criminal syndicates that conduct international smuggling operations. Furthermore, the United States has engaged regional partners throughout the Caribbean and entered into bilateral agreements that permit the United States unprecedented authority to patrol other states' territorial seas and board foreign-flagged vessels suspected of migrant smuggling to suppress smuggling activity and protect the lives of migrants.

The Government has consistently maintained that this dangerous crime puts the lives of migrants who embark in unsafe smuggling vessels at grave risk, leading directly to tragic deaths at sea every year. The Coast Guard, Customs and Border Patrol, and other federal agencies charged with combating migrant smuggling devote massive operating hours (and costs) to patrol the primary maritime migration threat areas, repatriate migrants, and prosecute suspected smugglers and other related activities.<sup>176</sup>

Undermining this massive multi-agency and multi-national effort is a law that does not work. The Executive and Legislative Branches both freely acknowledge that existing laws to combat migrant smuggling are inadequate. The solution that the House of Representatives has proposed in H.R. 1029 is untenable and does nothing more than tinker with an instrument (8 U.S.C. §1324) that is woefully

inadequate for its intended purpose. With no law capable of meting out meaningful punishment to smugglers, there is virtually no deterrent to any would-be maritime migrant smuggler. Over the years, smuggling networks have grown more sophisticated, and massive profits from smuggling have funded expanding criminal enterprises throughout south Florida.

The Coast Guard's MASLEA proposal can eliminate this weak link in the strategy. Cooperation between the Coast Guard and Department of Justice has produced tremendous success in combating drug smuggling. The multi-agency approach to combating migrant smuggling from the Dominican Republic to Puerto Rico has proven that the right combination of prosecutions and meaningful punishment can dramatically reduce migrant smuggling activity. The MASLEA proposal can do the same for the primary threat areas in the Florida Straights by ensuring that migrant smugglers operating out of Florida face significant prison terms that reflect the serious nature of the crime and the risk that smugglers subject migrants to on every voyage. In the end, the MASLEA is not an immigration law; it imposes no new criminal or other penalties on migrants who attempt to enter the United States illegally. On the contrary, the MASLEA is targeted solely at smugglers who seek to profit from the desperation of maritime migrants. By putting in place a law that promises to deliver meaningful consequences to smugglers, the MASLEA will reduce the lure of maritime migrant smuggling by increasing the prosecution risk and penalty to smugglers, which, in turn, will reduce risks to migrants and save lives.

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<sup>176</sup> Connors interview, *supra* note 37.

## Appendix

### Proposed Maritime Alien Smuggling Law Enforcement Act And Sentence Enhancements To 18 U.S.C. § 2237

Subtitle VII of Title 46, United States Code, is amended by adding at the end the following new subchapter:

Chapter 707—Maritime Alien Smuggling Law Enforcement

Sec.

70701. Offense.

70702. Penalties.

70703. Seizure and forfeiture of property.

70704. Jurisdiction.

70705. Claims of failure to comply with international law.

70706. Federal Activities.

70707. Definitions.

#### § 70701. Offense.

(a) any person who knowingly transports, harbors, or conceals an alien on board a vessel described in subsection (d) of this section, knowing or in reckless disregard of the fact that such alien is attempting to enter the United States unlawfully, shall be punished as provided in section 70702.

(b) any person who attempts or conspires to commit a violation under this section shall be punished in the same manner as a person who completes a violation of this section.

(c) it is an affirmative defense to any prosecution under this chapter of any master, operator or person in charge of a vessel only, which the defendant must prove by a preponderance of the evidence, that –

(1) the alien was on board pursuant to a rescue at sea, or was a stowaway; and

(2) the defendant, as soon as reasonably practicable, informed the United States Coast Guard of the presence of the alien and the circumstances of any rescue:

Provided that the defendant complies with all orders given by U.S. law enforcement officials and does not bring or attempt to bring any alien to the land territory of the United States unless the alien is in imminent threat of death or serious bodily injury, in which case the defendant shall report to the U.S. Coast Guard the circumstances of any rescue or the discovery of any stowaway immediately upon delivering the alien to emergency medical personnel or to U.S. law enforcement or immigration officials ashore.

(d) the following vessels are covered by this section –

(1) a vessel of the United States that is less than 300 gross tons (as measured under chapter 145 or an alternate tonnage measurement as prescribed by the Secretary under section 14104,

(2) a vessel that is subject to the jurisdiction of the United States that is less than 300 gross tons (as so measured), or

(3) a vessel of any size that is abandoned, stateless or stolen.

#### § 70702. Penalties

Any person who commits a violation of this chapter shall –

(a) shall be imprisoned for not less than 3 years and not more than 20 years, fined under title 18, or both;

(b) in the case in which the violation created a substantial risk of death or serious bodily injury to another person, including without limitation the transportation of any person under inhumane conditions as defined in section 70707, be imprisoned not less than 5 years and not more than 20 years, fined under title 18, or both;

(c) in the case in which the violation caused serious bodily injury to any person, regardless of where the injury occurred, be imprisoned not less than 7 years and not more than 30 years, fined under title 18, or both;

(d) in the case in which the violation caused the death of any person, regardless of where the death occurred, be imprisoned not less than 10 years, any terms of years, or life, fined under title 18, or both.

**§ 70703. Seizure and Forfeiture of Property.**

(a) Any personal property used or intended to be used to commit or facilitate the commission of a violation of this chapter, the proceeds of such violation, and any real or personal property traceable to such property or proceeds, shall be subject to forfeiture.

(b) Seizures and forfeitures under this subsection shall be governed by the provisions of chapter 46 of title 18, United States Code, relating to civil forfeitures, except that such duties as are imposed upon the Secretary of the Treasury under the Customs laws described in section 981(d) shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Secretary of Homeland Security.

**§ 70704. Jurisdiction.**

(a) There is extraterritorial jurisdiction of an offense under this chapter;

(b) Jurisdiction of the United States with respect to vessels and persons subject to this chapter is not an element of the offense. All issues of jurisdiction over vessels and persons arising under this chapter are preliminary questions of law to be determined by the trial judge.

**§ 70705. Claim for failure to comply with international law.**

Failure to comply with international law shall not be the basis for any defense of a person charged with a violation of this chapter. A claim of failure to comply with international law in the enforcement of this chapter may only be invoked by a foreign nation, and a claim of failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this section.

**§ 70706. Federal Activities.**

Nothing in this chapter shall apply to otherwise lawful activities carried out by or at the direction of the government of the United States.

**§ 70707. Definitions.**

As used in this chapter –

(a) the term ‘alien’ has the meaning given that term in section 101(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3));

(b) the term ‘proceeds’ includes any property or interest in property obtained or retained as a consequence of an act or omission in violation of this section;

(c) the term ‘vessel subject to the jurisdiction of the United States’ has the meaning given that term in section 70502 of this title;

(d) the term ‘vessel of the United States’ has the meaning given that term in section 70502 of this title;

(e) the term ‘transportation under inhumane conditions’ means the transportation of persons in an engine compartment, storage compartment, or other confined space, transportation at a excessive speed, transportation of a number of persons in excess of the rated capacity of the means of transportation, or intentionally grounding a vessel in which persons are being transported.”

**Section 2237 of title 18, United States Code, is amended –**

(1) in subsection (a), by adding at the end the following new paragraph:

“(3) It shall be unlawful for the master, operator, or person in charge of a vessel of the United States or a vessel subject to the jurisdiction of the United States, less than 300 gross tons (or an alternate tonnage prescribed by the Secretary under section 14104 of title 46), as measured under section 14502 of title 46, to knowingly operate or assist in the operation of any such vessel whenever it is fitted out, in whole or in part, for the purpose of being employed to bring any merchandise, contraband, or person unlawfully into the United States.”; and

(2) by striking subsection (b) and inserting the following:

“(b)(1) Whoever intentionally violates this section shall, unless the offense is described in paragraph (2), be fined under this title or imprisoned for not more than 5 years, or both.

“(2) If the offense—

“(A) is committed in the course of a violation of section 274 of the Immigration and Nationality Act (alien smuggling); chapter 77 (peonage, slavery, and trafficking in persons), section 111 (shipping), 111A (interference with vessels), 113 (stolen property), or 117 (transportation for illegal sexual activity) of this title; chapter 705 (maritime drug law enforcement) or chapter 707 (maritime alien smuggling) of title 46, or title II of the Act of June 15, 1917 (Chapter 30; 40 Stat. 220), the offender shall be fined under this title or imprisoned for not more than 10 years, or both;

“(B) results in serious bodily injury (as defined in section 1365 of this title) or transportation under inhumane conditions, the offender shall be fined under this title, imprisoned not more than 15 years, or both; or

“(C) results in death or involves kidnapping, an attempt to kidnap, the conduct required for aggravated sexual abuse (as defined in section 2241 without regard to where it takes place), or an attempt to commit such abuse, or an attempt to kill, be fined under such title or imprisoned for any term of years or life, or both.”