

Immigration

Law on the Edge

The year 2006 was to be the year of true immigration reform. Employer sanctions, the Minuteman Project, massive immigrant-rights marches and rallies—these all entered the lexicon and consciousness last year. Given all that, immigration law change was said to be near-certain.

Near-certain is as close as it got. As 2007 begins, the same issues will arise and may lead to legislation. Until then, we present articles on three aspects of the topic. Send your own thoughts on the state of immigration law to Tim.Eigo@staff.azbar.org.

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Alien Smuggling Along the Arizona–Mexico Border

Federal and State Responses



As long as nations have attempted to regulate entry through their borders, there have been individuals who wish to evade such regulations. Not surprisingly, an underground network developed in which transportation and assistance is offered for illicit financial gain, a network commonly referred to as “alien smuggling” or “human smuggling.”

The volume and sophistication of human smuggling, especially into the United States, has increased dramatically in recent years. The U.S. Government Accountability Office reported to Congress in 2005, “Estimates by the United Nations and the federal law enforcement and intelligence communities indicate that people smuggling is a huge and highly profitable business worldwide, involving billions of dollars annually, and the United States is a major destination country.”¹

The difficult and sometimes deadly decision to seek illegal entry into the United States is almost always motivated by higher-paying jobs or reunification with family members. But fears that terrorists could enter the country through the same alien smuggling channels have helped to drive the debate over border security.

Although different agencies within the federal government bear responsibility and are expected to effectively control the admission of aliens into the United States, illegal immigration, and the alien smuggling that accompanies it, has continued virtually unabated. Out of an estimated 7.2 million unauthorized workers—almost five percent of the U.S. labor force—2.5 million of them arrived between 2000 and 2005.² The recent, and often divisive, national debate over how to effectively address this issue has brought terms such as alien smuggling and “coyotes”—for-profit human smugglers—into the national vocabulary.

The vastly different provisions in the

competing bills that have passed the House and Senate illustrate the broad disagreement over the most effective methods of addressing alien smuggling. Department of Homeland Security (DHS) law enforcement agencies continue their efforts to address this growing problem through focused strategies, with varying degrees of success.

Of the border states that have been affected by alien smuggling, Arizona has been a focal point for implementing and developing a national strategy by Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP), two of the DHS agencies tasked with securing the border and enforcing U.S. immigration laws. The controversial deployment of U.S. National Guard troops to the Arizona–Mexico border is one of the most recent attempts by the federal government to gain control over alien smuggling.

Border states, frustrated with relying upon the federal response, are taking action at the state level, including legislating in an area that has traditionally been relegated to the federal government. Arizona has received national attention on this issue as a result of the exponential increase in the number of individuals attempting to cross its border with Mexico without proper inspection or admission into the United States. As more populated border areas of the country have become more uniformly regulated, Arizona has become the border crossing destination of choice for the illicit human smuggling trade, and of the 1.2 million illegal immigrants apprehended in Fiscal Year 2005 by CBP, more than half the crossings were

made in Arizona.³

In response to the flow of illegal entrants into the United States through the Arizona–Mexico border, in August 2005 Governor Janet Napolitano declared that a “state of emergency” existed, which made \$1.5 million in state funds available to border counties, particularly for law enforcement. This was just one of several state measures aimed at addressing human smuggling.

In 2005, in addition to other immigration-related legislation, Arizona enacted new criminal laws specifically to target human smuggling. As Arizona attempts to control alien smuggling on its borders, other states are closely monitoring its enforcement efforts. Like other immigration-related Arizona legislative initiatives, its methods to address human smuggling will likely influence other states. These “anti-coyote” laws are being tested in the courts for the first time, and the resolution of arguments over the application of these laws and whether they should be amended will have a significant impact on border enforcement at the state and federal levels.

Typical of the polarizing debate over immigration, personal views and experiences often inform one’s immediate response to a deceptively complex problem such as alien smuggling. It could easily be characterized as an issue primarily involving human rights, law enforcement, economic reality or national security. The problem of alien smuggling is not easily categorized,

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and the lack of an effective response or satisfactory solution reflects that reality.

Human Smuggling Versus Human Trafficking

Alien smuggling, also referred to as human smuggling, involves the procurement of illegal entry into a country for financial or other material benefit. The Arizona and federal statutes criminalizing alien smuggling focus on any act associated with transportation of aliens into the United States without lawful inspection or admission.⁴ “Human trafficking” is a distinct offense involving the exploitation of an alien who is being transported by force, coercion or deception and for purposes of forced labor or prostitution.⁵

DHS, through ICE, has made combating human trafficking rings a major focus in its enforcement efforts, which have led to a steep increase in arrests and convictions. Congress has passed several laws specifically to address trafficking issues, including the Trafficking Victims Protection Reauthorization Act, pursuant to which the Bush Administration authorized more than \$200 million to combat human trafficking.

Whether human smuggling or human trafficking has taken place is sometimes difficult to ascertain. In a typical “smuggling” situation, there is a financial agreement between an alien and a smuggler, often referred to as a “coyote,” that transportation will be provided into the United States. The smuggled individual consents to being transported, and the relationship with the coyote ends once the transportation is complete.

In some cases, during the course of transportation, the relationship between the smuggled alien and coyote changes, and smuggling evolves into a human trafficking offense. There are unfortunate incidents in which smuggled aliens are held against their will at a “drop house” upon their arrival in the United States and forced to perform labor while money is extorted from family members abroad. In those cases, the smuggled alien becomes the victim of human trafficking.

Federal Initiatives To Combat Alien Smuggling

Arizona, and its border with Mexico, has been the focus of several ICE and CBP

operations to address the human smuggling problem. ICE conducted a financial analysis during a six-month period in early 2003 that revealed more than \$160 million was sent through Phoenix money-transmitting businesses, much of which was likely intended for payment of smuggling fees.⁶

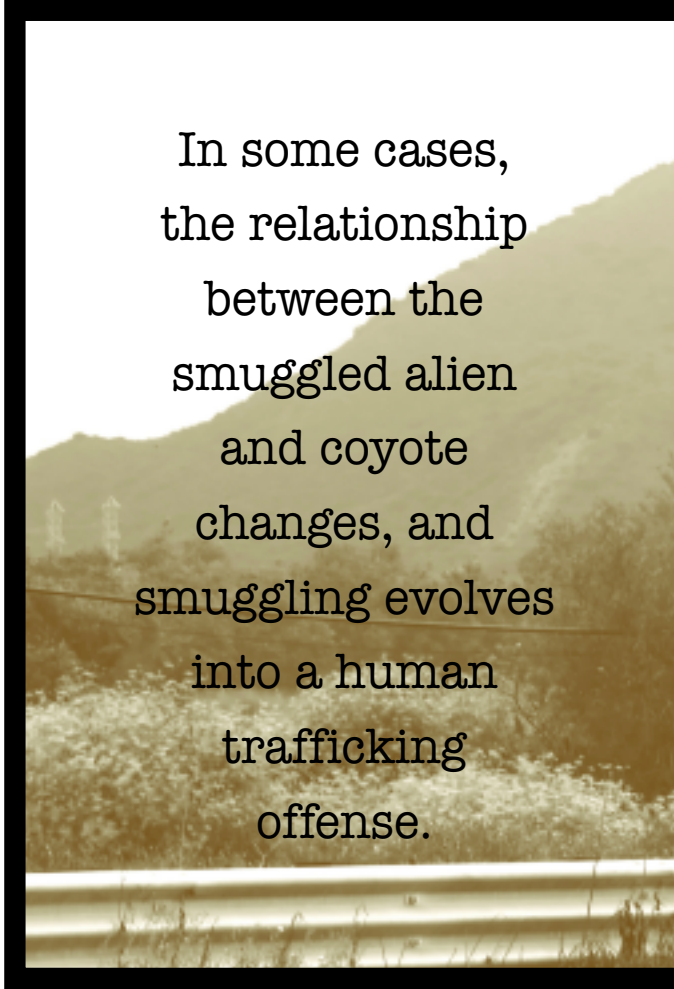
Following the creation of the DHS in March 2003, “Operation ICE Storm” was initiated, which focused on combating alien smuggling along the Arizona border and within the state by coordinating with federal, state and local law enforcement agencies. DHS has claimed it served “as a strategic model for anti-smuggling operations in other parts of the nation” and for more recent federal enforcement efforts.⁷ ICE Storm focused on financial investigations to target and seize the assets of human smuggling rings. It resulted in the seizure of more than \$7.4 million dollars and the prosecution of 343 defendants.⁸

DHS subsequently announced the first phase of its Arizona Border Control (ABC) Initiative in March 2004, which also involved coordination between federal agencies, such as ICE, CBP, and the Transportation Security Administration (TSA), and state and local officials. An additional 200 CBP officers were deployed to the Arizona border along with additional surveillance resources, which DHS stated resulted in 384,954 apprehensions during Fiscal Year 2004, as opposed to 270,585 in FY2003.⁹

Although the exact number of migrant deaths along the Arizona border is often disputed, DHS stated it had reduced the number by 19 percent during 2004. The ABC Initiative has been renewed each year, with additional increases in the number of CBP agents in Arizona and along its border, as well as helicopters and unmanned aerial vehicles. DHS has claimed significant disruption to alien smuggling rings.

DHS announced its nationwide Secure Border Initiative (SBI) in November 2005.

It incorporates the anti-smuggling methods of the ABC Initiative and focuses on worksite monitoring and document fraud. ICE officials have reported to Congress that worksite enforcement will be a key component of its continued enforcement efforts as “part of a comprehensive layered approach that focuses on how illegal aliens get to our country, the ways in which they obtain identity documents allowing them to



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become employed, and the employers who knowingly hire them.”¹⁰ ICE also cites worksite enforcement as a means to combat alien smuggling, such as the April 19, 2006, raids on IFCO Systems worksites in eight states, which resulted in the arrest of 1,187 illegal workers.¹¹

When the SBI was announced, DHS stated it was ending the “catch and release” enforcement program by “streamlining” the removal process for all illegal aliens apprehended in the United States. These

expedited removal procedures raise concerns about providing due process while quickly removing individuals from the United States. They will likely be the subject of court challenges.

As part of the Intelligence Reform and Terrorism Prevention Act (IRTPA) passed by Congress in 2004, the Human Smuggling and Trafficking Center (HSTC) was established as an "Interagency intelli-

Current Application of Federal Anti-Alien Smuggling Laws and Calls for Change

Section 274 of the Immigration and Nationality Act, the federal statute used to prosecute alien smugglers, prohibits knowingly or recklessly bringing in, transporting or harboring certain aliens.¹³ Under this statute, a conviction could result in a maximum penalty of 10 years' imprisonment per alien smuggled. If the violation involves serious bodily injury or placing life in jeopardy, Section 274 provides for additional penalties.

There have been many high-profile prosecutions of alien smuggling rings by federal law enforcement officials. For example, in May 2006, the executives of a bus company that transported an estimated 40,000 illegal aliens from Tucson to Los Angeles pled guilty to federal human smuggling charges.

Since FY 1999, federal prosecutors have convicted

more than 2,000 smugglers annually under Section 274.¹⁴ The disparity between the number of prosecutions under the federal statute and the volume of alien smuggling may be attributed in part to a lack of resources. Federal prosecutors have focused their resources on serious smuggling offenses leading to violence or bodily harm.

The lack of prosecutorial deterrence has led to efforts to deter smuggling at the border itself. President Bush's May 15, 2006, primetime address and subsequent deploy-

ment of U.S. National Guard troops to the U.S.-Mexico border, including Arizona's border, has continued the nationwide debate over the best way to address alien smuggling. The various enforcement programs implemented by DHS must somehow be reconciled with the President's statement that, "We must remember that the vast majority of illegal immigrants are decent people who work hard, support their families, practice their faith, and lead responsible lives."

The deployment of National Guard troops to the border has had an immediate impact on the number of individuals detained at the border. CBP reported that apprehensions along the U.S.-Mexico border decreased by 21 percent, to 26,994, in the first 10 days of June, compared with 34,077 for the same period in 2005, and a 23 percent decrease occurred along the Arizona border.¹⁵ This reduced figure was reported even though fewer than 100 National Guard troops had actually been deployed.

Alien smugglers have reportedly increased their fees for travel into the United States from approximately \$2,000 to as high as \$4,000.¹⁶ Whether the combination of high transport fees and general fears regarding encounters with U.S. troops will continue to discourage border crossers remains to be seen. It is theorized that alien smugglers might decide to use more difficult or dangerous routes to avoid detection, which could add to the more than 1,900 deaths that have occurred on the U.S.-Mexico Border since CBP began its tally in October 1998.¹⁷

President Bush's deployment of National Guard troops was only part of his call for comprehensive immigration reform. Such reform would necessarily have to address alien smuggling.

Pending Immigration Legislation in Congress and Alien Smuggling

In 2006, immigration reform bills passed both the House and Senate. However, the disparity between them was so great, there were realistic concerns that no action would be taken. That, of course, turned out to be the case, when the session ended with no significant immigration legislation passed. Despite that, it is worth noting the details of the bills. They exemplify much of the ongoing debate about immigration, and the



gence/law enforcement/diplomacy fusion center and information clearinghouse composed of representatives from the Departments of State, Justice, and Homeland Security and the Intelligence Community."¹² The HSTC is a specific example of the federal response to human smuggling at the international level, because its duties include maintaining partnerships with foreign governments and law enforcement agencies to share intelligence concerning smuggling and human trafficking.



same issues—and similar bills—are likely to return in the coming session.

The House Bill, HR 4437, was an “enforcement-only” bill, which included a provision that all illegal aliens currently in the United States, approximately 11.5 million to 12 million people,¹⁸ could be charged with an aggravated felony. Furthermore, it greatly expanded the definition of felony “alien smuggling” to include knowingly giving assistance to an illegal alien so he or she may remain or attempt to remain in the United States. This broad definition would criminalize currently lawful conduct by social services organizations, refugee agencies, churches and immigration attorneys. An illegal immigrant would be unable to even consult with an attorney without the attorney facing potential penalties as an alien smuggler, and family members or charitable workers could face felony charges for assisting undocumented immigrants.

The Senate’s immigration bill, S.2611, proposed by Sen. John McCain and Sen. Edward Kennedy, addressed alien smuggling by continuing to support cooperative efforts and operations similar to the ABC Initiative and SBI. ICE, CBP and federal, state, local and tribal authorities would be required to improve coordination efforts to oppose human smuggling. It would also continue to make visas available to the victims of human trafficking and other crimes who assist in criminal prosecutions. It would not criminalize illegal aliens currently in the United States and provide a means for many of them, depending upon their length of residence in the United States, to eventually earn lawful residence and citizenship.

Shortly before the mid-term elections, Congress did agree to pass the Secure Fence Act, which requires the building of 700 miles of fence along the 1,951 mile U.S.–Mexico border. The law has strained U.S.–Mexico relations, and the incoming chair of the House Homeland Security Committee has suggested he will “re-visit” the issue in the next session.¹⁹

Immigration reform has been identified as one area in which the newly elected Congress and President Bush may be able to reach some compromise over the next two

years. However, bipartisan compromises on such a divisive issue will be difficult to secure, and some aspects of comprehensive reform would likely prove unpopular with a legislator’s constituents. The political liabilities of making a strong push for comprehensive immigration reform may prove to outweigh the recognized need for it. An alternative may be the passage of piecemeal legislation aimed at strengthening border security and increasing the number and

of the financial burden placed upon Yuma, Pima, Santa Cruz and Cochise counties.

Public frustration over the ease by which illegal immigrants enter through the Arizona border has given rise to groups such as the Minuteman Project, which has received national attention for its private efforts to patrol the Arizona border. The Arizona legislature responded by proposing a number of immigration enforcement bills, some of which were vetoed by the governor.

In a highly charged political climate, this has led to accusations and acrimonious debate over what measures should be taken on an issue affecting an estimated 400,000 to 450,000 illegal immigrants in the state.²²

More than 200 individuals smuggled through the Arizona border who appeared in Maricopa County have been charged with violating the anti-smuggling statute.

Arizona “Anti-Coyote” Statute

On August 12, 2005, Arizona enacted a state law, A.R.S. § 13-2319, which makes it a crime to intentionally engage in the smuggling of human beings for profit or commercial purpose. The statute defines “smuggling of human beings” as “the transportation or procurement of transportation by a person or an entity that knows or has reason to know that the person or persons transported or to be transported are not United States citizens, permanent resident aliens or persons otherwise lawfully in this state.”²³ A person who engages in the smuggling of aliens—a “coyote”—is guilty of a Class 4 felony.

In response to the passage of this legislation, Arizona’s Attorney General formed a Border Trafficking Team, focused on the investigation and prosecution of human smuggling operations and seizure of their assets, which has filed criminal charges against 58 coyotes as of October 2006.²⁴ The Attorney General’s Office has obtained court orders to seize more than \$17 million that was suspected to be intended for human smuggling organizations.²⁵ Western Union has filed suit against the Attorney General’s Office over the seizure of wire transfer funds, although its request for a temporary restraining order to halt the program was rejected.²⁶ A separate class action lawsuit was filed on October 18, 2006, by several individuals who transferred money via Western Union into Arizona.²⁷ The Attorney General’s Office has stated it has

availability of certain types of visas.

Even if Congress acts in the next legislative session, it is an open question whether Congress would preempt the states’ ability to enact their own laws criminalizing alien smuggling and other immigration-related offenses. Courts have upheld the ability of states to enact laws that do not “burden or conflict” with federal laws.²⁰ Arizona, for example, has taken such measures in response to what has been deemed an “emergency” along its border.

Arizona’s Response to Alien Smuggling

Although DHS has reported improvements in federal enforcement along the Arizona–Mexico border, Arizona continues to have the highest rate of illegal immigration in the country, and the increased detention of illegal aliens comes at great costs to the state.

Since October 1, 2005, CBP has reported an average of 1,600 arrests a day in the Yuma and Tucson sectors of the Arizona border. In 2005, Arizona’s four border counties asked the federal government for \$23.2 million to cover the cost of jailing thousands of illegal immigrants, but they were only reimbursed for \$731,000.²¹ Shortfalls such as these led Governor Napolitano to declare that a state of emergency has existed along the border since August 2005, and \$1.5 million in state funds are being used to relieve a small part

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procedures for individuals to recover money that was part of a legitimate transfer, but opponents have criticized the program as discriminatory.

A.R.S. § 13-2319 also has been the subject of controversy concerning its application to those aliens who agreed to be smuggled into the United States.

The Maricopa County Attorney's Office interpreted the new law as creating liability for such individuals under Arizona's conspiracy statute, A.R.S. § 13-1003. On June 9, 2006, this interpretation was upheld by the Maricopa County Superior Court after the defendants arrested under the statute moved for dismissal under various grounds. The court found jurisdiction and venue were proper in Maricopa County because overt acts in furtherance of smuggling occurred there. The court found the defendants "may be prosecuted for conspiracy to smuggling themselves" if it is proved they provided themselves as "human cargo" and agreed to be transported as illegal aliens.²⁸

Despite testimony from one of the bill's sponsors that A.R.S. § 13-2319 was not intended to be applied to the aliens who were being smuggled, such exclusionary language was not included in the statute and the legislature is presumed to have known and intended the conspiracy statute would apply to a violation of A.R.S. § 13-2319.


More than 200 individuals smuggled through the Arizona border who appeared in Maricopa County have been charged with violating the anti-smuggling statute. In the case decided on June 9, 2006, 48 illegal immigrants were charged as conspirators to human smuggling after they were discovered in a pair of furniture trucks 50 miles west of Phoenix. Some pled guilty to solicitation to commit human smuggling, a Class 6 felony that carries up to a year in jail.

On October 19, 2006, for the first time in the United States, a jury convicted an illegal immigrant of conspiring to commit human smuggling, a Class 4 felony, under the "anti-coyote" and conspiracy statutes.²⁹ The illegal immigrant, who was found to have agreed to be smuggled into the United States, now faces a potential sentence of almost four years' imprisonment when he is sentenced on December 5, 2006.³⁰

The Maricopa County Attorney's Office reports a 90 percent conviction rate for defendants charged under these laws, and 161 individuals have been convicted of felonies under A.R.S. §§ 13-2319, 13-1003 and 13-1001 as of November 1, 2006.³¹ Though appeals are likely to challenge the application of these laws, Arizona stands to prosecute virtually any illegal entrant who received the assistance of another individual with the intent to "smuggle themselves." Other counties in Arizona may start to follow the lead of the Maricopa County Sheriff's Office and County Attorney's Office in arresting and prosecuting illegal immigrants under this statutory interpretation.

This controversial application of A.R.S. § 13-2319 may be broader than intended by the legislature or by some of the bill's sponsors. However, if the application of the conspiracy statute was an unintended consequence, the responsibility to address the problem and amend A.R.S. § 13-2319 falls to the legislature.

The consequences of failing to clarify the anti-smuggling law on this point are far-reaching. A conviction under the statute may bar the alien from obtaining lawful status in the U.S. at any point in the future, leading to family unification and undocumented immigration concerns. If Arizona legislators consider the absence of statutory language specifically excluding the conspiracy statute to be a regrettable oversight, it would be inexcusable for them to fail to take action.

It remains to be seen whether Arizona's "anti-coyote" statute will be an effective deterrent to alien smuggling or whether its application will have political or societal consequences. Alien smuggling organizations have proved to be resilient at resisting both federal and state efforts to prevent them from operating along Arizona's border with Mexico. Whether or not state and federal enforcement efforts are able to stem the tide, Arizona will be forced to deal with the consequences of alien smuggling for years to come. 

endnotes

1. GAO-05-892T, p. 4.
2. Pew Hispanic Center, *Fact Sheet* (April 13, 2006), at 1.
3. CBP Border Patrol Overview (Jan. 11, 2006).
4. 18 U.S.C. § 1324(a)(1)(A)(i)-(v); A.R.S. § 13-2319(C).
5. 18 U.S.C. §§ 1592-95; 22 U.S.C. §§ 7101-7110; A.R.S. §§ 1306-1308.
6. White House Press Release regarding Operation ICE Storm (Nov. 10, 2003), p. 1.
7. GAO-05-892T, p. 2.
8. DHS Fact Sheet for Arizona Border Control Initiative—Phase II (Mar. 30, 2005), p. 1.
9. *Id.*
10. Statement of ICE Asst. Sec'y Julie Myers to Senate Judiciary Subcommittee (June 19, 2006), p. 2.
11. *Id.* at 3.
12. HSTC Report to Congress (June 16, 2005), p. 3.
13. 8 U.S.C. § 1324.
14. GAO-05-305, p. 15.
15. Associated Press, *Troops Reducing Illegal Border Crossings*, June 12, 2006, at 1.
16. Associated Press, *Mexico's Migrant Smugglers Hike Rates*, June 14, 2006, at 1.
17. *Id.*
18. Pew Hispanic Center, *Fact Sheet* (May 22, 2006), at 1.
19. United Press International, Nov. 13, 2006, "Dem Congress May Scrap Border Fence."
20. *State v. Alvarado*, CR 06-005932-033, June 9, 2006, Minute Entry, p. 7.
21. *Loose Borders Sap County Coffers*, USA TODAY, Mar. 7, 2006, at 1 (citing Department of Justice records).
22. Pew Hispanic Center, *Fact Sheet* (April 26, 2006), at 1.
23. A.R.S. § 13-2319(C).
24. Arizona Attorney General, Press Release, undated, "Border Trafficking Team to Combat Human Smuggling and Drugs," available at www.azag.gov/CriminalProsecutions/BorderTraffickingTeam.html
25. Arizona Attorney General, Press Release, Oct. 18, 2006, "Terry Goddard Vows to Continue Human Smuggling Prosecutions."
26. Arizona Attorney General, Press Release, Sept. 20, 2006, "Terry Goddard Applauds Court's Rejection of Bid to Limit 'Coyote' Investigations."
27. Arizona Attorney General, Press Release, Oct. 18, 2006, "Terry Goddard Vows To Continue Human Smuggling Prosecutions."
28. *Alvarado*, CR 06-005932-033, June 9, 2006, Minute Entry, p. 3.
29. Maricopa County Attorney Press Release, October 19, 2006, "Illegal Immigrant Found Guilty By Jury."
30. *Id.*
31. *Id.*; Maricopa County Attorney Press Release, Nov. 1, 2006, "List of Felons Convicted Under Arizona's Human Smuggling Law."