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Crooked Straits: Maritime Smuggling of Humans from Cuba to the United States

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COMMENT

CROOKED STRAITS: MARITIME SMUGGLING OF HUMANS FROM CUBA TO THE UNITED STATES

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I. INTRODUCTION

In December 2001, thirty Cuban men, women, and children each reportedly secured payment in excess of \$10,000 to smugglers in Florida for covert transit to the United States.¹ They

1. See Jody A. Benjamin, Tanya Weinberg, & Vanessa Bauza, *Search for 30 Cubans Called Off: U.S. Officials Begin Inquiry into Fatal Smuggling Attempt*, SUN-SENTINEL, Nov. 22, 2001, at 1A.

crowded onto a hired stranger's speedboat on the north coast of Cuba for the 100-mile crossing under the cover of darkness. When the vessel failed to arrive in South Florida the following day, as U.S.-based relatives expected that it would, the United States Coast Guard was notified.² The Coast Guard's search discovered a capsized vessel believed to be that driven by the hired smuggler, but no survivors or bodies were found.³ This event is typical of many unsuccessful human smuggling trips in the Straits of Florida, as smuggling has flourished in this corridor since 1998.⁴

This comment will examine the historical background and unique circumstances that have spawned this localized business of human smuggling⁵ and will discuss the issues countering effective resolution of the crisis. Part II discusses the historical background and distinctive nature of Cuban alien migration and the factors that have generated the smuggling trend. Part III examines the roles of various agencies responsible for alien interdiction and analyzes their ability to prevail given resource capabilities and challenges in the existing law. Part IV analyzes the complexities of prosecuting captured smugglers and discusses competing approaches to a unique problem. Part V discusses the limits of current measures available under the law to prevent smuggling. Part VI surveys the impact that recent terrorist events and related legislation could have on reducing human smuggling.

This comment concludes that repeal of the Cuban Adjustment Act would probably remove the unintended, U.S.-imposed incentives for Cuban aliens to resort to smuggling, but it is unlikely that this change will happen. Absent any policy shift, the threat of smuggling and smuggling-related deaths demands that the United States improve law enforcement resource capabilities and information sharing, maximize preventative measures under the law, and widen the scope of prosecutions to encompass the smug-

2. Press Release No. 11-09, U.S. Coast Guard Seventh District Public Affairs, *Coast Guard Locates Capsized Boat, Searches for Survivors* (Nov. 19, 2001) (on file with author).

3. Press Release No. 11-10, U.S. Coast Guard Seventh District Public Affairs, *Coast Guard Intends to Suspend Search for Missing Cuban Migrants, Sets up Meeting with Family Members* (Nov. 20, 2001) (on file with author).

4. See Interview with Curtis Miner, AUSA, Southern District of Florida, Major Crimes Division, Miami, Fla. (Feb. 26, 2002).

5. Human smuggling is the for-profit transport of aliens illegally across borders and is distinguished from human trafficking by which migrants are coerced and transported for the purpose of exploitation through labor or prostitution. See Friedrich Heckman & Tanja Wunderlich, *Trans-Atlantic Workshop on Human Smuggling*, 15 GEO. IMMIGR. L.J. 167 (2000).

gler's entire support structure. Through these steps, it is highly probable that the flow of smuggled migrants can be seriously diminished.

II. HISTORY, TRENDS, AND THE EMERGENCE OF A NEW THREAT

A. *Cuban Migration Background*

Tension and confrontation have marked the U.S.-Cuba relationship since Fidel Castro's rise to power in 1959 and severance of diplomatic relations in 1960.⁶ As Cubans fled the island to the United States, Congress was prompted to pass the Cuban Adjustment Act in 1966, whereby any Cuban alien who was physically present in the United States for at least one year could apply for and be considered lawfully admitted for permanent residence.⁷ This preferential treatment remains in effect today.

Between 1966 and 1971, the United States coordinated "Freedom Flights" which transported several hundred thousand Cubans to the United States.⁸ From 1971 until September 1994, Cuban President Castro periodically used immigration policy as a political spigot by opening the Cuban border for unrestricted outflow in order to abate political and economic dissension within Cuba and to burden the United States. Castro responded to political defiance in 1980 by opening Cuba's border to nearly 125,000 people in what became known as the Mariel Boatlift.⁹ Suffering

6. See U.S. DEPT OF STATE FACT SHEET, U.S.-CUBA RELATIONS (May 2001) available at <http://www.state.gov/p/wha/rls/fs/2001/2558.htm> (last visited Feb. 8, 2002) [hereinafter U.S.-CUBA RELATIONS]. Castro assumed power in 1959 and was initially recognized as the head of the new Cuban government. *Id.* The United States broke relations with Cuba in October 1960 once Cuba expropriated U.S. properties and declared commitment to a one party Marxist-Leninist system. *Id.*

7. See Cuban Adjustment Act, Pub. L. No. 89-732, as amended (1966), available at http://www.state.gov/www/regions/wha/cuba/publiclaw_89-732.html (last visited Feb. 13, 2002). "Any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States . . . and has been physically present in the United States for at least one year, may be adjusted by the Attorney General, in his discretion . . . to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence." *Id.* While waiting for the year and one day to pass, Cubans are normally released from detention as parolees. See *id.*

8. See U.S. DEPT OF STATE, OFFICE OF CUBAN AFFAIRS FACT SHEET, CHRONOLOGY OF CUBAN MIGRATION, 1958-1998 (Mar. 20, 2000) available at http://www.state.gov/www/regions/wha/cuba/migration_chron.html (last visited Feb. 13, 2002) [hereinafter CHRONOLOGY OF CUBAN MIGRATION].

9. See ALEX LARZELERE, THE 1980 CUBAN BOATLIFT 12-13 (1988). In April 1980,

from island-wide food shortages and electrical blackouts in 1994, Castro quelled demonstrating mobs by again allowing unrestricted departure by sea.¹⁰ The U.S. response to this mass migration was a coordinated at-sea rescue effort entitled Operation ABLE VIGIL.¹¹ Unlike the rescued migrants from Mariel, the 30,000 migrants in 1994 were transported to Guantanamo Bay, Cuba, rather than directly to the United States.¹²

In 1994 and 1995, the United States and Cuba established bilateral migration accords.¹³ These accords stipulate, *inter-alia*, that Cuban migrants interdicted at sea will be returned to Cuba and will receive instruction on legal means of immigration, and oblige Cuba to refrain from any action against returned migrants for attempting to immigrate illegally.¹⁴ Both parties agreed to cooperate jointly to ensure "safe, legal, and orderly" migration and that "all actions taken will be consistent with the parties' international obligations."¹⁵

Furthermore, the United States committed to provide no less than 20,000 visas annually for legal immigration of Cubans to the United States.¹⁶ Despite this bilateral attempt to encourage

approximately 10,000 Cubans stormed the Peruvian Embassy in Havana to seek political asylum. U.S.-CUBA RELATIONS, *supra* note 6. The Cuban Government then allowed Cubans to depart unopposed from Mariel, a port on the north coast of Cuba. *Id.* Between April and September 1980, 124,776 Cuban migrants were rescued at sea and brought to the United States. See U.S. COAST GUARD, OFFICE OF LAW ENFORCEMENT, ALIEN MIGRANT INTERDICTION, MARIEL BOAT LIFT, available at <http://www.uscg.mil/hq/g-o/g-opl/mle/mariel.htm> (last visited Feb. 13, 2002); see generally *United States v. Zayas-Morales*, 685 F.2d 1272 (11th Cir. 1982) (dismissing indictments charging defendants with transporting illegal aliens during the Mariel Boatlift).

10. See U.S.-CUBA RELATIONS, *supra* note 6.

11. See U.S. Coast Guard, *Alien Migrant Interdiction: Operation ABLE VIGIL*, at <http://www.uscg.mil/hq/g-o/g-opl/mle/amiostats1.htm#fy> (last visited Feb. 13, 2002). Over 30,000 Cubans were interdicted at sea in a one-month period between August and September 1994. See *id.* A total of 37,191 Cubans were interdicted at sea during calendar year 1994. See *id.*

12. See CHRONOLOGY OF CUBAN MIGRATION, *supra* note 8. Eventually, these 30,000 Cubans were transported to the United States and the visas issued were credited against the 20,000 minimum annual visa commitment in the amount of 5,000 per year. See Cuba-United States: Joint Statement on the Normalization of Migration, Building on the Agreement of Sept. 9, 1994, May 2, 1995, 35 I.L.M. 327 [hereinafter *The Accords*].

13. See generally *The Accords*, *supra* note 12.

14. See *The Accords*, *supra* note 12, at 328. Representatives of the U.S. Interests Section located in Havana are charged with monitoring this commitment. See *id.*

15. See *id.*

16. See U.S. DEP'T OF STATE, U.S. INTERESTS SEC., HAVANA, CONSULAR AND REFUGEE OPERATIONS IN CUBA (May 21, 1997), available at <http://usembassy.state.gov/havana/wwwhop.html> (last visited Feb. 13, 2002). This commitment to a

orderly and legal migration, many Cubans still resort to illegal means of migration.¹⁷ Some Cubans are motivated by political reasons, others are in search of an improved economic lifestyle, while others seek reunification with families that have already migrated to the United States.¹⁸

Given the political climate in Cuba, the United States recognizes that each individual who is intercepted trying to enter the United States illegally may have legitimate concerns or a credible fear of persecution if returned to Cuba.¹⁹ Therefore, despite the U.S. agreement to repatriate all Cubans interdicted at sea per *The Accords*, each Cuban is interviewed by an Asylum Pre-Screening Officer ("APSO") to make a determination of whether the individual has a credible fear of persecution if returned.²⁰

The economic disparity between Cuba and the United States ensures the likelihood that Cubans will continue to make perilous journeys across the Straits of Florida to seek better lives. Most Cubans interdicted at sea are considered economic refugees, without credible fear claims, and are returned to Cuba under *The Accords*.²¹ These migrants are often trying to escape the poverty and dismal living conditions that persist in Cuba.²² Additionally, the majority of Cubans who have successfully migrated to the

minimum number of annually authorized immigrants represents a policy distinguished from U.S. immigration policy with all other countries. *See generally id.*

17. *See* U.S. Coast Guard, *Coast Guard Migrant Interdictions at Sea, Fiscal Year 1982-2002*, at <http://www.uscg.mil/hq/g-o/g-opl/mle/amiostats1.htm#cy> (last visited Feb. 13, 2002) [hereinafter *Coast Guard Migrant Interdictions at Sea*]. After *The Accords* were implemented, interdiction at sea rates still measured from 400 to 1600 Cuban migrants annually between 1995 and 2001. *See id.*

18. *See generally* Mark P. Sullivan & Maureen Taft-Morales, *RL30806: Cuba: Background and Current Issues for Congress*, CONG. RES. SERV. (Jan. 17, 2001).

19. *See generally* State Department Coordinator for Cuban Affairs, Michael Ranneberger, Remarks before the Governor's Free Cuba Task Force (Apr. 30, 1997), available at http://www.state.gov/www/regions/wha/970430_ranneberger.html (last visited June 8, 2002) [hereinafter Ranneberger Remarks].

20. *See id.* Asylum Pre-Screening Officers ("APSOs") are transported to the at sea location of detained migrants to make credible fear determinations. *See id.* Although the text of the *The Accords* seems absolute that all Cubans interdicted at sea will be returned, the language requiring actions "consistent with international obligations" allows the United States to continue to screen migrants for a credible fear determination. *See generally The Accords, supra* note 12. Any Cuban migrant with a legitimate claim would then be excluded from those identified for return to Cuba. *See Ranneberger Remarks, supra* note 19.

21. *See* Interview with Lt. Joseph Kramek, Chief, Operations Law Branch, Seventh Coast Guard District Legal Office, in Miami, Fla. (Feb. 13, 2002). Coast Guard Cutters routinely transport interdicted Cubans back to Cuba. *See id.*

22. *See* Sullivan & Taft-Morales, *supra* note 18.

United States have settled in Florida.²³ A Cuban who knows that her relatives, friends, and a welcoming support community are living in freedom only ninety miles away, has an enticing lure looming over the horizon.

B. Denying the Route: Smuggling Emerges as the Only Viable Option

Cubans who are unwilling to wait for legal means by which to immigrate have traditionally traveled to the United States, directly or indirectly, aboard homemade rafts or tubes. Notwithstanding the overwhelming surge of migrants during the mass migrations in 1980 and 1994, U.S. Forces efficiently detect, recover, and return most rafters to Cuba.²⁴ Given that rafting has become nearly futile, traditional rafting has subsided as the primary means of migration since 1994.²⁵ Hence, the rafting route has been effectively denied. Moreover, since Cubans generally do not have access to any means of conveyance other than homemade rafts, their only alternative has been to rely on someone from the United States to retrieve them.

On occasion, Cuban Americans living in the United States, desperate to have their family members in Cuba come to the U.S., have traveled by boat to pick up their relatives. This method, however, has proven to be very risky, especially if apprehended by Cuban forces.²⁶ The frequency of these events has been manageable for law enforcement.²⁷ Even if the individuals are prosecuted so that the practice will be discouraged, the violators often evoke jury sympathy because their motivation is to rescue loved ones,

23. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CULTURE, RACE, AND ETHNICITY: A REPORT OF THE SURGEON GENERAL, 6-2 (citing to the POPULATION REFERENCE BUREAU, 2000), available at <http://www.mentalhealth.org/crc/> (last visited Feb. 13, 2002). This study indicates that two-thirds of Cuban-Americans live in Florida. See *id.*

24. While it is difficult to quantify what percentage of all voyages are interdicted because the number of successful trips cannot be ascertained, resources that patrol in search of migrant vessels have had fewer and fewer interdictions. See *Coast Guard Migrant Interdictions at Sea*, *supra* note 17.

25. See *Coast Guard Migrant Interdictions at Sea*, *supra* note 17.

26. Cuban forces apprehended a Cuban-American smuggler when the smuggling vessel capsized and one person was killed. See Anita Snow, *Americans' Smuggling Trial Begins*, ASS'D PRESS, Aug. 27, 1999, available at <http://198.62.75.1/www2/fc/f/smug82899.html> (last visited Feb. 8, 2002). Several of the suspect's relatives were aboard the vessel in addition to other migrants who allegedly paid up to \$8000 each. See *id.*

27. See John D. McKinnon, *Prosecutors Stem Exodus*, A.B.A. J., Nov. 1994, at 36.

not to gain profit through smuggling.²⁸ Some defendants have been tried for transportation of Cuban aliens but the prosecutions have not been successful.²⁹

Cubans have realized that in order to immigrate to the United States and become eligible for permanent residency status under the Cuban Adjustment Act, they must evade interdiction at sea and they must actually reach land.³⁰ Making it into the territorial sea of the United States is insufficient for procedural rights to attach.³¹ Absent a credible fear, migrants interdicted in the territorial sea will be returned to Cuba per *The Accords*.³² Dry land, therefore, serves as a goal line for Cuban migrants.³³ Given these conditions, the only consistently successful transportation mode capable of getting Cubans to dry land is professional smuggling. Professional smugglers can provide vessels with the speed and maneuverability to outperform law enforcement resources. Boat captains have the expertise to navigate along both the Cuban and Florida coasts and are compensated handsomely for their willingness to take their chances against law enforcement on both sides of the Straits of Florida. Finally, professional smugglers can provide the necessary logistical coordination of the covert transit through an underground network collecting advance payment or financing of expensive fees from relatives in both Cuba and the United States.

28. See *id.*

29. See *id.*; see also *United States v. Zayas-Morales*, 685 F.2d 1272 (11th Cir. 1982) (dismissing indictments charging defendants with transporting illegal aliens during the Mariel Boatlift).

30. See David Cazares, *Tragedy at Sea Puts Spotlight on U.S. Policy: Preferential Status for Defectors Actually Leads to People Smuggling, Law Critics Say*, SUN-SENTINEL, Nov. 22, 2001, at 42A.

31. See generally Department of Justice Memorandum from Office of General Counsel to INS General Counsel Regarding Rights of Aliens Found In United States Internal Waters (Nov. 21, 1996), available at <http://www.usdoj.gov/olc/pft90.htm> (last visited June 8, 2002). This memorandum details the legal determination known as the Feet Wet/Feet Dry distinction. See *id.* Aliens of any nationality interdicted in the territorial sea and internal waters of the United States are to be distinguished from "Aliens Treated as Applicants for Admission" under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Division C, 110 Stat. 3009 (1996). See *id.* Only those aliens that have landed on U.S. soil are considered "present in" or to have "arrived in" the United States for purposes of the Act and therefore entitled to procedural rights and deportation hearings. See *id.* The feet wet/feet dry policy is often inaccurately credited as the reason why Cubans who reach shore are allowed to remain in the United States, whereas it is actually the Cuban Adjustment Act that grants Cubans eligibility for permanent residency in a year and a day. See generally Cuban Adjustment Act, *supra* note 7.

32. *The Accords*, *supra* note 12.

33. See Cazares, *supra* note 30.

Given the detached and lucrative nature of alien smuggling, organizers are generally only concerned with maximizing profit by getting as much of their human cargo from one point to another without getting caught.³⁴ Safety subsequently takes a low priority as evidenced by overcrowded and dangerous vessels. Smuggling is presumed to be very successful, although assessing the actual number of people who arrive in the United States by way of smuggling is difficult.³⁵ It is likely that successful events are either not reported out of fear of retaliation by the smuggling network or because those smuggled have no incentive to report the event since they are able to remain in the United States whether they truthfully report how they arrived here or not.³⁶

C. *The Unique Nature of Cuban Alien Smuggling*

Cuban alien smuggling is unique from other forms of alien smuggling, even within the Caribbean region. The Caribbean is a transit zone for people of many nationalities, including Haitian, Dominican Republic, Eastern European, Southeast Asian, and Middle Eastern.³⁷ The migrants who are smuggled from Cuba to the United States have generally been exclusively Cuban, whereas those who migrate between Caribbean Islands and into Puerto Rico are of various descents and use the islands as waypoints with the ultimate destination being the U.S. mainland. To date, few nationalities use Cuba as a waypoint, despite its close proximity to the United States.³⁸ This is probably due to the perception that the Cuban government has strict control over its borders. Given Cuba's close proximity to the United States, Cubans do not face the challenges that other nationalities face in having to make multiple trips via numerous countries to reach their final destination. The transit over the horizon is enticing given the short duration of risk and immediate reunion with a community of family and friends at their destination.

The United States and Cuba agreed in *The Accords* to meet periodically by mutual consent for discussions to improve effec-

34. See David Cazares, *7 Accused of Smuggling; U.S. Says Ring Transported 100 Cubans; 1 Died*, SUN-SENTINEL, Dec. 1, 2001, at 3B.

35. See Interview with Lt. Joseph Kramek, *supra* note 21.

36. See generally *id.* Many landed migrants reportedly delay reporting their arrival to law enforcement until smuggling vessels are well beyond detection or simply claim that they rafted from Cuba and their raft sank a short distance off shore. *Id.*

37. See *Coast Guard Migrant Interdictions at Sea*, *supra* note 17.

38. See Interview with Lt. Joseph Kramek, *supra* note 21.

tiveness in ensuring orderly migration; these discussions are conducted annually.³⁹ Despite the advances made through bilateral cooperation, the Government of Cuba blames the United States for the emergence of smuggling because the Cuban Adjustment Act and the Feet Wet/Feet Dry legal distinction act together to encourage migration by smugglers.⁴⁰ Cuba also asserts its dissatisfaction with U.S. enforcement against captured smugglers⁴¹ as compared to Cuba's purported tough stance in accordance with *The Accords*.⁴²

The assertion that the Cuban Adjustment Act encourages smuggling is difficult to dispute but is usually re-characterized by U.S. officials to shift the attention to Cuba's political and economic shortfalls.⁴³ Moreover, the United States shows no signs of repealing the Cuban Adjustment Act to remove the incentive to reach the shoreline. In March 1996, Congress passed and the President signed into law the Cuban Liberty and Democratic Solidarity ("LIBERTAD") Act after U.S.-Cuba tensions spiked when Cuban fighter jets shot down unarmed aircraft in international airspace, killing three U.S. citizens and one U.S. resident.⁴⁴ The Act codified the longstanding U.S. embargo on trade and financial transactions.⁴⁵ Additionally, each year since 1996, the President has renewed a declaration of a National Emergency Related to Cuba stating that ". . .the Government of Cuba has not demonstrated that it will refrain from future use of reckless and excessive force against U.S. vessels and aircraft that may engage in memorial activities or peaceful protest north of Cuba."⁴⁶ More recently, there has been some momentum for easing U.S. policy toward

39. See *The Accords*, *supra* note 12.

40. See Dagoberto Rodriguez, Chief, Cuban Interests Section, Remarks to U.S.-Cuba Cooperative Security Conference (Feb. 2001) (translated by Center for Defense Information), available at <http://www.uscubasecurity.org/about.html> (last visited Feb. 16, 2002).

41. See *id.*

42. See *id.* Rodriguez claims that over seventy smugglers have been detained in Cuba, that Cuba actively seizes boats to be used for departure, and imposes stiff prison penalties on those involved in smuggling activities. See *id.*

43. See Dalia Acosta, *Politics-Cuba / US: Havana Again Challenges U.S. Migration Policy*, INT'L PRESS SERV., Dec. 4, 2001. James Carragher, the U.S. State Department Coordinator for Cuban Affairs characterized the motives of Cuban migrants as derived from their inability to "exercise their human rights," and "the continued failure of the Cuban economy." *Id.*

44. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (known as the Helms-Burton Act), Pub. L. No. 104-114, 22 U.S.C. §§ 6021-91 (1996).

45. See *id.*

46. Proclamation No. 6867, 63 Fed. Reg. 137 (July 17, 1998), available at <http://www.whitehouse.gov/news/releases/2002/02/20020227-8.html> (last visited June 8,

Cuba by lifting travel ban restrictions, yet there has not been discussion concerning any change to the Cuban Adjustment Act.⁴⁷ The remaining criticism over the measure of U.S. law enforcement efforts to disrupt smuggling and prosecutorial efforts to convict will be discussed in detail in Parts III and IV.

Solving the Cuba-U.S. smuggling problem transcends the framework in solutions offered by the United Nations model set forth in the Protocol Against the Smuggling of Migrants By Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime.⁴⁸ Solutions to smuggling are generally rooted in actively improving the environment in the source country.⁴⁹ The approach offered in workshop discussions may have valid application in other regional or other national smuggling operations, but unfortunately the relationship between the United States and Cuba inhibits application here. Cuban migration is also distinguished from other regional smuggling operations because information is solicited from every Cuban migrant and consideration given to each migrant for a credible fear determination; migrants of other nationalities must voice an asylum claim to receive any consideration.

III. THE COMPLEXITIES OF ENFORCING THE LAW

A. *Maritime Interdiction: U.S. Coast Guard Authority, Resources, and Constraints*

The primary agency in the challenging mission of maritime alien detection and interdiction is the U.S. Coast Guard. This mission has become increasingly difficult to prosecute since alien smuggling organizations now dominate Cuban migration and smugglers maintain an advantage over law enforcement agencies.⁵⁰ Coast Guard resources have had marginal success inter-

2002). The Proclamation has been renewed annually with the most recent on Feb. 27, 2002.

47. On Jul. 25, 2001, the House of Representatives voted 240-186 in favor of HR 2590 banning Treasury Department funding to enforce travel restrictions on Cuba. The language was, however, subsequently omitted from the Treasury and General Government Appropriations Act 2002, passed by the Senate Nov. 1, 2001.

48. See G.A. Res. A/RES/55/25, U.N. GAOR, 55th Sess., U.N. Doc. A/55/383 (2000). The UN model calls for open communication and sharing of information to the fullest extent in order to cripple smuggling networks. See *id.* In contrast to following this model, U.S.-Cuba diplomatic dialogue has been limited to annual migration discussions and operations under *The Accords*. See *The Accords*, *supra* note 12.

49. See generally Interagency Working Group Releases, *Report on Alien Smuggling*, 73 No. 4 INTERPRETER RELEASES 99 (Jan. 1996).

50. See generally Interview with Lt. Joseph Kramek, *supra* note 21.

cepting the smuggling vessels, usually thirty feet in length with two or more outboard engines. Detecting these vessels at night is nearly impossible even though some airborne and surface assets are equipped with state of the art night vision goggles, thermal imaging devices, standard radar, and Forward Looking Infrared Radar ("FLIR"). Unless search coordinators are given a last known position, course and speed of a suspect vessel in order to focus the search in a certain area, it is unlikely that assets will stumble across a smuggling vessel while conducting regular patrols. Despite the growing number of smuggling events, the search area remains too large and the search target too small for available law enforcement assets to saturate the transit zone.

Upon detection of a suspect vessel, the challenge shifts to forcing the vessel to stop while keeping safety of life at sea tantamount to all else. Although smuggling vessels are usually severely overloaded, smugglers still operate, albeit without regard for safety, at speeds faster than most Coast Guard vessels. One author asserts that future success in the maritime realm may be contingent upon building improved Coast Guard assets capable of high speeds in rough, open ocean conditions for extended periods of time.⁵¹ This view offers a sound long-term possibility for the maritime anti-smuggling mission but no immediate relief, as resource improvements require congressional budget approval, design and construction. Coupling improved resource capability with well-trained personnel must be pursued in order to attempt to overcome the smuggler's dominance in the maritime realm. Reckless smugglers, however, could easily respond with newer and faster smuggling vessels, still unrestricted by concerns for safety.

Moreover, forcing a fast boat full of people to stop, even with numerous law enforcement vessels, is no easy task without putting the lives of those onboard all vessels in danger. This situation inevitably results in a chase to the shoreline where only a coordinated effort between forces at sea and forces on land can prevent the vessel from reaching shore and unloading its cargo.⁵² Detention of smugglers and aliens at sea requires dedication of a Coast Guard Cutter to hold and provide humanitarian care. This

51. See Jim Howe, *The Need for Big Speed*, in UNITED STATES NAVAL INSTITUTE: PROCEEDINGS 58 (Dec. 2001). Although this article specifically targets drug interdiction, the Coast Guard uses the same resources for drug interdiction and migrant interdiction.

52. See Interview with Lt. Joseph Kramek, *supra* note 21.

inevitably reduces resource availability, and the Cutter's crowded decks substantially decrease maneuverability and effectiveness to conduct any missions.

Cuba claims to be diligent in the pursuit of smugglers and tough in its prosecutions.⁵³ Cuba plays a vital role in the Coast Guard's ability to intercept smuggling vessels.⁵⁴ Upon detection of a smuggling event, the Cuban Border Guard regularly faxes smuggler information to the U.S. Coast Guard Command Center in Miami, Florida, especially when Cuban forces are unable to respond.⁵⁵ Cuban authorities, however, have criticized the United States for failing to reciprocate with information on case outcome and status of people who do not return.⁵⁶ The Coast Guard responds to all the telexes that it has the resource capacity to handle.⁵⁷ Nevertheless, some reports reportedly still go unchecked due to resource constraints.⁵⁸ In the interest of continued dialogue and increased safety of life at sea, the Coast Guard or other appropriate U.S. authority should consider providing periodic, detailed feedback to the Cuban Border Guard with regard to each notification received, whether or not a response is launched or is successful.

The Coast Guard role in stemming the flow of smuggled Cuban aliens is critical. Unless stopped at sea, all the undocumented Cuban aliens will remain in the United States once they reach shore. Yet, successful end game in a migrant smuggling event relies on coordinated responses with the U.S. Border Patrol.

B. Shore-side Investigation: U.S. Border Patrol Anti-Smuggling

The United States Border Patrol ("USBP") is the mobile uni-

53. See Rodriguez, *supra* note 40.

54. See Interview with Lt. Joseph Kramek, *supra* note 21.

55. See *id.* The demands of coordinated air traffic in the busy corridor between the United States and South America require that there be open communication between Cuba and the United States for flight safety and emergency situations. See *id.* Likewise, the Search and Rescue mission of the U.S. Coast Guard requires that Coast Guard authorities be able to communicate with officials in Cuba for safety of life at sea. See *id.* By means of telexes, and also by fax, the Cuban Border Guard and the Coast Guard Command Center in Miami relay real-time information to one another. See *id.*

56. See Rodriguez, *supra* note 40.

57. See Interview with Lt. Joseph Kramek, *supra* note 21.

58. Mark Fineman, *Inside Look at Human Smuggling: More Cuban Americans Face Tougher Jail Terms in Havana, but Castro's Border Guard Unit Confesses to Being Overmatched*, L.A. TIMES, Jan. 5, 2001, at A1.

formed law enforcement arm of the Immigration and Naturalization Service ("INS"); Border Patrol is the primary agency concerned with detection and apprehension of illegal aliens and smugglers of aliens at or near the land border.⁵⁹ This is accomplished by maintaining surveillance, following up leads, responding to electronic sensor alarms and aircraft sightings, and interpreting and following tracks.⁶⁰ Additionally, Border Patrol is the lead agency on anti-smuggling investigations.⁶¹

Manpower allocations are based on the agents' duties ashore; hence, Border Patrol often lacks the manpower to dispatch agents to sea where investigations must be completed.⁶² Cuban aliens cannot be conveniently brought to shore for the duration of an investigation because they would then be ineligible for return to Cuba.⁶³ Compounding Border Patrol's manpower deficiencies is agency-wide weakness in anti-smuggling program coordination, lack of an automated case tracking and management system, and ineffective procedures for collection and reporting of intelligence.⁶⁴

Given this environment, exhaustive investigation and prosecution of alien smuggling events is feasible in only the most serious cases, such as those involving injury or loss of life.⁶⁵ Alternatively, alien smugglers interdicted at sea who do not have a documented history will often be released without more than administrative documentation of the event.⁶⁶ This reinforces perceptions that the United States does not adequately punish or deter alien smuggling.

Border Patrol also coordinates the shore-side response for aliens who make it to shore. If the communications network works well, then Border Patrol would ideally intercept a suspect vessel evading capture at sea upon arrival. This inherently requires coordination of both State and Federal resources to sum-

59. See U.S. Border Patrol, *Overview, Mission*, at <http://www.ins.usdoj.gov/graphics/lawenfor/bpatrol/overview.htm> (last visited June 8, 2002).

60. See *id.*

61. See *id.*

62. See Interview with AUSA Curtis Miner, *supra* note 4. The U.S. Border Patrol Anti-Smuggling unit for Cuban migrant interdictions normally has only 6 qualified investigators to conduct all its maritime and land-based investigations. See *id.*

63. See Cuban Adjustment Act, *supra* note 7.

64. OFFICE OF THE INSPECTOR GENERAL INSPECTIONS DIVISION, SURVEY OF INS'S ANTI-SMUGGLING UNITS, Report No. I-2001-003 (March 2001). The OIG surveyed field units and validated the GAO's reported findings of deficiencies in GAO/GGD-00-103, ALIEN SMUGGLING: MANAGEMENT AND OPERATIONAL IMPROVEMENTS NEEDED TO ADDRESS A GROWING PROBLEM (May 2000). *Id.*

65. See Interview with AUSA Curtis Miner, *supra* note 4.

66. See *id.*

mon the necessary manpower and expertise to cover hundreds of miles of shoreline.

Inter-agency cooperation between the Coast Guard and Border Patrol, as well as other maritime and shore-side resources such as Customs, Florida Marine Patrol, and State and Local police authorities, is essential for apprehension of smugglers. Beyond this coordinated effort, case development is dependent upon the willingness to prosecute by the office of the U.S. Attorney.⁶⁷

IV. THE CHALLENGES OF PROSECUTING SUSPECTED SMUGGLERS

A. *Statutory Violations and Charging Strategy*

Smuggling of Cuban migrants poses prosecution challenges unique from other forms of migrant smuggling. Cuban migrant smuggling is localized to South Florida and therefore exclusively the U.S. Attorney for the Southern District of Florida prosecutes the cases.⁶⁸ Since Cubans are the only nationality of migrants that receive preferential treatment once they reach shore, investigations and prosecution decisions concerning witnesses and evidence must be made while all evidence and witnesses remain at sea.⁶⁹ Federal prosecutors combine several applicable smuggling charges under 8 U.S.C. 1324 for Transportation of Illegal Aliens combined with charges under Title 18, U.S. Code §371, Conspiring to Smuggle Illegal Aliens for Profit.⁷⁰ Given the resource constraints on the interdicting and investigating agencies upon which the U.S. Attorney relies, prosecutors have focussed on for-profit trips involving death or bodily injury.⁷¹ Convictions under these statutes carry sentencing guidelines with penalties that increase substantially depending on whether it is a first or subsequent offense, proof of financial gain, and whether the defendant caused death or serious bodily injury.⁷² The range in sentencing extends from misdemeanor charges for transportation of aliens to life in

67. *See id.*

68. *See id.* Most Cuban smuggling networks are believed to operate from the Miami area and most interdictions take place in the Florida Straits south of Miami and the Florida Keys. *See id.*

69. *See id.*

70. *See id.*

71. *See* Interview with AUSA Curtis Miner, *supra* note 4.

72. *See id.*

prison or death if the defendant caused death.⁷³

B. The Prosecutor's Hurdles: Overcoming the Rescue Defense, Sympathetic South Florida Juries, and Alien Material Witness Issues.

Suspected smugglers routinely claim that they were on a legitimate voyage for fishing or pleasure and that they rescued the migrants when they found them adrift at sea.⁷⁴ On occasion, prosecutors have successfully overcome the defendant's "rescue" defense by either proving that the smuggler has family members on board or through evidentiary admission of information passed by electronic telex messages from the Cuban Border Guard to the United States Coast Guard.⁷⁵ These telexes often indicate a detailed description of the vessel, identifying hull numbers, an estimate on the number of people on board, and a last-known position of the suspect vessel within Cuban Territorial Seas.⁷⁶

While the telex information clearly counters the smuggler's contention of "rescue," it can also be easily excluded as hearsay since the originator will not be available to testify in a U.S. Court.⁷⁷ Two possible ways around this obstacle might be available. First, the testimony of a law enforcement officer aboard the Coast Guard Cutter that responded to a Cuban telex and traveled to the position where they found the described suspect vessel might suffice. Alternatively, the prosecution could offer the telex communication as a record of regularly conducted activity under F.R.E. Rule 803(6), subject to a determination by the court that information originating from the Cuban authorities, with whom we have engaged in bilateral migration accords, is trustworthy.

Prosecutors must also contend with issues over whether South Florida juries may be overly sympathetic to smugglers given the high level of criticism of the Government of Cuba expressed by the community at large.⁷⁸ Consequently, the most solid and convincing cases are those involving repeat smugglers and instances where the migrants were exposed to extreme hard-

73. See *id.* See also Jennifer Babson, *Dade Men Linked to Human-Cargo Trade; Cuban Migrant Died on Bahamas Isle*, THE MIAMI HERALD, Nov. 30, 2001, at 1A.

74. See Interview with AUSA Curtis Miner, *supra* note 4.

75. See *id.* If a smuggler's family member were on the smuggling vessel, it would refute any claim that the smugglers just happened to stumble upon migrants in need of rescue. See *id.*

76. See Interview with Lt. Joseph Kramek, *supra* note 21.

77. See Interview with AUSA Curtis Miner, *supra* note 4.

78. See McKinnon, *supra* note 27, at 36.

ship, injury, or death.⁷⁹ Trial venues for suspected smugglers are generally held in the jurisdiction where the suspects are brought to shore and turned over to Border Patrol investigators.⁸⁰ Most interdictions occur in the vicinity of Key West, which happens also to be logistically convenient since Coast Guard resources are based there. Moreover, this location is strategically important for prosecutors who want to avoid a presumably sympathetic jury in Miami.⁸¹

Prosecutors are likewise limited by the availability of evidence and witnesses who can testify against the smugglers.⁸² Smugglers who anticipate capture will often jettison overboard the incriminating charts and electronic positioning devices that indicate the route followed from Cuba to the United States.⁸³ Migrants rarely are willing to testify against the smugglers.⁸⁴ If any of the migrants are willing to identify and testify against the smugglers, they must be brought to shore and are then ineligible for return to Cuba.⁸⁵ Furthermore, a migrant who agrees to implicate the smuggler when interdicted at sea may not be as willing months later when a case actually goes to trial. A prosecutor is then left without a material witness and the Cuban migrant is allowed to remain in the United States. Accordingly, prosecutors seek migrant material witnesses only in really significant smuggling cases.⁸⁶

C. *Competing Models: Absolute Prosecution versus the Unified Task Force Approach*

The U.S. Attorney and the law enforcement agencies that pursue smugglers must collectively determine the best approach to prosecuting migrant smugglers. One model for enforcement is to charge every suspect that is apprehended to maximize the number of convictions, even if the maximum crime punishable is a misdemeanor. This approach is attractive for several reasons. An

79. See Interview with AUSA Curtis Miner, *supra* note 4.

80. See *id.*

81. See *id.* Prosecutors generally perceive that a jury composed of fewer former immigrants will be more likely to convict or less sympathetic when sentencing. See *id.*

82. See *id.*

83. Press Release, United States Attorney for the Southern District of Florida, Roberto Nieves Alien Smuggling Conviction (Dec. 6, 2000), available at <http://www.usdoj.gov/usao/fls/Nieves.html> (last visited June 8, 2002).

84. See Interview with AUSA Curtis Miner, *supra* note 4.

85. See Cuban Adjustment Act, *supra* note 7.

86. See Interview with AUSA Curtis Miner, *supra* note 4.

aggressive approach to migrant smugglers could have a substantial deterrent effect against future violations, the increased number of prosecutions could help legitimize the United States' resolve to combat smuggling to our international neighbors, and law enforcement would have a quantifiable measure of its effectiveness. This approach, however, is in serious tension with the current capabilities of the enforcement agencies. Unless the Border Patrol Anti-Smuggling Units and the Coast Guard are reinforced with manpower, resources and training to facilitate at sea investigation and detention of smugglers in every case, these agencies will not be able to give prosecutors the information they will need to successfully prosecute cases.

In contrast to this absolute model, a preferable approach is similar to U.S. efforts to combat drug smuggling. A unified task force with interagency cooperation and comprehensive information sharing could help track and connect smugglers and members of their networks. A prime example of this approach is Operation Barrier Reef ("Barrier Reef"), initiated in 2001 by the U.S. Attorney's Office for the Southern District of Florida.⁸⁷ The objective of Barrier Reef is to accumulate and record as much information as possible during all interdictions and then to make the information available, on demand, to the other contributing law enforcement officers to develop smuggling conspiracy charges.⁸⁸ For example, a smuggling event is disrupted at sea and the suspected smugglers are identified as U.S. residents; numerous migrants are aboard the vessel but there is no indication of injury or that lives were put in serious jeopardy. Maritime interdiction units would have access to collectively shared information held by INS, Coast Guard, and state and federal authorities to determine whether the suspect has a history of smuggling or is a first time offender. In turn, units could better assess the likelihood the U.S. Attorney will prosecute or if alternatively, effort should focus on the exhaustive collection and documentation of personal information, phone numbers, points of contact, vessel ownership and any other indicators of the smuggler's network, which could be used in broad scope investigations or in future prosecutions of more egregious cases. The end result under this model is fewer criminal charges filed in day-to-day interdictions, but more comprehensive prosecutions and substantial penalties in future cases.⁸⁹

87. *See id.*

88. *See id.*

89. *See id.*

The demands that stretch the capacity of law enforcement resources would still be present, but this model would not impose further requirements as could be expected in the absolute model. Barrier Reef already produced its first indictment that exhaustively charged seven suspects with smuggling for profit, conspiracy to smuggle illegal aliens into the U.S., and attempted smuggling resulting in death; these charges carry penalties of up to life in prison.⁹⁰ The broad scope of the indictment is the result of comprehensive information sharing and dismantling of the chief smuggler's network.⁹¹ Four of the seven defendants already pleaded guilty, including the alleged mastermind.⁹² Both models have advantages and disadvantages; however, the unified task force approach is clearly a better option for results in the current setting. Nevertheless, it remains to be seen what level of deterrence the final outcome of the first Barrier Reef indictment will have on the frequency of future smuggling events.

V. DETERRENCE AND PREVENTION

What can be done to prevent maritime smuggling before it happens? The Coast Guard, Border Patrol, Customs, and the Florida Marine Patrol often locate typical smuggling type fast boats as they are departing South Florida.⁹³ These vessels often have quantities of fuel and food inconsistent with what one would expect on a short pleasure cruise or fishing trip as well as conflicting explanations about the nature of the voyage; these are often indicators that are consistent with vessels that travel to Cuba to smuggle migrants.⁹⁴ Law enforcement lacks the authority to prohibit the voyages because none of the indicators is a crime in itself and there is no statutory provision to prohibit operation of a vessel outfitted to smuggle humans.⁹⁵ Additionally, U.S. agencies lack the resources to monitor vessels for the duration of their trip and can not freely exchange descriptive information of suspicious vessels with Cuba since, presumably, the U.S. government would not

90. Babson, *supra* note 73 at 1A.

91. *See id.*

92. Jennifer Babson, *2 Guilty of Smuggling Cubans*, THE MIAMI HERALD, May 24, 2002, at 3B. The two lead defendants have not yet been sentenced. *Id.* Two of the smugglers have already been sentenced to 18 months each for conspiracy to smuggle and two others will face trial in Key West. *Id.*

93. *See* Interview with Lt. Joseph, *supra* note 21.

94. *See id.*

95. *See id.* Vessels outfitted to smuggle contraband are subject to seizure and civil forfeiture under 19 USCA § 1703. No similar provision, however, exists for human smuggling. *See id.*

want to aid in the apprehension of American residents by the Cuban government.

In situations where the inspecting officer determines that the amount of fuel on board the vessel is excessive and constitutes a safety hazard, vessels can be ordered back to port where voyages are terminated.⁹⁶ At a minimum, this disrupts or delays a planned smuggling event and obstructs the smuggling network. Additionally, administrative recording of the occupants' information can be shared with other agencies involved with immigration matters for future use.

VI. WILL NATIONAL SECURITY CONCERNS SHIFT THE FOCUS? RECENT TERROR ATTACKS, LEGISLATION, AND BORDER SECURITY

In response to the terrorist attacks on the United States in September 2001, the U.S. government enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act").⁹⁷ The Act could have significant impact on anti-smuggling as it thrusts immigration issues into national attention and forces increased cooperation and information sharing between law enforcement agencies in the pursuit of excluding terrorists and dangerous aliens.⁹⁸ This will probably bring about increased budgets and resources for the Coast Guard and Border Patrol, both of which provide border security.⁹⁹ On account of the heightened level of national security, increases in cooperation and information sharing among law enforcement is to be expected and could have a positive spill-over effect on alien interdiction. Also, the Act provides for increased powers in investigation of money-laundering networks¹⁰⁰ that could facilitate disruption of Miami-based smuggling networks.

Concerns are also mounting that terrorists may align themselves with existing alien smuggling organizations in order to gain

96. Coast Guard authority to conduct maritime law enforcement boardings and safety inspections is derived from 14 U.S.C. 89 (1974).

97. USA PATRIOT Act, Public Law No. 107-56.

98. See Rosemary Jenks, *The USA PATRIOT Act of 2001, A Summary of the Anti-Terrorism Law's Immigration Related Provisions* (Dec. 2001) available at <http://www.cis.org/articles/2001/back1501.html> (last visited June 8, 2002).

99. President George W. Bush, Remarks at Southern Maine Technical College, Portland, Maine, (Jan. 25, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020125-1.html> (last visited June 8, 2002).

100. See Jenks, *supra* note 98.

access to the United States.¹⁰¹ Thus far, immigration response has focused on accelerated deployments of manpower to the U.S.-Canada border, while maintaining current manning on the U.S.-Mexico border.¹⁰² The maritime border of the United States may be equally susceptible and this threat calls for proportional increases in manpower and resources. Despite the recent advancements made toward orderly and legal migration under *The Accords*, Cuba continues to be recognized as a state sponsor of terrorism.¹⁰³ These two issues are constantly in tension and demand that the United States exercise continued caution in its relationship with Cuba.

VII. CONCLUSION

The United States should acknowledge that its deferential policy toward landed Cuban aliens provides incentive for Cubans to seek passage from smugglers. A policy shift in this area, however, is unlikely; therefore, the threat of smuggling and smuggling-related deaths demands that the United States explore alternatives to its current anti-smuggling efforts. The United States must improve law enforcement capability by increasing funds for improved resources and ensuring border forces are adequately trained and staffed. Prosecutors must maximize preventative measures under the law through a continued unified task force approach such as Barrier Reef. Additionally, the scope of prosecutions should be broadened under existing law to encompass the smuggler's entire support structure. With these changes, it is possible that the flow of smuggled migrants could be seriously

101. See INS Commissioner James W. Ziglar, Remarks before the House Committee on Government Reform (Dec. 5, 2001). Regarding long term implications of Homeland Security needs, Ziglar stated:

"...the National Anti-Smuggling Strategy focuses on the deterrence, disruption and dismantling of major smuggling organizations operating not only in the United States, but in source and transit countries as well. In FY 2002, the strategy will place a significant emphasis on targeting organizations that smuggle aliens who present a threat to national security. Terrorists and their associates are likely to align with specific alien smuggling networks to obtain entry into the United States. . .The INS' activity in this area will target specific smuggling corridors, and will emphasize long term, complex investigations targeting smuggling organizations that present a threat to national security."

Id.

102. See *id.*

103. See Martin Arostegui, *Fidel May Be Part of Terror Campaign*, INSIGHT, Dec. 2001, at 16.

diminished and countless lives could be saved.†

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† Disclaimer: The opinions and materials presented in this article are strictly the opinions of the author and do not represent the official opinions or policies of the United States of America or the United States Coast Guard.

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