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Immigration Crimes: Improper Entry and Reentry

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Immigration Crimes: Improper Entry and Reentry

Congress has established a comprehensive framework governing the admission and removal of aliens (a term defined in the Immigration and Nationality Act [INA] as “any person not a citizen or national of the United States”). These rules are buttressed by a multifaceted enforcement scheme with civil and criminal components. Aliens who have engaged in certain kinds of proscribed conduct may be denied admission to the country or, if present in the United States, face removal through procedures that are civil in nature. Congress has also established criminal penalties for certain activities that undermine immigration rules and requirements, and offenders could potentially be subject to imprisonment and criminal fine. In addition to being subject to removal, aliens who improperly enter the United States or reenter the United States after removal (or attempt to do either) may face federal criminal prosecution under 8 U.S.C. § 1325(a) (improper entry) and 8 U.S.C. § 1326(a) (reentry of removed aliens).

An alien may be found culpable of improper entry under Section 1325(a) through several avenues: entering or attempting to enter the United States at a time or place other than as designated by immigration authorities (e.g., a surreptitious border crossing between ports of entry); eluding inspection or examination by immigration authorities; or entering or attempting to enter the United States by a willfully false or misleading misrepresentation or willful concealment of a material fact. A first-time unlawful entry offense is typically a misdemeanor subject to a fine or imprisonment, while subsequent offenses after an initial improper entry conviction are felonies subject to a fine or imprisonment not more than two years.

Section 1326(a) makes it a felony for an alien to reenter or attempt to reenter, or at any time be found in, the United States without authorization after the alien has been “denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding.” Violations can result in criminal penalties of a term of imprisonment or a fine (or both).

Federal courts have disagreed over whether *entry* under Sections 1325(a) and 1326(a) requires an alien to enter the United States “free from official restraint” and what it means to enter free from official restraint. Likewise, Section 1326(a)’s “found in” provision raises some distinct legal issues that might be of interest to lawmakers, such as what is the meaning of “found in” the United States, whether the statute is applicable to previously removed aliens who enter the United States lawfully but remain in violation of law, and the application of the pertinent statute of limitations. Another potential area of interest is the intersection of the principles of asylum and the imposition of criminal liability for improper entry and reentry. Congress might wish to consider whether those who unlawfully enter the United States but intend to seek asylum should be prosecuted for unlawful entry or reentry.

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Introduction

Federal criminal statutes occupy a prominent role in the comprehensive framework established by Congress to regulate the admission and removal of aliens. According to the U.S. Sentencing Commission, immigration-related criminal cases made up a significant portion of the federal criminal caseload for which a defendant was sentenced in FY2021, accounting for 29.6% of all reported cases.¹

Improper entry and reentry have been criminal offenses since the Immigration Act of 1929.² The 1929 Act imposed criminal sanctions on (1) aliens who entered the United States at places other than those designated by immigration officials (i.e., not at ports of entry) and (2) aliens who reentered the United States after a previous deportation.³ The Immigration and Nationality Act (INA), enacted in 1952, carried over these criminal provisions,⁴ and these offenses have been further amended over the years.⁵

Under the current statutory scheme, aliens who improperly enter the United States or reenter the United States after removal, or attempt to do so, may face criminal prosecution.⁶ Although prosecutors might also utilize other federal statutes targeting conduct related to unlawful entry or reentry—such as using a fraudulent visa or other immigration documents—conduct constituting improper entry or reentry are generally prosecuted under two federal statutes:

- 8 U.S.C. § 1325(a): Improper entry by alien
- 8 U.S.C. § 1326(a): Reentry of removed aliens

Both statutes contain multiple avenues through which a prosecutor may obtain a conviction against an alien for improper entry or reentry. Under 8 U.S.C. § 1325(a), criminal liability attaches when an alien (1) enters or attempts to unlawfully enter the United States at a place other than a designated port of entry, (2) eludes examination and inspection by immigration officers, or (3) attempts to enter or enters the United States by a willfully false or misleading representation or the willful concealment of a material fact. An alien who has previously been removed or voluntarily departed under an outstanding removal order may be convicted for violating 8 U.S.C. § 1326(a) after reentering or attempting to reenter the United States or after being “found in” the United States without authorization to enter.

¹ See U.S. SENTENCING COMMISSION, FISCAL YEAR 2021 OVERVIEW OF FEDERAL CRIMINAL CASES 18 (2022). This is a decrease from prior years with drug offenses overtaking immigration offenses as the most common federal crime for which a defendant was sentenced. *Id.* at 5. Overall, immigration offenses cases decreased by 36.2 % from the year before. *Id.* Most of the decrease in immigration cases occurred in cases involving unlawful reentry. *Id.* at 18.

² Immigration Act of 1929, Pub. L. No. 70-1018 §§ 1, 2, 45 Stat. 1551 (establishing reentry after deportation as a felony and entry at places other than place designated by immigration officials as a misdemeanor); see also *United States v. Corrales-Vazquez*, 931 F.3d 944, 947 (9th Cir. 2019) (providing brief overview of history of improper entry offense).

³ See Immigration Act of 1929, *supra* note 2, §§ 1, 2.

⁴ Compare Immigration and Nationality Act, Pub. L. No. 82-414, §§ 275, 276 with Immigration Act of 1929, Pub. L. No. 70-1018 §§ 1, 2.

⁵ See, e.g., Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-618 § 105 (adding civil penalties for improper entry); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 §§ 121(b)(3), § 543(b)(2) (amending the unlawful entry and reentry statutes to include attempted offenses).

⁶ 8 U.S.C. §§ 1325(a), 1326(a); cf. *United States v. Rizo-Rizo*, 16 F.4th 1292, 1296–97 (9th Cir. 2021) (noting that the criminal penalty for unlawful entry “was enacted to control unlawful immigration”), *cert. denied*, 143 S. Ct. 120 (2022).

These statutes do not punish entries or reentries solely because an individual is determined to be inadmissible under the INA.⁷ Rather, these criminal provisions punish improper entry and reentry based on the manner and circumstances surrounding an alien's entry into the United States.⁸ In addition to criminal penalties of a fine or a term of imprisonment, aliens might also be subject to civil fines and face immigration consequences, including potential removal from the United States.⁹

This report provides a legal overview of improper entry and reentry offenses located in 8 U.S.C. §§ 1325(a) and 1326(a), first discussing relevant key concepts related to and underlying both offenses and then examining the prohibited conduct under both statutes and select court challenges. It concludes by identifying pertinent legal considerations for Congress.

Key Concepts

This section summarizes key immigration law concepts that are relevant to understanding and analyzing the criminal offenses of improper entry by aliens and reentry of removed aliens.

Criminal Versus Civil Enforcement of Immigration Laws

The INA provides a comprehensive framework regulating the admission, presence, and removal of aliens. These rules are buttressed by a multifaceted enforcement scheme. Aliens who engage in certain kinds of proscribed conduct may be denied admission to the country or, if present in the United States, face removal.¹⁰ Alien removal and associated administrative processes are civil in nature.¹¹ In addition, citizens and aliens alike may face civil fines for certain conduct undermining immigration rules.¹²

Congress has also established criminal penalties for activities that undermine immigration rules and requirements. Some offenses carry relatively minor misdemeanor penalties,¹³ while others constitute felonies potentially punishable by lengthy prison terms (and, in a few cases involving

⁷ See *infra* discussion pp. 4–5 “**Error! Reference source not found.**”.

⁸ See 8 U.S.C. §§ 1325(a) (imposing criminal penalties for entering the United States at an improper time or place, avoiding examination or inspection, and misrepresentations and concealment of facts); 1326(a) (penalizing previously removed aliens who enter or attempt to enter, or are found in, the United States).

⁹ See *e.g.*, *id.* § 1182(a)(6)(A)(i) (removable as an “alien present in the United States ... who arrives in the United States at any time or place other than as designated by the Attorney General”), (7)(B)(i) & (9)(A)(i)-(ii).

¹⁰ *Id.* §§ 1182(a) (setting forth the grounds for denying admission into the United States, and for removing an unadmitted alien from the country); 1227(a) (providing grounds for the removal of aliens who had been admitted into the United States).

¹¹ *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (“We have long recognized that deportation is a particularly severe ‘penalty,’ but it is not, in a strict sense, a criminal sanction.”) (internal citations omitted); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39 (1984) (“A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry.... The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws.”).

¹² See, *e.g.*, 8 U.S.C. §§ 1325(b) (civil penalties for unlawful alien entry); 1229c(d) (civil fines for aliens who agree to voluntarily depart the United States in lieu of removal and fail to do so); 1323(b) (civil fines for unlawfully bringing aliens into the United States who lack a required passport and unexpired visa); 1324a(e)(4) (civil penalties related to the hiring or recruitment of aliens who lack authorization for employment); 1324c(d)(3) (civil penalties for immigration-related document fraud).

¹³ See, *e.g.*, *id.* §§ 1325(a) (providing that a first-time unlawful entry offense is a misdemeanor subject to a fine and/or imprisonment for no more than six months).

aggravating circumstances, life imprisonment or death).¹⁴ While Congress has enacted numerous criminal statutes that address immigration-related conduct, most fall into three overarching and overlapping categories: (1) offenses related to unlawful alien entry, (2) offenses related to an alien’s unlawful presence (though unlawful presence is not itself a per se crime¹⁵), and (3) immigration-related fraud.¹⁶

In many cases, conduct that makes an alien removable might also result in criminal sanctions. For example, an alien apprehended shortly after surreptitiously entering the United States between points of entry is not only subject to removal by immigration authorities¹⁷ but might also be referred to federal prosecutors to face criminal penalties for the offense of improper entry.¹⁸ Decisions as to whether a removable alien in immigration authorities’ custody will be referred to criminal law enforcement authorities may depend on a number of factors, including the nature of the offense, prosecutorial resources, and enforcement priorities.¹⁹

In recent years, most immigration-related prosecutions have occurred in federal district courts along the U.S.-Mexico border, with improper entry under Section 1325(a) and improper reentry under Section 1326(a) being among the most frequently prosecuted immigration-related crimes.²⁰ As a result, caselaw that has developed in the Fifth, Ninth, and Tenth Circuits—the judicial circuits where those federal district courts are located—has proven particularly important to the interpretation and application of the two criminal statutes.

Select CRS Products

- CRS Legal Sidebar LSB10150, *Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border*, by Hillel R. Smith
- CRS Report R43892, *Alien Removals and Returns: Overview and Trends*, by Audrey Singer
- CRS Report R47077, *U.S. Immigration Courts and the Pending Cases Backlog*, by Holly Straut-Eppsteiner
- CRS In Focus IF11536, *Formal Removal Proceedings: An Introduction*, by Hillel R. Smith
- CRS In Focus IF11410, *Immigration-Related Criminal Offenses*, by Kelsey Y. Santamaria

¹⁴ See, e.g., *id.* §§ 1324(a)(1)(B)(iv) (establishing that certain violations of the alien smuggling and harboring statute resulting in the death of a person may be punished by death or imprisonment for any terms of years or life imprisonment); 1326(b) (providing that a person convicted of unlawful reentry after having previously been convicted of an aggravated felony may be punished by a fine and/or imprisonment for up to twenty years).

¹⁵ See *Arizona v. United States*, 567 U.S. 367, 407 (2012) (“As a general rule, it is not a crime for a removable alien to remain in the United States.”).

¹⁶ See CRS In Focus IF11410, *Immigration-Related Criminal Offenses*, by Kelsey Y. Santamaria.

¹⁷ 8 U.S.C. § 1182(a)(6)(A)(i), (7)(B)(i) & (9)(A)(i)-(ii).

¹⁸ *Id.* § 1325(a)(1) (making it an offense to enter or attempt “to enter the United States at any time or place other than as designated by immigration officers”).

¹⁹ See U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-172, IMMIGRATION ENFORCEMENT: IMMIGRATION-RELATED PROSECUTIONS INCREASED FROM 2017-2018 IN RESPONSE TO U.S. ATTORNEY GENERAL’S DIRECTION 21 (2019) [hereinafter GAO REPORT] (discussing considerations informing an uptick in improper entry prosecutions by the Department of Justice in FY2018 and reporting that agency officials indicated that “practices for improper entry cases may change over time, depending on the priorities of various stakeholders in the federal criminal process, physical space limitations, or availability of resources such as interpreters, among other reasons”).

²⁰ See, e.g., U.S. SENTENCING COMMISSION, *supra* note 1, at 3 (noting that five judicial districts along the U.S.-Mexico land border accounted for a disproportionate number of all individual offenders sentenced in FY2020, and these higher numbers were “largely driven by immigration cases”); GAO REPORT, *supra* note 19, at 6 (estimating that from FY2014 through FY2018, “more than 90 percent ... of immigration-related offenses took place in the five southwest border districts,” and “improper reentry, illegal reentry, and alien smuggling charges comprise[d] ... approximately 99 percent ... of immigration-related prosecutions”).

“Entry” for Purposes of Improper Entry and Reentry Offenses

Sections 1325(a) and 1326 each make it a crime for an alien to *enter* or *attempt to enter* the United States in a variety of manners.²¹

Before the passage of the INA in 1952, courts interpreted *entry* to mean that the alien must have traveled from a foreign location to the United States. In the 1929 decision *United States ex. rel. Claussen v. Day*, the Supreme Court considered the meaning of *entry* under the Immigration Act of 1917.²² The Court held that a Danish national had *entered* the United States for purposes of the Act when he arrived at a seaport in Boston following a trip to South America, even though he had been in New York before his trip to South America.²³ The Court explained:

The word ‘entry’ by its own force implies a coming from outside. The context shows that in order that there be an entry within the meaning of the act there must be an arrival from some foreign port or place. There is no such entry where one goes to sea on board an American vessel from a port of the United States and returns to the same or another port of this country without having been in any foreign port or place.²⁴

Congress initially codified this meaning of *entry* when it enacted the INA in 1952, expressly defining the term to mean “any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise....”²⁵ However, with the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996²⁶ (IIRIRA), the new term *admission*, discussed below, was introduced and displaced the former definition of *entry* in the INA.²⁷ Nevertheless, Sections 1325 and 1326 continue to address improper physical “entry” or “reentry” into the United States, with the term’s meaning elucidated through judicial interpretation.²⁸

In the 2011 case *United States v. Young Jun Li*, the Ninth Circuit addressed the meaning of *entry* in the Section 1325(a) context.²⁹ There, two aliens were convicted of improper entry by attempting to travel by boat from Saipan in the Commonwealth of the Northern Mariana Islands to Guam.³⁰ The Ninth Circuit reversed their convictions on the basis that an alien traveling from one part of the United States to another does not *enter* the United States simply because he traveled through international waters during his trip.³¹ Although *Claussen* and *Young Jun Li* involved an aspect of travel through international waters, both cases illustrate the principle that

²¹ See *id.* §§ 1325(a), 1326(a).

²² *United States ex. rel. Claussen v. Day*, 279 U.S. 398, 401 (1929).

²³ *Id.*

²⁴ *Id.*

²⁵ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 § 101(a)(13).

²⁶ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Enacted as Division C of the Consolidated Appropriations Act of 1997), Pub. L. 104-208, 110 Stat. 3009 [hereinafter IIRIRA].

²⁷ IIRIRA §§ 301 (defining “admission”), 308(f)(1) (substituting “admission” for “entry” “admission” into various parts of the INA); see also *Hing Sum v. Holder*, 602 F.3d 1092, 1099-1101 (9th Cir. 2010) (discussing the adoption of “admission” in IIRIRA).

²⁸ See *United States v. Young Jun Li*, 643 F.3d 1183, 1188 (9th Cir. 2011) (explaining that Section 1325(a) relies on *entry*, noting that the judicial interpretation of *entry* continues to control); *United States v. Gonzalez-Torres*, 309 F.3d 594, 598 (9th Cir. 2002) (interpreting, in a post-IIRIRA case, the term *enter* in Section 1325 by relying on judicial understanding of the term stretching back to 1908).

²⁹ *United States v. Young Jun Li*, 643 F.3d 1183, 1186–88 (9th Cir. 2011).

³⁰ *Id.* at 1185.

³¹ *Id.* at 1188.

courts will consider whether the accused traveled to the United States from a foreign place in order to have made an *entry* into the United States.³²

A Note About the Term *Admission*

The concept of *admission* is central to many critical aspects of immigration law, but it is distinct from the concept of *entry*. An alien who arrives at a port of entry and presents himself or herself for inspection is an *applicant for admission*.³³ The INA defines the terms *admission* or *admitted* as “with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officers.”³⁴ As a general matter, if an alien has been admitted into the United States, that person is subject to being found removable under 8 U.S.C. § 1227 rather than being found inadmissible to the United States.³⁵

In most cases, an alien who physically enters the United States without being admitted into the country is subject to removal and, perhaps, criminal sanction for unlawful entry. However, not every alien authorized by the federal government to physically enter and remain in the United States has been “admitted” into the country for purposes of the INA. For instance, an alien granted parole to enter and remain in the United States for urgent humanitarian or significant public benefit reasons is still treated as an applicant for admission for immigration purposes.³⁶

Prohibited Conduct

Improper Entry, 8 U.S.C § 1325(a)

Section 1325(a) makes it a crime for an alien to enter or attempt to enter the United States in an improper manner. The statutory language provides that:

Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under Title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under Title 18, or imprisoned not more than 2 years, or both.³⁷

³² Cf. *Torres v. Barr*, 976 F.3d 918, 924 (9th Cir. 2020) (stating in the context of defining *admission* as a “lawful entry,” explaining that “although the INA does not currently define the term ‘entry,’ we have long understood this term to refer to ‘coming from outside’ into the United States.”); *Tellez v. Lynch*, 839 F.3d 1175, 1178 (9th Cir. 2016) (stating, in the context of the reinstatement of orders of removal for unlawfully reentering the United States, that the petitioner “entered the country when she left Mexico and came into the sovereign territory of the United States at the San Ysidro border-crossing station.”).

³³ 8 U.S.C. § 1101(a)(4) (“The term ‘application for admission’ has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa.”).

³⁴ *Id.* § 1101(a)(13)(A).

³⁵ See 8 U.S.C. § 1227(a) (“Any alien ... in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes ... ”); *id.* § 1182(a) (“[A]liens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States”); see also *id.* § 1229a(e)(2) (“The term ‘removable’ means (A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of [Title 8], or (B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.”).

³⁶ *Id.* § 1182(d)(5)(A) (“Parole of [any alien applying for admission to the United States] shall not be regarded as an admission of the alien.... ”); see also *Iredia v. Att’y Gen. of United States*, 25 F.4th 193, 196 (3d Cir. 2022) (explaining that when parole ends, an alien is treated like any other applicant for admission, thereby “further reinforcing that the paroled alien is considered an ‘applicant for admission.’”); *Altamirano v. Gonzales*, 427 F.3d 586, 590 (9th Cir. 2005) (“The government argues that Altamirano is a parolee and is therefore an ‘applicant for admission’ who bears the burden of proof. We agree.”).

³⁷ 8 U.S.C. § 1325(a).

Section 1325(a) contains *three* distinct avenues in which an alien can commit the crime of improper entry, as described in further detail below. The Ninth Circuit has observed that, considered together, these three provisions are “broad enough to cover [unauthorized] entry in any manner.”³⁸ A first-time violation of this provision is a misdemeanor offense, and a subsequent violation is a felony offense.³⁹

Entry or Attempted Entry into the United States at a Time or Place Other Than Designated by Immigration Officers, 8 U.S.C. § 1325(a)(1)

Under Section 1325(a)(1), it is a criminal offense for an alien to enter or attempt to enter the United States at a place other than one designated by immigration officers.⁴⁰ The paradigmatic example is when an alien crosses the international border into the United States by walking around a fence, miles away from a designated port of entry, and is then discovered by immigration officers after crossing the border.⁴¹

For misdemeanor improper time or place entry, the government must establish that the accused entered or attempted to enter at a place other than a designated port of entry.⁴² To establish felony improper time or place entry, the government must also prove that the alien had been previously convicted of improper entry.⁴³

³⁸ *United States v. Corrales-Vazquez*, 931 F.3d 944, 950 (9th Cir. 2019) (citing H.R. REP. NO. 70-2418, at 4). The Ninth Circuit described the statute:

Section 1325(a)(1) covers aliens who enter or attempt to enter outside of an open port of entry. Section 1325(a)(2) covers aliens who cross through an open port of entry, but elude examination or inspection in doing so. And § 1325(a)(3) covers aliens who cross through an open port of entry and submit to examination and inspection, but obtain entry (or attempt to obtain entry) through willful misrepresentation or concealment. The statute works as a seamless whole.

Id.

³⁹ *Id.* § 1325(a). If the statute does not expressly classify the offense as a misdemeanor or felony, 18 U.S.C. § 3559 classifies certain offenses as misdemeanors or felonies based on the maximum term of imprisonment authorized by the underlying criminal statute. Because the term of imprisonment for a first-time violation of Section 1325(a) is a maximum term of imprisonment of six months, it is classified as a misdemeanor under federal law. *See id.* § 3559(a)(7) (providing that “six months or less but more than thirty days” is a Class B misdemeanor). A subsequent violation under Section 1325(a) imposes a maximum term of imprisonment not more than two years and therefore is classified as a felony. *See id.* § 3559(a)(5) (providing that “less than five years but more than one year” is a Class E felony).

⁴⁰ 8 U.S.C. § 1325(a)(1).

⁴¹ *United States v. Perez-Velasquez*, 16 F.4th 729, 730 (10th Cir. 2021) (holding that the defendants had unlawfully entered the United States at a time or place at other than as designated by immigration officers and rejecting the argument that the defendants did not enter free from official restraint on a continuous surveillance theory), *cert. denied*, 142 S. Ct. 2878 (2022).

⁴² *United States v. Aldana*, 878 F.3d 877, 880 (9th Cir. 2017) (“In order to convict a defendant of a violation of § 1325(a)(1), the government must prove beyond a reasonable doubt that the individual was an ‘alien who ... entered or attempted to enter the United States at any time or place other than as designated by immigration officers.’”), *cert. denied*, 139 S. Ct. 157 (2018); *United States v. Romero-Corona*, 475 Fed. App’x. 142, 143 (9th Cir.) (affirming improper entry conviction on the ground that district court’s jury instruction that the element of felony improper entry was “prior commission” instead of “prior conviction” was harmless error, as evidence of defendant’s prior misdemeanor conviction was submitted to the jury), *cert. denied*, 568 U.S. 902 (2012); *accord United States v. Khazel*, No. 98-50915, 1999 WL 423017, at *2 (5th Cir. May 28, 1999) (“To obtain a conviction for unlawful entry in violation of 8 U.S.C. § 1325, the Government had the burden of proving (1) that [the defendant] was an alien; (2) that he entered the United States; and (3) that he entered unlawfully at a time or place other than as designated by immigration officers.”).

⁴³ *United States v. Arriaga-Segura*, 743 F.2d 1434, 1436 (9th Cir. 1984) (upholding determination by jury that the defendant had been previously convicted of illegal entry upon evidence of a criminal complaint and testimony of a border patrol agent).

Establishing Entry

As discussed earlier, the term *entry* is not defined in the INA, but courts have interpreted *entry* to mean that the alien must have traveled from a foreign location to the United States.⁴⁴

Courts have upheld convictions for improper entry under Section 1325(a)(1) when, combined with admissions and corroborating evidence, the evidence presented confirms the alien effected an entry.⁴⁵ In *United States v. Arriaga-Segura*, the Fifth Circuit concluded that substantial evidence supported convictions for felony improper entry where the defendants, who lacked entry documents, were stopped near the southwest border more than twelve miles from the nearest port of entry in an area known for alien smuggling.⁴⁶ Likewise, in an unreported decision, the Fifth Circuit upheld the defendant’s conviction by bench trial for improper entry where, in addition to an admission that he was entering the United States from Mexico by crossing the Rio Grande, the defendant was found without a passport or other valid documents in a remote area near the border while wearing torn clothing.⁴⁷

Some reviewing courts have interpreted *entry* to have another distinct legal requirement that goes beyond physical presence in the United States for criminal liability to attach under Section 1325(a)(1): The accused must have entered “free from official restraint.”⁴⁸ One circuit—the Ninth Circuit—has definitively established that the accused must enter or attempt to enter the United States “free from official restraint,”⁴⁹ even though the statutory language does not expressly contain this specification.⁵⁰ The courts have interpreted *free from official restraint* to generally mean that the defendant intended to enter the United States “without being detected, apprehended, or taken into custody by government authorities so that he or she could roam freely in the United States.”⁵¹ The Ninth Circuit explained that this “doctrine is based on the legal

⁴⁴ See *supra* discussion pp. 4–5 “‘Entry’ for Purposes of Improper Entry and Reentry”.

⁴⁵ See, e.g., *United States v. Arriaga-Segura*, 743 F.2d 1434, 1435 (9th Cir. 1984); *United States v. Ledesma-Saldivar*, No. 20-MJ-20174, 2020 WL 7078846, at *3 (S.D. Cal. Dec. 3, 2020) (holding that circumstantial evidence corroborated defendant’s admission of improper entry outside of a port of entry when she was encountered by border patrol agents in a “rugged and remote” area two and a half miles from the nearest port of entry) (currently on appeal to the Ninth Circuit). As a general principle, the Supreme Court has established that “an accused may not be convicted on his own uncorroborated confession.” *Smith v. United States*, 348 U.S. 147, 152 (1954) (citing *Warszower v. United States*, 312 U.S. 342, 347–48 (1941)).

⁴⁶ *United States v. Arriaga-Segura*, 743 F.2d 1434, 1435 (9th Cir. 1984). This case also concerned whether the government met its burden to prove a prior conviction. *Id.* at 1436. While noting that “a certified copy of the prior conviction” is the most reliable evidence of a prior conviction under Section 1325, the Fifth Circuit concluded that presentation of the criminal complaint and testimony from immigration officers was sufficient evidence for a rational trier of fact to find a previous conviction. *Id.* at 1435–36.

⁴⁷ *United States v. Khazel*, No. 98-50915, 1999 WL 423017, at *3 (5th Cir. May 28, 1999).

⁴⁸ Some courts have also held that the principle of freedom from official restraint is applicable to Section 1326(a)—the criminal offense of reentry of removed aliens—as discussed below. See *supra* discussion p. 16 “Establishing Entry”.

⁴⁹ *United States v. Gonzalez-Torres*, 309 F.3d 594, 598–99 (9th Cir. 2002) (concluding the defendant, convicted under both Sections 1325(a) and 1326(a), was not free from official restraint because he was continuously surveilled while crossing the border); cf. *United States v. Pacheco-Medina*, 212 F.3d 1162, 1164–65 (9th Cir. 2000) (discussing requirement of “freedom from official restraint” in the context of Section 1326(a)).

⁵⁰ See *United States v. Gaspar-Miguel*, 947 F.3d 632, 633–34 (10th Cir.) (detailing history of the concept of “freedom from official restraint”), *cert. denied*, 141 S. Ct. 873 (2020); cf. *United States v. Pacheco-Medina*, 212 F.3d 1162, 1164–65 (9th Cir. 2000); *Lopez v. Sessions*, 851 F.3d 626, 630–31 (6th Cir. 2017) (discussing the concept of freedom from official restraint in the civil and criminal context).

⁵¹ *United States v. Rizo-Rizo*, 16 F.4th 1292, 1294 (9th Cir. 2021), *cert. denied*, 143 S. Ct. 120 (2022); see also *Correa v. Thornburgh*, 901 F.2d 1166, 1172 (2d Cir. 1990) (“‘freedom from official restraint’ means that the alien who is attempting entry is no longer under constraint emanating from the government that would otherwise prevent her from physically passing on.”); cf. *Lopez*, 851 F.3d at 630 (“What, then, is freedom from official restraint? It’s the alien’s liberty to go where he wishes and to mix with the general population.”).

fiction that an entry is not accomplished until the alien is free from official restraint and can move freely within the country.”⁵² To further explain the underlying purpose of the concept, the Ninth Circuit has stated that “the freedom from official restraint requirement addresses the practical concern that failing to require such a finding would lead to the criminalization of individuals who arrive at a port of entry but have not yet had an opportunity to apply for inspection.”⁵³

Other circuits, specifically the Fifth and Tenth Circuits, have yet to definitively weigh in on whether entry requires “freedom from official restraint,” leaving some uncertainty in those circuits as to whether the accused must enter free from official restraint for criminal liability to attach.⁵⁴ At times, reviewing courts have affirmed convictions because, assuming *arguendo* that freedom from official restraint is required, the defendants were not under official restraint at the time of their unlawful entry.⁵⁵

Circuits are split over whether continuous surveillance by immigration officers amounts to official restraint. On several occasions, the Ninth Circuit has concluded that continuous surveillance constitutes official restraint.⁵⁶ When under surveillance, according to the Ninth Circuit, the alien “has still not made an entry despite having crossed the border with the intention of evading inspection, because he lacks the freedom to go at large and mix with the population.”⁵⁷ For example, the court in 2002 held that a group of border crossers was not free from official restraint, as a border patrol agent observed the group cross into the United States, contacted other agents in the area, and continuously observed the group as they were apprehended.⁵⁸

In contrast, the Tenth Circuit has held that continuous surveillance by immigration officers does not qualify as official restraint.⁵⁹ In the 2020 Tenth Circuit decision, *United States v. Gaspar-Miguel*, immigration officers observed a group of people cross the border from Mexico into the United States by walking around a fence and continued to observe the group until other agents apprehended them.⁶⁰ The defendant argued that she did not enter the country within the meaning of Section 1325(a) because she was subject to continuous surveillance and thus was not free from

⁵² *Gaspar-Miguel*, 947 F.3d at 633.

⁵³ *United States v. Vazquez-Hernandez*, 849 F.3d 1219, 1227 (9th Cir. 2017) (discussing freedom from official restraint doctrine in determining entry by a petitioner seeking review of final order by the Board of Immigration Appeals excluding her from admission into the United States.).

⁵⁴ See, e.g., *United States v. Perez-Velasquez*, 16 F.4th 729, 731 (10th Cir. 2021) (“But this court has never required freedom from official restraint for an ‘entry’ under § 1325(a), and we need not decide whether it is required here.”), *cert. denied*, 142 S. Ct. 2878 (2022); *United States v. Rojas*, 770 F.3d 366, 368 (5th Cir. 2014) (affirming a Section 1326(a) conviction, observing that the Fifth Circuit “never explicitly adopted the doctrine”), *cert. denied*, 575 U.S. 1011 (2015).

⁵⁵ See, e.g., *Perez-Velasquez*, 16 F.4th at 731–32; *Rojas*, 770 F.3d at 368 (“Accordingly, the official restraint doctrine, even assuming *arguendo* that it applies in general in this circuit, is inapposite here.”).

⁵⁶ See *United States v. Gonzalez-Torres*, 309 F.3d 594, 597 (9th Cir. 2002) (recounting that one agent followed the group through brush while another maintained continuous observation until the group was apprehended), *cert. denied*, 538 U.S. 969 (2003); *United States v. Pacheco-Medina*, 212 F.3d 1162, 1166 (9th Cir. 2000) (reversing the defendant’s conviction under Section 1326(a) for unlawful reentry because he was under continuous surveillance, but the court noted that he was culpable of attempted reentry); cf. *United States v. Ruiz-Lopez*, 234 F.3d 445, 448 (9th Cir. 2000) (“Our precedent in this circuit requires that we construe restraint broadly to include constant government surveillance of an alien, regardless of whether the alien was aware of the surveillance or intended to evade inspection.”).

⁵⁷ *Pacheco-Medina*, 212 F.3d at 1164 (quoting *Matter of Pierre*, 14 I. & N. Dec. 467, 469 (1973)).

⁵⁸ *Gonzalez-Torres*, 309 F.3d at 598–99.

⁵⁹ *United States v. Gaspar-Miguel*, 947 F.3d 632, 634–35 (10th Cir. 2020); *United States v. Perez-Velasquez*, 16 F.4th 729, 732 (10th Cir. 2021) (affirming *Gaspar-Miguel*’s holding that surveillance does not constitute restraint).

⁶⁰ *Id.* at 632–33.

official restraint.⁶¹ The Tenth Circuit concluded that continuous surveillance by immigration officers does not constitute official restraint, declaring that “from a common-sense viewpoint, that continuous surveillance could be thought of as ‘restraint’ is illogical. If the alien does not know that he is under surveillance, it is difficult to perceive how that surveillance can be said to have prevented that alien from moving ‘at large and at will within the United States.’”⁶²

The Tenth Circuit ruled similarly in a 2021 case, rejecting the defendant’s argument that surveillance by immigration officers from a distance constituted official restraint.⁶³ The court explained that “regardless of the distance of observation—or whether surveillance is aided by technologies such as binoculars—surveillance on its own cannot transform into restraint.”⁶⁴

Mens Rea

Section 1325(a)(1) does not contain an express *mens rea* requirement.⁶⁵ At least one court of appeals has concluded that Subsection 1325(a)(1) is a regulatory offense.⁶⁶ Regulatory offenses are offenses the Supreme Court has “understood Congress to impose a form of strict criminal liability through statutes that do not require the defendant to know the facts that make his conduct illegal.”⁶⁷ Therefore, under Section 1325(a)(1), within the Ninth Circuit, the government need only prove that the accused is an alien and that he or she entered the United States at a place other than a designated port of entry.⁶⁸

The Ninth Circuit has also held that Section 1325(a)(1)’s “*attempt* offense incorporates the common law requirement of specific intent to commit the offense.”⁶⁹ In other words, “[t]he specific intent of the attempt offense in § 1325 is simply that the person specifically intended to enter the United States at a time or place other than as designated by immigration officers....”⁷⁰

Meaning of “Place Other Than as Designated by Immigration Officers”

Neither Section 1325(a)(1) nor the INA as a whole define the phrase *at any time or place other than as designated by immigration officers*. Federal regulations provide that “application to lawfully enter the United States shall be made in person to an immigration officer at a U.S. port-of-entry when the port is open for inspection, or as otherwise designated in this section.”⁷¹ In the Ninth Circuit decision, *United States v. Aldana*, the defendants were convicted of a misdemeanor

⁶¹ *Id.* at 633.

⁶² *Id.* at 634–35.

⁶³ *Perez-Velasquez*, 16 F.4th at 732–33 (“And even if we assumed that freedom from official restraint is required, neither can establish official restraint because they only rely on a theory of continuous surveillance, and continuous surveillance alone does not equate to restraint.”)

⁶⁴ *Id.* at 732.

⁶⁵ See *United States v. Rizo-Rizo*, 16 F.4th 1292, 1296 (9th Cir. 2021), *cert. denied*, 143 S. Ct. 120 (2022).

⁶⁶ *Id.* at 1294–95; see also *United States v. Cervantes-Ramirez*, No. 20-50176, 2021 WL 5027491, at *1 (9th Cir. Oct. 29, 2021) (consolidated with *Rizo-Rizo*), *cert. denied*, 143 S. Ct. 120 (2022).

⁶⁷ *Staples v. United States*, 511 U.S. 600, 606 (1994) (explaining that, in examining statutes involving regulatory offenses, it “inferred from silence that Congress did not intend to require proof of *mens rea* to establish an offense”).

⁶⁸ *Rizo-Rizo*, 16 F.4th at 1294-95.

⁶⁹ *Id.* at 1294. A thorough discussion on the intricacies of *mens rea* is beyond the scope of this report. “Few areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime.” *United States v. Bailey*, 444 U.S. 394, 403 (1980). For a discussion on *mens rea*, see CRS Report R46836, *Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses*, by Michael A. Foster (July 7, 2021).

⁷⁰ *Rizo-Rizo*, 16 F.4th at 1295.

⁷¹ 8 C.F.R. § 235.1(a).

under Section 1325(a)(1) and did not dispute that they had entered the United States away from a port of entry facility.⁷² The defendants argued that the implementing regulations “designate entire geographic regions as ports of entry.”⁷³ The Ninth Circuit rejected that interpretation and ruled that the statutory phrase refers to “designated ports of entry, as contemplated by” implementing regulations.⁷⁴

Challenges to Section 1325(a)(1) Convictions

Some defendants have challenged their convictions for attempted illegal entry under Section 1325(a)(1) on a theory that the government must prove that they had knowledge of their status as aliens.⁷⁵ This argument followed the Supreme Court’s ruling in *Rehaif v. United States*, in which the Court held that a defendant must know of his status as an unlawfully present alien to be convicted of firearm possession under 18 U.S.C. § 922(g).⁷⁶ In *United States v. Rizo-Rizo*, the Ninth Circuit considered whether Section 1325(a)(1) requires the government to prove the accused had knowledge of his or her status as an alien.⁷⁷ The court held that Section 1325(a)(1) is a regulatory offense on the grounds that Section 1325(a) “was enacted to control unlawful immigration,” which is “a normal regulatory function of the sovereign,” and noted that unlawful entry outside of a port of entry is “conduct that individuals would legitimately expect to be unlawful.”⁷⁸ The panel also looked to the penalty of six months’ imprisonment imposed under Section 1325(a) as suggesting that Congress intended the “statute to be a regulatory offense.”⁷⁹ According to the Ninth Circuit, because it is a regulatory offense, Section 1325(a)(1) does not require the government to prove knowledge of alienage status.⁸⁰ The Ninth Circuit rejected the defendant’s reliance on *Rehaif*, reasoning that the statute at issue in *Rehaif* “concerned an *express mens rea* requirement” unlike Section 1325(a)(1) because it penalizes those who knowingly violate the provision.⁸¹

Defendants have also challenged their Section 1325(a)(1) convictions as violations of the Due Process Clause, and these challenges have generally been rejected by reviewing courts.⁸² Some defendants have argued that Section 1325(a) unconstitutionally delegates legislative power to the executive branch on the theory that Section 1325(a)(1) “permit[s] any immigration officer, with no governing standards, to designate the times and locations when aliens may lawfully enter the United States.”⁸³ Article I of the Constitution vests all legislative powers to Congress, but there may be questions over whether a grant of delegation to the executive branch contravenes the

⁷² See *United States v. Aldana*, 878 F.3d 877, 878 (9th Cir. 2017).

⁷³ *Id.*

⁷⁴ *Id.* at 882.

⁷⁵ See, e.g., *Rizo-Rizo*, 16 F.4th at 1293; Zepeda-Rodriguez, No. 19-MJ-24357-LL-TWR, 2022 WL 1289691, at *5 (S.D. Cal. Apr. 29, 2022).

⁷⁶ *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019).

⁷⁷ *Rizo-Rizo*, 16 F.4th at 1294.

⁷⁸ *Id.* at 1297.

⁷⁹ *Id.*

⁸⁰ *Id.*; accord *United States v. Nunez-Soberanis*, 406 F. Supp. 3d 835, 843 (S.D. Cal. 2019).

⁸¹ *Rizo-Rizo*, 16 F.4th at 1295.

⁸² See, e.g., *United States v. Melgar-Diaz*, 2 F.4th 1263, 1267 (9th Cir. 2021) (“Defendants argue that § 1325(a)(1) is an unconstitutional delegation of legislative power to immigration officials and is void for vagueness. We hold that these constitutional challenges fail.”), *cert. denied*, 142 S. Ct. 813 (2022); *United States v. Pastor-Narcizo*, No. 19-MJ-024548-LL-BAS-1, 2021 WL 268156, at *2–3 (S.D. Cal. Jan. 27, 2021) (rejecting vagueness challenge).

⁸³ *Melgar-Diaz*, 2 F.4th at 1265.

Constitution’s delegation of legislative powers to Congress.⁸⁴ The nondelegation doctrine, as established by the Supreme Court, provides that Congress “may not transfer to another branch ‘powers which are strictly and exclusively legislative.’”⁸⁵ The Court has repeatedly affirmed congressional authority “to delegate power under broad standards” to governmental entities.⁸⁶ The Court has explained that “Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors.”⁸⁷

In the 2021 Ninth Circuit decision *United States v. Melgar-Diaz*, the defendants argued that the delegation of authority to immigration officials to designate times and places for entry into the United States violates the nondelegation doctrine by unconstitutionally allowing immigration officers to “designate either all or none of the border as a permissible place of entry.”⁸⁸ The Ninth Circuit rejected the defendants’ argument, reasoning that “Section 1325(a)(1) does not give immigration officials the power to create crimes.”⁸⁹ The Ninth Circuit held that, “by tasking the Executive with determining the times and places of lawful entry, Congress permissibly gave immigration officials ‘flexibility to deal with real-world constraints in carrying out [their] charge’ to manage entry at the border.”⁹⁰

Defendants have also claimed that Section 1325(a)(1) is void for vagueness in violation of the Fifth Amendment’s Due Process Clause because it does not give individuals clear notice of the conduct it proscribes.⁹¹ In *Melgar-Diaz*, the Ninth Circuit rejected the two defendants’ as-applied Due Process challenge claiming the statute was unconstitutionally vague.⁹² The court concluded that the statute gave a “person of ordinary intelligence fair notice of what is prohibited” because the proscription on unlawful entry was clear.⁹³ The Ninth Circuit observed that their conduct “fell within the heartland of what § 1325(a)(1) prohibits,” as both defendants were found “in isolated areas miles away from any port of entry.”⁹⁴

Courts have also rejected arguments that Section 1325(a)(1) is unconstitutionally vague on an arbitrary enforcement theory.⁹⁵ As a general principle, the void-for-vagueness doctrine “guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.”⁹⁶ The Ninth Circuit in *Melgar-Diaz* ruled that the defendants did not establish that the government arbitrarily applied

⁸⁴ U.S. CONST. art. I.

⁸⁵ *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (quoting *Wayman v. Southard*, 23 U.S. 1, 42 (1825)).

⁸⁶ *Mistretta v. United States*, 488 U.S. 361, 373 (1989).

⁸⁷ *Touby v. United States*, 500 U.S. 160, 165 (1991).

⁸⁸ *Melgar-Diaz*, 2 F.4th at 1267.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1268 (quoting *Gundy*, 139 S. Ct. at 2130).

⁹¹ *See, e.g., id.* at 1269; *see also Pastor-Narcizo*, 2021 WL 268156, at *2–3 (reasoning that “Section 1325 provides adequate notice to people of reasonable intelligence as to what is prohibited.”). As the Supreme Court has observed, “it is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *See Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

⁹² *Melgar-Diaz*, 2 F.4th at 1269 (9th Cir. 2021).

⁹³ *Id.* (citation omitted).

⁹⁴ *Id.* The court also quickly rejected the defendants’ arguments that Section 1325(a)(1) is facially vague. *Id.* at 1270. The court observed that “Defendants largely reframe in vagueness terms their same nondelegation theories.” *Id.*

⁹⁵ *Id.*; *see also, e.g., Pastor-Narcizo*, 2021 WL 268156, at *2–3; *United States v. Campos-Atrisco*, No. 19-MJ-24683-KSC, 2020 WL 7181086, at *3 (S.D. Cal. Dec. 7, 2020).

⁹⁶ *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

Section 1325(a)(1) to them.⁹⁷ The court reasoned that the conduct—their unlawful entry between ports of entry—fell within the core of the provision’s prohibition.⁹⁸

Eluding Examination or Inspection, 8 U.S.C. § 1325(a)(2)

Section 1325(a)(2) makes it a crime for an alien to elude examination or inspection by immigration officers.⁹⁹ Examples of conduct falling within Section 1325(a)(2)’s scope include “an alien who hides in the trunk of a vehicle passing through a port of entry, or an alien who crosses through a port of entry on foot and then sneaks by the officers conducting inspections or examinations.”¹⁰⁰

To establish a violation, the government must prove that the defendant eluded examination or inspection by immigration officers.¹⁰¹ Like Section 1325(a)(1), the statutory language of Section 1325(a)(2) makes no express reference to the mental state required to be guilty of this crime. Although not binding, lower courts have held in unpublished opinions that Section 1325(a)(2) requires only that the government prove that the accused intended to commit the acts constituting the offense and not intent of wrongdoing.¹⁰²

Location of Violation

A question that has been raised regarding this provision is whether an alien can violate Section 1325(a)(2) if he or she evades examination and inspection by immigration officials by engaging in conduct proscribed under Section 1325(a)(1), that is, unlawfully entering the United States at a place other than a designated port of entry (i.e., between ports of entry).

Although this issue has not been addressed by other appellate courts, the Ninth Circuit has distinguished eluding examination or inspection under Section 1325(a)(2) from entry at a place other than a designated port of entry under Section 1325(a)(1). In *United States v. Corrales-Vazquez*, a Mexican national was found by a border patrol agent hiding in some brush just north of the international border after unlawfully crossing the border away from a port of entry.¹⁰³ He was convicted under Section 1325(a)(2) for eluding examination or inspection by immigration

⁹⁷ *Melgar-Diaz*, 2 F.4th at 1269–70 (observing that “[t]heir arbitrary enforcement claim is instead a reprise of their non-delegation theory premised on supposedly standardless congressional directives, which fails for” the same reasons the nondelegation argument failed).

⁹⁸ *Id.*

⁹⁹ 8 U.S.C. § 1325(a)(2); *see, e.g.*, *United States v. Corrales-Vazquez*, 931 F.3d 944, 948 (9th Cir. 2019).

¹⁰⁰ *Corrales-Vazquez*, 931 F.3d at 949. *See also, e.g.*, *United States v. Montes-De Oca*, 820 F. App’x 247, 249–252 (5th Cir. 2020) (per curiam) (ruling that sufficient evidence supported a defendant’s conviction of eluding examination or inspection where she was observed moving on foot in vehicular traffic lanes away from the pedestrian border crossing and was spotted jumping a barrier separating traffic toward the United States.).

¹⁰¹ 8 U.S.C. § 1325(a)(2); *Montes-De Oca*, 820 F. App’x at 251 (approving of jury instructions requiring the government to “prove that (1) the defendant was an alien and (2) the defendant knowingly eluded examination by the immigration officers”).

¹⁰² *See, e.g.*, *Montes-De Oca*, 820 Fed. App’x. at 251–52; *United States v. Montes-de Oca*, No. 19-CR-01508-FM, 2019 WL 3536823, at *4 (W.D. Tex. Aug. 2, 2019) (“§ 1325(a)(2) is a general intent crime, and the Government must prove Defendant acted knowingly to elude examination by immigration officers.”); *United States v. Cruz-Garcia*, No. 18-MJ-2260-RNB-MMA, 2018 WL 8867808, at *1 (S.D. Cal. Aug. 31, 2018) (“Section 1325(a)(2) is a general intent crime”); *United States v. Santiago-Ortega*, No. 18-MJ-3320-WVG-MMA, 2018 WL 9782517, at *1 (S.D. Cal. Sept. 21, 2018) (same); *United States v. Gloria-Martinez*, No. 18-MJ-3412-RNB-MMA, 2018 WL 9437360, at *1 (S.D. Cal. Oct. 17, 2018) (same).

¹⁰³ *United States v. Corrales-Vazquez*, 931 F.3d 944, 946 (9th Cir. 2019).

officers.¹⁰⁴ In vacating his conviction, the Ninth Circuit held that eluding examination or inspection can occur only at open ports of entry where examinations or inspections take place.¹⁰⁵ The court rejected the government’s view that “any alien who crosses into the United States without examination or inspection necessarily ‘eludes examination or inspection,’ even if the alien crosses miles away from any place where those processes occur.”¹⁰⁶ The Ninth Circuit asserted that Section 1325(a)(1) would be superfluous if Section 1325(a)(2) also applied to surreptitious crossing between ports of entry.¹⁰⁷ One judge writing in dissent criticized the effective insertion of *at a port of entry* by the majority to the provision in the absence of arguably unambiguous statutory language.¹⁰⁸

Other circuits have not weighed in on whether Section 1325(a)(2) requires the eluding examination or inspection to occur at a designated port of entry, leaving some question as to whether prosecutors may also charge illegal entrants who surreptitiously enter between ports of entry under Section 1325(a)(2) in other circuits.

Proof of Entry

While not binding precedent, at least one circuit court has considered whether Section 1325(a)(2) requires proof of entry. In an unpublished decision, the Fifth Circuit rejected the defendant’s argument that proof of entry is an additional element of Section 1325(a)(2).¹⁰⁹ The court noted the absence of any express reference to entry in the provision when compared to Section 1325(a)’s other provisions.¹¹⁰

Entry by Misrepresentation, 8 U.S.C. § 1325(a)(3)

Section 1325(a)(3) makes it a crime for an individual to enter or attempt to enter the United States by willfully making a false or misleading representation or willfully concealing a material fact. A paradigmatic violation is the willful presentation of a counterfeit identity document to immigration officers in an effort to secure entry to the United States.¹¹¹ When discussing the use of fraudulent documents in the context of a separate statute, the Supreme Court observed that “if a counterfeit [identity document] were presented to secure entry or re-entry into the country, the bearer could be prosecuted under 8 U.S.C. § 1325, which provides for the punishment of ‘(a)ny alien who ... obtains entry to the United states by a willfully false or misleading representation....”¹¹²

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 947–48; *see also* *United States v. Perez-Martinez*, 779 Fed. App’x. 479 (9th Cir. 2019) (overturning conviction under 1325(a)(2) because defendant’s apprehension occurred twenty-three and a half miles east of the nearest port of entry).

¹⁰⁶ *Corrales-Vazquez*, 931 F.3d at 947–48.

¹⁰⁷ *Id.* at 950–53.

¹⁰⁸ *United States v. Corrales-Vazquez*, 931 F.3d 944, 956–57 (9th Cir. 2019) (J. Fernandez, dissenting).

¹⁰⁹ *United States v. Montes-De Oca*, 820 Fed. App’x. 247, 251 (5th Cir. 2020).

¹¹⁰ *Id.*

¹¹¹ *United States v. Campos-Serrano*, 404 U.S. 293, 299 (1971), *cert. denied*, 404 U.S. 1023 (1972); *see also, e.g., United States v. Custodio-Morales*, No. 19-CR-23-DPJ-FKB, 2020 WL 7321069, at *1 (S.D. Miss. Dec. 11, 2020) (presented visa belonging to someone else in order to gain entry into the United States).

¹¹² *Campos-Serrano*, 404 U.S. at 299 (discussing how possession of a counterfeit driver’s license away from the border would not qualify as possessing a fraudulent entry document punishable under 18 U.S.C. § 1546, which prohibits the possession, use, or receipt of counterfeit or altered visas, permits, or other documents required for entry in the United States).

To establish a violation under Section 1325(a)(3), the government must prove that the defendant entered or attempted to enter the United States by a willfully false or misleading representation or by concealing a material fact for gaining entry.¹¹³

Unlike the other two avenues through which to commit improper entry under Section 1325(a), Congress adopted an express *mens rea* requirement in Section 1325(a)(3).¹¹⁴ This provision punishes “any alien who ... attempts to enter or obtains entry to the United States by a *willfully* false or misleading representation or the *willful* concealment of a material fact.”¹¹⁵ Federal statute does not define willfulness, but the Supreme Court has observed generally that “the word ‘willfully’ is sometimes said to be ‘a word of many meanings’ whose construction is often dependent on the context in which it appears.”¹¹⁶ Case law addressing the meaning of *willfully* in the context of Section 1325(a)(3) appears to be scarce. Pattern jury instructions provide some guidance on how courts have construed the term *willfully* in the context of Section 1325(a)(3). Courts within the Fifth Circuit, for instance, typically instruct juries that, in the context of Section 1325(a)(3), the government must prove “the defendant acted willfully, that is, he [or she] deliberately and voluntarily made the representation knowing it was false [or concealed a material fact].”¹¹⁷

Penalties, 8 U.S.C. § 1325(a)

A first-time violation under Section 1325(a) constitutes a misdemeanor offense carrying a six-month maximum term of imprisonment and a fine.¹¹⁸ Subsequent violations of Section 1325(a) constitute a felony and carry a two-year maximum penalty.¹¹⁹

In addition to criminal penalties, a violation under Section 1325(a)(1) for improper entry at a time or place other than as designated by immigration officers can also result, under Section 1325(b), in a civil penalty of at least \$50 and not more than \$250 for each entry or attempted entry.¹²⁰ If an alien had previously been subject to a civil penalty, a violation can result in twice the amount of a sum between \$50 and \$250.¹²¹ Section 1325(b) does not impose civil penalties for violations under Section 1325(a)(2) and (a)(3).¹²²

¹¹³ 8 U.S.C. § 1325(a)(3); *Tomczyk v. Wilkinson*, 987 F.3d 815, 823 (9th Cir. 2021) (providing elements the government must prove to establish a violation under Section 1325(a)(3)), *opinion amended and superseded*, 25 F.4th 638 (9th Cir. 2022).

¹¹⁴ *Cf.* *United States v. Rizo-Rizo*, 16 F.4th 1292, 1298 (9th Cir. 2021) (observing that “Congress ... adopted express mens rea requirements in other parts of Section 1325,” including Section 1325(a)(3)).

¹¹⁵ *Id.* § 1325(a)(3) (emphasis added).

¹¹⁶ *Bryan v. United States*, 524 U.S. 184, 191 (1998); *accord* *United States v. Arditti*, 955 F.2d 331, 340 (5th Cir. 1992).

¹¹⁷ FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 2.02C (2019).

¹¹⁸ 8 U.S.C. § 1325(a). In the absence of an amount specified in Section 1326, a person convicted under 1326(a) may be subject to a fine not more than \$250,000 or potentially an alternative fine of twice the amount of pecuniary gain from the offense or pecuniary loss to a person other than the defendant. 18 U.S.C. § 3571.

¹¹⁹ 8 U.S.C. § 1325(a).

¹²⁰ *Id.* § 1325(b).

¹²¹ *Id.*

¹²² *See id.* § 1325(b) (“Any alien who is apprehended while entering (or attempting to enter) the United States at a time or place other than as designated by immigration officers shall be subject to a civil penalty ...”).

Illegal Reentry, 8 U.S.C. § 1326(a)

Under Section 1326(a), it is a felony offense for an alien to reenter or attempt to reenter, or to be found in, the United States without authorization to enter the United States after having been “denied admission, excluded, deported, or removed or [] departed the United States while an order of exclusion deportation, or removal is outstanding”¹²³ Unlike prosecutions for improper entry under Section 1325(a), prosecutions under Section 1326(a) require proof that the accused entered the United States without authorization following either prior removal from the United States or voluntary departure while an order of removal was outstanding. A paradigmatic example of a Section 1326(a) violation is an alien who was removed through expedited removal after he was found crossing the southwest border at a place or time other than as designated by immigration officers and was then discovered in the United States by authorities years later while the removal order remained in effect.¹²⁴ An example of attempted reentry is when an individual who had been previously removed twice walked up to a port of entry and displayed a photo identification of his cousin to immigration officers in an attempt to secure entry.¹²⁵

To establish a violation under Section 1326(a), the government must typically prove that the alien left the United States with an outstanding order of deportation or removal against him and that afterward the alien entered, attempted to enter, or was found in the United States.¹²⁶ Circuits have generally identified four separate elements of this criminal offense: (1) alienage; (2) denial of admission, a prior deportation or removal, or a voluntary departure while an order of removal was outstanding; (3) entry into or unlawful presence in the United States; and (4) lack of permission to enter.¹²⁷ It is also a crime under Section 1326(a) for aliens previously subject to removal to be “found” in the United States. To sustain a conviction under Section 1326(a) for being “found” in the United States following a prior removal, the government must establish (1) the alien’s physical presence in the United States and (2) the illegality of that presence (i.e., that the alien is in the country without authorization).¹²⁸ In the words of the Seventh Circuit, this provision enables “prosecution of deportees who evade detection at the border and remain present here

¹²³ *Id.* § 1326(a).

¹²⁴ *See, e.g.,* United States v. Gonzalez-Fierro, 949 F.3d 512, 515–16 (10th Cir. 2020).

¹²⁵ *See* United States v. Resendiz-Ponce, 549 U.S. 102, 104 (2007).

¹²⁶ *Gonzalez-Fierro*, 949 F.3d at 516 (citing United States v. Almanza-Vigil, 912 F.3d 1310, 1316 (10th Cir. 2019)).

¹²⁷ United States v. Ayon-Brito, 981 F.3d 265, 269 (4th Cir. 2020) (“Thus, the elements of the offense are: (1) that the defendant is an alien; (2) that he was deported or removed from the United States; (3) that he thereafter reentered (or attempted to reenter) the United States; and (4) that he lacked permission to do so.”), *cert. denied*, 142 S. Ct. 162 (2021); United States v. Flores-Peraza, 58 F.3d 164, 166 (5th Cir. 1995) (identifying the elements as “(1) alienage, (2) arrest and deportation, (3) reentry into or unlawful presence in the United States, and (4) lack of the Attorney General’s consent to reenter.”) (citing United States v. Cardenas-Alvarez, 987 F.2d 1129, 1131–32 (5th Cir. 1993), *cert. denied*, 516 U.S. 1076 (1996)). *But see* United States v. Meza-Soria, 935 F.2d 166, 168 (9th Cir. 1991) (“The elements of this crime are straightforward.... The elements are: (1) the defendant is an alien; (2) he was arrested and deported or excluded and deported; and (3) thereafter, he improperly entered, or attempted to enter, the United States.”).

The Ninth Circuit has expressly stated the elements the government must prove for the crime of *attempted* illegal reentry into the United States under Section 1326(a):

- (1) the defendant had the purpose, i.e., conscious desire, to reenter the United States without the express consent of the Attorney General;
- (2) the defendant committed an overt act that was a substantial step towards reentering without that consent;
- (3) the defendant was not a citizen of the United States;
- (4) the defendant had previously been lawfully denied admission, excluded, deported or removed from the United States; and
- (5) the Attorney General had not consented to the defendant’s attempted reentry.

United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1196 (9th Cir. 2000), *cert. denied*, 535 U.S. 1069 (2002).

¹²⁸ *See, e.g.,* United States v. Ayon-Brito, 981 F.3d 265 (4th Cir. 2020).

undetected, even for long periods of time.”¹²⁹ The Ninth Circuit has clarified that a conviction for being “found” in the United States is not punishing immigration status, as the provision necessarily requires that a defendant commit an act: He must reenter the United States without permission¹³⁰ or remain unlawfully after the expiration of authorization to be present in the United States.¹³¹

Some circuits have held that U.S. citizenship is a defense to charges brought under Section 1326(a) on the basis that U.S. citizenship negates the requirement that the accused be an alien to be guilty of this offense.¹³²

Establishing Entry

As discussed earlier, *entry* is not defined in the INA, but courts have interpreted the term to require that the alien traveled from a foreign location to the United States.¹³³ As with the case of unlawful entry under Section 1325(a)(1), some reviewing courts have interpreted *entry* for purposes of a Section 1326(a) conviction to require entry “free from official restraint.”¹³⁴

Mens Rea

Lower courts have mostly agreed that general intent is the appropriate mental state required to be culpable for reentry or being “found” in the United States under Section 1326(a).¹³⁵ The Tenth Circuit has stated that “nothing more than a showing of general intent is required.”¹³⁶ The court further explained that “the government need not show that [the] defendant willfully and knowingly engaged in criminal behavior, but only that the defendant’s *acts* were willful and

¹²⁹ *United States v. Are*, 498 F.3d 460, 462 (7th Cir. 2007).

¹³⁰ *United States v. Reyes-Ceja*, 712 F.3d 1284, 1288–89 (9th Cir.) (“Had Reyes-Ceja accidentally wandered across the border while drunk, or been kidnapped and taken across the border against his will, a different question would need to be answered.”), *cert. denied*, 571 U.S. 979 (2013); *see also* *United States v. Rincon-Diego*, No. 12-CR-2416-KC, 2012 WL 6021472, *4 (W.D. Tex. Nov. 19, 2012) (concluding that “a noncitizen cannot be ‘found in’ the United States ... without exiting and reentering the country after a previous conviction for illegal reentry.”).

¹³¹ *See* *United States v. Pina-Jaime*, 332 F.3d 609, 611 (9th Cir. 2003) (holding criminal liability attached to defendant who remained in the United States after the expiration of his period of parole).

¹³² *See, e.g.,* *United States v. Juarez*, 672 F.3d 381, 386 (5th Cir. 2012); *United States v. Smith-Baltiher*, 424 F.3d 913, 922 (9th Cir. 2005) (explaining, in the context of charges under Section 1326(a), “because derivative citizenship would negate that element of the offense, [the defendant] must be allowed to present that defense to the jury.”). However, one court has stated that alienage is not an element of the offense.

¹³³ *See supra* discussion pp. 4–5 ““Entry” for Purposes of Improper Entry and Reentry”.

¹³⁴ *See supra* discussion pp. 7–9 “Establishing Entry”; *see also* *United States v. Lombera-Valdovinos*, 429 F.3d 927, 929 (9th Cir. 2005) (“Our circuit precedent clearly holds that an alien who is on United States soil, but who is “deprived of [his] liberty and prevented from going at large within the United States,” remains under official restraint and therefore has not entered the country for the purposes of § 1326.”).

¹³⁵ *See* *United States v. Carlos-Colmenares*, 253 F.3d 276, 277 (7th Cir.) (collecting cases), *cert. denied*, 534 U.S. 914 (2001); *United States v. Berrios-Centeno*, 250 F.3d 294, 298 (5th Cir.), *cert. denied*, 534 U.S. 928 (2001); *United States v. Gutierrez-Gonzalez*, 184 F.3d 1160, 1165 (10th Cir.), *cert. denied*, 528 U.S. 1011 (1999); *United States v. Henry*, 111 F.3d 111, 114 (11th Cir.), *cert. denied*, 522 U.S. 894 (1997); *United States v. Ortiz-Villegas*, 49 F.3d 1435, 1437 (9th Cir.), *cert. denied*, 516 U.S. 845 (1995); *United States v. Espinoza-Leon*, 873 F.2d 743, 746 (4th Cir.), *cert. denied*, 492 U.S. 924 (1989). This report is not an exhaustive discussion on *mens rea* requirements. It is worth emphasizing that “few areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime.” *See* *United States v. Bailey*, 444 U.S. 394, 403 (1980). For a discussion on *mens rea* generally, *see* CRS Report R46836, *Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses*, by Michael A. Foster.

¹³⁶ *United States v. Miranda-Enriquez*, 842 F.2d 1211, 1212 (10th Cir. 1988).

knowing—that the defendant willfully and knowingly reentered the United States and ... did so without ... permission [from immigration officers].”¹³⁷

Lower courts disagree over whether *attempted* illegal reentry requires general or specific intent. Several circuits have held that “specific intent is not an element of the statute.”¹³⁸ The Fifth Circuit stated that “in proving an attempted illegal reentry, it is sufficient that the government demonstrates that a previously deported alien knowingly intended to reenter the United States—general intent with respect to the *actus reus* of the crime—rather than showing that the alien has a reasonable but mistaken belief that he had the consent of the Attorney General to reenter the country.”¹³⁹ The Ninth Circuit has held that attempted illegal reentry “requires proof of specific intent, more particularly the specific intent ‘to reenter without consent.’”¹⁴⁰

Within the Ninth Circuit, defendants have successfully challenged their attempted reentry convictions on the premise that they did not have the requisite mental state of specific intent to enter the United States “free from official restraint.”¹⁴¹ In other words, they claim that they did not intend to enter the country without being detected, apprehended, or taken into custody. In *United States v. Argueta-Rosales*, the defendant crossed into the United States from Mexico by climbing over the primary fence and was spotted by border patrol agents.¹⁴² Following his Section 1326(a) conviction by bench trial, the defendant appealed the conviction on the ground that he lacked the requisite intent to reenter the United States without detection because he intended to enter into the government’s custody.¹⁴³ The defendant presented evidence that he “entered the United States under the psychotic belief that he was being chased by armed gunmen in Mexico” and that he intended to enter to “find protection” by turning himself over to the border patrol.¹⁴⁴ The Ninth Circuit noted that, although evidence showed intent to enter the United States into government custody, other evidence also pointed to the contrary.¹⁴⁵ The court reversed his conviction on the ground that it was for the trier of fact to determine whether the government had proven unlawful intent to enter the United States free from official restraint beyond a reasonable doubt.¹⁴⁶ The Ninth Circuit further clarified that, in order to convict an alien of attempted illegal reentry, the government had to prove only that the alien intended to enter the United States free from official restraint—not that this was his only purpose.¹⁴⁷

¹³⁷ *Id.*

¹³⁸ *United States v. Morales-Palacios*, 369 F.3d 442, 446–49 (5th Cir. 2004); *accord* *United States v. Peralt-Reyes*, 131 F.3d 956, 957 (11th Cir. 1997) (per curiam), *cert. denied*, 523 U.S. 1087 (1998); *United States v. Reyes-Medina*, No. 94-1923, 1995 WL 247343, at *1 (1st Cir. Apr. 25, 1995) (unpublished); *United States v. Florentino-Rosario*, 459 F. Supp. 3d 345, 354-59 (D.P.R. 2020) (discussing *Reyes-Medina* and other case law and concluding that “proving attempted reentry in violation of section 1326(a) requires proof of a purpose to enter the United States but does not require proof of intent to do so illegally.”), *aff’d*, 19 F.4th 530 (1st Cir. 2021).

¹³⁹ *Morales-Palacios*, 369 F.3d at 449.

¹⁴⁰ *United States v. Argueta-Rosales*, 819 F.3d 1149, 1155–56 (9th Cir. 2016) (citing *United States v. Lombera-Valdovinos*, 429 F.3d 927, 929 (9th Cir. 2005)).

¹⁴¹ *See, e.g., Argueta-Rosales*, 819 F.3d at 1161; *Lombera-Valdovinos*, 429 F.3d at 928 (holding it was “impossible to convict a previously deported alien for attempted illegal reentry into the United States under [Section 1326(a)] when he crosses the border with the intent only to be imprisoned ... , because attempted illegal reentry is a specific intent crime that requires proof of intent to enter the country free from official restraint.”).

¹⁴² *Argueta-Rosales*, 819 F.3d at 1152.

¹⁴³ *Id.* at 1153–54.

¹⁴⁴ *Id.* at 1154.

¹⁴⁵ *Id.* at 1157–58.

¹⁴⁶ *Id.* at 1155–56.

¹⁴⁷ *Id.* at 1157.

In another Ninth Circuit decision, the court reversed a defendant’s Section 1326(a) conviction on the ground that he lacked specific intent to be free from official restraint because he had intended to be taken to jail while crossing.¹⁴⁸

Physical Departure After the Issuance of an Order of Removal

Reviewing courts have considered whether an alien can be said to have been deported and reentered if that alien never physically departed the United States. In *United States v. Romo-Romo*, the Ninth Circuit held that the defendant could not be considered “found” in the United States without physically exiting and reentering the country after a deportation order.¹⁴⁹ The defendant had been ordered deported but was never actually physically removed from the country because, while his removal was being carried out, he allegedly escaped and remained in the United States.¹⁵⁰ He was later convicted of reentry under Section 1326(a) for being “found” in the United States.¹⁵¹ In concluding the district court erroneously instructed the jury that the defendant did not actually have to leave the United States to be deported, the Ninth Circuit clarified that the defendant must in fact depart the United States following an order of removal for criminal liability to attach.¹⁵²

Although the Fifth Circuit has not addressed whether an alien must physically depart the United States after the issuance of an order of removal, it has stated that one of the elements the government must prove to establish a violation under Section 1326(a) is “arrest and *deportation*,” indicating that the alien must physically depart from the United States after the issuance of an order of removal.¹⁵³ Similarly, the Tenth Circuit has identified that a violation requires an arrest and deportation.¹⁵⁴

Remaining Unlawfully After a Lawful Entry

At least one court of appeals has considered whether a previously removed alien who had been authorized to enter the United States but remained in the country in violation of law is culpable under Section 1326(a) for being “found” in the United States. In *United States v. Pina-Jaime*, the Ninth Circuit clarified that Section 1326(a) does not require an unauthorized entry for liability to attach.¹⁵⁵ There, the court upheld a conviction for being “found” in the United States where the previously deported alien, who had been paroled into the United States for a specified period of time, voluntarily chose to remain in the United States after his parole period had expired.¹⁵⁶ The

¹⁴⁸ *United States v. Lombera-Valdovinos*, 429 F.3d 927, 928 (9th Cir. 2005).

¹⁴⁹ *United States v. Romo-Romo*, 246 F.3d 1272, 1274 (9th Cir. 2001); *accord* *United States v. Orozco-Acosta*, 607 F.3d 1156, 1162 (9th Cir. 2010) (recounting that “the government ... was required to prove ... that Orozco-Acosta, prior to being apprehended, had in fact been physically removed from the United States.”).

¹⁵⁰ *Id.* at 1273–74.

¹⁵¹ *Id.* at 1274.

¹⁵² *Id.* at 1274–75.

¹⁵³ *United States v. Flores-Peraza*, 58 F.3d 164, 166 (5th Cir. 1995) (emphasis added), *cert. denied*, 516 U.S. 1076 (1996); *accord* *United States v. Rincon-Diego*, No. 12-CR-2416-KC, 2012 WL 6021472, at *5 (W.D. Tex. Nov. 19, 2012).

¹⁵⁴ *United States v. Miranda-Enriquez*, 842 F.2d 1211, 1212 (10th Cir. 1988) (“Under [Section 1326(a)] it is a felony for any alien who has been arrested and deported to thereafter enter or subsequently be found in the United States, unless he has obtained permission for reentry from the Attorney General or he demonstrates that such permission was not required.”).

¹⁵⁵ *United States v. Pina-Jaime*, 332 F.3d 609, 612 (9th Cir. 2003).

¹⁵⁶ *Id.*; *accord* *Altamirano Trejo v. Rosen*, 832 Fed. App’x. 525, 526 (9th Cir. 2021) (“By overstaying his parole in such an egregious manner, Altamirano effectuated an illegal reentry.”).

court rejected the defendant's argument that he could not be held criminally liable under Section 1326(a) because he had entered the United States with permission, even though he had remained unlawfully.¹⁵⁷

Other lower courts have not definitively addressed whether an alien can violate 1326(a)'s "found in" provision without an unlawful entry, but at least one circuit court stated in an unpublished opinion "that there are circumstances where an alien can be convicted of violating § 1326(a)'s 'found in' provision without having unlawfully entered the country within the meaning of the statute."¹⁵⁸

Voluntary Presentation to Immigration Officers

Courts of appeals have vacated reentry convictions for having been "found" in the United States when the accused voluntarily presented himself or herself to immigration officers.¹⁵⁹ In the 1991 Eleventh Circuit decision *United States v. Canals-Jimenez*, a former lawful permanent resident previously removed from the United States was purportedly flying from the Dominican Republic to Canada through the Miami airport.¹⁶⁰ The alien presented himself to immigration officers in Miami who suspected he was attempting to enter the United States without authorization.¹⁶¹ He was arrested and later found guilty for being "found" in the United States after having been previously removed from the United States.¹⁶² On appeal, the Eleventh Circuit vacated the defendant's conviction, holding that he was not "found" in the United States because he voluntarily approached immigration officers.¹⁶³ The court noted that an "alien who seeks admission through a recognized immigration port of entry might be guilty of entering or attempting to enter the United States, but not of being found in the United States."¹⁶⁴

The Fifth Circuit also held that an alien who voluntarily approaches an immigration officer does not qualify as "found" in the United States under Section 1326(a), even though he or she is physically present in the United States.¹⁶⁵ The defendant, who had voluntarily approached an immigration officer at the Dallas–Fort Worth International Airport, initially pleaded guilty under Section 1326(a) for having been "found" in the United States.¹⁶⁶ On appeal, the Fifth Circuit vacated his conviction, concluding that because the defendant voluntarily approached immigration authorities, "it cannot be said that he was discovered in or found in the United States."¹⁶⁷ Although an alien may not be charged with being "found" in the United States

¹⁵⁷ *United States v. Pina-Jaime*, 332 F.3d 609, 612 (9th Cir. 2003).

¹⁵⁸ *United States v. Ramirez-Jose*, 93 F. App'x 256, 258 (1st Cir. 2004) (unpublished).

¹⁵⁹ *See, e.g., United States v. Zavala-Mendez*, 411 F.3d 1116, 1120–21 (9th Cir. 2005) (noting that a conviction for being "found in" the United States was not appropriate; "lying about his green card might have exposed [the defendant] to an 'attempting to enter' conviction, but he was not charged with that."); *United States v. Angeles-Mascote*, 206 F.3d 529, 531 (2000); *United States v. Canals-Jimenez*, 943 F.2d 1284, 1285–86 (11th Cir. 1991).

¹⁶⁰ *Canals-Jimenez*, 943 F.2d at 1285–86.

¹⁶¹ *Id.*

¹⁶² *Id.* at 1286.

¹⁶³ *Id.* at 1287.

¹⁶⁴ *Id.*

¹⁶⁵ *United States v. Angeles-Mascote*, 206 F.3d 529, 531 (5th Cir. 2000).

¹⁶⁶ *Id.* at 531.

¹⁶⁷ *Id.*

following reentry in those circumstances, the Fifth Circuit noted, he or she could still be charged with attempted reentry depending on the facts of the case.¹⁶⁸

Statute of Limitations

Some previously removed aliens are discovered by immigration officers shortly after reentering or attempting to reenter the United States, while others might remain in the United States undetected by immigration officers for long periods of time, potentially even decades.¹⁶⁹ Federal law contains statutes of limitations that set the maximum time after certain conduct within which the government may initiate prosecution. Ordinarily, the statute of limitations begins to run as soon as the crime has been “completed,” which occurs when the last element of the crime has been satisfied.¹⁷⁰ The statute of limitations applicable for most federal criminal offenses is five years after the offense is committed.¹⁷¹ Because inspections take place at the time of entry into the United States, the offenses of improper entry and reentry are consummated when an alien gains entry without submitting to inspection.¹⁷² The statute of limitations then begins.

The “found in” provision of Section 1326(a) raises a distinct issue when it comes to the triggering of the statute of limitations. Certain crimes continue even after the elements of the crime have been completed. The statute of limitations for these crimes, referred to as “continuing offenses,” is delayed if either “the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.”¹⁷³

Federal courts have “nearly universally recognized” the “found in” component of Section 1326(a) as a continuing offense.¹⁷⁴ The Fourth Circuit explained that “if the alien succeeds in reentering

¹⁶⁸ *Id.* (commenting that “[t]he appropriate indictment ... would have been to charge [the defendant] with attempting to enter the United States after previously being deported”).

¹⁶⁹ See generally CRS Report RL31253, *Statute of Limitation in Federal Criminal Cases: An Overview*, by Charles Doyle.

¹⁷⁰ *Toussie v. United States*, 397 U.S. 112, 115 (1970) (quoting *Pendergast v. United States*, 317 U.S. 412, 418 (1943)).

¹⁷¹ 18 U.S.C. § 3282.

¹⁷² See, e.g., *United States v. DiSantillo*, 615 F.2d 128, 136 (3d Cir. 1979) (“[T]he crime of illegal entry through a recognized INS port of entry after being arrested and deported is not a continuing offense.... ”); *United States v. Rincon-Jimenez*, 595 F.2d 1192, 1193–94 (9th Cir. 1979) (“Because these examinations and inspections are to take place at the time of entry, a fixed point in time, this suggests that the offense described by § 1325[(a)](2) is consummated at the time an alien gains entry through an unlawful point and does not submit to these examinations.”).

¹⁷³ *Toussie*, 297 U.S. at 115. For a compilation of federal offenses that are continuing offenses, see CRS Report RL31253, *Statute of Limitation in Federal Criminal Cases: An Overview*, by Charles Doyle (updated Nov. 14, 2017).

¹⁷⁴ *United States v. Ayon-Brito*, 981 F.3d 265, 270 (4th Cir. 2020) (listing cases from various federal courts of appeals recognizing “found in” as a continuing offense), *cert. denied*, 142 S. Ct. 162 (2021); *accord United States v. Orna-Ibarra*, 831 F.3d 867, 870 (7th Cir. 2016) (“Illegal re-entry is a ‘continuing offense’ that is committed from the moment the defendant reenters the country until federal immigration agents gain ... knowledge of her presence, her identity, and her unlawful immigration status”) (citation omitted); *United States v. Mendez-Cruz*, 329 F.3d 885, 889 (D.C. Cir. 2003) (“Reentry was clearly an act committed during the offense of being found in the United States because that offense is a continuing violation that commences with the illegal entry”); *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996) (“Where a deported alien enters the United States and remains here with the knowledge that his entry is illegal, his remaining here until he is ‘found’ is a continuing offense because it is ‘an unlawful act set on foot by a single impulse and operated by an unintermittent force.... ’), *cert. denied*, 517 U.S. 1228 (1996).

Although it has not specifically addressed whether Section 1326(a)’s “found in” provision constitutes a continuing offense, the Supreme Court weighed in on whether a statute penalizing seamen who are “present” in the United States for more than twenty-nine days allowed by the crew’s conditional landing permit, codified in 8 U.S.C. § 1282(c), is a continuing offense. *United States v. Cores*, 356 U.S. 405, 406 (1958). The Court described such provision as a continuing offense, reasoning that the “affirmative act of willfully remaining” is an ongoing offense. *Id.* at 408–09. The (continued...)

the country surreptitiously, as opposed to being stopped at the border, the offense is complete when the alien is ‘found in’ in the United States.”¹⁷⁵ Describing the “found in” component as a continuing offense, the Seventh Circuit explained that “an ‘entry’ is complete when it occurs, while illegal ‘presence’ is ongoing.”¹⁷⁶ By categorizing “found in” as a continuing offense, Section 1326’s “found in” provision is therefore committed from the moment the alien enters the country until immigration officers gain knowledge of his or her presence, identity, and unlawful immigration status.¹⁷⁷ So long as an alien remains unlawfully present in the United States without detection, the general five-year statute of limitations is not triggered.¹⁷⁸ Once the alien becomes known to federal law enforcement, the five-year statute of limitations begins.¹⁷⁹ To determine “whether an indictment for illegal reentry is within the five-year statute of limitations, therefore, a court must assess when the alien was ‘found in’ the United States.”¹⁸⁰

At times, immigration officers may interact with an individual but fail to realize his or her unlawful presence. The five-year statute of limitations, as stated by the Eighth Circuit, generally begins “when immigration authorities could have, through the exercise of diligence typical of law enforcement authorities, discovered the violation.”¹⁸¹ For instance, in the Third Circuit decision *United States v. DiSantillo*, a previously removed alien reentered the United States through a port of entry under his own name and an immigrant visa and, nearly nine years later, was charged with illegal reentry.¹⁸² As his entry was not surreptitious, the Third Circuit reasoned, immigration officers had sufficient notice of his entry, and the statute of limitations began upon his arrival in the United States.¹⁸³ In vacating the conviction, the court concluded that the charges were barred by the statute of limitations, given that it expired approximately four years before the filing of the indictment.¹⁸⁴

Some defendants have sought to evade criminal liability by claiming that prosecution was barred by the statute of limitations because it had been triggered when the alien was “found” by state officials.¹⁸⁵ As a general rule, an alien is “found” when he is discovered by federal officials, not state officials, because only the federal government can enforce immigration laws.¹⁸⁶

Court explained, “It seems incongruous to say that while the alien ‘willfully remains’ on the 29th day when his permit expires, he no longer does so on the 30th, though still physically present in the country.” *Id.* at 409.

¹⁷⁵ *United States v. Alas*, 63 F.4th 269, 273 (4th Cir. 2023) (citation omitted).

¹⁷⁶ *United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 460–61 (7th Cir. 2006) (citation omitted).

¹⁷⁷ *See* *United States v. Orona-Ibarra*, 831 F.3d 867, 870 (7th Cir. 2016) ; *see also* *Ayon-Brito*, 981 F.3d at 270 (“[W]e hold that § 1326(a) creates a continuing offense, which begins with a previously deported alien’s reentry (or attempted reentry) into the United States and continues until the alien is found”).

¹⁷⁸ *See, e.g.*, *United States v. Clarke*, 312 F.3d 1343 (11th Cir. 2002); *United States v. Lopez-Flores*, 275 F.3d 661 (7th Cir. 2001); *United States v. Reyes-Pacheco*, 248 F.3d 942 (9th Cir. 2001); *United States v. Acevedo*, 229 F.3d 350 (2d Cir.) *cert. denied*, 531 U.S. 1027 (2000).

¹⁷⁹ *See, e.g.*, *United States v. Gomez*, 38 F.3d 1031, 1037 (8th Cir. 1994); *United States v. Uribe-Rios*, 558 F.3d 347, 354 (4th Cir. 2009); *United States v. Rivera-Ventura*, 72 F.3d 277, 282 (2d Cir. 1995).

¹⁸⁰ *Alas*, 63 F.4th at 273.

¹⁸¹ *Gomez*, 38 F.3d at 1037; *see also* *Rivera-Ventura*, 72 F.3d at 285.

¹⁸² *United States v. DiSantillo*, 615 F.2d 128, 130 (3d Cir. 1980).

¹⁸³ *Id.* at 137.

¹⁸⁴ *Id.*

¹⁸⁵ *See, e.g.*, *United States v. Uribe-Rios*, 558 F.3d 347, 352–53 (4th Cir. 2009); *United States v. Clarke*, 312 F.3d 1343, 1347 (11th Cir. 2002) (rejecting argument that immigration authorities could have learned of his illegal presence when Florida police confirmed his identity).

¹⁸⁶ *United States v. Alas*, 63 F.4th 269, 273 (4th Cir. 2023) (citing *Uribe-Rios*, 558 F.3d at 353); *United States v. Clarke*, 312 F.3d 1343, 1347 (11th Cir. 2002) (collecting cases in rejecting argument that knowledge by state officials (continued...))

Federal law, though, allows federal immigration authorities to deputize certain qualified state officers to perform the functions of an immigration officer in some circumstances, with the “principal example” being a program authorized by Section 287(g) of the INA (Section 287(g)), found in 8 U.S.C. § 1357(g).¹⁸⁷ Under a Section 287(g) agreement, local officers may perform immigration enforcement functions if immigration authorities determine and certify that the officer is “qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States.”¹⁸⁸ At least one circuit has clarified that aliens detected by state officers designated and trained under a Section 287(g) agreement to enforce federal immigration law would be considered to be “found” in the United States for purposes of Section 1326(a), while aliens discovered by a state officer not designated or trained under a Section 287(g) agreement would not be considered to be “found” in the United States.¹⁸⁹

In the 2023 decision *United States v. Alas*, the Fourth Circuit held that a Section 287(g) agreement with a state or local law enforcement entity does not render all employees, including those who are not designated or trained under a Section 287(g) agreement, as immigration officers for purposes of triggering the statute of limitations.¹⁹⁰ The court rejected the defendant’s theory that the statute of limitations began when he spoke with a county sheriff’s deputy when the deputy visited the defendant in a hospital to discuss an assault because the sheriff’s department had a 287(g) agreement.¹⁹¹

Challenging the Underlying Order of Removal

Some have sought to evade criminal liability under Section 1326(a) by challenging the underlying order of removal as invalid.¹⁹² Section 1326(d) of Title 8 provides opportunity for defendants to collaterally attack their prior removals as improper, but defendants must satisfy certain procedural requirements.¹⁹³ Defendants must show that (1) they exhausted any administrative remedies that may have been available to seek relief against the removal orders, (2) the removal proceedings improperly deprived them of the opportunity for judicial review, and (3) entry of the order was fundamentally unfair.¹⁹⁴

In the 2021 decision *United States v. Palomar-Santiago*, the Supreme Court considered whether the defendant was excused from satisfying the first two of the procedural requirements because his prior removal order was premised on a conviction that was later found not to be a removable offense.¹⁹⁵ There, the defendant was indicted for improper reentry under Section 1326(a) after he

is insufficient to trigger the five-year statute of limitations); *United States v. Mercedes*, 287 F.3d 47, 55 (2d Cir.), *cert. denied*, 537 U.S. 900 (2002).

¹⁸⁷ *Arizona v. United States*, 567 U.S. 387, 408 (2012); 8 U.S.C. § 1357(g)(1). To learn more about the 287(g) program, see CRS In Focus IF11898, *The 287(g) Program: State and Local Immigration Enforcement*, by Abigail F. Kolker.

¹⁸⁸ 8 U.S.C. § 1357(g)(1).

¹⁸⁹ *United States v. Sosa-Carabantes*, 561 F.3d 256, 257 (4th Cir. 2009).

¹⁹⁰ *Alas*, 63 F.4th at 275.

¹⁹¹ *Id.*

¹⁹² *See, e.g.*, *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1620 (2021); *United States v. Castillo-Martinez*, 16 F.4th 906, 911 (1st Cir. 2021), *cert. denied*, 143 S. Ct. 123 (2022); *United States v. Cerna*, 603 F.3d 32, 38 (2d Cir. 2010).

¹⁹³ 8 U.S.C. § 1326(d).

¹⁹⁴ *Id.*; *Palomar-Santiago*, 141 S. Ct. at 1619.

¹⁹⁵ *Palomar-Santiago*, 141 S. Ct. at 1619.

was removed due to a prior California conviction for driving under the influence (DUI).¹⁹⁶ The defendant collaterally attacked the underlying order of removal as invalid following the Supreme Court’s 2004 decision in *Leocal v. Ashcroft*,¹⁹⁷ in which the Court held that felony DUI does not constitute an aggravated felony warranting removal under the INA.¹⁹⁸ Even though there had been a substantive change in the law, the Court in *Palomar-Santiago* held unanimously that individuals must satisfy all of Section 1326(d)’s administrative exhaustion requirements and that the first two requirements are not satisfied just because an alien was removed for an offense that should not have rendered him removable.¹⁹⁹ This ruling clarifies that defendants must exhaust administrative remedies in accordance with Section 1326(d), and substantive invalidity of a removal order is insufficient, in itself, to evade criminal liability for reentry.²⁰⁰

The question before the Court in *Palomar-Santiago*, however, did not concern what constitutes exhaustion of administrative remedies or a deprivation of judicial review, leaving open such questions to the lower courts. For instance, prior to *Palomar-Santiago*, the Ninth Circuit held that “a showing of ineffective assistance of counsel can justify a failure to exhaust and satisfy the judicial review requirement.”²⁰¹ However, the First Circuit, since *Palomar-Santiago*, has ruled that ineffective assistance of counsel does not excuse Section 1326(d)’s requirements because of the availability to file a motion with the Board of Immigration Appeals (BIA) to reopen a case on the grounds of ineffective assistance of counsel.²⁰²

The Ninth Circuit has expressed uncertainty about *Palomar-Santiago*’s impact on its prior jurisprudence.²⁰³ In a 2022 decision, *United States v. Castellanos-Avalos*, the Ninth Circuit recounted how its jurisprudence contained:

three circumstances in which a defendant could overcome both § 1326(d)(1)’s exhaustion requirement and § 1326(d)(2)’s deprivation-of-judicial-requirement: (1) “when the [immigration judge] failed to inform the alien that he had a right to appeal his [removal] order to the BIA;” (2) when the IJ failed “to inform the alien that he is eligible for a certain type of relief;” and (3) when the defendant waived his right to appeal to the BIA, but can show that “his waiver was not considered and intelligent.”²⁰⁴

The court noted how *Palomar-Santiago* “called at least some aspects of this framework into question” but also observed how *Palomar-Santiago* “concerned a different circumstance in which our court’s precedents permitted excusal of a failure to comply with § 1326(d)’s procedural requirements.”²⁰⁵

¹⁹⁶ *Id.* at 1618–19.

¹⁹⁷ *Leocal v. Ashcroft*, 543 U.S. 1, 11–13 (2004).

¹⁹⁸ *Palomar-Santiago*, 141 S. Ct. at 1620.

¹⁹⁹ *Id.* at 1620–21.

²⁰⁰ *Id.* at 1621.

²⁰¹ *Castellanos-Avalos*, 22 F.4th 1142, 1146 (9th Cir. 2022) (citing *United States v. Lopez-Chavez*, 757 F.3d 1033, 1044 (9th Cir. 2014)).

²⁰² *United States v. Castillo-Martinez*, 16 F.4th 906, 916 (1st Cir. 2021), *cert. denied*, 143 S. Ct. 123 (2022); *accord United States v. Cerna*, 603 F.3d 32, 40 (2d Cir. 2010) (holding that ineffective assistance of counsel may be grounds to excuse § 1326(d)(2)’s requirement).

²⁰³ *See Castellanos-Avalos*, 22 F.4th at 1145–46 (noting that *Palomar-Santiago* “called at least some aspects of this framework into question.”); *Zamorano v. Garland*, 2 F.4th 1213, 1225 (9th Cir. 2021); *Alam v. Garland*, 11 F.4th 1133, 1137–38 (9th Cir. 2021) (en banc) (Bennet, J., concurring).

²⁰⁴ *Castellanos-Avalos*, 22 F.4th at 1145 (quoting *United States v. Gonzalez-Villalobos*, 724 F.3d 1125, 1130–31 (9th Cir. 2013))

²⁰⁵ *Id.* at 1146.

The *Castellanos-Avalos* panel rejected the defendant’s arguments that procedural defects in his removal proceedings constituted the deprivation of the “opportunity for judicial review” justifying setting aside his removal order.²⁰⁶ The Ninth Circuit observed that the defendant had, in fact, “actively pursued judicial review” and therefore was not deprived of judicial review for purposes of Section 1326(d).²⁰⁷ The court noted that the defendant’s claim that his proceedings were unfair on the ground that the immigration judge did not notify him of possible entitlement to voluntary departure was unpersuasive, as the defendant’s attorney had made him aware of this potential form of relief.²⁰⁸

Although not binding, an example of a successful challenge to an underlying order of removal post-*Palomar-Santiago* is a 2022 district court decision, *United States v. Sam-Pena*, in which the district court concluded that the defendant demonstrated that he had no available administrative remedies, that his removal proceedings deprived him of opportunity for judicial review, and that the underlying removal order was fundamentally unfair.²⁰⁹ The district court agreed with the defendant that he satisfied Section 1326(d)(1)’s requirement “because he had no available administrative remedies where he could contest the immigration officer’s [legal] determination that his prior conviction [of kidnapping] was an aggravated felony.”²¹⁰ The defendant had been removed through expedited removal and was informed that he could challenge factual conclusions but had not been explicitly informed that he could challenge legal conclusions underlying his removability.²¹¹ The district court also agreed that the government did not carry its burden to establish that the defendant made a valid waiver of his right to pursue judicial review.²¹² The defendant claimed the waiver was not explained to him in Spanish and no other evidence sufficiently established that he knowingly waived his right to appeal.²¹³ Lastly, the district court concluded that the prior removal was “fundamentally unfair” because the underlying state kidnapping conviction does not constitute an aggravated felony to support expedited removal.²¹⁴ The Ninth Circuit did not weigh in on appeal, as the federal government voluntarily dismissed its appeal.²¹⁵

Vagueness Challenges

Some defendants have challenged their Section 1326(a) convictions as unconstitutionally vague, but lower courts have generally rejected such claims.²¹⁶ The Supreme Court has explained that “as generally stated, the void-for-vagueness doctrine requires that a penal statute define the

²⁰⁶ *Castellanos-Avalos*, 22 F.4th at 1148.

²⁰⁷ *Id.* at 1148 (rejecting the defendant’s reliance on *United States v. Rojas-Pedroza*, 716 F.3d 1253 (9th Cir. 2013) in arguing that the “IJ’s failure to advise him of his potential eligibility for voluntary departure constitute[d] a deprivation of judicial review.”).

²⁰⁸ *Id.*

²⁰⁹ *United States v. Sam-Pena*, 602 F. Supp. 3d 1204, 1212 (D. Ariz. 2022), *appeal dismissed*, No. 22-10141, 2022 WL 17403200 (9th Cir. Aug. 30, 2022).

²¹⁰ *Id.* at 1208–09.

²¹¹ *Id.*

²¹² *Id.* at 1209–12.

²¹³ *Id.* at 1209.

²¹⁴ *Id.* at 1212.

²¹⁵ *United States v. Sam-Pena*, No. 22-10141, 2022 WL 17403200 (9th Cir. Aug. 30, 2022).

²¹⁶ *See, e.g.*, *United States v. Marte*, 356 F.3d 1336, 1341 (11th Cir. 2004); *United States v. Ayala*, 35 F.3d 423, 424 (9th Cir. 1994), *cert. denied*, 514 U.S. 1019 (1995); *United States v. Meraz-Valeta*, 26 F.3d 992 (10th Cir. 1994), *overruled on other grounds*, *United States v. Aguirre-Tello*, 353 F.3d 1199 (10th Cir. 2004); *United States v. Whittaker*, 999 F.2d 38 (2d Cir. 1993).

criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”²¹⁷ In rejecting the defendant’s argument that his “found in” conviction was unconstitutionally vague,²¹⁸ the Second Circuit explained that the “found in” provision sufficiently informs a previously removed alien who enters without permission that his or her conduct is unlawful, thereby providing “sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”²¹⁹ The Ninth Circuit has also found vagueness arguments unpersuasive, concluding that the provision does not “contain any ambiguity at all.”²²⁰ The court further explained, “To avoid being ‘found in’ the United States, a deported alien can either not re-enter the United States or, if he has already re-entered the United States, he can leave.”²²¹

Penalties, 8 U.S.C. § 1326(a)

A conviction for reentry carries a punishment of a fine²²² and a term of imprisonment for up to two years for most defendants.²²³ As shown in **Table 1**, an individual may be subject to a heightened criminal penalty in the case of prior criminal history or prior removal on certain grounds.

Table 1. Section 1326(a) Penalties

Prior Activity	Penalty
No relevant history	Fine and/or no more than 2 years imprisonment
Conviction follows three or more misdemeanors involving drugs or crimes against the person	Fine and/or imprisonment up to 10 years
Conviction follows a felony	Fine and/or imprisonment up to 10 years
Conviction follows aggravated felony	Fine and/or imprisonment up to 20 years
Conviction follows removal on terrorist grounds	Fine and/or imprisonment up to 10 years
Conviction follows removal prior to completion of a term of imprisonment in accordance with 8 U.S.C. § 1231(a)(4)(B) and enters, attempts to enter, or is found in the U.S. without permission from the Attorney General	Fine and/or imprisonment up to 10 years

Source: 8 U.S.C. § 1326(a), (b).

Select Considerations Regarding Asylum

Some defendants charged with improper entry offenses have claimed that prosecutions brought against them conflict with principles of asylum established by international treaty obligations and

²¹⁷ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

²¹⁸ *Whittaker*, 999 F.3d at 42.

²¹⁹ *See id.* (citing *United States v. McElroy*, 910 F.3d 1016, 1021 (2d Cir. 1990)).

²²⁰ *Ayala*, 35 F.3d at 425 (9th Cir. 1994).

²²¹ *Id.*

²²² In the absence of an amount specified in Section 1326, a person convicted under this statute may be subject to a fine not more than \$250,000 or potentially an alternative fine of twice the amount of pecuniary gain from the offense or pecuniary loss to a person other than the defendant. 18 U.S.C. § 3571.

²²³ 8 U.S.C. § 1326(a).

federal statute.²²⁴ Asylum is a humanitarian-based discretionary form of relief from removal for an applicant who establishes past persecution or a well-founded fear of future persecution in his or her country of origin or last country of residence on account of a protected ground, including race, religion, nationality, membership in a particular social group, or political opinion.²²⁵

Federal Statute

Federal statute provides that an alien may apply for asylum. Section 1158(a)(1) of Title 8 reads:

Any alien who is physically present in the United States or who arrives in the United States [] whether or not at a designated port of arrival ... [] irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.²²⁶

This provision contemplates that an alien who intends to apply for asylum might enter the United States outside of designated ports of entry not in accordance with immigration law, as the statutory text includes “whether or not at a designated port of arrival.”²²⁷ Even though individuals who surreptitiously enter the United States are eligible to apply for asylum, lower courts have concluded that claimed refugee or asylum status does not preclude criminal prosecution. In one case, the Fifth Circuit reasoned that asylum seekers are “aliens under 8 U.S.C. § 1325(a)” and that “qualifying for asylum under 8 U.S.C. § 1158 would not change ... alien status.”²²⁸ One district court stated that “a plain reading of the statutes suggests that ... Congress chose not to grant immunity to asylum seekers who face criminal prosecution.”²²⁹

International Treaty Obligations

Defendants charged with improper entry or reentry have argued that prosecution violates rights bestowed by the United Nations Convention Relating to the Status of Refugees (“Convention”),²³⁰ that is, the right to seek asylum, the prohibition against penalties for irregular

²²⁴ See, e.g., *United States v. Vasquez-Hernandez*, 924 F.3d 164, 168 (5th Cir. 2019); *United States v. Ramirez-Ortiz*, 370 F. Supp. 3d 1151, 1154–55 (S.D. Cal. 2019).

²²⁵ 8 U.S.C. 1158(b)(1)(A) (“The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.”). The INA defines a refugee as

(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Id. § 1101(a)(42)(A).

²²⁶ *Id.* § 1158(a)(1).

²²⁷ *East Bay Sanctuary Covenant v. Trump*, 993 F.3d 640, 669 (9th Cir. 2021).

²²⁸ *Vasquez-Hernandez*, 924 F.3d at 169.

²²⁹ *Ramirez-Ortiz*, 370 F. Supp. 3d at 1155–56.

²³⁰ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

entry, and the principle of nonrefoulement.²³¹ Although the United States did not sign the Convention, it acceded to the 1967 Protocol Relating to the Status of Refugees (Protocol), which binds parties to comply with the substantive provisions of articles 2 through 34 of the Convention.²³² Article 31(1) in particular mandates that signatories “shall not impose penalties” because of a refugee’s “illegal entry or presence.”²³³

The 1967 Protocol, however, does not impose obligations enforceable under domestic law. When the United States signs a treaty, the treaty is either “self-executing” or “non-self-executing.”²³⁴ A self-executing treaty is considered to have the force of U.S. domestic law without the need for implementing legislation.²³⁵ A non-self-executing treaty is not directly enforceable in U.S. courts.²³⁶ Indeed, federal courts have held that the Protocol is not self-executing for domestic law purposes and thus creates no judicially enforceable rights or duties.²³⁷ Accordingly, implementing legislation, including 8 U.S.C. § 1158, governs the availability of asylum for individuals.

As relevant to prosecutions under Sections 1325(a) and 1326(a), lower courts have not been receptive to arguments that prosecution for improper entry or reentry contravenes international obligations, pointing to the fact that the 1967 Protocol does not grant judicially enforceable domestic rights.²³⁸ Additionally, several district courts have ruled that Article 31(1) cannot serve as a defense to prosecution.²³⁹

Select CRS Products

- CRS Report R45539, *Immigration: U.S. Asylum Policy*, by Andorra Bruno
- CRS Legal Sidebar LSB10582, *Asylum Processing at the Border: Legal Basics*, by Ben Harrington
- CRS Report R46755, *The Law of Asylum Procedure at the Border: Statutes and Agency Implementation*, by Ben Harrington
- CRS In Focus IF10861, *Global Human Rights: Multilateral Bodies & U.S. Participation*, by Michael A. Weber

²³¹ See, e.g., *Ramirez-Ortiz*, 370 F. Supp. 3d at 1154–55.

²³² See *INS v. Stevic*, 467 U.S. 407, 416 (1984); *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009).

²³³ Specifically, Article 31(1) provides: “The Contracting States *shall not impose penalties*, on account of their illegal entry or presence, on refugees, who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

²³⁴ The Supreme Court “has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding law.” *Medellín v. Texas*, 552 U.S. 491, 504 (2008). “While treaties may comprise international commitments ... they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing and is ratified on these terms.” *Id.* at 505 (citation and internal quotation marks omitted). For a discussion on the effect of international law and agreements on the United States, see CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by Stephen P. Mulligan.

²³⁵ *Medellín*, 552 U.S. at 505.

²³⁶ *Id.*; see also *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991) (“The language of the [1967] Protocol and the history of the United States’ accession to it leads to the conclusion that Article 33 is not self-executing and thus provides no enforceable rights to the Haitian plaintiffs in this case.”), *cert. denied*, 502 U.S. 1122 (1992).

²³⁷ See *id.*; *Bertrand v. Sava*, 684 F.2d 204, 218–19 (2d Cir. 1982).

²³⁸ See *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991) (“The language of the [1967] Protocol and the history of the United States’ accession to it leads to the conclusion that Article 33 is not self-executing and thus provides no enforceable rights to the Haitian plaintiffs in this case.”); *Sava*, 684 F.2d at 218–19.

²³⁹ See, e.g., *United States v. Ramirez-Ortiz*, 370 F. Supp. 3d 1151, 1155 (S.D. Cal. 2019); *United States v. Velazquez-Luna*, No. 18-mj-11463, 2019 WL 338947, at *2 (S.D. Cal. Jan. 28, 2019) (ruling that criminal defendant could not rely on Article 31(1) to challenge his prosecution under Section 1325(a)(2)); *United States v. Munoz*, No. CR-17-1078, 2017 WL 4922047, at *3 (D. Ariz. Oct. 30 2017).

Considerations for Congress

Congress has broad power to establish rules for the admission, removal, and presence of aliens, and these rules are buttressed by a multifaceted enforcement scheme. Congress may elect to utilize its legislative authority to amend the INA's statutory scheme that certain individuals who undermine immigration rules by entering or reentering the United States in violation of law are subject to criminal liability.

This section discusses some key areas of focus that may be of interest to Congress as relevant to Sections 1325(a) and 1326(a), along with a sample of bills introduced in the 116th, 117th, and 118th Congresses.²⁴⁰

Entry

As discussed earlier, the INA does not define or further extrapolate on the meaning of *entry* in the context of Sections 1325(a) and 1326.²⁴¹ Courts generally agree that *entry* requires the coming of an alien from a foreign port or place.²⁴² However, in the absence of guidance from the Supreme Court, lower courts have not come to a consensus on whether an alien must “enter free from official restraint.”²⁴³ Further, courts disagree over what constitutes official restraint.²⁴⁴

Due to the circuit divide over the principle of freedom from official restraint, prosecutorial outcomes may differ in the case of aliens observed by federal authorities unlawfully crossing the border depending on where a defendant is charged (e.g., unlawful entry over the border into Arizona versus unlawful entry over the border into Texas). Congress may opt to utilize its legislative authority to clarify the meaning of *entry*, particularly whether Sections 1325(a) and 1326(a) require or do not require an alien to enter free from official restraint for criminal liability to attach. Alternatively, Congress may determine that the current versions of Sections 1325(a) and 1326(a) appropriately encompass entries that arise in a variety of contexts.

“Found” in the United States

As discussed above, the criminal offense of being “found in” the United States after having unlawfully reentered the country under Section 1326(a) raises distinct legal issues that might be of interest to lawmakers.²⁴⁵ The provision poses some difficulties for reviewing courts relating to the statute of limitations for Section 1326(a) prosecutions.²⁴⁶ When the statute of limitations is triggered controls whether and when an alien who has remained unlawfully in the United States, potentially for a long period of time, can be prosecuted under Section 1326(a).

²⁴⁰ This discussion is not exhaustive of areas of potential focus for Congress. For instance, a potential consideration for Congress might consist of amending Section 1325(a) to extrapolate on whether an alien who improperly enters the United States between ports of entry is liable under Section 1325(a)(2)'s prohibition on entry without inspection, in addition to liability under Section 1325(a)(1) for entering the United State at a time or place other than as designated by immigration officers. *See supra* discussion pp. 12-13 “Location of Violation”.

²⁴¹ *See supra* discussion pp. 4-5 ““Entry” for Purposes of Improper Entry and Reentry”.

²⁴² *See id.*

²⁴³ *See supra* discussion pp. 7-9 “Establishing Entry”; *supra* discussion p. 16 “Establishing Entry”.

²⁴⁴ *See id.*

²⁴⁵ *See generally* “Illegal Reentry, 8 U.S.C. § 1326(a)”.

²⁴⁶ *See supra* discussion pp. 20–22 “Statute of Limitations”.

Courts have generally held that the statute of limitations starts to run when immigration authorities actually discovered or should have discovered a previously removed alien.²⁴⁷ Congress may consider clarifying what it means to be “found” in the United States, as well as whether being “found” is limited to discovery by immigration officers or potentially even other law enforcement.

In addition, although it is well established that Section 1326(a)’s “found in” provision applies to previously removed aliens encountered in the United States after an unauthorized reentry, it is mostly unclear whether the provision applies to previously removed aliens who entered the United States with permission but then remain in violation of law.²⁴⁸ At least one circuit court has stated that criminal liability attaches to an alien who enters with permission but remains beyond the authorized period of time.²⁴⁹ Other circuits have not weighed in on the matter but have indicated that an alien who remains after the period of authorization might be culpable under Section 1326(a).²⁵⁰ Congress may elect to clarify whether this criminal offense applies to previously removed aliens who enter the country with permission by immigration officers but then remain in the country after the period of authorization expires. Alternatively, Congress might determine that the current version of the statute appropriately encompasses conduct that may arise in a variety of contexts.

Asylum

A potential area of interest of Congress may be whether individuals who unlawfully enter the United States but intend to seek asylum should be prosecuted for illegal entry or reentry. As discussed above, the asylum statute, 8 U.S.C. § 1158, envisages that aliens who enter the United States, including those who enter without authorization, are permitted to apply for asylum.²⁵¹ Reviewing lower courts have concluded that, even though aliens who did not enter with permission are eligible to apply for asylum, they are not shielded from criminal liability for the unlawful entry itself.²⁵² Lawmakers may consider amending Sections 1325(a) and 1326(a), or alternatively Section 1158, to prohibit the prosecution of certain aliens who intend to seek asylum. The Protect Asylum Seekers Act introduced in the 116th Congress would have exempted asylum seekers from criminal prosecution for unlawful entry and reentry so long as the alien “presents himself to an immigration officer or an asylum officer without unnecessary delay after entering the United States, and indicates an intention to apply for asylum....”²⁵³ The exemption from prosecution would not have applied to aliens who raise fraudulent asylum claims.²⁵⁴

In the alternative, Congress might conclude that aliens who unlawfully enter the United States, regardless of an intention to seek asylum, should be subject to prosecution for improper entry as part of the immigration enforcement scheme. Congress might determine that criminal liability for improper entry generally deters unlawful entry and provides incentive for aliens, including those who intend to seek asylum, to present themselves to immigration officers at a designated port of entry. To provide clear guidance for courts and law enforcement, Congress could consider

²⁴⁷ *See id.*

²⁴⁸ *See supra* discussion pp. 18-19 “Remaining Unlawfully After a Lawful Entry”.

²⁴⁹ *See id.*

²⁵⁰ *See id.*

²⁵¹ *See supra* discussion pp. 26 “Federal Statute”.

²⁵² *See id.*

²⁵³ H.R. 9040, 116th Cong. § 2 (2020).

²⁵⁴ *Id.*

amending Sections 1158, 1325(a), or 1326(a) to provide that an alien who states an intention to seek asylum but unlawfully enters the United States is not immune to prosecution.

The 118th Congress has introduced legislation that would make certain aliens who improperly enter the United States, regardless of their criminal liability under Sections 1325(a) and 1326(a), ineligible to apply for asylum. The Border Enforcement and Security Act of 2023 would amend Section 1158(a)(1) to provide that only aliens who arrive at designated ports of entry are eligible to apply for asylum, meaning that those who enter at places other than a designated port of entry (i.e., surreptitious crossing) would be barred from applying for asylum.²⁵⁵ In addition, this proposed legislation would amend Section 1158(b)(2) to provide that aliens who are convicted of offenses under Section 1326(a) are ineligible to apply for asylum.²⁵⁶ Likewise, under the Secure and Protect Act of 2023, only aliens who enter through designated ports of entry would be eligible to apply for asylum.²⁵⁷

Penalties

Like earlier Congresses, the 118th Congress has shown interest in the penalties imposed on those who commit improper entry or illegal reentry. Congress might utilize its legislative authority to amend penalties under these provisions.²⁵⁸ Alternatively, Congress could determine that penalties currently imposed are sufficient.

Passed by the House of Representatives in the 118th Congress, the Secure the Border Act of 2023 would increase civil penalties under Section 1325(a) for improper entry at a time or place other than as designated by immigration officers.²⁵⁹ Additionally, if enacted, the legislation would add another provision to Section 1325 imposing criminal sanctions on aliens who are admitted into the United States as nonimmigrants but fail to maintain nonimmigrant status for an aggregate of ten days or more or otherwise fail to comply with conditions of such status.²⁶⁰

Introduced in the 117th Congress, the Stop Illegal Reentry Act (or “Kate’s Law”) would have increased criminal penalties for certain aliens who reenter the United States without authorization after removal or exclusion.²⁶¹ In contrast, other legislation introduced in the 117th Congress sought to “decriminalize migration.”²⁶² The New Way Forward Act would have repealed criminal penalties for improper entry and illegal reentry.²⁶³

²⁵⁵ H.R. 2640, 118th Cong. § 104 (2023).

²⁵⁶ *Id.* § 105.

²⁵⁷ S. 425, 118th Cong. § 3 (2023).

²⁵⁸ *See supra* discussion p. 14 “Penalties, 8 U.S.C. § 1325(a)”; *supra* discussion pp. 25-26 “Penalties, 8 U.S.C. § 1326(a)”.

²⁵⁹ H.R. 2, 118th Cong. § 601 (2023).

²⁶⁰ *Id.* Likewise, the Visa Overstays Penalties Act would increase civil penalties for improper entry at a time or place other than as designated by immigration officers and establish new criminal sanctions for nonimmigrants who fail to maintain status and remain in the United States without authorization. H.R. 2436, 118th Cong. § 2 (2023).

²⁶¹ H.R. 3374, 117th Cong. § 2 (2021); S. 890, 117th Cong. § 2 (2021).

²⁶² H.R. 536, 117th Cong. § 601 (2021); *see also* H.R. 5383, 116th Cong. § 601 (2019) (same).

²⁶³ H.R. 536, 117th Cong. § 601 (2021).

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