STATE AUTHORITY TO EXECUTE IMMIGRATION LAW UNDER EXISTING FEDERAL STATUTE

by the Honorable John Hostettler

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Executive Summary

The dramatic rise in encounters of migrants illegally entering the United States between the ports of entry at the southwest border during 2021 and 2022 has elevated the issue of border security across the country. Adding to the chaos this creates for border communities—as well as for those inside the U.S.—is the federal government's neglect of its role in securing the border. As a result of this neglect, a question has been raised: What can states do to secure the border? This paper aims to discuss the two federal statutes that authorize states to arrest aliens who are illegally present in the United States. The first program, commonly referred to as "287(g)" due to its location in federal statute, will be discussed briefly. The second program, referred to as the federal anti-human smuggling statute (FAHSS), will be the primary focus of this paper and will consequently receive more discussion.

Widespread execution of both programs could result in a significant reduction in the number of encounters at the southwest border. However, given the differing modes of implementation and operation, aggressive and innovative application of the FAHSS would likely have a more immediate effect.

Key Points

- States are largely preempted from executing immigration law.
- Certain discretionary federal authority exists which permits states to execute federal immigration law (287(g) program).
- Other federal authority exists which expressly empowers states to make arrests of aliens illegally entering the U.S.
- The migration of aliens to the southwest border and their illegal entry between land ports of entry there are controlled by transnational criminal organizations.
- Aliens who wish to illegally enter the U.S. between the ports of entry must enter into a conspiracy with cartel-sanctioned smugglers.

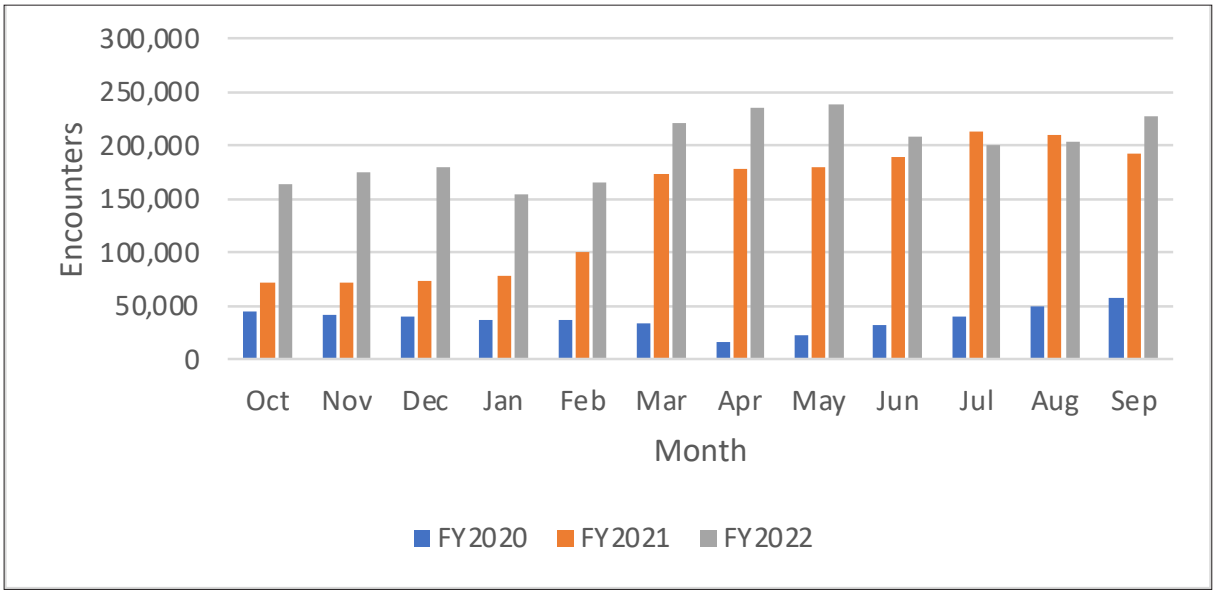
The Problem With Preemption

The dramatic rise in encounters of migrants illegally entering the United States between the ports of entry (POEs) at the southwest border (hereafter "encounters") during 2021 and 2022 has elevated the issue of border security across the country (see **Figure 1**).

Adding to the chaos this creates for border communities—as well as for those inside the U.S.—is the federal government's demonstrated failure in its role in securing the border. As a result of this failure, a question has been raised: What can states do to secure the border?

Although the number of migrant encounters between the POEs on the southwest border is unprecedented, the states' frustration with the federal government's lax approach to securing that border is not. A previous attempt to make up for the shortfall in the federal government's protecting Arizona's border with Mexico resulted in the U.S. Supreme Court opinion in *Arizona et al. v. United States* (2012).

Figure 1
U.S. Southwest Land Border Encounters



Note. Data from *Southwest Land Border Encounters*, U.S. Customs and Border Protection, U.S. Department of Homeland Security, accessed January 11, 2023 (https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters).

In that opinion, the Court held that three provisions of Arizona's SB 1070 (2010)—were preempted by federal law to wit the following:

> Section 3 … creates a new state misdemeanor. It forbids the "willful failure to complete or carry an alien registration document ... in violation of 8 United States Code section 1304(e) or 1306(a)". … This state framework of sanctions creates a conflict with the plan Congress put in place. … Section 3 is pre-empted by federal law.
>
> Section 5(C) … makes it a state misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" in Arizona. … Under [Section] 5(C) … Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens. … Section 5(C) is pre-empted by federal law.
>
> Section 6 … provides that a state officer, "without a warrant, may arrest a person if the officer has probable cause to believe … [the person] has committed any public offense that makes [him] removable from the United States." … [Section] 6 creates an obstacle to the full purposes and objectives of Congress. … Section 6 is pre-empted by federal law. (*Arizona v. United States*, 2012, pp. 400–410)

The *Arizona* Court (2012) asserted that the judicial doctrine of preemption provides the following:

> First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.
>
> Second, state laws are pre-empted when they conflict with federal law. (p. 399)

Regarding immigration—and by implication, migration into the United States between POEs—the Court declared that the doctrine of preemption applies in that "the Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens" (*Arizona v. United States*, 2012, p. 394).

Since the Supreme Court issued its opinion in *Arizona v. United States*, states have been reluctant to attempt to enact legislation that may be construed to directly affect immigration. Instead, they have opted to exercise long-recognized state police powers such as arresting migrants who cross the southwest border between POEs and trespass on private property (Office of the Texas Governor, 2021). Texas (Letter from Gov. Greg Abbott to Major General Tracy R. Norris, 2021) has also empowered its National Guard to assist in such arrests. Such state initiatives have limited success. However, these initiatives have limited resources—law enforcement resources that are being pulled away from the traditional and wide-ranging public safety demands and prerogatives of their communities. All of this while the resources of the federal government, statutorily assigned the express task of protecting the border, are not fulfilling the obligation which the federal courts proclaim only they can.

In order to avoid the possibility of federal courts determining that state attempts to deal with rising numbers of illegal aliens within their borders are preempted, states can exercise authority expressly granted them in federal statute.

287(g) – Use With Permission

Enacted in 1996 and named after the section of the Immigration and Nationality Act (INA) in which it resides (110 Stat. 3009-563, codified in 8 U.S.C. §1357(g)), the program known as "287(g)" provides for state and local law enforcement agencies (LEAs) to aid the federal government in arresting, detaining, and transporting aliens who are illegally present in the United States, including those who have crossed the southwest border between POEs. According to U.S. Immigration and Customs Enforcement (ICE, 2022),

> The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 added Section 287(g), to the Immigration and Nationality Act. This section of law authorizes the Director of ICE to enter into agreements with state and local law enforcement agencies, that permit designated officers to perform limited immigration law enforcement functions. Agreements under section 287(g) require the local law enforcement officers to receive appropriate training and to function under the supervision of ICE officers. (para. 2)

The 287(g) program is a discretionary exercise on the part of both the LEA and the federal government. The program provides that "nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement … under this subsection"

Since the Supreme Court issued its opinion in *Arizona v. United States*, states have been reluctant to attempt to enact legislation that may be construed to directly affect immigration.

(8 U.S. C. Sec. 1357(g)(9)). On the federal side, as mentioned previously, the law provides that the federal government "**may** [emphasis added] enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined … to be qualified to perform a function of an immigration officer … may carry out such function" (Sec. 1357(g)(1)). Because this program is discretionary on the part of the federal government, the presidential administration, whose duty it is to enter such an agreement, may—or may not—do so. Because the express authority is discretionary, the executive branch is free to decline the request.

A presidential administration may have valid reasons not to enter into an agreement with a particular LEA, such as the lack of a qualified LEA employee as required by the law. However, the history of the program suggests that there is a demand for it among LEAs. According to ICE (2022), several LEAs have entered into agreements since the most recent version of the Memorandum of Agreement (MOA; ICE, 2016) was approved in 2016 (ICE, 2021). For example, 45 LEAs signed up for the program in 2019 (ICE, 2022). In 2020, 97 LEAs signed an MOA with ICE. However, as of this writing, no agreements had been entered into by the current Biden administration, which has been in place since January 2021. What is the likelihood of the Biden administration entering into 287(g) MOA's with additional LEAs?

As a candidate for president, Joe Biden (n.d.) declared that, if elected, he would "end all the agreements [i.e., MOAs] entered into by the Trump Administration, and aggressively limit the use of 287(g) and similar programs." To date, the Biden administration has terminated one MOA (DHS, 2021b) and, again, entered into no MOAs with any LEA.

Additionally, President Biden nominated Ed Gonzalez, the sheriff of Harris County, Texas (which includes the

Houston metro area), to lead ICE as director. Although Sheriff Gonzalez withdrew from consideration for the office of ICE director (Edison, 2022) in 2022, his nomination is noteworthy. Shortly after taking office in Harris County in 2017, Sheriff Gonzalez terminated the 287(g) MOA (Pinkerton & Barned-Smith, 2017) that his predecessors had entered into with ICE. According to the *Houston Chronicle*, the sheriff claimed that his termination of the long-standing program "was not political 'but an issue of resources,' explaining the deputies may be assigned to help [execute other law enforcement duties]" (para. 4).

Given the perspective of the current administration, it is unlikely that states will find much assistance in securing the border from massive illegal migration by utilizing the 287(g) program. The record is clear that President Biden is adhering to his campaign pledge to greatly diminish the program's impact in removing aliens illegally in the U.S.

It is a well-known fact that any diminution of the federal government's resolve to remove aliens illegally in the country—including its well-established program to enlist the aid of LEAs to do so—creates a "pull factor" to the border. To explain the concept of a migration "pull factor," we turn to one of the most historically notable pull factors in the immigration policy area, commonly referred to as "amnesty." The term "amnesty" is not found in statute but is, as mentioned, used in the immigration policy parlance. In this context, to grant amnesty to an individual is to convey legal status to an alien who is illegally present in the United States. To understand the practical effect of a pull factor, we turn to testimony of a longtime law enforcement officer from the southwest border of the United States and his experience with amnesty.

Former El Paso County, Texas, Sheriff the late-Leo Samaniego testified before Congress in March 2006. At the time of his testimony, he was serving in his sixth four-year term as sheriff of the border county, having been first elected in 1984, after serving 28 years in the El Paso Police Department (El Paso County Sheriff's Office, n.d.). In response to a question regarding the effect of the passage of the Immigration Reform and Control Act of 1986, which granted legal status (i.e., "amnesty") to migrants who were illegally in the U.S. (Pub. L. No. 99-603, 1986), Sheriff Samaniego provided the following testimony:

> Anytime you give a group of illegal, undocumented aliens that are already here amnesty or even anything that sounds close to amnesty, you're sending the message to the next 12 million that are going to come in after them. You cannot … let them come in—they know that if they stay here long enough, they get a job and they're good people, that they're going to be given amnesty and they'll be able to stay here. But it sends the message to the rest of the world you can do the same thing because the same thing is going to happen to you. (Subcommittee on Immigration, 2006, Sheriff Leo Samaniego's testimony)

In the context of the 287(g) program, foreign nationals the world over learn that President Biden is reducing the U.S. government's commitment to remove aliens who have illegally entered the country, and they are, understandably, encouraged to join those numbers.

The bustling human smuggling industry likewise tracks the progress—and regress—of the U.S.'s efforts to secure the border with the help of state and local law enforcement. The smugglers, or "coyotes" as they are euphemistically referred to, market their services to the throngs of potential clients (Davidson, 2019). When a foreign national decides that he wishes to migrate to the U.S. and cross the southwest border without prior approval he can approach a coyote to initiate the process.

As has been explained, the 287(g) program is administered by a federal agency, which must grant permission to LEAs to execute the federal immigration laws covered by the program. A presidential administration that is averse to aggressively executing federal immigration law may withhold the grant of such permission.

There is, however, another federal statute that empowers LEAs to execute other authority related to the illegal migration of aliens into and throughout the U.S. This authority requires no agreement with a federal agency or pre-approval from the federal government and has existed for more than 60 years. More recently, an amendment to this particular statute provided even greater potential for state and local law enforcement to play a crucial role in securing the southwest border.

The Federal Anti-Human Smuggling Statute

The unprecedented levels of migration between POEs at the southwest border of the U.S. have corresponded to the growing realization of a troubling aspect of the situation immediately south of the border with Mexico. Transnational criminal organizations (TCOs), traditionally referred to as cartels, control immense swaths of territory immediately south of the U.S.–Mexico border and beyond (Jones & Reynolds, 2021). Their control of this area is not

only for the purpose of transporting drugs and other inanimate contraband to the border. They also reap massive revenue from the smuggling of migrants who wish to enter the U.S. between the POEs. Some of the human smuggling is conducted by the TCOs themselves, but the preponderance is accomplished by independent actors who pay a tax to the TCOs for the safe transport of their cargo—migrants—to the U.S.–Mexico border.

Human smuggling across the southwest border is nothing new. Although the most recent numbers of unlawful entries into the U.S. are unprecedented in absolute terms, the situation at the border not long after World War II was also overwhelming the relatively small number of border patrol agents the United States government had committed to border security. According to the report of the President's Commission on Migratory Labor (1951),

> Before 1944 the illegal traffic on the Mexican border, though always going on, was never overwhelming in numbers. Apprehensions by immigration officials leading to deportations or voluntary departures before 1944 were fairly stable and under 10 thousand per year …. The number of deportations and voluntary departures has continuously mounted each year, from 29 thousand in 1944 to 565 thousand in 1950. (p. 69)

According to U.S. Customs and Border Protection (CBP, 2020a), "over 1,400 people were employed by the Border Patrol in law enforcement and civilian positions by the end of [World War II, 1945]" ("The War Years" section). Recently, CBP (2020b) reported that the number of Border Patrol Agents for the fiscal year 2019 (October 1, 2018, to September 30, 2019) assigned to the Southwest Border Sectors (U.S. border with Mexico) was 16,731. In a rough comparison, in 1950, CBP provided 1,400 border patrol agents to apprehend 565,000 migrants illegally crossing the southwest border from Mexico into the U.S., while the federal government provided more than 16,000 border patrol agents of CBP (2022) to apprehend slightly more than 977,000 migrants illegally crossing the southwest border in 2019. The ratio of agents to apprehensions in 1950 was 1 agent for every 403 apprehensions while the ratio in 2019 was 1 agent for every 58 apprehensions. If we extrapolate, once again roughly given the lack of border patrol staffing level data for 2021, and assume no change in staffing levels from 2019, the ratio of agents to apprehensions in 2021 according to CBP (2022) data which is available (1,734,686), was 1 agent for every 104 apprehensions.

So dire was the situation at the southwest border in 1950 that, in comparing it to the condition at the border just six years earlier, the commission declared, "In its newly achieved proportions, it is virtually an invasion."

Given the level of concern with the current situation at the southwest border as a result of the unprecedented numbers of apprehensions there, it should be understood that the relative ability to respond to the situation today dwarfs the corresponding ability in 1950. This is true with the realization that, by comparison, the personnel resources, relatively speaking, dedicated to the southwest border are nearly four times that which was available in 1950. Add to that, today there is the benefit of some border barrier that did not exist in 1950. Also, substantial technological assets are currently deployed at the southwest border unavailable to—and not dreamed of by—the predecessors of current-day border agents.

With this perspective, it is easy to understand why President Harry Truman would convene a commission to address the situation at the border. The President's Commission on Migratory Labor (1951) issued its formal report, *Migratory Labor in American Agriculture*, and described the massive growth in migration across the southwest border. The report focused on the demand for migrant labor in the U.S. agriculture industry in 1950 and the supply as a result of that demand being met by migrants illegally crossing into the U.S. However, the commission's discussion of the migration phenomenon, and especially its smuggling aspect, is critical to understand the motivation for Congress' enactment of the federal anti-human smuggling statute (FAHSS).

So dire was the situation at the southwest border in 1950 that, in comparing it to the condition at the border just six years earlier, the commission (1951) declared, "In its newly achieved proportions, it is virtually an invasion" (p. 69).

In 1952, President Truman approved "AN ACT To assist in preventing aliens from entering or remaining in the United States illegally" (Pub. L. No. 82-283). The act revised previous law by maintaining provisions that applied to those who were bringing aliens into the country illegally and

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were doing so either as the "owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation" (Sec. 8). This was in response to the commission's findings regarding the work of smugglers (98 Cong. Rec. 1413, 1952). However, as a result of additional findings of the commission, other appropriate safeguards were enacted.

The commission (1951) declared that at the time, "Although smuggling of wetbacks is widespread, the majority of wetbacks apparently enter alone or in small groups without a smuggler's assistance" (p. 77). "Wetbacks" was the pejorative used at the time to describe the individuals illegally entering the U. S. across the Rio Grande. Continuing this discussion, the commission found that when migrants crossed the border illegally, many times they did so "in a group moving without the aid of a smuggler" and that "there usually is one who has made the trip before and who is willing to show the way." The 1952 act expanded on previous law and applied to those willing to show the way. It provided that those "willfully or knowingly encourag[ing] or induc[ing], or attempt[ing] to encourage or induce, either directly or indirectly, the entry into the United States of any alien … not duly admitted by an immigration officer or not lawfully entitled to enter or reside with the United States … shall be guilty of a felony" (Sec. 8(a)(4)) in the same way as would a smuggler.

There was another major evolution in the efforts against human smuggling. Alien smuggling had been transformed from a misdemeanor in the previous law to a felony in the 1952 statute. And the mere encouragement or inducement of crossing the southwest border illegally had been added as a felony, as well.

But while the evolution of the smuggling provisions of the statute was noteworthy, a new provision of the immigration law of the U.S. was revolutionary. If, as the commission observed, the situation at the southwest border had escalated to one that was "virtually an invasion," the federal government would need every available resource to repel such an incursion. Rather than swell the ranks of the border patrol with additional federal spending during the Korean War, Congress opted to enlist the support of all of criminal law enforcement in the country. Near the end of the new statute, Congress provided that "no officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the United States Immigration and Naturalization Service … **and all other officers whose duty it is to enforce criminal laws** [emphasis added]" (Sec. 8(b)) currently codified in 8 USC §1324(c).

This delegation of arrest authority to state and local law enforcement is unlike any other provision in federal immigration law. And it is clear that this provision does apply to LEAs. A report of the Congressional Research Service (2009) concluded that "the legislative history of [the section] confirms" that "the elimination of the limiting phrase 'of the United States,' [originally included in an early Senate version of the bill after the phrase "all other officers,"] appears to make Congress's intent clear that all criminal law enforcement officers, federal or otherwise, are authorized to enforce [the section]" (p. 14).

This arrest authority, initiated in 1952, was carried over to the creation of the Immigration and Nationality Act (INA; Pub. L. No. 82-414) approved later the same year by President Truman. As mentioned during our discussion of the 287(g) program, the INA is the basis of current immigration law. LEA authority to make arrests regarding human smuggling, which was originally enacted in 1952 as a result of what amounted to "virtually an invasion," exists today. Unlike the 287(g) program, LEAs are not required to receive federal permission to exercise this arrest authority.

The only question remaining is, for what violations of federal immigration law are LEAs authorized to make arrests related to human smuggling? To answer that question, we will turn to the text of the relevant section of the most recent iteration of the INA—Section 1324. This section includes both the arrest authority and the applicable infractions of the INA subject to that authority.

At the outset, it is important to realize one glaring omission. Though the section of the INA we have been discussing has been referred to as the Federal Anti-Human Smuggling Statute, neither the word "smuggle" nor any derivative of it is found in the text of the relevant section—Title 8, Section 1324 of the U.S. Code. This has been the case since the earliest days of the language found in the stand-alone 1952 act to today. Section 1324 is broadly titled, "Bringing in and harboring certain aliens." And the section has gone through significant growth since it was first made a part of the INA. This growth reflects the spectrum of legal infractions that can be considered by the arresting authority, including LEAs, much of which did not exist at the creation of the INA in 1952.

Section 1324 provides for criminal penalties against the following:

1. "Any person who … brings to or attempts to bring to the United States in any manner whatsoever an alien at a place other than a designated port of entry or place other than as designated by the [Secretary of the Department of Homeland Security]" (§1324(a)(1)(A)(i));

2. "Any person who … transports, or moves or attempts to transport or move [an] alien [illegally present in the U.S.] within the United States" (§1324(a)(1)(A)(ii));

3. "Any person who … conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection [an] alien [illegally present in the U.S.] in any place, including any building or any means of transportation" (§1324(a)(1)(A)(iii));

4. Any person who [for the purpose of commercial advantage or private financial gain] encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law (§1324(a)(1)(B)(i)); or

5. "Any person who … engages in any conspiracy to commit any of the preceding acts, or aids or abets the commission of any of the preceding acts" (§1324(a)(1)(A)(v)(I)–(II)).

Historically, presidential administrations—regardless of party affiliation—have aggressively targeted human smuggling operations. However, the demand for the services of coyotes to move migrants north to the U.S. southwest border is such that any specific smugglers who are successfully removed from the lucrative trade are immediately replaced by new players eager to benefit from that removal. Given the illicit nature of the human smuggling trade, estimates of the size of the market at the southwest border vary wildly.

One estimate provided by the secretary of the U.S. Department of Homeland Security (Committee on Homeland Security and Governmental Affairs, 2018) placed the figure at "$500 million a year, or more," while a previous report by the United Nations (2010) concluded that it was closer to $6.6 billion (p. 16). According to DHS, the number of migrants illegally crossing the southwest border was significantly higher in 2019 (CBP, 2022) than in 2008 (Rytina & Simanski, 2009). Therefore, it is likely that the current market for human smuggling across the southwest border is well over $7 billion per year.

While the U.N. report (2010) is helpful in its assessment of the magnitude of the smuggling market, it is even more instructive for this paper due to its revelation regarding the extent to which migrants use the service of smugglers to cross the southwest border illegally. According to the report, "over 90% of illegal Mexican migrants are assisted by professional smugglers" (p. 60). Additionally, the report stated, "Most irregular migrants [i.e., non-Mexican nationals] to the United States of America enter clandestinely across the south-west border of the country and over 90% are assisted by a large number of small scale professional smugglers" (p. v). Also informative is the study's explanation of one aspect of the smugglers' mode of operation. At the border, "it appears that smugglers face little risk of arrest, since they normally pretend to be irregular migrants, and are immediately repatriated" (p. 64). This repatriation is nothing more than a link in the smuggler's supply chain.

Combining an understanding of the smuggling industry and the relevant provisions of federal law, it is possible to develop an unprecedented state-based response to the floundering federal approach to securing the border.

Historically, the federal government has concentrated its enforcement efforts on the smuggler and the wider smuggling operations. For example, in late 2021, the U.S. Department of Justice (Office of Public Affairs, 2021) issued a press release titled, *Man Sentenced for Role in International Human Smuggling Conspiracy*. The release announced the sentencing of

> a Bangladeshi national formerly residing in Tapachula, Mexico, [who] conspired with and assisted human smugglers operating out of Bangladesh, South and Central America, and Mexico to bring numerous undocumented individuals to the U.S. border in exchange for payment. [The Bangladeshi national] operated out of Tapachula where he maintained a hotel that housed the individuals on their way to the United States. [He also] provided plane tickets and other assistance for the individuals to travel from Tapachula to Monterrey, Mexico, where [a] co-conspirator … assisted their illegal crossing into the United States. (para. 2)

The Bangladeshi national was prosecuted for violation of the conspiracy provision of the FAHSS. To reiterate, the specific language of the conspiracy subsection provides that "any person who … engages in any conspiracy to commit any of the … acts" that are previously described in the larger subsection which contains the conspiracy provision. Those previously described acts include bringing in or attempting to bring in an alien at "a place other than a designated port of entry or place other than as designated by the" federal government; or harboring, transporting, moving, an alien or attempting to do any of those things when the alien "has come to, entered, or remains in the United States in violation of law."

At this point, we must highlight the distinct difference between two crimes that are often conflated in the discussion of the unlawful movement of aliens into the United States. These two crimes are human smuggling and human trafficking. As ICE (2017) states in an information bulletin titled *Human Trafficking vs Human Smuggling*:

> Human trafficking and human smuggling are often confused. The two crimes are very different and it is critical to understand the difference between the two.
>
> **Human trafficking** involves exploiting men, women, or children for the purposes of forced labor or commercial sexual exploitation.
>
> **Human smuggling** involves the provision of a service—typically, transportation or fraudulent documents—to an individual who voluntarily seeks to gain illegal entry into a foreign country. (paras. 1–2)

A primary difference between the two crimes as they relate to aliens entering the U.S. is that the movement on the part of an alien in a smuggling operation is voluntary, whereas the movement of an alien in a trafficking operation is involuntary. Another primary difference between the two crimes as they relate to aliens entering the U.S. is that the smuggled alien pays the smuggler for his service, whereas the trafficker is not paid by the trafficked alien but by the person who will receive the trafficked alien.

The smuggling operation is not only characterized by voluntary movement and payment by the alien; it is also characterized by the initiation of the operation by the alien to be smuggled. Unlike a trafficking operation, which is from the beginning initiated by the party desiring the involuntary service of an alien and is driven to its end by the trafficker, a smuggling operation is initiated by the alien to be smuggled and driven by that alien's continued desire to illegally enter the U.S. Without the alien initiating and continuing the entire process, there is no smuggling operation. The alien initiates the conspiracy in violation of the FAHSS and sustains the conspiracy in violation of the FAHSS.

By way of background, the conspiracy provision of the FAHSS was added (H.R.3610, 1996) to federal law in 1996 as a part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Prior to its inclusion, there were no criminal penalties for conspiring to, for example, bring or attempt to bring an alien into the U.S. between the POEs, or to transport or move, or attempt to transport or move an alien within the United States when that alien's presence in the U.S. was "in violation of law." And the statute expressly covers "any person who … engages in any conspiracy to commit" these and other "acts" enumerated in the statute. There is an exception to this seemingly all-inclusive language, however.

The statute (§1324(a)(1)(C)) provides that certain of the violations do not apply to "a religious denomination having a bona fide nonprofit, religious organization in the United States … to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary … as a volunteer." Consequently, the conspiracy provision does not apply to this situation. However, this is the only exception. Congress could have created other exceptions. They have done so in the past with the original statute enacted as a result of the 1951 presidential commission discussed earlier.

Returning to the brief 1952 anti-human smuggling statute (Pub. L. No. 82-283) that was ultimately made a part of the larger INA enacted later that same year, Congress made an

exception to the "harboring" aspect of the new statute. The statute provided "that for purposes of this section, employment … shall not be deemed to constitute harboring." As the Library of Congress (n.d.) explains, in 1986, Congress effectively repealed this exception by enacting legislation that "introduced civil and criminal penalties to employers who knowingly hired undocumented immigrants or individuals unauthorized to work in the U.S."

The legislative history is clear. When Congress wishes to make exceptions to the bringing in and harboring of certain aliens in the U.S., it does so expressly. Whether the exception is broadly applied to employers or more restrictively applied to religious organizations officially recognized by the IRS, Congress has clearly provided for exceptions. Congress has provided no exception to the conspiracy provision of the FAHSS to the initiator of the smuggling conspiracy—the alien who desires to be smuggled either individually or with family members.

The conspiracy provision of the FAHSS has not been applied to all potential classes of co-conspirators. Smuggled aliens initiate the conspiracy to be illegally brought into the U.S. Additionally, as the number of family units illegally crossing the southwest border has risen dramatically in recent years, alien parents are smuggling their children into the U.S. and conspiring with coyotes to do so.

Criminal penalties for the FAHSS refer to individuals and organizations who operate "in violation of law." The statute itself defines such violations specifically in most cases.

However, the current status of the law as it relates to asylum claims must be understood to grasp the extent to which "violation of the law" applies to various parties.

In response to the unprecedented claims for asylum by aliens crossing the southwest border from Mexico into the U.S. in early 2019, the administration of President Donald Trump initiated the Migrant Protection Protocols (MPP; Memorandum from Kirstjen M. Nielsen, 2019). This program, better known as "Remain in Mexico" policy, required non-Mexican aliens who requested asylum upon entering the U.S. from Mexico—"illegally or without proper documentation" (p. 1) —to return to Mexico "for the duration of" the U.S. government's consideration of their immigration status. After this policy was implemented, asylum claimants were not released into the interior of the United States and were consequently not

In response to the unprecedented claims for asylum by aliens crossing the southwest border from Mexico into the U.S. in early 2019, the administration of President Donald Trump initiated the Migrant Protection Protocols (MPP).

granted authorization to work here—a benefit (8 U.S.C. §1158(d)(2)) aliens acquire when they've been in the U.S. for more than 180 days, and their asylum request has not yet been adjudicated. After implementation of MPP, and the accompanying denials of stay and work in the U.S., there was a dramatic reduction in migrant crossings between POEs at the southwest border.

Prior to MPP, an alien who crossed the southwest border into the U.S. and requested asylum may have been considered immune to arrest, effectively, under the FAHSS. This was due to the fact that prior to MPP, the policy was to release the requesting migrant into the interior of the U.S. subject to the requirement of a Notice to Appear before an immigration judge for consideration of his asylum claim. However, when MPP was implemented, the policy became law. As a result, any non-Mexican national illegally crossing into the U.S., including at the southwest border, and requesting asylum was "in violation of law"—to use the wording of the FAHSS—if they remained in the U.S.

On the day that President Joe Biden was inaugurated, his administration's DHS (2021a)terminated new enrollments of migrants in MPP. Not long after, several states filed suit to have the policy reinstated. A federal district judge (*State of Texas v. Biden*, 2021) enjoined the Biden administration, and new enrollments MPP were commenced. After that first judicial pronouncement, an appellate court affirmed the reinstatement of MPP, and the program remained in place. In other words, MPP is still the law. Consequently, any alien who has crossed the southwest border "at a place other than a designated port of entry or place other than as designated by the [federal government]," in the words of the FAHSS, is "in violation of law" and subject to arrest by LEAs according to the FAHSS.

Not only are the aliens requesting asylum subject to arrest, but "any person who … transports, or moves or attempts to transport or move … or engages in any conspiracy" to do so is likewise subject to arrest. The reason being that those transporters or movers or conspirators in such actions are doing so "in violation of law"—namely, MPP.

Finally, it is important to note that aliens who have conspired to enter the United States "at a place other than a designated port of entry," and those co-conspirators who have assisted them, are subject to arrest—according to the FAHSS (8 U.S.C. §1324(a)(1)(A)(i))—"regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and **regardless of any future official action which may be taken with respect to such alien** [emphasis added]" (e.g., receipt of Notice to Appear before an immigration judge, grant of asylum, grant of parole, receipt of work authorization, etc.). Therefore, the authority to arrest stands on its own, unaffected by any "official" action which may have previously been, or may be in the future, directed at the migrant co-conspirator.

Discretion and the FAHSS

Similar to the 287(g) program discussed earlier, LEA participation in exercising arrest authority pursuant to the FAHSS is discretionary. The statute (8 U.S.C. §1324(c)) provides that state and local "officers whose duty it is to enforce criminal laws" are among those who "shall have authority to make any arrests for a violation of any provision of [Section 1324]." Though LEAs have arrest authority, the statute does not compel them to exercise that authority.

And though state and local law enforcement may arrest unauthorized aliens and others for various infractions for which Section 1324 provides felony penalties, the jurisdiction for potential prosecution of those persons rests solely with federal prosecutors. In this regard, federal authorities are free to exercise "prosecutorial discretion" (U.S. Department of Justice, n.d., 9-27.000 – Principles of Federal Prosecution) as it relates to those accused of violating Section 1324. For example, the Bangladeshi hotelier convicted of conspiring with human smugglers discussed earlier was prosecuted following an affirmative decision to prosecute. The use of prosecutorial discretion is widespread on a vast array of issues in both federal and state cases. There would be nothing unique in its application in situations related to Section 1324.

In both the application of arrest authority by LEAs and the subsequent federal prosecution of individuals arrested for violating provisions of Section 1324, the discretion on the part of LEAs and federal prosecutors would be more of a political consideration than of a legal one.

Conclusion

Federal preemption of immigration policy results in little opportunity for states to provide relief from the consequences of lax federal execution of laws against illegal migration into the United States. However, provisions of the FAHSS expressly grant extraordinary arrest authority to state and local law enforcement to arrest violators of the statute.

The nature of illegal migration into the U.S. from Mexico is such that virtually every alien—more than 90%—are brought into the U.S. with the aid of smugglers. The addition of criminal penalties directed against "any person who … engages in any conspiracy" to bring in, harbor, or move an alien illegally present in the U.S. implicates virtually every alien adult who illegally crosses the southwest border. Additionally, persons who transport or move aliens illegally present in the U.S. and the organizations that conspire to assist such aliens—including those who request asylum in the U.S. and are consequently subject to the MPP—are likewise vulnerable to arrest by state and local law enforcement authorities.

Finally, even without consideration of the MPP, the FAHSS's explicit exemption of consideration of any previous or potential official action regarding the alien co-conspirator's immigration status in the United States means state and local law enforcement authorities executing arrests pursuant to the FAHSS are to concern themselves only with the nature of the alien's entry into the U.S. to wit, whether the entry was at an official U.S. port of entry or not.

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