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"Should I Stay or Should I Go Now?": Analyzing the Federal Prosecution of Aliens who Attempt to Stop Living Unlawfully in the United States

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"SHOULD I STAY OR SHOULD I GO NOW"*: ANALYZING THE FEDERAL PROSECUTION OF ALIENS WHO ATTEMPT TO STOP LIVING UNLAWFULLY IN THE UNITED STATES

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INTRODUCTION

"Should I stay or should I go now? If I go, there will be trouble. And if I stay it will be double. So come on and let me know. Should I stay or should I go?"[1] This is the dilemma of an illegal alien who wants to stop

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* Mick Jones & Joe Strummer, Should I Stay or Should I Go (1981).

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1. THE CLASH, *Should I Stay or Should I Go, on* COMBAT ROCK (Epic Records 1982).

living in the United States unlawfully. Currently, an illegal alien who attempts to stop being illegal by voluntarily arriving at a port of entry seeking to leave the country may or may not be prosecuted, depending upon which circuit has jurisdiction over the port of entry.

Section 1326 of Title 8 of the U.S. Code states that a previously deported alien can be prosecuted for being "found in" the United States when he is in the country without permission from the Attorney General.[2] However, the circuit courts disagree as to whether an illegal alien can be prosecuted for being "found in" the country when he is detained by immigration authorities at a port of entry while seeking to *leave* the United States. The Second Circuit holds that the presence of an illegal alien at a port of entry who is seeking to leave the country does not legally constitute being "found in" the United States for purposes of § 1326.[3] By contrast, the Fifth and Ninth Circuits hold that an illegal alien at a port of entry seeking to leave the country (and stop living in the United States unlawfully) is "found in" the United States for purposes of the statute.[4] The alien commits a felony in these two circuits, although he is trying to leave the country rather than enter it. Accordingly, the same action (*i.e.*, an alien trying to terminate his illegal presence in the United States) is prosecuted in two circuits and not in another.

This Article will discuss why the plain language of § 1326 does not support the prosecution of previously deported persons for being "found in" the United States when they are detained by immigration authorities at a port of entry while voluntarily seeking to leave the United States. Part I will briefly discuss the three offenses under 8 U.S.C. § 1326 and address how federal courts define "found in" under the statute. Part II will look at the current circuit split regarding the "found in" prong of § 1326 when an alien is voluntarily present at a port of entry seeking to leave the country. Part III will argue why, *as a matter of law,* an alien avoids liability under § 1326 when he is voluntarily present at the port of entry seeking to leave the country. Part IV will examine the current illegal alien phenomenon in the United States. Finally, Part V will argue that punishing illegal aliens under § 1326 when they are seeking to leave the country is contrary to congressional intent.

2. *See* 8 U.S.C. § 1326(a) (2015).

3. *See* United States v. Macias, 740 F.3d 96, 102 (2d Cir. 2014).

4. *See* United States v. Rojas, 770 F.3d 366, 367-68 (5th Cir. 2014), *cert. denied,* 135 S. Ct. 2312 (2015); United States v. Gonzalez-Diaz, 630 F.3d 1239, 1243 (9th Cir. 2011); United States v. Ambriz-Ambriz, 586 F.3d 719, 723-24 (9th Cir. 2009).

I. SECTION 1326 OF UNITED STATES TITLE 8

A. *Offenses Under 8 U.S.C. Section 1326*

Though the focus of this Article is specifically on the "found in" prong of § 1326, the statute articulates three separate and distinct offenses: entering, attempting to enter, and being found in the United States.[5] Each of the three offenses under § 1326 is a distinct and separate offense with different elements.[6] Under the statute, an "actual entry" "require[s] both physical presence in the country as well as freedom from official restraint . . . ."[7] An alien is under "official restraint" if he "lacks the freedom to go at large and mix with the population [of the country]."[8] "An alien does not have to be in the physical custody of the authorities to be officially restrained; rather, the concept of official restraint is interpreted broadly."[9] "The restraint may take the form of surveillance, unbeknownst to the alien."[10] When under any type of surveillance, an alien lacks freedom to go at large within the country, thus, he is under official restraint.[11] "Attempted entry," on the other hand, "only requires that the person approach a port of entry and make a false claim of citizenship or non-resident alien status."[12] It also includes any attempt or substantial step towards entering the United States surreptitiously (*i.e.*, climbing the fence).[13] This article will analyze those cases where the alien is prosecuted solely under the "found in" prong of § 1326 for voluntarily

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5. Section 1326(a) of Title 8 provides in relevant part:

> (a) In general
> . . . [A]ny alien who--
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
> (2) enters, attempts to enter, or is at any time found in, the United States . . .
> (3) shall be fined under title 18, United States Code, or imprisoned not more than 2 years, or both.

6. *See* United States v. Corrales-Beltran, 192 F.3d 1311, 1320 (9th Cir. 1999) ("Every other circuit that has considered whether § 1326 contemplates three distinct substantive offenses has concluded that it does.").

7. *See* United States v. Angeles-Mascote, 206 F.3d 529, 531 (5th Cir. 2001) (citing United States v. Cardenas-Alvarez, 987 F.2d 1129, 1132-33 (5th Cir. 1993)).

8. *See* United States v. Hernandez-Herrera, 273 F.3d 1213, 1219 (9th Cir. 2001) (citing United States v. Ruiz-Lopez, 234 F.3d 445, 448 (9th Cir. 2000)).

9. *Id.*

10. *Id.* (quoting *In re* Pierre, 14 I. & N. Dec. 467 (1973)).

11. *Id.*

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

13. *See* United States v. Leos-Maldonado, 302 F.3d 1061, 1062-64 (9th Cir. 2002).

arriving at a port of entry seeking to *leave* the country and terminate his illegal presence in the United States.

Congress added the words "found in" to the statute because an illegal alien cannot be prosecuted for "entry" or "attempted entry" unless an indictment or information is filed within five years after he commits these two offenses.[14] The "found in" prong alleviates the difficult task of prosecuting illegal aliens, who entered the country surreptitiously, for entering and attempting to enter before the five year statute of limitations runs out. "The purpose of the statute of limitations is to balance the government's need for sufficient time to discover and investigate the crime against the defendant's right to avoid perpetual jeopardy for offenses committed in the distant past."[15] As the Third Circuit explained:

> The addition of "found" to the statute when it was reenacted in 1952 . . . is strong evidence that Congress intended it to differ in meaning from "enter" . . . . Congress must have intended to include the crimes committed by entry or attempted entry through the regular immigration service procedures, of which the INS would have an official record, as well as the crime committed by being found in the United States when the alien did not enter the United States through an INS port of entry, thus providing the INS with no official record of his entry.[16]

Congress added the "found in" prong to § 1326 because it recognized that many illegal aliens residing in this country entered surreptitiously rather than through an authorized port of entry. It recognized that many of these aliens ultimately reside in this country undetected for more than five years, and the "found in" prong of the statute serves to prosecute these aliens.[17] As the Third Circuit further explained:

> Congress recognized that not every alien would enter through recognized ports of entry. Thus, although the act that Congress sought to prevent occurs even when the alien enters surreptitiously, immigration officials are unlikely to know about the violation at that time. Only the alien knows the precise date of his surreptitious entry. Congress must have included the word "found" in § 1326 to alleviate the difficult law enforcement burden of finding and prosecuting this class of aliens, who are already aware that they are in violation of the law as evidenced by their surreptitious entry,

14. *See* United States v. DiSantillo, 615 F.2d 128, 129-37 (3d Cir. 1980).
15. *Id.* at 135.
16. *Id.* (citations omitted).
17. *Id.*

before the five year statute of limitations runs.[18]

The "found in" prong of the statute serves to prosecute the millions of illegal aliens who have resided in this country illegally for more than five years.

B. *Defining the "Found In" Prong of Section 1326*

The word "found" under the statute has been defined by federal courts as being synonymous with "discovered," and the courts have held that "[a]ny party who voluntarily approaches an INS station cannot be said to have been found or discovered in the United States."[19] As a matter of law, to "find" or "discover" an alien requires that immigration authorities actively seek the alien as opposed to passively waiting for him to show up at the port of entry.[20] And being "found" in the United States under the statute is not synonymous with being "present" in the country.[21]

With respect to the word "in" under the statute, "federal courts have recognized since 1908 that 'entering' the United States requires more than mere physical presence within the country."[22] To be considered "in" the United States "require[s] both physical presence in the country as well as freedom from official restraint . . . ."[23] "For over a half century th[e] [Supreme] Court has held that the detention of an alien in custody [at a port of entry or boundary line] pending determination of his admissibility does *not* legally constitute an entry, though the alien is physically within the United States."[24] This notion dates back to the early 1900s when the Supreme Court, in determining whether an alien detained in custody at Ellis Island pending deportation was in the country as a matter of law, declared:

> [W]hile she was at Ellis Island she was to be regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared. . . . She was still in theory of law at the

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18. *Id.*

19. *See* United States v. Angeles-Mascote, 206 F.3d 529, 531 (5th Cir. 2000) (quoting United States v. Canals-Jimenez, 943 F.2d 1284, 1287 (11th Cir. 1991)); *see also* United States v. Zavala-Mendez, 411 F.3d 1116, 1119-21 (9th Cir. 2005).

20. *See Zavala-Mendez*, 411 F.3d at 1119 ("'Found' implies that someone else found the alien in the sense of discovering him, and that is not so where he voluntarily presents himself.").

21. *See* United States v. Macias, 740 F.3d 96, 98-99 (2d Cir. 2014).

22. *See* United States v. Villanueva, 408 F.3d 193, 198-99 n.5 (5th Cir. 2005) (citing United States v. Gonzalez-Torres, 309 F.3d 594, 598 (9th Cir. 2002)).

23. *See Angeles-Mascote*, 206 F.3d at 531.

24. *See* Leng May Ma v. Barber, 357 U.S. 185, 188 (1958) (emphasis added).

boundary line and had gained no foothold in the United States.[25]

In other words, to be "in" an alien has to have the freedom to go at large within the country.[26]

II. THE CIRCUIT SPLIT REGARDING THE "FOUND IN" PRONG OF SECTION 1326 WHEN ALIENS SEEK TO LEAVE THE COUNTRY

A. *The Ninth and Fifth Circuits' View*

Circuit courts disagree as to whether an illegal alien can be prosecuted for being "found in" the country when he is detained by immigration authorities at a port of entry while seeking to *leave* the United States.

As a matter of law, the Ninth and Fifth Circuits hold that an alien attempting to leave the country at a port of entry can be prosecuted for being "found in" the United States.[27] In these circuits, the alien at the port of entry is considered to be "in" the United States for purposes of § 1326.[28] Although these circuits recognize the principle that in order to be "in" the United States within the meaning of § 1326 an alien must have both physical presence in this country as well as freedom from restraint, they conclude (without explanation) that such principles only apply to aliens seeking to enter the United States from a foreign country.[29]

As a matter of public policy, the Ninth and Fifth circuits also believe that aliens under these circumstances should be punished. Their decisions are colored by the idea that, because the alien is not attempting to enter, the "found in" prong of the statute is the only way these aliens can be prosecuted.[30] For these circuits, the conclusion that no statute prohibits their conduct is an "untenable result."[31]

For example, in *United States v. Ambriz-Ambriz,* a previously deported alien sought to leave the country by traveling to the Canadian border.[32] Ambriz-Ambriz crossed the port of entry into Canadian territory. Ambriz-Ambriz, however, was denied admission into Canada. The vehicle in which Ambriz-Ambriz was traveling was forced to return

25. *See* Kaplan v. Tod, 267 U.S. 228, 230 (1925).

26. *See* United States v. Hernandez-Herrera, 273 F.3d 1213, 1219 (9th Cir. 2001).

27. *See* United States v. Quezada-Rojas, 770 F.3d 366 (5th Cir. 2014), *cert. denied,* 135 S. Ct. 2312 (2015); United States v. Gonzalez-Diaz, 630 F.3d 1239 (9th Cir. 2011); United States v. Ambriz-Ambriz, 586 F.3d 719 (9th Cir. 2009).

28. *See Rojas,* 770 F.3d at 368; *Gonzalez-Diaz,* 630 F.3d at 1244; *Ambriz-Ambriz,* 586 F.3d at 724.

29. *See* United States v. Macias, 740 F.3d 96, 100 n.7 (2d Cir. 2014).

30. *Id.* at 101.

31. *Id.*

32. *Ambriz-Ambriz,* 586 F.3d at 721.

to the American port of entry.[33] At the port of entry, Ambriz-Ambriz was held under custody by immigration authorities and was charged under the "found in" prong of § 1326.[34] Ambriz-Ambriz contended that he was not "found in" the United States because he was under official restraint.[35] The Ninth Circuit, however, determined that Ambriz-Ambriz was never legally in Canada.[36] Therefore, at the port of entry, Ambriz-Ambriz was still "in" the United States for purposes of § 1326.[37] The Ninth Circuit rejected Ambriz-Ambriz's contention that he was not "in" for purposes of § 1326 because he was under official restraint.[38] The court held that the official restraint doctrine only pertains to an individual *entering* the United States from a foreign country.[39] Because the court determined that Ambriz-Ambriz was never *legally* in Canada, the court concluded that he was not *entering* from a foreign country. Thus, the official restraint doctrine did not apply.[40]

Now consider *United States v. Gonzalez-Diaz.* In *Gonzalez-Diaz,* the alien also drove to the Canadian border seeking to leave the country.[41] Like Ambriz-Ambriz, Gonzalez-Diaz was also returned to an American port of entry, where he was detained by immigration authorities.[42] Gonzalez-Diaz was likewise charged under the "found in" prong of § 1326.[43] Gonzalez-Diaz contended that he was not "found in" the United States for purposes of § 1326 because he was under official restraint.[44] The Ninth Circuit, however, rejected Gonzalez-Diaz's contention. It held that the doctrine of official restraint only pertains to individuals *entering* the United States from a foreign country, and that Gonzalez-Diaz was never *legally* in Canada.[45]

Most recently, in *United States v. Quezada-Rojas,* the Fifth Circuit also determined that a previously deported alien was "found in" the United States under § 1326 when he was detained by immigration authorities at a port of entry after he sought to leave the country.[46] Quezada-Rojas, an illegal alien, boarded a commercial bus in Denver,

33. *Id.*
34. *Id.*
35. *Id.* at 722.
36. *Id.* at 723-24.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *See* United States v. Gonzalez-Diaz, 630 F.3d 1239, 1240 (9th Cir. 2011).
42. *Id.* at 1240-41.
43. *Id.*
44. *Id.* at 1243.
45. *Id.* at 1243-44.
46. *See* United States v. Rojas, 770 F.3d 366, 367 (5th Cir. 2014).

Colorado en route to his native country of Mexico.[47] Seeking to leave the country (and stop living in the United States unlawfully), Quezada-Rojas arrived at the port of entry in El Paso, Texas.[48] Customs and Border Protection officers, conducting random inspections on outbound traffic at the port of entry, interviewed Quezada-Rojas and determined that he was a previously deported alien not in possession of valid immigration documents.[49] Quezada-Rojas was charged and convicted for being "found in" the United States in violation of § 1326.[50] On appeal Quezada-Rojas argued that his case presented a question over which circuits are divided.[51] Based on Supreme Court precedent, Quezada-Rojas argued that once he voluntarily entered the port of entry seeking to leave the country, he was not legally considered to be "found" or "in" within the meaning of § 1326.[52] Specifically, Quezada-Rojas contended that, under Supreme Court precedent, an alien who is at a port of entry or boundary line and under official restraint is not considered to be "in" the United States as a matter of law.[53] He also argued that he was not "found" within the meaning of the statute because that term is synonymous with "discovered," and a person like Quezada-Rojas, who voluntarily approaches immigration authorities at a port of entry, cannot be said to have been "discovered" by those authorities.[54] He contended that the term "found" as used in § 1326 requires that immigration authorities actively seek and "discover" the alien, not passively wait until the alien shows up at the port of entry.[55] He contended that the term "found" is not the same as the term "present" for purposes of § 1326.[56] Quezada-Rojas requested the Fifth Circuit to find that: (1) once an alien voluntarily enters a port of entry seeking to *leave* the country, he or she is not legally considered to be "found in" for purposes of § 1326, and (2) the official restraint doctrine should also apply to cases where the alien is seeking to *leave* the country.[57] The Fifth Circuit, however, rejected Quezada-Rojas's request.[58] The Fifth Circuit aligned with the Ninth Circuit and held that:

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47. *Id.* at 367.

48. *Id.*

49. *Id.*

50. *Id.*

51. Appellant's Reply Brief at 7-13, United States v. Rojas, 770 F.3d 366 (5th Cir. 2014) (No. 13-50926).

52. Appellant's Reply Brief at 7-13, *Rojas*, 770 F.3d at 367-68 (No. 13-50926); *see also Rojas*, 770 F.3d at 367-68.

53. *See* Appellant's Reply Brief at 7-13, United States v. Rojas, 770 F.3d 366 (5th Cir. 2014) (No. 13-50926).

54. Appellant's Reply Brief at 3-7, *Rojas*, 770 F.3d at 367-68 (No. 13-50926).

55. *Id.*

56. *Id.*

57. *Id.* at 7-13.

58. *See* United States v. Quezada-Rojas, 770 F.3d 366 (5th Cir. 2014), *cert. denied*, 135 S.

(a) an illegal alien could be prosecuted for being "found in" the United States when he is detained by immigration authorities at a port of entry even when seeking to *leave* the country, and (b) the official restraint doctrine only pertains to individuals entering the United States from a foreign country, "not to persons leaving."[59]

B. *The Second Circuit's View*

In contrast, the Second Circuit holds that an illegal alien is not "found in" the country for purposes of § 1326 when he is detained by immigration authorities at a port of entry while seeking to leave the United States (and not legally considered to be in another country).[60]

Recently, in *United States v. Macias,* a previously deported alien charged under the "found in" prong of § 1326 was held at the border after he sought to leave the United States by attempting to enter into Canada.[61] Macias arrived at the Canadian border and walked across the bridge to the Canadian port of entry.[62] Macias, however, was denied admission into Canada and was returned to U.S. immigration authorities on the other side of the bridge at the American port of entry.[63] Macias was charged with being "found in" in violation of § 1326.[64] In concluding that the alien under those circumstances was not "found in" the country for purposes of § 1326, the Second Circuit recognized that an alien who is seeking to enter or leave the country must be free from official restraint in order to be considered "in" the United States within the meaning of § 1326.[65] The Second Circuit rejected the Ninth Circuit's view in *Gonzalez-Diaz* and *Ambriz-Ambriz* that "the official restraint doctrine [only] pertains to an individual entering the United States from a foreign country[.]"[66] The Second Circuit stated: "Neither *Gonzalez-Diaz* nor *Ambriz-Ambriz* explains why the logic of the official restraint doctrine, which distinguishes between physical and legal presence, should not apply unless an alien is entering from another country."[67]

As a matter of public policy, the Second Circuit noted that the Ninth Circuit justified its view of punishing aliens under these circumstances simply "because it believed that the 'found in' prong was the only way that [an alien held at the border seeking to leave the country] could be

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Ct. 2312 (2015).

59. *See* United States v. Rojas, 770 F.3d 366, 367-68 (5th Cir. 2014).
60. United States v. Macias, 740 F.3d 96, 101-02 (2d Cir. 2014).
61. *Id.* at 99-100.
62. *Id.* at 97-98.
63. *Id.*
64. *Id.* at 98.
65. *Id.* at 100 n.7.
66. *Id.*
67. *Id.*

prosecuted."[68] The Second Circuit, however, observed: "not every unlawful stay in the United States—even by a previously-deported alien—can or should result in a criminal conviction."[69] The Second Circuit stated:

> [I]t seems equally anomalous to punish an alien for being "found in" the United States when he was only found based on his attempt to stop living in the United States unlawfully. This would create a disincentive for undocumented, previously deported aliens to do the one thing that Congress would most like them to do—leave.[70]

Accordingly, the Second Circuit held that an alien charged for being "found in" under § 1326, while he was detained at the border for seeking to do the one thing that Congress wanted him to do—leave the country—is not guilty under that prong of the statute.[71]

III. AN ILLEGAL ALIEN AVOIDS LIABILITY UNDER § 1326 WHEN HE VOLUNTARILY ARRIVES AT A PORT OF ENTRY SEEKING TO LEAVE THE COUNTRY

Contrary to the Ninth and Fifth Circuits' view, an alien is *not* "found in" the United States within the meaning of § 1326 when he voluntarily arrives at a port of entry seeking to leave the country.[72] Supreme Court precedent holds that an alien at the port of entry or boundary line facing deportation proceedings does not legally constitute that he is "found in" the United States, notwithstanding the fact that the alien is physically within the country.[73] In *Kaplan v. Tod*, the Supreme Court, in determining that an alien detained in custody at the Ellis Island port of entry pending deportation was *not* in the country, stated that: "[The alien] was still in theory of law at the boundary line and had gained no foothold in the United States."[74] In *Kaplan,* the alien was not considered to be "in" the United States simply because she was at a port of entry or boundary line and in custody.[75] Under Supreme Court precedent, an alien who is: (1) at a port of entry or boundary line, and (2) under official restraint is *not* considered to be "found in" the United States.[76]

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68. *Id.* at 101.
69. *Id.*
70. *Id.*
71. *Id.* at 101-02.
72. *See* Leng May Ma v. Barber, 357 U.S. 185, 188 (1958).
73. *Id.* at 188.
74. *See* Kaplan v. Tod, 267 U.S. 228, 230 (1925).
75. *Id.*
76. *Id.*

Every defendant in the circuit case law cited in this article was, as a matter of fact, indisputably at the port of entry or boundary line and under custody.[77] And, as previously stated, to be considered "in" the United States "require[s] both physical presence in the country as well as freedom from official restraint[.]"[78] These defendants clearly were not free of restraint because they were both under surveillance and surrounded by immigration authorities at the port of entry.[79] Accordingly, they were *not* "in" the United States as a matter of law for purposes of § 1326.[80]

The Ninth Circuit, whose approach the Fifth Circuit endorsed, held that the "official restraint" doctrine only applies if an alien is seeking to enter the United States from a foreign country.[81] However, as the Second Circuit explained in *Macias*: "Neither [decision by the Ninth Circuit] explains why the logic of the official restraint doctrine, which distinguishes between physical and legal presence, should not apply unless an alien is entering from another country."[82] This is particularly puzzling when one considers that we are talking about the same piece of real estate whether the alien is attempting to enter or attempting to leave the country. The alien is at the same boundary line. Under Supreme Court precedent, there is no requirement that an alien enters from another country for purposes of § 1326.[83] In fact, Supreme Court precedent holds that, at the border or boundary line, an alien pending deportation is not "in" the United States within the meaning of § 1326 and that he or she "might not be present in another country" in that situation.[84] Clearly, *as matter of law,* an alien at the port of entry or boundary line seeking to *leave* the United States is not "in" the United States for purposes of § 1326.

Furthermore, federal courts have recognized that, under § 1326, in order for an alien to be "found" or "discovered," immigration authorities must actively seek the alien as opposed to passively waiting for him to

77. *See* United States v. Macias, 740 F.3d 96 (2d Cir. 2014); United States v. Quezada-Rojas, 770 F.3d 366 (5th Cir. 2014), *cert. denied,* 135 S. Ct. 2312 (2015); United States v. Gonzalez-Diaz, 640 F. 3d 1239 (9th Cir. 2011); United States v. Ambriz-Ambriz, 586 F.3d 719 (9th Cir. 2009).

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

79. *See* United States v. Macias, 740 F.3d 96, 104 n.2 (2d Cir. 2014); United States v. Villanueva, 408 F.3d 193, 198 n.5 (5th Cir. 2005).

80. *See* Macias, 740 F.3d at 100 n.7 (citing United States v. Gonzalez-Diaz, 630 F.3d 1239, 1243 (9th Cir. 2011) and United States v. Ambriz-Ambriz, 586 F.3d 719, 723 (9th Cir. 2009)).

81. *Id.*

82. *Id.*

83. *Id.* at 102.

84. *Id.* at 99-100 (citing Shaughnessy v. United States *ex rel. Mezei,* 345 U.S. 206, 209 (1953) and Zadvydas v. Davis, 533 U.S. 678, 693 (2001)); *see also* Kaplan v. Tod, 267 U.S. 228, 230 (1925); Leng May Ma v. Barber, 357 U.S. 185, 188-89 (1958).

show up at the port of entry.[85] "Found implies that someone else found the alien in the sense of discovering him, and that is not so where he voluntarily presents himself."[86] The term "found" is not synonymous with the term "present" for purposes of § 1326.[87] Thus, when an alien voluntarily presents himself to immigration authorities at a port of entry, he cannot be said to have been "found" or "discovered" in the country for purposes of § 1326.[88]

Every defendant in the circuit case law cited in this article voluntarily approached immigration authorities at a port of entry. They traveled to the port of entry seeking to *leave* the United States. Common sense tells us that these previously deported aliens expected to encounter immigration authorities once they arrived at the port of entry. Certainly, they did not travel to the port of entry against their will. These aliens were not "found" or "discovered" by immigration authorities because the aliens voluntarily approached them first, not vice versa. If immigration authorities had actively sought these aliens, they could have "found" or "discovered" the aliens before the aliens approached the port of entry. The law is clear under federal case law that a person who voluntarily approaches immigration authorities at a port of entry is neither "found" nor "discovered" in the country within the meaning of § 1326.[89]

To be liable under the statute, the alien must be both "found" and "in" *as a matter of law* within the meaning of the statute, and nothing less. An alien who voluntarily arrives at a port of entry seeking to leave the country and is detained by immigration authorities is neither "found" nor "in" within the meaning of § 1326 as a matter of law. When the alien reached the port of entry, he avoided liability under the statute. Circuit courts hold that an alien can *leave* to avoid liability.[90] In *United States v. Ayala,* in assessing the constitutionality of § 1326, the Ninth Circuit held:

> We are not persuaded that § 1326 contains any ambiguity at all. The plain meaning of § 1326 can easily be understood by a person of "ordinary intelligence." It prohibits a deported alien from reentering the United States without permission. 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

85. *See* United States v. Zavala-Mendez, 411 F.3d 1116, 1119 (9th Cir. 2005).

86. *Id.*

87. *See Macias,* 740 F.3d at 98-99.

88. *See* United States v. Angeles-Mascote, 206 F.3d 529, 531 (5th Cir. 2000); United States v. Canals-Jimenez, 943 F.2d 1284, 1286 (11th Cir. 1991); *Zavala-Mendez,* 411 F.3d at 1119-21.

89. *Angeles-Mascote,* 206 F.3d at 531.

90. *See* Canals-Jimenez, 943 F.2d at 1289; *see also* United States v. Mendez-Cruz, 329 F.3d 885, 889 (D.C. Cir. 2003); United States v. Ayala, 35 F.3d 423, 425 (9th Cir. 1994).

States, he can leave.[91]

In assessing the culpability of an alien under the "found in" prong of § 1326, the District of Columbia Circuit, in *United States v. Mendez-Cruz,* also stated: "If appellant had previously entered and then left the country, he avoided prosecution for that distinct offense when he left."[92] So, the fact that an alien entered and established presence in this country is irrelevant *as a matter of law* once he is voluntarily present at the port of entry or boundary line seeking to *leave.*

Likewise, whether or not an alien is returned to U.S. immigration authorities by foreign authorities, after the alien arrived at the port of entry seeking to leave the country, is also irrelevant. An alien, under these circumstances, is never considered to be legally present in another country. Rather, the relevant inquiry in a "found in" case of an alien who is present at the port of entry seeking to leave the country is whether he is: (1) voluntarily at the port of entry or boundary line, and (2) detained there by immigration authorities.[93] Every defendant in the circuit case law cited in this article addressing the issue at hand met this criteria. Accordingly, they were *not* "found in" the United States as a matter of law within the meaning of § 1326.

It could be argued that these aliens are considered to be "in" under the statute because illegal reentry is a continuing offense. A continuing offense "begins at the time the defendant illegally reenters the country and does not become complete unless or until the defendant is 'found' [by immigration authorities] 'in' the United States."[94] However, the offense ends or is complete *only* if the alien is "found in" or "discovered in" the United States by immigration authorities.[95] When an alien voluntarily arrives at the port of entry seeking to *leave* the country, he cannot be said to have been "discovered in" or "found in" the United States as a matter of law for purposes of § 1326. Accordingly, the offense of being "found in" the country in violation of § 1326 is *not* complete under these circumstances. Moreover, "[a] continuing offense, by its very nature, [ends] the date of the voluntary termination of the illegal activity."[96] An alien voluntarily terminates his illegal activity when he voluntarily arrives at the port of entry or boundary line seeking to *leave*

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91. *See* Ayala, 35 F.3d at 425.

92. *See* Mendez-Cruz, 329 F.3d at 889 (citing United States v. Ruelas-Arreguin, 219 F.3d 1056, 1061 (9th Cir. 2000)); Ayala, 35 F.3d at 425.

93. *See Macias*, 740 F.3d at 99-102.

94. *See* United States v. Vargas-Garcia, 434 F.3d 345, 350 (5th Cir. 2005) (citing United States v. Corro-Balbuena, 187 F.3d 483, 486 (5th Cir. 1999)).

95. *Id.* at 349 ("[U]nlawful 'entry' [is] a continuing offense until at least such time as the alien is [found in].") (alteration in original).

96. *See* United States v. Alvarado-Santilano, 434 F.3d 794, 796 (5th Cir. 2005) (citing United States v. Maxim, 55 F.3d 394, 397 (8th Cir. 1995)).

the country. At that moment, the alien is withdrawing from criminal activity and is not "found in" the country *as a matter of law* within the meaning of § 1326.[97] Accordingly, the fact that unlawful entry is a continuous offense is simply irrelevant in these cases.

It is important to note that this article does not state, nor does it propose, that aliens under these circumstances are beyond prosecution for all crimes. Rather, it simply states that, under Supreme Court and circuit court precedent, an alien who voluntarily approaches an immigration station at the border seeking to *leave* the country and stop living here unlawfully cannot be said to have been "found in" the United States as a matter of law under § 1326. An alien, under these circumstances, could be subject to prosecution under other criminal statutes, state or federal.[98] He, however, cannot be prosecuted under the "found in" prong of § 1326.[99]

IV. THE ILLEGAL ALIEN PHENOMENON IN THE UNITED STATES

There are over 11 million illegal aliens living in the United States.[100] But, it is well documented that most illegal immigrants do not come to this country with the intention of making the United States their permanent home. In fact, they eventually leave the country for any number of reasons.[101] Those reasons can include family, economics, or simply a desire to stop hiding. Thus, many voluntarily arrive at a port of entry seeking to *leave* the United States.[102] "From 2005 to 2010, the number of Mexicans who moved from the [United States] to Mexico rose to 1.4 million, roughly double the number who had done so 10 years

97. *See* Brief of Petitioner-Appellant at *16, United States v. Rojas, 770 F.3d 366 (5th Cir. 2014) (No. 13-50926) (In the Fifth Circuit case of *Rojas,* the district court observed that Rojas was "withdrawing from criminal conduct" when he voluntarily arrived at the port of entry.).

98. *See* United States v. Canals-Jimenez, 943 F.2d 1284, 1287-88 (11th Cir. 1991).

99. *Id.; see also* Macias, 740 F.3d at 100-02.

100. *See* Haya El Nasser, *More Mexicans Returning Home, Fewer Immigrating to U.S.*, USA TODAY (Apr. 24, 2012), http://usatoday30.usatoday.com/news/nation/story/20120423/mexican-immigration-united-states/5448 7564/1.

101. *See* Nasser, *supra* note 100; *see also* Ted Hesson, *Why Immigrants Boomerang to Mexico*, NAT'L J. (Jan. 17, 2014), http://www.nationaljournal.com/next-america/policy/why-immigrants-boomerang-to-mexico-20140117; Associated Press, *Illegal Mexican Immigrant Numbers Down as More Migrate Back to Mexico,* CBS NEWS (Apr. 23, 2012), http://www.cbsnews.com/news/il legal-mexican-immigrant-numbers-down-as-more-migrate-back-to-mexico; Sara Miller Llana, *Home Again in Mexico: Illegal Immigration Hits Net Zero,* CHRISTIAN SCI. MONITOR (Apr. 8, 2012), http://www.csmonitor.com/World/Americans/2012/0408/Home-again-in-Mexico-Illegal-immigration-hits-net-zero.

102. *See* Tara Bahrampour, *For First Time Since Depression, More Mexicans Leave U.S. Than Enter*, WASH. POST (Apr. 23, 2012), http://www.washingtonpost.com/local/for-first-time-since-depression-more-mexicans-leave-us-than-enter/2012/04/23/gIQApyiD dt_story.html.

before."[103] And, as of today, an illegal alien seeking to leave the country may or may not be liable under the "found in" prong of § 1326. It depends on which port of entry the alien approaches to *leave* the country and, most importantly, which circuit has jurisdiction.

Illegal immigration is a national concern that, according to United States Sentencing Commission Statistics, results in an average of 20,000 prosecutions for illegal re-entry every year.[104] Prosecution for illegal re-entry of a previously deported person is the most common type of federal prosecution in district courts.[105] Generally, in each of these prosecutions, the illegal alien is charged under all three prongs of § 1326, including the "found in" prong of the statute. Section 1326 prosecutions do not only include illegal aliens seeking to enter the country. They also include prosecutions of illegal aliens who are seeking to *leave* the United States! This fact has substantial public policy implications in terms of the economic impact, given that it costs approximately $30,000 annually to incarcerate an inmate.[106]

Prosecuting aliens for seeking to *leave* the country is a recent shift in policy.[107] Border Patrol Officers monitor vehicles entering Mexico from the United States to ensure that they are not crossing with more than $10,000 cash.[108] They do this because Mexican cartels transport large amounts of money from drug sales to Mexico.[109] When conducting these random searches, Border Patrol Officers, however, often encounter illegal aliens (with *no* prior criminal felonies like the Fifth Circuit case of *Quezada-Rojas*)[110] who are simply attempting to leave the United

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103. *See* Nasser, *supra* note 97.

104. *See* U.S Sentencing Commission, *Quick Facts, Illegal Reentry Offenses*, U.S. SENTENCING COMMISSION 1, 1 (2013), http://www.ussc. gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Illegal_Reentry.pdf.

105. *See* U.S. District Courts, *Table D-2 U.S. District Courts-Criminal Defendants Commenced, by Offense, During the 12-Month Periods Ending September 30, 2009 Through 2013*, U.S. DISTRICT COURTS 1, 3 (Sept. 30, 2013), http://www.uscourts.gov/statistics/ table/d-2/judicial-business/2013/09/30.

106. *See* Nancy La Vigne & Julie Samuels, *The Growth and Increasing Cost of the Federal Prison System: Drivers and Potential Solutions*, URB. INST., JUST. POL'Y CENTER (Dec. 2012), http://www.urban.org/uploadedpdf/412693-the-growth-and-increasing-cost-of-the-federal-prison-system.pdf.

107. NPR, The Curious Practice of Bringing Immigrants Back — To Deport Them (Apr. 23, 2014), http://www.npr.org/2014/04/23/306238506/the-curious-practice-of-bringing-immigrants-back-to-deport-them.

108. *Id.*

109. *Id.*

110. *See* Brief of Petitioner-Appellant at 4, United States v. Rojas, 770 F.3d 366 (5th Cir. 2014) (No. 13-50926) (indicating that Quezada-Rojas was sentenced to "time served"); *see also* Presentence Investigation Report at ¶ 22, United States v. Rojas, 770 F.3d 366 (5th Cir. 2014)("Quezada-Rojas has no [prior] criminal convictions.").

States.[111] Now, when an individual without permission to be in the country is at the port of entry merely seeking to return to Mexico, he or she is not allowed to leave and is brought back into the country to be prosecuted for being "found in" under § 1326. These new prosecutions took the Honorable Robert Brack, District Judge for the District of New Mexico (who has sentenced more than 14,000 illegal aliens over the last decade), by surprise.[112] In a recent interview, Judge Brack stated:

> I've not seen that historically, so it was a significant shift in prosecution policy. And it really surprised me. I didn't see that coming. . . . But the people that I see didn't have any money. They've never had any money, and they certainly don't have any guns. It's just people that were in the country without permission trying to leave.[113]

Nevertheless, as of today, an illegal alien who simply seeks to *leave* the country may be liable under the "found in" prong of the statute depending upon which port of entry he uses to leave the country.

V. PROSECUTING ILLEGAL ALIENS FOR SEEKING TO LEAVE THE COUNTRY UNDER § 1326 IS CONTRARY TO CONGRESSIONAL INTENT

As a matter of law, when an alien voluntarily arrives at the border, encounters immigration authorities, and is detained by those authorities, he is: (1) no longer "in" the country for purposes of § 1326, and (2) not "found" within the meaning of the statute. Accordingly, he clearly avoids liability under § 1326. Punishing these aliens— who want to be "right" with the law— limits their options if they no longer wish to live here. They can remain in the United States in violation of the statute, travel to Second Circuit jurisdiction to cross into Canada, or attempt a dangerous crossing through the desert, scale the fence, or swim the river to return to Mexico. All of these options, however, clearly lead to a result that is impractical, unreasonable, illogical, absurd, and contrary to the goal of §

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111. *See* American Immigration Council, *Immigrants and Crime: Are They Connected? A Century of Research Finds that Crime Rates for Immigrants are Lower than for the Native-Born*, IMMIGR. POL'Y CENTER (Oct. 2008), http://www.immigrationpolicy.org/just-facts/ immigrants-and-crime-are-they-connected-century-research-finds-crime-rates-immigrants-are ("Numerous studies by independent researchers and government commissions over the past 100 years repeatedly and consistently have found that immigrants are less likely to commit crimes or be behind bars that the native-born.").

112. NPR, The Curious Practice of Bringing Immigrants Back — To Deport Them (Apr. 23, 2014), http://www.npr.org/2014/04/23/306238506/the-curious-practice-of-bringing-immigrants-back-to-deport-them.

113. *Id.*

1326. Certainly, Congress could not have intended such a bizarre result.[114]

"Section 1326 was passed to fulfill the purpose of being able to prosecute aliens who are illegally present in the country and entered the country surreptitiously."[115] Because the goal of the statute is to prevent aliens from entering and remaining in the United States, punishing these aliens for attempting to stop being illegal contradicts that goal. Though not a case under § 1326, the logic applied by the Third Circuit in *United States v. Cuevas-Reyes* illustrates the logic that should be applied to the types of § 1326 cases discussed in this Article.[116] In *Cuevas-Reyes,* the Third Circuit reversed a defendant's conviction under 8 U.S.C. § 1324 (the alien smuggling statute) based on the defendant's participation in *removing* illegal aliens from the United States. In doing so, the Third Circuit stated: "Because the goal of § 1324 is to prevent aliens from entering or remaining in the United States illegally by punishing those who shield or harbor them . . . punishing [an alien] for helping illegal aliens leave the country is contrary to that goal."[117] In *Macias,* a § 1326 case, the Second Circuit applied the same type of logic and recognized that the alien seeking to leave the country is simply attempting to do what Congress wants him to do.[118] In reversing the alien's conviction under 8 U.S.C. § 1326, the Second Circuit observed:

> [An alien under these circumstances does] not wish to be inside the United States. Indeed, despite the indictment's (unnecessary) charge that [the alien] "was voluntarily present" in the United States, the only expression of [the alien's] will [is] his strong desire to get out of the country. This does not make [the alien] more susceptible to prosecution under [the found in prong of] 8 U.S.C. § 1326 than if he intended to enter the United States.[119]

The Second Circuit's holding in *Macias* is based on Supreme Court precedent, congressional intent, and simple logic. As the Second Circuit observed in that case, an alien under these circumstances clearly: (1) does not want to be here, (2) is involuntarily present on United States soil, and

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114. *See* United States v. Turkette, 452 U.S. 576, 580 (1981) (In statutory interpretation, "absurd results are to be avoided"); *see also* Johnson v. Sawyer, 120 F.3d 1307, 1319 (5th Cir. 1997) (Courts "follow the plain meaning of the statute unless it would lead to a result so bizarre that Congress could not have intended it.") (citing Demarest v. Manspeaker, 498 U.S. 184, 191 (1991)).

115. *See* United States v. Canals-Jimenez, 943 F.2d 1284, 1289 (11th Cir. 1991).

116. *See* United States v. Cuevas-Reyes, 572 F.3d 119, 122 (3d Cir. 2009).

117. *Id.* at 122.

118. *See* United States v. Macias, 740 F.3d 96, 101-02 (2d Cir. 2014).

119. *Id.* at 102.

(3) is simply attempting to leave the country and stop being illegal.[120]

Common sense tells us that illegal aliens seeking to *leave* the United States should be permitted to end their illegal activity and allowed to return home. Permitting individuals to withdraw from criminal activity without prosecution is not a novel concept. Cities across the country from New York to Los Angeles are promoting a "Gun Buyback Program" where individuals are encouraged to turn in their illegal firearms, including assault weapons and firearms with a defaced serial number, in exchange for gift cards.[121] This is done anonymously—no questions asked.[122] Ironically, any of these individuals could be illegal aliens. So the question begs to be asked, "Why would we prosecute an illegal alien (with *no* prior criminal felonies as in the Fifth Circuit case of *Quezada-Rojas*)[123] for attempting to leave the country and *not* for possessing an illegal firearm?" Allowing illegal aliens to return home without being prosecuted supports Congressional intent.

The implication of the Ninth and Fifth Circuits' reasoning to prosecute these cases is that, as a practical matter, illegal aliens from Mexico are not going to travel to Second Circuit jurisdiction to return to Mexico nor are they going to attempt a dangerous crossing through the Southwest. As a result, the Ninth and Fifth Circuits are discouraging aliens from leaving the United States and returning home. Such a result clearly frustrates congressional intent.

The circuit division makes clarification by the Supreme Court especially important. Congress wants illegal aliens to return home, but the approach by the Fifth and Ninth Circuits thwarts congressional intent. Creating a uniform approach with respect to this issue will eliminate inconsistency and uncertainty for the 11 million illegal aliens currently residing in the United States. Resolving the issue is essential to providing greater clarity to immigration authorities, federal prosecutors, federal defenders, and federal judges—not to mention aliens considering leaving the country. The circuits agree that an alien at the port of entry seeking to *enter* the country is not considered to be "found in" under the statute, but

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120. *Id.*

121. *See* Soumya Karlamangla, *Trade in Your Gun, Receive a Gift Card in L.A.*, L.A. TIMES (May 9, 2015), http://www.latimes.com/local/lanow/la-me-in-la-buyback-20150509-story.html; *see also 10 Handguns, 5 Assault Weapons Collected at L.I. Gun Buyback*, CBS NEWS (Mar. 22, 2014), http://newyork.cbslocal.com/2014/03/22/10-handguns-5assault-weapons-collected-at-l-i-gun-buyback/; *see also* Richard Valdemar, *The Fallacy of Gun Buyback Programs*, POLICE MAG. (Dec. 26, 2013), http://www.policemagpolicemag.com/blog/gangs/story/2013/12/the-fallacy-of-gun-buyback-programs.aspx.

122. Karlamangla, *supra* note 118.

123. *See* Brief of Petitioner-Appellant at *4, United States v. Rojas, 770 F.3d 366 (5th Cir. 2014) (No. 13-50926) (indicating that Quezada-Rojas was sentenced to "time served."); *see also* Presentence Investigation Report ¶ 22, United States v. Rojas, 770 F.3d 366 (5th Cir. 2014) ("Quezada-Rojas has no [prior] criminal convictions.").

they clearly disagree when the alien is seeking to *leave* the country.

CONCLUSION

Whether an illegal alien should be prosecuted for being "found in" the United States under § 1326 when he is detained by immigration authorities at a port of entry while seeking to leave the country turns on *a pure question of law.* Supreme Court precedent, congressional intent, and simple logic dictate that an alien under these circumstances is not "found in" within the meaning of the statute as a matter of law. The inconsistent prosecution of aliens seeking to leave the country—particularly the position of the Fifth and Ninth Circuits—creates a disincentive for aliens to do what Congress wants them to do—leave the country. This inconsistency not only affects the 11 million illegal aliens currently residing in the United States, it also affects the pocketbooks of the American tax payers. It is critical that the Supreme Court resolves the sharp circuit split and clarifies the law. Recently, in the Fifth Circuit's case of *Quezada-Rojas,* the illegal alien asked the Supreme Court to resolve the split in the circuits.[124] The Supreme Court, however, denied the petition for a writ of certiorari.[125] Until the Supreme Court weighs in on the issue or the circuits align, the dilemma for the illegal aliens seeking to stop living in the country unlawfully will continue to be: "Should I stay or should I go now?"[126]

124. *See* Rojas v. United States, 135 S. Ct. 2312 (2015).

125. *Id.*

126. THE CLASH, *supra* note 1.