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Alien Smuggling: Recent Legislative Developments

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Summary

The primary statutory provision proscribing alien smuggling is §274 of the Immigration and Nationality Act (INA). INA §274 proscribes a broad spectrum of activities that would aid aliens to enter and live within the United States without proper legal status. Recently in Congress, a flurry of proposed legislation has been introduced addressing alien smuggling. H.R. 4088/S. 2366/S. 2368 (the SAVE Act), the House-passed H.R. 2399, its companion bill S. 2463, and the House-passed H.R. 2830 all contain similar language that would amend both the INA and Title 18 of the U.S. Code. These bills would significantly alter the wording and structure of INA §274, expanding its scope. They would also add alien smuggling provisions in §2237 of Title 18, which would enhance sentencing for disobeying federal officials on the high seas while engaging in alien smuggling.

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Introduction

Statutory proscriptions against the illegal importation of aliens into the United States can be found as far back as 1875.[1] The modern statute that broadly prohibits various forms of alien smuggling predates the Immigration and Nationality Act (INA), the current source for the bulk of the federal immigration laws, and was first enacted in 1917.[2] Today, this provision, and its many amendments, can now be found in INA §274.[3] Not only does this statute prohibit the smuggling of aliens across the U.S. border, but it also prohibits the transport and harboring of aliens within the United States. Thus, the statute covers a broad spectrum of activities that could conceivably subject to criminal liability any individual who provides assistance to an alien he knows or should know is unlawfully present within the United States.

Recently, there has been a flurry of proposed legislation introduced in Congress addressing alien smuggling. The proposed legislation can be found in multiple bills, all containing near identical language that seeks to alter several statutory provisions in both the INA and Title 18 of the United States Code. This report describes the law that currently governs alien smuggling and then addresses how the proposed legislation would change the current law structurally and substantively.

Activities Currently Proscribed

INA §274 proscribes several types of activities that can be characterized as alien smuggling. These activities are characterized broadly, potentially criminalizing a wide range of activities. This is particularly apparent when analyzing the *scienter* element of these provisions. Most of these provisions state that a violation occurs when a defendant commits an offense "knowing or in reckless disregard of the fact" that an alien's presence in the United States is in violation of the law.[4] "Reckless disregard" requires more than mere negligence, but it does not require that a defendant have actual knowledge that the alien he is assisting is in the country

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[1] Act of March 3, 1875, 18 Stat. 477, §§ 2-4 (March 3, 1875).

[2] *See* Immigration Act of 1917, 39 Stat. 874, § 8 (February 5, 1917).

[3] *See also* INA §277 (codified at 8 U.S.C. § 1327) (prohibiting aiding or assisting any inadmissible alien to enter the United States); INA § 278 (codified at 8 U.S.C. § 1328) (prohibiting the importation of an alien for purposes of prostitution or other immoral purposes).

[4] *See* INA § 274(a) (codified at 8 U.S.C. § 1324(a)).

illegally for there to be a violation.[5] Rather, "reckless disregard" requires a person to consciously disregard a substantial and unjustifiable risk, and such disregard must constitute a gross deviation from the standard of care that a reasonable person would exercise in the situation.[6] Thus, a violation would occur if a defendant chooses to assist an alien in some manner when he "should have known" that the alien was in the United States illegally.

Furthermore, although a defendant must either know or act in reckless disregard of the fact that an alien is unlawfully present within the United States in order to commit a violation, the person need not know that his act violates the alien smuggling statute and is unlawful in order to be susceptible to criminal liability.[7] Thus, *scienter* (i.e., the "intent" requirement) is only required in terms of the defendant knowing the alien is unlawfully present and the defendant knowingly assisting the alien; ignorance about the unlawfulness of the assistance is most likely not a defense.

Bringing an Alien to the United States Without Authorization. INA §274(a)(2) makes it an offense *to bring or attempt to bring an alien into the United States in any manner whatsoever* while knowing or in reckless disregard of the fact an alien has not received prior official authorization to come to, enter, or reside in the United States, regardless of any official action that may later be taken with respect to such alien.[8] The term "bringing," a potentially broad term, is not defined in the INA. Thus, it has been subject to interpretation by the federal courts. For example, the Ninth Circuit has held that "bringing" may include activities beyond physical transport, such as "leading, escorting or causing an alien to come along to the United States."[9] On the other hand, the Sixth Circuit has held that merely accompanying or assisting an alien seeking unauthorized entry does not constitute "bringing."[10] Furthermore, the breadth of this statute is also evident in statutory language that

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[5] BLACK'S LAW DICTIONARY 1276 (7th ed. 1999) (defining "recklessness"). *See also* Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991) (noting in a libel case by a public figure, the utterer of the defamatory statement must have acted knowing the statement was false or in reckless disregard of its falsity; "mere negligence is insufficient"); Rodriguez-Castro v. Gonzales, 427 F.3d 316, 323-324 (5th Cir. 2005) (distinguishing "reckless disregard" from mere negligence in the context of deciding what constitutes a crime of moral turpitude).

[6] Matter of Median, 15 I. & N. Dec. 611, 613-614 (BIA 1976).

[7] United States v. Fierros, 692 F.2d 1291 (9th Cir. 1982).

[8] INA § 274(a)(2) (codified at 8 U.S.C. § 1324(a)(2)) ("Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien....").

[9] United States v. Yoshida, 303 F.3d 1145, 1151-1152 (9th Cir. 2002) (finding a person who guided aliens to an airplane headed to the United States was guilty of unlawfully "bringing" the aliens to the United States even though she did not pilot the airplane). *See also* United States v. Gonzalez-Torres, 309 F.3d 594 (9th Cir. 2002).

[10] McFarland v. United States, 19 F.2d 805 (6th Cir. 1927).

suggests that bringing an alien into the United States constitutes a violation even when it was likely that the alien would be eligible for asylum or some other form of relief from removal.[11]

Bringing an Alien to the United States at a Place Other Than a Designated Port of Entry. INA §274(a)(1)(A)(i) makes it an offense, while knowing a person is an alien, to *bring or attempt to bring such person into the United States at a place other than a designated port of entry* regardless as to whether the person was authorized to come to the United States.[12] Although it appears that this statute overlaps with INA §274(a)(2), it differs in that it imposes criminal liability so long as the defendant knows that the person he is "bringing" into the United States is an alien. Knowledge of legal status is irrelevant. However, in order to incur liability, the defendant must assist the alien in evading inspection at a port of entry.

Transporting Aliens Within the United States. INA §274(a)(1)(A)(ii) makes it an offense, while knowing or in reckless disregard of the fact that an alien's presence in the United States is in violation of the law, *to transport, move, or attempt to transport or to move* such alien within the United States in furtherance of the violation against the law.[13] Although it appears that this statute is broad, it does have a limiting principle. In order to incur criminal liability, the violation must be committed "in furtherance" of the alien's unlawful entry or presence. The Ninth and Eighth Circuits have stated that a person's transportation of an alien is not "in furtherance" of an alien's unlawful entry or presence if the transport was only "incidentally connected to" the alien's unauthorized entry or status.[14] Certain factors the Ninth Circuit appears to weigh when determining whether there is a transport violation are the "time, place, distance, and overall impact" that the transportation has upon the alien's violation of immigration laws.[15]

On the other hand, the Sixth Circuit has rejected this "direct and substantial relationship test," and instead examines the intent of the person transporting the

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[11] *See also* United States v. Merkt, 794 F.2d 950, 964 (5th Cir. 1986) (reading an older version of the statute to criminalize the smuggling of aliens into the United States so that they may claim asylum); United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989).

[12] INA § 274(a)(1)(A)(i) (codified at 8 U.S.C. § 1324(a)(1)(A)(i)) ("Any person who knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, 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...shall be punished as provided in subparagraph (B).").

[13] INA § 274(a)(1)(A)(ii) (codified at 8 U.S.C. § 1324(a)(1)(A)(ii)) ("Any person who knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law...shall be punished as provided in subparagraph (B).").

[14] United States v. Moreno, 561 F.2d 1321, 1323 (9th Cir. 1977); United States v. Velasquez-Cruz, 929 F.2d 420 (8th Cir. 1991) (applying *Moreno*).

[15] *Moreno*, 561 F.2d at 1323.

alien.[16] The Circuit has suggested that the transport of "friends, relatives, and...co-workers" who are unlawfully present may not constitute transportation "in furtherance" of an immigration violation if the transport was meant only to maintain the alien's well-being and existence; criminal liability seems to require that the assistance be given with a specific intent to promote an alien's illegal presence within the United States.[17] Other federal circuits, in contrast, have taken a more general approach to assessing whether the transportation of an unauthorized alien is "in furtherance" of an alien's violation of the law by considering the individual facts and circumstances of each particular case.[18]

Harboring Aliens. INA §274(a)(1)(A)(iii) makes it an offense, while knowing or in reckless disregard of the fact that an alien is unlawfully present in the United States, *to conceal, harbor, or shield from detection, or attempt to conceal, harbor, or shield from detection* such alien.[19] Courts have typically construed the harboring statute broadly. For example, the Fifth Circuit has interpreted the provision concerning the "shielding of aliens from detection" to prohibit the warning of unauthorized aliens of the presence of immigration officers.[20] Furthermore, some courts have interpreted the harboring provision such that the mere sheltering of an alien, knowing or in reckless disregard of the alien's unlawful status, is a ground for criminal liability, regardless of whether it was done surreptitiously.[21] Another court has interpreted this provision to require "conduct tending substantially to facilitate an alien's 'remaining in the United States' illegally."[22]

Encouraging or Inducing an Alien to Come to, Enter, or Reside in the United States. INA §274(a)(1)(A)(iv) makes it an offense to *encourage or induce an alien to come to, enter, or reside in the United States* while knowing or in reckless disregard of the fact that the alien would be present within the United States

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[16] United States v. 1982 Ford Pick-Up, 873 F.2d 947, 951 (6th Cir. 1989).

[17] *Id.* at 952.

[18] *See* United States v. Barajas-Chavez, 162 F.3d 1285 (10th Cir. 1999) (en banc); United States v. Parmelee, 42 F.3d 387 (7th Cir. 1994); *Merkt*, 764 F.2d 266 (5th Cir. 1985).

[19] INA § 274(a)(1)(A)(iii) (codified at 8 U.S.C. § 1324(a)(1)(A)(iii)) ("Any person who knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation...shall be punished as provided in subparagraph (B).").

[20] United States v. Rubio-Gonzalez, 674 F.2d 1067 (5th Cir. 1982).

[21] *E.g., Aguilar*, 883 F.2d 662 (9th Cir. 1989) (finding that a church official violated the harboring provision when he invited an illegal alien to stay in an apartment behind his church, and interpreting harboring statute as not requiring an intent to avoid detection); *Rubio-Gonzalez*, 674 F.2d at 1067 (suggesting that "harboring" an alien is a broader concept than other smuggling provisions relating to the concealment of an alien or the shielding of an alien from detection); U.S. v. Acosta De Evans, 531 F.2d 428 (9th Cir. 1976) (upholding harboring conviction of defendant who provided illegal aliens with apartment, and concluding that harboring provision was not limited to clandestine sheltering only) .

[22] United States v. Lopez, 521 F.2d 437, 441 (2d Cir. 1975).

in violation of law.[23] Courts have recognized that encouragement or inducement can mean providing conscious material support for an alien's attempt to unlawfully enter or reside in the United States. For example, providing or selling an illegal alien fraudulent immigration and work documents so that he may more easily remain in the United States has been found to be grounds for liability.[24] Indeed, the Seventh Circuit has found that in order to demonstrate that a person "encouraged or induced" an alien, "all that the government needed to establish was that...[the individual] knowingly helped or advised the alien[...]."[25]

Conspiracy to Commit a Smuggling Offense. INA §274(a)(1)(A)(v)(I) makes it an offense to *engage in any conspiracy to commit any of the acts* proscribed by INA §274(a)(1).[26] Thus, this provision only criminalizes conspiracies *to bring or attempt to bring an alien into the United States at a place other than a designated port of entry, to transport, move, or attempt to transport or move an alien, to conceal, harbor, shield from detection, or attempt to conceal, harbor, or shield from detection an alien*, and *to encourage, induce, or attempt to encourage or induce an alien to come to, enter, or reside in the United States*. Alternatively, a defendant could be charged with a federal conspiracy offense under 18 U.S.C. §371, which is not limited to the offenses enumerated in INA §274(a)(1). Section 371, however, may not be the best vehicle to pursue a conspiracy offense because, unlike INA §274, it has a statutory provision requiring that at least one conspirator commit an overt act to effect the underlying offense for there to be a violation.[27] On the other hand, several federal circuits appear to require a showing of an overt act in order for there to be an INA §274 conspiracy offense.[28]

Aiding and Abetting a Smuggling Offense. INA §274(a)(1)(A)(v)(II) makes it an offense to *aid and abet the commission of any of the acts* proscribed by INA §274(a)(1).[29] Alternatively, under 18 U.S.C. § 2, a person "who aids, abets,

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[23] INA § 274(a)(1)(A)(iv) (codified at 8 U.S.C. § 1324(a)(1)(A)(iv)) ("Any person who 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...shall be punished as provided in subparagraph (B).").

[24] United States v. Oloyede, 982 F.2d 133 (4th Cir. 1992); United States v. Ndiaye, 434 F.3d 1270 (11th Cir. 2006).

[25] United States v. Fuji, 301 F.3d 535, 540 (7th Cir. 2002).

[26] INA § 274(a)(1)(A)(v)(I) (codified at 8 U.S.C. § 1324(a)(1)(A)(v)(I)) ("Any person who engages in any conspiracy to commit any of the preceding acts...shall be punished as provided in subparagraph (B).").

[27] *See* Whitfield v. United States, 543 U.S. 209 (2005) (holding that a federal statute making it a crime to conspire to commit a listed offense required prosecutors to prove only that a conspiracy existed, and not that any overt action was subsequently taken in furtherance of the conspiracy).

[28] *See* United States v. Driscoll, 449 F.2d 894 (1st Cir. 1971); United States v. Vega-Limon, 548 F.2d 1390 (9th Cir. 1977).

[29] INA § 274(a)(1)(A)(v)(II) (codified at 8 U.S.C. § 1324(a)(1)(A)(v)(II)) ("[A]ids or abets the commission of any of the preceding acts...shall be punished as provided in subparagraph (continued...)

counsels, commands, induces, or procures" the commission of an offense against the United States may be punishable as a principal.

Hiring Smuggled Aliens. INA §274(a)(3) makes it an offense *to knowingly hire for employment* during any 12-month period at least 10 individuals with actual knowledge that the individuals are either unauthorized aliens[30] or have been brought into the United States in violation of INA § 274(a).[31] This provision is distinct from INA §274A, which more generally imposes penalties upon persons for employing any unlawfully present alien.

Religious Denomination Exemption

Despite the rather broad sweep of INA §274, the statute outlines an exemption. It states that a religious denomination does not violate the proscription against *transporting, moving, attempting to transport or to move, concealing, harboring, shielding from detection, attempting to conceal, attempting to harbor, attempting to shield from detection, or encouraging or inducing an alien to reside in the United States*, if the denomination encourages, invites, calls, allows, or enables an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination in the United States as an uncompensated volunteer so long as the alien was a member of the denomination for at least one year.[32]

Current Sentencing Provisions

The various offenses enumerated in INA §274 carry different baseline penalties, which may be enhanced depending on the circumstances. For example, committing an alien smuggling offense in furtherance of a commercial activity or causing a serious injury or death to a person while committing the offense will enhance the sentence.

- *Bringing or attempting to bring an alien into the United States at a place other than a designated port of entry* (INA §274(a)(1)(A)(i))

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[29] (...continued)
(B).").

[30] *See* INA § 274A(h)(3) (codified at 8 U.S.C. § 1324a) (defining an "unauthorized alien" as an alien either not admitted for permanent residence within the United States or not authorized to be employed).

[31] INA § 274(a)(3) (codified at 8 U.S.C. § 1324(a)(3)).

[32] INA § 274(a)(1)(C) (codified at 8 U.S.C. § 1324(a)(1)(C)) ("It is not a violation of clauses (ii) or (iii) of subparagraph (A), or of clause (iv) of subparagraph (A) except where a person encourages or induces an alien to come to or enter the United States, for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, 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 for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.").

or *conspiring to commit any of the acts proscribed by INA §274* (INA §274(a)(1)(A)(v)(I)) merits either a fine, imprisonment of not more than 10 years, or both.[33]

- *Transporting, moving, or attempting to transport or move an alien* (INA §274(a)(1)(A)(ii)), *concealing, harboring, shielding from detection, or attempting to conceal, harbor, or shield from detection an alien* (INA §274(a)(1)(A)(iii)), or *encouraging or inducing an alien to enter the United States* (INA §274(a)(1)(A)(iv)) for purposes of commercial advantage or private financial gain merits either a fine, imprisonment of not more than 10 years, or both.[34]
- *Transporting, moving, or attempting to transport or move an alien* (INA §274(a)(1)(A)(ii)), *concealing, harboring, shielding from detection, or attempting to conceal, harbor, or shield from detection an alien* (INA §274(a)(1)(A)(iii)), or *encouraging or inducing an alien to enter the United States* (INA §274(a)(1)(A)(iv)) for purposes other than commercial advantage or private financial gain, or *aiding and abetting any of the acts proscribed by INA §274* (INA §274(a)(1)(A)(v)(II)), merits only a fine, imprisonment for not more than five years, or both.[35]
- If during or in relation to the violation of any act proscribed by INA §274 a serious bodily injury occurs, or a person's life is placed in jeopardy, the violator can be fined, imprisoned for not more than 20 years, or both.[36]
- If a death occurs during or in relation to a violation of any of the acts proscribed by INA §274, the violator can be fined, punished by death, imprisoned for any number or years or for life, or fined and imprisoned or punished with death.[37]
- *Knowingly hiring for employment aliens not authorized to work in the United States* (INA §274(a)(3)) is punishable by fine, imprisonment for not more than five years, or both.[38]

Different penalties apply for *bringing or attempting to bring an alien into the United States in any manner whatsoever* (INA §274(a)(2)).

- In general, the above offense can be punished by a fine, a term of imprisonment for not more than one year, or both, for each alien brought into the United States by the defendant.[39]
- However, committing the offense with the intent or with reason to believe that the alien would commit an offense against the United

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[33] INA § 274(a)(1)(B)(i) (codified at 8 U.S.C. § 1324(a)(1)(B)(i)).

[34] *Id.*

[35] INA § 274(a)(1)(B)(ii) (codified at 8 U.S.C. § 1324(a)(1)(B)(ii)).

[36] INA § 274(a)(1)(B)(iii) (codified at 8 U.S.C. § 1324(a)(1)(B)(iii)).

[37] INA § 274(a)(1)(B)(iv) (codified at 8 U.S.C. § 1324(a)(1)(B)(iv)).

[38] INA § 274(a)(3)(A) (codified at 8 U.S.C. § 1324(a)(3)(A)).

[39] INA § 274(a)(2)(A) (codified at 8 U.S.C. § 1324(a)(2)(A)).

States or any State punishable by imprisonment for more than one year, or committing the above offense for the purpose of commercial advantage or private financial gain, is punishable by fine for each violation, and/or a term of imprisonment for not less than three years nor more than 10 years for each of the first two violations, and a term of imprisonment for not less than five years nor more than 15 years for each additional violation.[40]

- Moreover, committing the above offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry is punishable by fine for each violation, and/or a term of imprisonment not more than 10 years for each of the first two violations, and a term of imprisonment not less than five years nor more than 15 years for each additional violation.[41]

When an alien is brought into the United States in violation of INA §274(a), sentences can be enhanced by up to 10 years if

- the offense was part of an ongoing commercial organization or enterprise;[42]
- aliens were transported in groups of 10 or more;[43]
- aliens were transported in a manner that endangered their lives;[44] or
- the aliens presented a life-threatening health risk to people in the United States.[45]

In addition, "any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission" of a violation of INA §274(a), "the gross proceeds of such violation, and any property traceable to such conveyance or proceeds," is subject to civil forfeiture.[46]

Proposed Legislative Changes

Several bills in the 110th Congress have provisions related to alien smuggling. H.R. 4088/S. 2366/S. 2368 (SAVE Act), the House-passed H.R. 2399, its companion bill S. 2463, and the House-passed H.R. 2830 all contain similar language that would amend both the INA and Title 18 of the U.S. Code. These bills would significantly alter the wording and structure of INA §274, expanding its scope. They would also add alien smuggling provisions in §2237 of Title 18, which would enhance

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[40] INA § 274(a)(2)(B)(iii) (codified at 8 U.S.C. § 1324(a)(1)(B)(iii)).

[41] *Id.*

[42] INA § 274(a)(4)(A) (codified at 8 U.S.C. § 1324(a)(4)(A)).

[43] INA § 274(a)(4)(B) (codified at 8 U.S.C. § 1324(a)(4)(B)).

[44] INA § 274(a)(4)(C)(i) (codified at 8 U.S.C. § 1324(a)(4)(C)(i)).

[45] INA § 274(a)(4)(C)(ii) (codified at 8 U.S.C. § 1324(a)(4)(C)(ii)).

[46] INA § 274(b)(1) (codified at 8 U.S.C. § 1324(b)(1)).

sentencing for disobeying federal officials on the high seas while engaging in alien smuggling.

Restructuring of INA §274. The most significant change is the overall restructuring of INA §274. The proposed legislation would consolidate most of the proscribed acts into paragraphs (a)(1)(A) and (a)(1)(B) of INA §274.[47] The only proscription left untouched is the one proscribing the employment of smuggled aliens unauthorized to work in the United States.[48] An issue that the proposed legislation does not address involves cross-referencing. Currently, INA §101(a)(43)(N) defines an "aggravated felony" as "an offense described in paragraph (1)(A) or (2) of" INA §274. If this cross-reference is left intact, this would mean *bringing an alien into the United States at a place other than a designated port of entry* would no longer be an aggravated felony. The result is that someone convicted of such an offense would no longer be inadmissible for committing an aggravated felony and automatically subject to removal from the United States.[49]

Changes in Sentencing. The restructuring also places most of the penalty provisions in INA §274(a)(1)(C).[50] The only sentencing provisions unaffected by the new legislation concern several sentencing enhancements and the penalties for employing aliens unauthorized to work in the United States.[51] The proposed legislation would alter the current sentencing schema in several ways:

- Unless stated otherwise, a violation of any act in INA §274 merits a fine, imprisonment for not more than five years, or both.
- If the offense involves the transit of the defendant's spouse, child, sibling, parent, grandparent, or niece or nephew, and the offense is not affected by the sentencing enhancements listed below, the defendant may be fined, imprisoned for not more than one year, or both.
- If the offense was for *recruiting, encouraging, or inducing an alien to come to, enter, or reside* in the United States, *transporting or moving an alien* in the United States, or *harboring, concealing, or shielding from detection* the alien in any place in the United States, for purposes of profit, commercial advantage, or private financial gain, the defendant may be fined, imprisoned for not more than 10 years, or both.
- If the offense was for *bringing an alien into the United States in any manner whatsoever* regardless of any future official action that may be taken with respect to the alien, for the purpose of profit,

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[47] *See, e.g.*, Alien Smuggling and Terrorism Prevention Act of 2007, H.R. 2399, 110th Cong. § 4 (2008).

[48] *See* INA § 274(a)(3).

[49] *See* CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Yule Kim and Michael John Garcia.

[50] *See, e.g.*, Alien Smuggling and Terrorism Prevention Act of 2007, H.R. 2399, 110th Cong. § 4 (2008).

[51] *See* INA § 274(a)(3), (4).

commercial advantage, or private financial gain, or if the offense was committed with the intent or reason to believe the alien would commit an offense against the United States or any State punishable by imprisonment for more than one year, the defendant may be fined for each violation, and/or imprisoned for not less than 3 and not more than 10 years for the first two offenses, and not less than 5 and not more than 15 years for each subsequent offense.

- If the offense results in serious bodily injury or places in jeopardy the life of any person, the defendant may be fined, imprisoned for not more than 20 years, or both.
- If the offense involves an individual who the defendant knew was engaged in or intended to engage in terrorist activities, the defendant may be fined, imprisoned for not more than 30 years, or both.
- If the offense involves kidnaping, an attempt to kidnap, conduct required for aggravated sexual abuse, an attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant may be fined, imprisoned for any term of years or life, or both.
- If the offense results in the death of any person, the defendant may be fined, imprisoned for any term of years or life, punished with death, or both.

Other Changes to INA §274. The proposed legislation would also result in several other changes to INA §274. For example, the legislation would add a provision to INA §274 that would affirmatively assert extraterritorial jurisdiction for acts of alien smuggling that occur outside the United States. Although many courts have suggested extraterritorial jurisdiction exists over some offenses,[52] this provision would clarify that the full reach of the statute extends to acts committed by alien smuggling networks on the high seas and in foreign countries.[53]

Furthermore, if a defendant violates INA §274 on "the high seas," no defense based on necessity can be raised unless (1) the defendant informs the Coast Guard "as soon as practicable" of the necessity and if a rescue is claimed, information about the vessel engaging in the rescue and (2) the defendant did not bring or attempt to bring any alien into the land territory of the United States without lawful authority, unless exigent circumstances existed that placed the life of the alien in danger.[54]

Finally, the legislation would alter the religious denomination exemption by explicitly making it an affirmative defense, which would clarify that the burden of proof is on the defendant religious denomination to demonstrate that its conduct falls

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[52] *See, e.g.*,United States v. Delgado-Garcia, 374 F.3d 1337 (D.C. Cir. 2004) (statute prohibiting conspiring to induce aliens to illegally enter United States and the bringing of unauthorized aliens to the United States applies extraterritorially).

[53] *See, e.g.,* Alien Smuggling and Terrorism Prevention Act of 2007, H.R. 2399, 110th Cong. § 4 (2008).

[54] *Id.*

under the exemption. It would also deny the exemption for religious denominations accused of *encouraging or inducing an alien to reside in the United States*.[55]

Alterations to Maritime Law Enforcement. The proposed legislation would not only alter INA §274, but would also affect §2237 of Title 18 of the U.S. Code. Section 2237 prohibits a ship master in charge of a vessel subject to the jurisdiction of the United States from knowingly failing to obey an order by an authorized Federal law enforcement vessel to heave to that vessel.[56] It also prohibits any person on such vessel from forcibly resisting a boarding or a law enforcement action authorized by Federal law or to provide materially false information to a Federal law enforcement officer with regard to information related to the vessel.[57] Normally, violating §2237 would subject a defendant to a fine, imprisonment for not more than five years, or both.[58] However, the proposed legislation would enhance the sentences under these circumstances:

- If the offense is committed in the course of a violation of INA §274, Chapter 77 of Title 18, §111 of Title 18, Section 111A of Title 18, §113 of Title 18, §117 of Title 18, Chapter 705 of Title 46, or Title II of the Act of June 15, 1917, the offender shall be fined, imprisoned for not more than 10 years, or both.
- If the offense results in serious bodily injury or transportation under inhuman conditions, the offender shall be fined, imprisoned not more than 15 years, or both.
- If the offense results in death or involves kidnaping, an attempt to kidnap, the conduct required for aggravated sexual abuse, or an attempt to commit such abuse, or an attempt to kill, the offender may be fined, imprisoned for any term of years or life, or both.[59]

The proposed legislation would also limit the availability of a necessity defense and would define the term "transportation under inhumane conditions."

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[55] *Id.*

[56] 18 U.S.C. § 2237(a)(1).

[57] 18 U.S.C. § 2237(a)(2).

[58] 18 U.S.C. § 2237(b).

[59] *See, e.g.*, Alien Smuggling and Terrorism Prevention Act of 2007, H.R. 2399, 110th Cong. § 5 (2008).