NOTES

DEFINING "FOUND IN": CONSTRUCTIVE DISCOVERY AND THE CRIME OF ILLEGAL REENTRY

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Over the past decade, the crime of illegal reentry has risen to prominence. It is not only the most common federal immigration charge, but also the most prosecuted federal crime. The cost of enforcing illegal reentry offenses has grown in kind, and Immigration and Customs Enforcement (ICE) is now particularly resource-strapped. Against this backdrop, this Note addresses an ambiguous provision in the statute governing illegal reentry, the interpretation of which could have a substantial impact on its enforcement and, by extension, the security interests the law seeks to protect.

An individual is guilty of illegal reentry if he is "at any time found in . . . the United States" after deportation. The federal circuits interpret this "found in" clause in different ways. In particular, they disagree over whether the federal government may be imputed with knowledge of an individual's illegal presence in the United States (i.e., being "found") if the government has the ability, through the exercise of diligence typical of law enforcement authorities, to obtain that knowledge itself. If such a "constructive discovery" standard were adopted, a given illegal reentry may be considered "complete," and the five-year statute of limitations would begin to run, far earlier than if the government were required to actually find that illegal reentrant.

After weighing the merits of each interpretation, including the effects on both ICE and future defendants, and taking into account the scant legislative history of the "found in" clause, this Note recommends a middle ground. It argues that courts should only be able to impute the federal government with knowledge of an illegal reentrant's status, i.e., the fact that he is not legally permitted to be present in the United States, and not that of his presence, i.e., the fact that he is physically located in the United States.

INTRODUCTION

The crimes of illegal entry and reentry are at a decisive moment in their history. In what some call a "crisis in the administration of federal

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criminal justice,"[1] the cost of prosecuting illegal entrants and reentrants is now more than a billion dollars a year.[2] The expense stems from the growing importance of these crimes. Since the September 11 attacks, they have played a major role in the maintenance of public safety and national security.[3]

Illegal reentry has risen to particular prominence. Today, it is not only the most common federal immigration charge, but it is also the most prosecuted federal crime.[4] This Note focuses on the actions that collectively constitute an illegal reentry, the subject of a circuit split. Given the volume of illegal reentry prosecutions and their importance, as well as the growing momentum behind immigration reform following President Obama's reelection,[5] the resolution of this split may have a major impact on the way immigration law is enforced.

The disagreement among the federal circuits arises from ambiguity in 8 U.S.C. § 1326, a statute whose language comes principally from the Immigration and Nationality Act of 1952 (INA). The statute provides that anyone who 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 "enters, attempts to enter, or *is at any time found in, the United States*" is guilty of a felony and shall be

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1. Doug Keller, Re-thinking Illegal Entry and Re-entry, 44 Loy. U. Chi. L.J. 65, 121 (2012) [hereinafter Keller, Re-thinking].

2. Id. at 68.

3. See Department of Homeland Security Law Enforcement Operations: Hearing Before H. Subcomm. on Crime, Terrorism, & Homeland Sec., 110th Cong. 1 (2005) [hereinafter Scott Statement] (statement of Rep. Robert C. Scott, Chairman, H. Subcomm. on Crime, Terrorism, & Homeland Sec.) (noting creation of Immigration and Customs Enforcement in 2002 was part of effort to "better protect the United States from terrorist attacks"); Role of Immigration in the Department of Homeland Security Pursuant to H.R. 5005, the Homeland Security Act of 2002: Hearing Before Subcomm. on Immigration, Border Sec., & Claims of H. Comm. on the Judiciary, 107th Cong. 11–14 (2002) [hereinafter Krikorian Statement] (statement of Mark Krikorian, Executive Director, Center for Immigration Studies) (discussing connection between immigration and national security).

4. Illegal Reentry Becomes Top Criminal Charge, Transactional Records Access Clearinghouse (June 10, 2011), [hereinafter TRAC, Top Charge] http://trac.syr.edu/immigration/reports/251/ (on file with the *Columbia Law Review*). The degree to which immigration crimes are prosecuted is highly unusual, as "[n]ot since Prohibition has a single category of crime been prosecuted in such record numbers by the federal government." Ingrid V. Eagly, Prosecuting Immigration, 104 Nw. U. L. Rev. 1281, 1281 (2010).

5. Melanie Mason, Schumer, Graham Bringing Back Immigration Reform Plan, L.A. Times: Politics Now (Nov. 11, 2012, 12:04 PM), http://www.latimes.com/news/politics/la-pn-schumer-graham-immigration-reform-20121111,0,6619152.story (on file with the *Columbia Law Review*) ("Immigration reform has received renewed focus in the election aftermath, after the president specifically mentioned revisiting the issue in his victory speech last night.").

fined, imprisoned for up to two years, or both.[6] It is this last means of violating the statute—what will hereinafter be referred to as the "found in" clause—that is the subject of different interpretations among the federal circuits.

To understand the contours of the circuit split, it is useful to think of the "found in" clause as requiring that the federal government have knowledge of two distinct characteristics of a given illegal reentrant: his physical presence in the United States ("presence") and the illegality of that presence ("status"). The former refers to that individual's physical location within the United States, regardless of whether or not he is legally permitted to be in the country. The latter refers to that individual's status, i.e., whether or not he is legally permitted to be in the United States, regardless of his current location.[7] Under this two-pronged approach, to have "found" an illegal reentrant—a question of what knowledge the government has at a given point in time—the federal government must have both located an illegal reentrant (presence) and determined that his presence in the country is illegal (status).[8]

The crux of the disagreement among the federal circuits is whether, under the "found in" clause, a court can impute the federal government with knowledge of the status and presence of a reentrant when it has the means of obtaining that information.[9] Endorsing this type of theoretical discovery will hereinafter be referred to as adopting a "constructive discovery" standard. The Third, Eighth, and Eleventh Circuits adopt this standard in its entirety. In other words, when retrospectively evaluating the facts of a given case, these courts maintain that an illegal reentrant is "found in" the United States when the federal government is capable of finding him—i.e., capable of identifying both his presence and illegal status—through the exercise of diligence typical of law enforcement,

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6. 8 U.S.C. § 1326(a) (2006) (emphasis added).

7. While several factors govern whether an immigrant's presence in the United States is legal, "status" here refers only to whether or not an immigrant is legally permitted to reenter the United States. Status is governed by 8 U.S.C. § 1326(a)(2), which provides that an immigrant must reapply for admission to the Attorney General unless his consent is not required under any other law.

8. See infra Part II.C (outlining positions of each circuit using two-pronged approach).

9. See infra Part II.C.1 (describing these decisions). There is very little scholarship on the meaning of this clause. Aside from a targeted discussion of Seventh Circuit decisions and an analysis of a related sentencing enhancement, there has been no direct consideration of the circuit split or its implications. See generally Doug Keller, Why the Prior Conviction Sentencing Enhancements in Illegal Re-entry Cases Are Unjust and Unjustified (and Unreasonable Too), 51 B.C. L. Rev. 719 (2004) (discussing sentencing enhancement); Steven Mroczkowski, Note, Improving the Seventh Circuit's Approach to Illegal Reentry Prosecutions with a Constructive Discovery Standard and Fast-Track Sentencing, 5 Seventh Circuit Rev. 532 (2010), http://www.kentlaw.iit.edu/Documents/Academic%20Programs/7CR/v5-2/mroczkowski.pdf (on file with the *Columbia Law Review*) (discussing Seventh Circuit's interpretation of "found in" clause).

regardless of whether or not the federal government took any actual steps to locate that illegal reentrant.[10] The Fourth and Seventh Circuits, by contrast, refuse to adopt the constructive discovery standard. They lump the presence and status prongs of the "found in" clause together and hold that the federal government must have *actually* found an illegal reentrant for the provision to be satisfied.[11] The Second, Fifth, and Tenth Circuits strike a middle ground, applying a constructive discovery standard only to the status, and not to the presence, of an illegal reentrant. In other words, if the federal government *actually* locates an individual in the United States, these courts are willing to then impute it with knowledge of that individual's status as an illegal reentrant.[12] This third position will hereinafter be referred to as the adoption of a "modified constructive discovery" standard.

The resolution of the circuit split is important because of its effect on the statute of limitations. In *Toussie v. United States*, the Supreme Court held that the statute of limitations on a crime begins to run when that crime is "'complete,'" i.e. when all of its elements are satisfied.[13] In the context of illegal reentry, which is subject to a five-year statute of limitations,[14] the ability of a court to impute the federal government with knowledge of both the presence and status of an illegal reentrant allows it to rule that the crime was "complete," and that the statute of limitations began to run, at a time earlier than when the federal government *actually* discovered that illegal reentrant. In other words, the standard allows a judge, when examining the validity of an indictment for illegal reentry, to shift the five-year window for prosecution backwards in time.

As a result of this narrower window for prosecuting illegal reentrants, the adoption of a constructive discovery standard could have a dramatic impact on Immigration and Customs Enforcement (ICE), the agency responsible for enforcing the statute.[15] If a constructive discovery

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10. See infra Part II.C.1 (discussing position of these circuits).

11. See infra Part II.C.2 (discussing position of these circuits).

12. See infra Part II.C.3 (discussing position of these circuits).

13. 397 U.S. 112, 115 (1970) (quoting Pendergast v. United States, 317 U.S. 412, 418 (1943)).

14. 18 U.S.C. § 3282(a) (2006).

15. See, e.g., Eagly, supra note 4, at 1332 ("[A]ttorneys employed by ICE have conducted large criminal worksite enforcement actions and have also presided over the surge in illegal reentry prosecutions."); Fugitive Operations, U.S. Immigration & Customs Enforcement, http://www.ice.gov/fugitive-operations/ (on file with the *Columbia Law Review*) (last visited Mar. 1, 2013) [hereinafter U.S. Immigration & Customs Enforcement, Fugitive Operations] (outlining responsibility for "identify[ing], locat[ing], and arrest[ing] fugitive aliens"); Public Advocate, U.S. Immigration & Customs Enforcement, http://www.ice.gov/about/offices/enforcement-removal-operations/publicadvocate/ (on file with the *Columbia Law Review*) (last visited Mar. 1, 2013) ("U.S. Immigration and Customs Enforcement (ICE) is committed to intelligent, effective, safe and humane enforcement of the nation's immigration laws.").

standard were adopted nationwide, ICE officials would have to keep meticulous track of every piece of information they received, paying close attention to when they had information sufficient to meet a constructive discovery standard such that they could act before the prosecution was time-barred. As a result, it may also require that ICE decide whether or not to allocate enforcement resources to a given illegal reentrant at an earlier time, based on more limited information. This could further undermine ICE's effectiveness, particularly given that the agency is already resource-strapped.[16] Granted, encouraging this kind of attentive policing would certainly help protect illegal reentrants from abusive prosecutorial tactics and the specter of perpetual jeopardy.[17]

This Note argues that the federal circuits should adopt the moderate view of the Second, Fifth, and Tenth Circuits—the modified constructive discovery standard—whereby the federal government may only be imputed with knowledge of an illegal reentrant's status, and not that of his presence. While the difference between status and presence is subtle, the adoption of a modified constructive discovery standard would have a substantially less onerous effect on ICE's day-to-day operations and is more consistent with the purpose of the "found in" clause.

Part I of this Note will briefly discuss the history of illegal reentry and the governing statute's "found in" clause, including factors that may shed light on its meaning. Part II will outline the circuit split, describing how each of the federal circuits has interpreted the "found in" clause. Part III will explore the policy implications of each interpretation, focusing on their effect on law enforcement and fairness to potential defendants. The Note concludes by recommending the adoption of a modified constructive discovery standard.

I. THE HISTORY OF ILLEGAL REENTRY AND ITS ENFORCEMENT

Immigration law has evolved largely as a reactionary enterprise.[18] While Congress initially restricted immigration to weed out

16. See infra Part III.A.2 (outlining resource constraints faced by ICE). See generally 153 Cong. Rec. 13,593 (2007) (statement of Sen. Sam Brownback) [hereinafter Brownback Statement] ("[I]f we shut down the border[,] . . . successfully end 100 percent of the visa overstays and double the number of DRO agents, then it will take us 25 to 30 years to deport the estimated 11 million to 13 million illegal aliens . . . ."); Rising Immigration Backlog at All-Time High yet Criminal, National Security, and Terrorism Cases Fall, Transactional Records Access Clearinghouse (Sept. 14, 2011), http://trac.syr.edu/immigration/reports/261/ [hereinafter TRAC, Immigration Backlog] (on file with the *Columbia Law Review*) (documenting backlog of immigration cases).

17. See infra Part III.B.1 (discussing arguments in favor of adopting constructive discovery standard).

18. See Brent S. Wible, The Strange Afterlife of Section 212(c) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry After *St. Cyr*, 19 Geo. Immigr. L.J. 455, 457 (2005) (discussing how immigration law developed in response to "perceived socio-political crises").

"undesirables" and protect the labor market, the government now regulates immigration as a means of promoting public safety and national security.[19] The statute governing illegal reentry, including its "found in" clause, is no exception. Part I.A will highlight the origins of the illegal reentry statute. Part I.B will then discuss the statute's modern form, including the "found in" clause, its legislative history, and how the law is enforced today.

A. *The Origin of Illegal Reentry: Criminalization*

Congress first codified illegal reentry in the early twentieth century not as a general criminal prohibition, but as two separate misdemeanor restrictions on the entrance of prostitutes and anarchists into the United States.[20] Passed at a time when Congress kept the nation's borders largely open in an effort to attract human capital,[21] the two laws served little more than a symbolic role.[22] In 1929, Congress passed a more broadly applicable prohibition on illegal reentry, classifying it as a felony punishable by two years in prison.[23] However, despite a growing belief among members of Congress that immigration law was properly a criminal enterprise regulated through deterrence,[24] the law prohibiting illegal reentry was hardly enforced because of a lack of manpower at the border.[25]

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19. Kevin J. Fandl, Immigration Posses: U.S. Immigration Law and Local Enforcement Practices, 34 J. Legis. 16, 18–20 (2008) (discussing shift from focus on labor concerns in late nineteenth and early twentieth centuries to current focus on national security).

20. Act of Oct. 16, 1918, ch. 186, § 3, 40 Stat. 1012, 1012–13 (repealed 1952) (anarchists); Act of Mar. 26, 1910, ch. 128, § 3, 36 Stat. 263, 264–65 (repealed 1917) (prostitutes).

21. Aimee Deverall, Comment, Make the Dream a Reality: Why Passing the Dream Act is the Logical First Step in Achieving Comprehensive Immigration Reform, 41 J. Marshall L. Rev. 1251, 1255–56 (2008). Informal border crossings were common: As late as 1906, only seventy-five immigration officials patrolled the southern border with Mexico. Id. at 1256.

22. Keller, Re-thinking, supra note 1, at 74 ("The effect of the two prior illegal reentry provisions, however, did not extend beyond their symbolic value of congressional concern about prostitution and anarchism. Neither affected the actual administration of immigration policy as the government did not meaningfully enforce either provision and both statutes were ultimately repealed . . . .").

23. Act of Mar. 4, 1929, ch. 690, 45 Stat. 1551; see also Keller, Re-thinking, supra note 1, at 73–75 (discussing this law). Notably, illegal entry remained a misdemeanor. Keller, Re-thinking, supra note 1, at 72.

24. Keller, Re-thinking, supra note 1, at 72, 74 n.29 (noting passage of law was accompanied by "shift in thinking [that] included the belief that the strong hand of the criminal law had a part to play").

25. See id. at 77 ("In 1930, although the government prosecuted a large percentage of the deportable aliens it apprehended, the government could not apprehend even a modest percentage of illegal entrants and re-entrants because the borders were still mostly unguarded . . . .").

More sustained efforts to police immigration law violations began after Congress transferred responsibility for enforcing immigration law from the Bureau of Commerce and Labor to the Department of Justice (DOJ) in 1940, a move intended to promote public safety.[26] While most illegal immigrants at the time were still not pursued, the number of prosecutions for illegal entry and reentry increased markedly.[27] In 1951, the DOJ obtained 15,000 convictions for the two crimes, compared to only 8,000 a few years earlier.[28]

B. *Modern History: The "Found In" Clause*

In 1952, during what Judge Posner called a "xenophobic wartime period,"[29] Congress passed the McCarran-Waters Act, popularly known as the Immigration and Nationality Act, which formed the foundation of modern immigration law.[30] It was with this legislation that Congress added the "found in" clause to the illegal reentry statute.[31] The statute provided that any person who, after having been previously deported, "enters, attempts to enter, or is at any time found in, the United States" is guilty of a felony and subject to two years in prison and/or a $1,000 fine.[32] Apart from changes to the prescribed penalties, the statute remains virtually the same today.

Given the "found in" clause's origins in major legislation, one would think that the statutory history would be helpful in determining its meaning. Unfortunately, pertinent legislative history is almost nonexistent.[33] For example, while illegal reentry was recognized in an INA Senate Report as one of the biggest problems facing the Immigration and

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26. Krikorian Statement, supra note 3, at 12 ("[T]he INS was moved . . . to the Department of Justice, the body then tasked with ensuring homeland security, and the reason for that was, in President Roosevelt's own words, reasons of national safety."); Fandl, supra note 19, at 19 (noting when immigration authority was transferred to DOJ immigration became "national security matter").

27. See Keller, Re-thinking, supra note 1, at 80–81 (noting most immigrants were granted voluntary departure).

28. Id. at 80 (describing increased prosecutions under DOJ). Granted, 500,000 illegal immigrants were still taken into custody each year, so the number of prosecutions remained relatively small as a result of the DOJ's lack of resources and recognition of the continued need for Mexican labor. Id. at 81–82.

29. United States v. Anton, 683 F.2d 1011, 1021 (7th Cir. 1982), overruled by United States v. Carlos-Colmenares, 253 F.3d 276, 277 (7th Cir. 2001).

30. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.); Fandl, supra note 19, at 19 (noting act is "still the basis for federal immigration law today").

31. § 276, 66 Stat. at 229 (codified as amended at 8 U.S.C. § 1326 (2006)); Wible, supra note 18, at 458–59.

32. § 276, 66 Stat. at 229.

33. See United States v. DiSantillo, 615 F.2d 128, 135 (3d Cir. 1980) (noting legislative history of clause is "barren").

Naturalization Service (INS), the Report included little discussion of the specifics of the illegal reentry statute.[34] Similarly, the "found in" clause was only mentioned in passing in a related House Report.[35] As the Ninth Circuit noted after reviewing the INA's legislative history, "Congress was deeply concerned with many facets of the Immigration and Nationality Act of June 27, 1952, but . . . [§] 1326 w[as] not among the debated sections."[36]

One exception to the dearth of discussion of the "found in" clause is a statement made by Deputy Attorney General Peyton Ford during a joint congressional subcommittee hearing on the revision of immigration law prior to the passage of the INA. Deputy Attorney General Ford suggested that the addition of a "found in" clause would help prosecutors establish venue.[37] Rather than forcing investigators to determine exactly where a given illegal reentrant crossed the border, the provision would correct "inadequacies in existing law" by enabling prosecutors to charge illegal immigrants where they were taken into custody.[38]

While this is a plausible rationale for adding a "found in" clause, Congress explicitly cured the venue issue that Peyton Ford identified elsewhere in the INA. Congress granted jurisdiction to the district courts "at any place in the United States at which the violation may occur or at which the person charged with a violation under section 1325 or 1326 of this title may be apprehended."[39] If Congress intended only to simplify venue with the "found in" clause, then this section of the INA was redundant, and the "found in" clause could have been jettisoned. Given that Congress has maintained the "found in" clause through several amendments to the INA, it likely was intended to serve an additional purpose.

In 1980, the Third Circuit had occasion to engage in its own review of the legislative history of the "found in" clause in *United States v.*

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34. See S. Rep. No. 81-1515 (1950), reprinted in 1 Oscar M. Trelles, II & James F. Bailey, III, Immigration and Nationality Acts: Legislative History and Related Documents 1, 629–30 (1979) (discussing scope of deportation issues without referencing reentry).

35. H.R. Rep. No. 82-1365, at 64 (1952), reprinted in 1952 U.S.C.C.A.N. 1653, 1723–24 (noting only that "criminal sanctions are provided for . . . reentry of certain deported aliens"); see also Keller, Re-thinking, supra note 1, at 85 & n.99 (noting, other than passing reference, "[t]he only . . . piece of legislative history concerning the ["found in" clause] merely documents [its] existence").

36. United States v. Ortiz-Martinez, 557 F.2d 214, 216 (9th Cir. 1977).

37. Revision of Immigration, Naturalization, and Nationality Laws: Hearing on S. 716, H.R. 2379, and H.R. 2816 Before Subcomms. of Comms. on the Judiciary, 82d Cong. (1951) (statement of Peyton Ford, Deputy Att'y Gen. of the United States), reprinted in 2 Trelles & Bailey, supra note 34, at 711, 716.

38. Id.; see also Keller, Re-thinking, supra note 1, at 85 (noting how "found in" clause corrected difficulty in establishing venue stemming from Sixth Amendment right to trial where crime is committed).

39. Act of June 27, 1952, ch. 8, § 279, 66 Stat. 163, 230 (codified as amended at 8 U.S.C. § 1329 (2006)).

DiSantillo. While agreeing that venue simplification was one justification for the provision, the court offered an additional explanation. In the decision, cited favorably by other circuits,[40] Judge Aldisert noted:

> Congress must have included the word "found" in § 1326 to alleviate the difficult law enforcement burden of finding and prosecuting this class of illegal aliens, who are already aware that they are in violation of the law as evidenced by their surreptitious entry, before the five year statute of limitations runs.[41]

Thus, the court suggested that practical enforcement considerations, namely the trouble ICE may have locating illegal reentrants and pressing charges against them, *also* explain why Congress added the "found in" clause to § 1326.

However, even in light of *DiSantillo*, the legislative history does not conclusively determine the meaning of the "found in" clause. The subsequent history may therefore be of further assistance. In particular, the most salient drivers for enforcing the law—public safety and national security—lend support to the Third Circuit's claim that practical enforcement concerns led to the addition of the "found in" clause, simply because of how important the law had become.

In the 1980s, illegal reentry was "reconceived as a way to target individuals likely to commit crimes while in the United States illegally—to specifically deter and incapacitate these individuals."[42] Congress passed a series of amendments to the statute consistent with this public safety rationale. In 1988, Congress raised the maximum punishment for illegal reentrants who had previously committed a felony from the standard two-year maximum to five years,[43] and punishments for those who had committed aggravated felonies—murder, drug trafficking, and weapons trafficking—to fifteen years.[44] Senator Lawton Chiles, who introduced this legislation, described the enhancements as a way to target those who planned to reenter the country to commit crimes.[45] In 1994, in the

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40. E.g., United States v. Rodriguez, 26 F.3d 4, 8 (1st Cir. 1994); United States v. Canal-Jimenez, 943 F.2d 1284, 1287 (11th Cir. 1991).

41. United States v. DiSantillo, 615 F.2d 128, 135 (3d Cir. 1980). The Fifth Circuit, in interpreting the "found in" clause, has also considered its effect on law enforcement. See United States v. Compian-Torres, No. 11-10921, 2013 WL 1135808, at *4 (5th Cir. Mar. 19, 2013) (finding knowledge of other state or federal officers insufficient to trigger statute of limitations because "holding otherwise would create a requirement that ICE actively monitor all alien files at all times for any information suggesting an alien had returned to the United States").

42. Keller, Re-thinking, supra note 1, at 92.

43. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345, 102 Stat. 4181, 4471 (codified as amended at 8 U.S.C. § 1326 (2006)).

44. Id. The Sentencing Commission followed suit with similar enhancements. Keller, Re-thinking, supra note 1, at 100.

45. See 133 Cong. Rec. 8772 (1987) (statement of Sen. Lawton Chiles) (noting he was "introducing several bills which [we]re intended to strengthen U.S. immigration law

Violent Crime Control and Law Enforcement Act, Congress again raised the penalty for illegal reentrants who had previously committed aggravated felonies to twenty years.[46] Consistent with this renewed attention to illegal reentry,[47] immigration prosecutions skyrocketed in the late 1990s,[48] while the number of illegal reentry prosecutions increased tenfold between 1997 and 2009.[49]

The 9/11 attacks solidified the dominance of public safety and national security concerns in guiding enforcement of the illegal reentry statute and facilitated illegal reentry's growth into the most prosecuted federal crime.[50] As Senator Lindsey Graham explained, "the immigration debate [took] on a different tone. After 9/11, it [was] no longer about economic and social problems associated with illegal immigration. It [was] about national security problems associated with illegal immigration."[51] Then Secretary of State Colin Powell agreed, arguing that the attacks "fundamentally changed [the nation's] view of the openness of [its] society."[52] In line with this shift in immigration law, the USA PATRIOT Act of 2001 treated the enforcement of immigration law as a key component of the strategy for combating terrorism.[53] Likewise, in the Homeland Security Act of 2002, Congress abolished the INS,[54] granting immigration authority to the newly created Department of Homeland

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against illegal alien felons"); see also 133 Cong. Rec. 28,840 (1987) (statement of Rep. Lawrence Smith) (introducing related bill addressing problem of "criminal aliens").

46. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130001(b), 108 Stat. 1796, 2023 (codified at 8 U.S.C. § 1326(b)).

47. See Stephen H. Legomsky, The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms, 64 Wash. & Lee L. Rev. 469, 471–73 (2007) (discussing criminalization of immigration law); Jennifer M. Chacón, Managing Migration Through Crime, 109 Colum. L. Rev. Sidebar 135, 137 (2009), http://www.columbialawreview.org/wp-content/uploads/2009/12/135_Chacon.pdf (characterizing actions of 1980s and 1990s as evidence that "U.S. government has increasingly handled migration control through the criminal justice system").

48. David Alan Sklansky, Crime, Immigration, and Ad Hoc Instrumentalism, 15 New Crim. L. Rev. 157, 166 (2012); see also Keller, Re-thinking, supra note 1, at 109–10 (noting illegal reentry prosecutions rose dramatically while illegal entry cases remained static).

49. Sklansky, supra note 48, at 166.

50. Id. at 203–04 (discussing intimate connection between national security and immigration enforcement post-9/11).

51. 153 Cong. Rec. 13,598 (2007) (statement of Sen. Lindsey Graham).

52. G. Robert Hillman, 9-11 Has Impeded Immigration Changes, Powell Says, Dall. Morning News (July 12, 2002) (internal quotation marks omitted), http://highbeam.com/doc/1G1-88864642.html (on file with the *Columbia Law Review*).

53. Fandl, supra note 19, at 20.

54. Homeland Security Act of 2002, Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205 (codified at 6 U.S.C. § 291 (2006)).

Security (DHS) to "align immigration enforcement with the war on terrorism."[55]

Congress subsequently established ICE under DHS.[56] It is currently DHS's largest investigative branch[57] and handles all immigration enforcement operations within the interior of the United States.[58] According to the House Committee on the Judiciary, ICE's primary mission is to protect public safety.[59] ICE's Enforcement and Removal Operations (ERO) is similarly designed to "ensur[e] the removal of aliens who pose a threat to national security or public safety through fair and effective immigration law enforcement."[60] Against this backdrop, there were over

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55. Fandl, supra note 19, at 20 ("The USA PATRIOT Act of 2001 focused squarely on the role of immigration in combating terrorism."); cf. Krikorian Statement, supra note 3, at 16 ("[The] homeland-security aspect of immigration services is . . . unlikely to be carried out properly if the INS's functions are split among different executive departments.").

56. Scott Statement, supra note 3, at 1.

57. Id. at 2; Fact Sheet: A Day in the Life of ICE Enforcement and Removal Operations, U.S. Immigration & Customs Enforcement (2011) [hereinafter U.S. Immigration & Customs Enforcement, Fact Sheet], http://www.ice.gov/doclib/news/library/factsheets/pdf/day-in-life-ero.pdf (on file with the *Columbia Law Review*).

58. Chad C. Haddal, Cong. Research Serv., RS 21899, Border Security: Key Agencies and Their Missions 2–3 (2010). The United States Border Patrol has jurisdiction at the border. Id. at 2.

59. Immigration and the Alien Gang Epidemic: Problems and Solutions: Hearing Before Subcomm. on Immigration, Border Security, & Claims of H. Comm. on the Judiciary, 109th Cong. 4 (2005) (statement of Michael J. Garcia, Assistant Secretary, U.S. Immigration and Customs Enforcement); see also U.S. Gov't Accountability Office, GAO-08-67, Immigration Enforcement: ICE Could Improve Controls to Help Guide Alien Removal Decision Making 1 (2007) [hereinafter GAO, Improve Controls], available at http://www.gao.gov/assets/270/268081.pdf (on file with the *Columbia Law Review*) ("According to its strategic plan, ICE focuses the greater part of its immigration enforcement efforts on aliens who pose a threat to national security and public safety . . . ."). Note that in 2010, ICE was reorganized, and the name of the Office of Detention and Removal (DRO), as referred to in these sources, was changed to the Office of Enforcement and Removal Operations (ERO). Andrew Becker, Rebranding at ICE Meant to Soften Immigration Enforcement Agency's Image, Wash. Post (June 17, 2010) http://www.washingtonpost.com/wp-dyn/content/article/2010/06/16/AR2010061605324.html (on file with the *Columbia Law* Review).

60. U.S. Immigration & Customs Enforcement, Fact Sheet, supra note 57; see also Enforcement and Removal Operations, U.S. Immigration & Customs Enforcement, http://www.ice.gov/about/offices/enforcement-removal-operations/ (on file with the *Columbia Law Review*) (last visited Mar. 9, 2013) [hereinafter, U.S. Immigration & Customs Enforcement, Enforcement and Removal Operations] (identifying mission "[t]o identify, arrest, and remove aliens who present a danger to national security or are a risk to public safety, as well as those who enter the United States illegally"). Granted, the focus of immigration law at the time was not entirely on public safety. President George W. Bush argued vigorously for comprehensive immigration reform for a variety of reasons, including economic concerns. See Immigration Reform, U.S. Immigration Support, http://www.usimmigrationsupport.org/immigration-reform.html (on file with the

35,000 illegal reentry prosecutions in 2010, a number that continued to increase in 2011.[61] Today, illegal entry and reentry prosecutions make up almost half of all federal prosecutions: approximately 75,000 a year.[62] The public safety and national security narrative thus predominates both ICE's mandate and the enforcement of the illegal reentry statute.

Still, interpreting the "found in" clause in light of these concerns does not provide clear guidance on what the "found in" clause means. Rather, the "precise contours" of the "found in" clause remain undefined,[63] warranting further investigation of the circuit split itself. Part II will detail the positions of each of the federal circuits, including how each has justified its adoption, rejection, or endorsement of a modified version of the constructive discovery standard.

II. INTERPRETATIONS OF THE "FOUND IN" CLAUSE: THE CONSTRUCTIVE DISCOVERY CIRCUIT SPLIT

It is rare for the mental state of the government to be an element of a crime in a criminal statute, as it is usually the defendant's actions alone that govern whether a crime has been committed. Thus, with the addition of the phrase "at any time found in" to § 1326(a), Congress created a means of committing the crime of illegal reentry that was, to some extent, out of step with the rest of the criminal law. The crime is one that "depends not only on the conduct of the alien but also on the acts and knowledge of the federal authorities."[64] In this context, reading a constructive discovery standard into the "found in" clause would push the law further out of the mainstream, rendering the *ability* of the federal government to discover the presence of an illegal reentrant sufficient to complete the crime.

The uniqueness of the "found in" clause, and the implications of its interpretation, have led courts to spend considerable time interpreting it, defining the provision in a number of different ways. Such interpretations and their justifications are the subject of this section. First, Part II.A will discuss other instances of constructive discovery (or knowledge) in U.S. law, underscoring how unique the adoption of a constructive dis-

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Columbia Law Review) (last visited Mar. 18, 2013) (outlining President Bush's proposed immigration reforms).

61. See TRAC, Top Charge, supra note 4 (reporting current prosecution rates and noting there were 18,552 illegal reentry prosecutions in first half of fiscal year 2011).

62. Id. In fact, there are so many illegal reentry prosecutions that the District Court of Arizona declared a judicial emergency in response. Keller, Re-thinking, supra note 1, at 67 ("The District Court of Arizona . . . was driven to declare a judicial emergency—the first time any district has been forced to do so in almost three decades.").

63. Daniel P. Blank, Note, Suppressing Defendant's Identity and Other Strategies for Defending Against a Charge of Illegal Reentry After Deportation, 50 Stan. L. Rev. 139, 147 (1997).

64. United States v. Rivera-Ventura, 72 F.3d 277, 281 (2d Cir. 1995).

covery standard would be. Second, Part II.B will outline two factors relevant to interpreting the "found in" clause—continuing offenses and whose knowledge matters—that ultimately are not dispositive in determining each federal circuit's resolution of the constructive discovery issue. Third and finally, Part II.C will describe the circuit split itself, categorizing the federal circuits into three groups: (a) those applying the constructive discovery standard in its entirety, (b) those rejecting it in its entirety, and (c) those espousing a middle ground in which the court may only impute knowledge of an illegal reentrant's status, rather than that of his presence, to the federal government—the modified constructive discovery standard.

A. *Constructive Knowledge in U.S. Law*

Federal courts have generally been hesitant to impute knowledge to the federal government.[65] For example, in criminal procedure, courts are reluctant to hold that the government has the same knowledge as that of its agents.[66] Likewise, in property law, the government's land cannot be adversely possessed—the government cannot be held to have constructive knowledge of the presence of another on its property.[67]

There are, however, a few areas of U.S. law in which the government *is* sometimes held to have constructive knowledge. For example, in *Brady* cases, the prosecution may be imputed with the knowledge of its agents if the agents know of exculpatory evidence that should be disclosed to a defendant.[68] Additionally, courts may impute the government with knowledge of unilateral contractual mistakes. As the Federal Circuit noted, "[I]n limited circumstances . . . if the government has knowledge, or constructive knowledge, that a contractor's bid is based on a mistake, and the government accepts the bid and awards the contract . . . then a

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65. While there are other uses of the phrase "found in" in the U.S. Code, the statutes in which they are contained have not been thoroughly analyzed by the courts, nor have they been interpreted to include a constructive discovery standard. Such statutes include 18 U.S.C. § 32 (2006) (destruction of aircraft or aircraft facilities), 18 U.S.C. § 2280 (violence against maritime navigation), 18 U.S.C. § 2332f (bombings of places of public use), and 49 U.S.C. § 46502 (2006) (aircraft piracy). The "found in" clause of 18 U.S.C. § 32 has been discussed, but only to the extent that it implicates voluntariness. See, e.g., United States v. Yousef, 327 F.3d 56, 89–90 (2d Cir. 2003).

66. See United States v. Geames, 427 F.3d 1333, 1337 n.2 (10th Cir. 2005) ("[W]e do not hasten to impose . . . constructive knowledge on the government. Indeed, in cases such as this, where no record evidence supports any awareness by the local police or federal officers of the alleged suppressed evidence, we refrain from conjuring up its existence.").

67. See, e.g., Redfield v. Parks, 132 U.S. 239, 242–43 (1889) ("[N]o adverse possession of land can be acquired while the title is still in the United States government . . . .").

68. See, e.g., Smith v. Sec'y of N.M. Dep't of Corr., 50 F.3d 801, 824–25 (10th Cir. 1995) (noting knowledge of police or investigators may be imputed to prosecution).

trial court may reform or rescind the contract."[69] Courts also sometimes impute the government with knowledge of dangers for which it is responsible, such as hazards in a national park.[70]

Unfortunately, it is hard to distill any sort of pattern from these examples that indicates when imputing knowledge to the federal government is appropriate.[71] Still, it is important to note that none of the examples listed above implicate substantive criminal law.[72] In fact, the impact of imputing knowledge in these examples pales in comparison to what the impact of a constructive discovery standard could be if uniformly applied in illegal reentry cases. Because illegal reentry is the most prosecuted federal criminal offense,[73] and its prohibition is central to the protection of public safety,[74] the impact on enforcement may be particularly pronounced.[75] Thus, holding the federal government to have constructively discovered an illegal reentrant would not only be far from ordinary, but also could have more dramatic consequences than other statutes interpreted to include a constructive knowledge component.

B. *Continuing Offenses and Whose Knowledge Matters*

When interpreting the "found in" clause, particularly vis-à-vis the constructive discovery standard, the federal circuits often consider two issues: whether or not illegal reentry is a continuing offense and whose knowledge matters. Importantly, the continuing offense issue is a factor that *can* be used to justify a position on the constructive discovery issue, though circuits with the same view on whether or not illegal reentry is a continuing offense have come out differently on whether or not a con-

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69. Giesler v. United States, 232 F.3d 864, 869 (Fed. Cir. 2000) (citing United States v. Hamilton Enters., Inc., 711 F.2d 1038, 1046 (Fed. Cir. 1983)).

70. See Adams v. United States, 239 F. Supp. 503, 507 (E.D. Okla. 1965) (imputing government with knowledge of hazard in national park because it should have been discovered in exercise of ordinary care).

71. Granted, one factor worth considering is whether the government had a duty to obtain that knowledge. For an example in the context of the examination of contract bids for mistakes, see *Giesler*, 232 F.3d at 871–76 (considering government's duty to examine in determining whether contract rescission is permissible).

72. While the Supreme Court was asked in *Ashcroft v. Iqbal* to decide whether a supervising federal employee may be held accountable for the actions of his subordinates on a constructive notice basis, it did not ultimately decide the issue. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1956 (2009) (Souter, J., dissenting) ("[The parties] asked . . . whether they could be held personally liable for the actions of their subordinates based on . . . constructive notice of their subordinates' unconstitutional conduct. . . . [The certified question did not] ask[] the parties or the Court to address the elements of such liability.").

73. See TRAC, Top Charge, supra note 4 (noting illegal reentry was most common lead charge brought by federal prosecutors during first half of 2011 fiscal year).

74. See supra notes 42–49 and accompanying text (noting evidence of public safety rationale).

75. See infra Part III.B.2 (discussing effect of constructive discovery statute on ICE).

structive discovery standard should be adopted. The question of whose knowledge matters, by contrast, plays a role only after a circuit adopts a constructive discovery standard, as it identifies the type of knowledge necessary to meet that standard.

1. *Continuing Offenses.* — A continuing offense is a crime that does not end at a certain time, where "each day's acts bring a renewed threat of the substantive evil Congress sought to prevent" despite fulfillment of the elements of the crime.[76] For such crimes, the statute of limitations does not begin to run until the last act in furtherance of the crime is completed, i.e., not until the "proscribed course of conduct" ends.[77]

Based on the phrase "at any time found in the United States" in § 1326(a)(2), one could argue that illegal reentry is a continuing offense and that mere illegal presence in the United States constitutes continued violation of the statute. Taken to its logical extreme, as long as a given illegal reentrant remains in the United States (an act in furtherance of the crime of illegal reentry), the statute of limitations begins anew each time law enforcement discovers him.[78] If illegal reentry is a continuing offense in this sense of the term, the adoption of a constructive discovery standard would have no effect on law enforcement at all: At any time, ICE could simply rediscover the illegal reentrant in question in order to restart the statute of limitations.

For a crime to be considered a continuing offense, either "the explicit language of the substantive criminal statute [must] compel[] such a conclusion" or "the nature of the crime involved [must be] such that Congress must assuredly have intended that it be treated as a continuing one."[79] Using the latter test, most courts, including those that maintain different positions on the constructive discovery issue, have held that illegal reentry is a continuing offense and that mere presence in the United States violates the statute.[80] Importantly, though, these courts

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76. Toussie v. United States, 397 U.S. 112, 122 (1970).

77. Id. at 124 (White, J., dissenting) ("[I]n the case of a 'continuing offense,' the crime is not exhausted for purposes of the statute of limitations as long as the proscribed course of conduct continues.").

78. The case law defining the crime as a continuing offense, however, does not support this contention. See, e.g., United States v. Hernandez, 189 F.3d 785, 791 (9th Cir. 1999) (noting this interpretation is "unsupported by a single published decision" and would produce "unfair and absurd results").

79. *Toussie*, 397 U.S. at 115.

80. Compare United States v. Are, 498 F.3d 460, 462 (7th Cir. 2007) (rejecting constructive discovery and noting "[t]he 'found in' variation of the § 1326(a)(2) crime is a continuing offense"), with United States v. Scott, 447 F.3d 1365, 1368–69 (11th Cir. 2006) (adopting constructive discovery and stating "[t]he government correctly states that a violation of § 1326 is a continuing offense"), United States v. Santana-Castellano, 74 F.3d 593, 598 (5th Cir. 1996) (adopting modified constructive discovery and noting "[w]here a deported alien enters the United States and remains here with the knowledge that his entry is illegal, his remaining here until he is 'found' is a continuing offense"), and United

have not endorsed the extreme version of this position outlined above. Instead, they hold that the crime of illegal reentry is complete when the federal government *first* discovers, or has the ability to discover, the illegal reentrant, and that the statute of limitations does not restart upon subsequent discovery.[81] Thus, even if illegal reentry were a continuing offense, the statute of limitations would still constrain law enforcement efforts.

As a result of this more moderate interpretation, while courts often consider whether or not illegal reentry under § 1326(a)(2) is a continuing offense when interpreting the "found in" clause, this issue does not definitively determine their position on the constructive discovery standard issue.[82] Indeed, a constructive discovery standard has been adopted both by courts that find illegal reentry to be a continuing offense and by those that do not.[83] Thus, whether or not illegal reentry is a continuing offense is not ultimately relevant to the resolution of the circuit split.

2. *Whose Knowledge Matters.* — There is also some disagreement among the circuits about whom the federal government consists of, i.e., whose knowledge matters when determining if the federal government has discovered an illegal reentrant. This issue is relevant *after* a given circuit adopts a constructive discovery standard, as it helps to identify what, exactly, serves to satisfy that standard.

First, can the knowledge of state officials be attributed to the federal government? If such knowledge can be imputed, a constructive discovery standard would have quite a broad scope. In light of the immigration law enforcement authority given to state and local officials under INA section 287(g),[84] as well as the myriad of minor offenses that local actors enforce,

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States v. Guzman-Bruno, 27 F.3d 420, 422–23 (9th Cir. 1994) (adopting constructive discovery and holding "[a] violation of 8 U.S.C. § 1326 for being found in the United States after a prior deportation is a continuing offense").

81. See, e.g., *Are*, 498 F.3d at 462 (noting statute of limitations begins to run when defendant is actually discovered); *Scott*, 447 F.3d at 1369 ("[T]he offense conduct begins when the alien illegally enters the United States and continues until the alien is actually 'found' by immigration authorities."); *Santana-Castellano*, 74 F.3d at 598 ("[A] previously deported alien is 'found in' the United States when his physical presence is discovered and noted by the immigration authorities . . . ."); *Guzman-Bruno*, 27 F.3d at 422–23 ("The district court was correct to count the date Guzman-Bruno was arrested by INS agents as the day that he committed the offense of being a deported alien found in the United States under 8 U.S.C. § 1326.").

82. See supra note 80 (noting positions of several courts). The exceptions are the Fourth and Seventh Circuits. They reject the application of a constructive discovery standard outright on the basis that such a standard is inconsistent with the fact that § 1326(a)(2) is a continuing offense. See infra Part II.C.2 (describing position of Fourth and Seventh Circuits).

83. See supra note 80 (noting positions of several courts).

84. 8 U.S.C. § 1357(g) (2006); see infra notes 183–189 and accompanying text (discussing nature and scope of § 1357(g)). The Supreme Court recently addressed the extent to which the states can enforce federal immigration law in the context of Arizona's

their knowledge of an illegal reentrant would often likely be sufficient to meet a constructive discovery standard on its own, causing the statute of limitations to begin to run earlier than it otherwise would. Potentially because of the major burden that this interpretation would place on law enforcement, most courts refuse to impute the knowledge of state officials to the federal government for purposes of the "found in" clause.[85]

Second, is the knowledge of low-level federal officials sufficient to meet a constructive discovery standard? Imputing this type of knowledge would also render the constructive discovery standard quite broad by requiring that ICE carefully train and closely monitor its low-level employees. While there is little discussion of this aspect of the circuit split in the courts, the Eleventh Circuit in *United States v. Palomino Garcia* did hold that, in at least some circumstances, the knowledge of low-level employees cannot be attributed to the federal government as a whole.[86] In analyzing the prudence of imputing knowledge to the federal government based on the filing of routine immigration papers, the court noted:

> [H]olding immigration authorities had constructive notice of Mr. Palomino Garcia's illegal reentry based on Mrs. Palomino's pre-completion I-130 filings would all but mandate the agency adopt procedures requiring low-level employees charged with the initial processing of I-130 Petitions to scan continuously the stream of paper flowing across their desks, lest a later prosecution be barred by the statute of limitations. We decline to impose such a rule . . . .[87]

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controversial immigration bill (SB 1070) in Arizona v. United States, 132 S. Ct. 2492 (2012). Among other things, the Court held that the states cannot decide if an alien is removable on their own grounds and that § 1357(g) represents one of the "limited circumstances in which state officers may perform the functions of an immigration officer" under the Attorney General's supervision. Id. at 2496.

85. See, e.g., United States v. Uribe-Rios, 558 F.3d 347, 352–53 (4th Cir. 2009) ("[C]ourts have uniformly declined to find that state officials' knowledge of an alien's illegal presence in the United States may be imputed to federal immigration authorities to trigger the limitations period."); United States v. Clarke, 312 F.3d 1343, 1347 (11th Cir. 2002) (holding, after analyzing cases from various circuits, "[t]o the extent that [the reentrant] contends that the knowledge of Florida police can be imputed to the INS and therefore is sufficient to start the running of the five-year statute of limitations, we reject this argument"); United States v. Mercedes, 287 F.3d 47, 55 (2d Cir. 2002) (refusing to "adopt a rule that would make the INS responsible for any immigration-related information discovered in *state* investigations of the hundreds of thousands of prisoners in state custody at any given time"). But see United States v. Jimenez-Borja, 378 F.3d 853, 858 (9th Cir. 2004) (accepting knowledge of local police as sufficient).

86. 606 F.3d 1317, 1325 n.8 (11th Cir. 2010).

87. Id.

Thus, in most cases, it is likely unreasonable to impute the knowledge of low-level federal employees to the federal government as a whole, absent a clear delegation of responsibility.

A line-drawing problem certainly remains—it is unclear which ICE employees are sufficiently high-level for their knowledge to be attributed to the federal government and which are not. Given the reluctance of courts to attribute the knowledge of low-level employees to the federal government in general,[88] however, it seems safe to say that the only pertinent knowledge to consider when interpreting the "found in" clause is that to which higher-level federal government employees are privy.[89]

C. *The Positions of the Federal Circuits*

To understand the position of the federal circuits, recall that the "found in" clause requires that the federal government have knowledge of both the presence and status of an illegal reentrant.[90] Building on this foundation, the federal circuits have interpreted the "found in" clause by (a) adopting a constructive discovery standard, (b) rejecting a constructive discovery standard, or (c) endorsing a modified constructive discovery standard by applying it to an illegal reentrant's status, but not his presence.

Before diving into each of these positions, two caveats are in order. First, the categories presented above are not the only way to classify each circuit's stance.[91] While the Fourth and Seventh Circuits certainly reject constructive discovery, the positions of the other circuits tend to overlap, with courts sometimes citing with approval decisions from other circuits

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88. Cf. supra Part II.A (outlining exceptions to hesitance of courts to impute knowledge to federal government).

89. The Fifth Circuit has also implied that the only relevant knowledge is that of federal *immigration* officials. See United States v. Compian-Torres, No. 11-10921, 2013 WL 1135808, at *4 (5th Cir. Mar. 19, 2013) (finding knowledge of other state or federal officers insufficient to trigger statute of limitations because "[i]n order to be 'found' under § 1326, an alien's physical presence must be discovered and noted *by immigration authorities* and the illegality of the alien's presence must be reasonably attributable *to immigration authorities*"). The court also noted that "holding otherwise would create a requirement that ICE actively monitor all alien files at all times for any information suggesting an alien had returned to the United States." Id.

90. See supra text accompanying note 8 (discussing requirements of statute).

91. For alternative characterizations of the circuit split, see J. Gabriel Carpenter, Recent Development, Immigration—*United States v. Are*: Deciding Whether Actual or Constructive Knowledge Starts the Statute of Limitations for Deported Aliens "Found in" the United States, 31 Am. J. Trial Advoc. 681, 684–86 (2008) (including Second and Tenth Circuits among those circuits adopting constructive discovery standard and Third Circuit among those rejecting it); Mroczkowski, supra note 9, at 554 ("Of the eight federal circuits that have specifically addressed the issue, five have adopted a constructive discovery standard[:] . . . [t]he Second, Fifth, Eighth, Tenth and Eleventh Circuits.").

that endorse a different interpretation of the "found in" clause.[92] Therefore, while categorizing the positions of each circuit into three groups is a logical means of understanding the circuit split, it is impossible to be completely faithful to the intricacies of each decision. Second, to illustrate the position of each circuit, this Note refers to cases often cited in later decisions for their interpretations of the "found in" clause. While some of these cases concern whether or not a prosecution is time-barred, others center on the application of sentencing enhancements. In those cases, the court has to determine when the government discovered the presence of an illegal reentrant because the court can only apply those sentencing enhancements that were in effect when the discovery was made. Additionally, oftentimes the facts of a given case do not fit the rule that the court articulates; cases of this sort are discussed due to the importance of the specific formulation of the rule, rather than the rule's application to the facts of the case.[93]

1. *Full Constructive Discovery: Third, Eighth, and Eleventh Circuits.* — The Third, Eighth, and Eleventh Circuits hold that the "found in" clause is met when the federal government could have, "through the exercise of diligence typical of law enforcement authorities,"[94] discovered the presence and status of the illegal reentrant in question. To this end, courts in these circuits first determine what information was available to law enforcement at a given time and how it could have used that information. Then, if a court finds that the federal government could have discovered the illegal reentrant, they hold that the statute of limitations began to run when law enforcement obtained that capability—i.e., when sufficient information came to their attention.[95] The time at which the federal government *actually* discovered an illegal reentrant is only important in these circuits if the government had not previously constructively discovered him.

In addition to similarly interpreting the "found in" clause, these circuits also share the same approach to reaching that interpretation. First, they tend to blend the two prongs of the "found in" clause—knowledge of presence and knowledge of status—together, resulting in a standard in which "the statute of limitations for a 'found in' violation begins on the date the alien comes to the attention of immigration authorities."[96] Second, these circuits often derive their decisions from the reasoning of

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92. See, e.g., infra note 137 and accompanying text (describing one such instance).

93. See, e.g., United States v. Rivera-Ventura, 72 F.3d 277, 282, 284–85 (2d Cir. 1995) (articulating modified constructive discovery standard yet finding statute of limitations did not run because defendant was fugitive from justice).

94. See, e.g., United States v. Gomez, 38 F.3d 1031, 1037 (8th Cir. 1994).

95. See, e.g., id. (holding government may be imputed with knowledge of element of crime when it has means of obtaining that knowledge).

96. E.g., United States v. Lennon, 372 F.3d 535, 540 (3d Cir. 2004) (citing United States v. DiSantillo, 615 F.2d 128, 135 (3d Cir. 1980)).

the aforementioned Third Circuit case, *United States v. DiSantillo*. The *DiSantillo* court stated that "[i]f no record [of an illegal reentrant's border crossing] is possible because the entry was surreptitious and not through an official port of entry, [an illegal reentrant] is 'found' when his presence is first noted by the immigration authorities."[97] Although the court was ruling on the "enters" clause in § 1326(a)(1) when it held that a prosecution for illegal reentry was time-barred because the government could have discovered the defendant's *entry* into the country,[98] the court's analysis of that clause, and the frequency with which the analysis is cited in cases concerning the "found in" clause, render *DiSantillo* instructive.

The Third Circuit articulated its current interpretation of the "found in" clause in *United States v. Lennon*.[99] Unlike *DiSantillo*, *Lennon* involved the application of a sentencing enhancement that became law after the defendant had reentered the country.[100] Looking to *DiSantillo*, the *Lennon* court, based on the plain meaning of the statute and its "found in" clause, stated that "the statute of limitations only begins to run once the government is on notice of the alien's illegal presence in the United States."[101] The court made clear that "immigration authorities should be imputed with 'knowledge' of an alien's presence" in some instances.[102] While the *Lennon* court did not ultimately impute knowledge of the defendant to the federal government in the case before it,[103] the

97. *DiSantillo*, 615 F.2d at 137.

98. Id. at 135–37. The court concluded that surreptitious entry was a prerequisite to a "found in" violation, for otherwise the term "enters" in the statute would be redundant; those crimes would be subsumed by "found in" violations. Id. at 135. Recall that 8 U.S.C. § 1326 is not limited to the "found in" clause, but rather also provides that an illegal reentry occurs when an individual enters or attempts to enter the United States after having previously been deported. See supra text accompanying note 6 (providing statutory language).

99. In *Lennon*, the defendant reentered the United States under a pseudonym eleven months after being deported to Jamaica. 372 F.3d at 537. She committed several crimes after her reentry, including shoplifting and possession of marijuana with intent to distribute. Id. The INS learned of her presence from an anonymous tip nearly seven years after her reentry. Id. The date on which the defendant violated the statute was central to determining the applicable sentencing enhancement law, as well as which of the defendant's crimes counted towards enhancements. Id. at 537–38.

100. Id. at 539 ("Lennon first contends that the version of the Guidelines in force on the date of her 1994 re-entry . . . should have been used . . . . Those guidelines would have been more favorable to her . . . .").

101. Id. at 540.

102. Id. at 540–41.

103. Acknowledging the unique facts of the case, the *Lennon* court held that because the defendant attempted to conceal her identity when she crossed the border, knowledge of her presence should not be imputed. Id. at 541. The court feared that "[t]o hold otherwise would . . . favor the illegal reentrants who affirmatively conceal their identities over those who honestly use their own names," causing them to benefit from the protection of the earlier running of the statute of limitations. Id. One author saw this as

rule it articulated embraced a constructive discovery standard. Moreover, because the court did not distinguish between knowledge of a reentrant's physical presence in the United States and knowledge of his illegal status, it seems reasonable to conclude that the Third Circuit's position is that a constructive discovery standard may be applied to both elements.[104]

The Eighth Circuit, in *United States v. Gomez*, applied a constructive discovery standard when holding that an illegal reentry prosecution was time-barred.[105] Looking to *DiSantillo*, the *Gomez* court, adopting a "discovery rule" that is sometimes applied to plaintiffs in civil jurisprudence,[106] held that knowledge of an element of an offense can be imputed to the federal government when it has the information and means to obtain knowledge of that element.[107] The court reasoned that without such a rule, criminal defendants would be deprived of their right to protection from the statute of limitations.[108] The court summed up its position as follows: "[W]e believe that the statute of limitations for a 'found in' violation should . . . begin running when immigration authorities could have, through the exercise of diligence typical of law enforcement authorities, discovered the violation."[109]

Applying this standard to the facts of the *Gomez* case, the court held that knowledge of an illegal reentrant can be imputed to the federal government when the lack of that knowledge is attributable to "negligence by the government."[110] Because the INS in this case could have conducted a fingerprint comparison when the defendant presented himself and was fingerprinted at an INS naturalization office, the court held that the federal government had constructively discovered the defendant's illegal presence at that time, thereby rendering his prosecution time-barred.[111] While this holding was specific to knowledge of illegal status,[112]

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evidence that the court had not, in fact, adopted a full constructive discovery standard. See Mroczkowski, supra note 9, at 554 n.163 ("The Third Circuit's approach includes shades of both an actual and a constructive discovery standard.").

104. The court's own language seems to suggest this conclusion. See *Lennon*, 372 F.3d at 541 ("[T]he offense of being 'found in' the United States is 'committed' when the alien comes to the affirmative attention of INS officials."). At least one author, however, classifies this circuit as adopting an actual discovery standard. See Carpenter, supra note 91, at 684–85.

105. 38 F.3d 1031, 1037–38 (8th Cir. 1994).

106. For more information about the discovery rule, see, e.g., James R. MacAyeal, The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims, 15 Va. Envtl. L.J. 589, 594–98 (1996) ("Under the discovery rule . . . a plaintiff's claim does not accrue until the plaintiff knows, or in the exercise of reasonable diligence should know, of certain facts underlying the claim.").

107. *Gomez*, 38 F.3d at 1037.

108. Id.

109. Id.

110. Id. at 1038.

111. Id. at 1037–38.

the wording of the "discovery rule"—particularly its reference to a "violation" of the clause—suggests it applies to both the presence and status elements of the "found in" clause.

Finally, the Eleventh Circuit, in *United States v. Clarke*, also applied a full constructive discovery standard.[113] In *Clarke*, the court considered whether or not the statute of limitations barred an illegal reentry prosecution because the federal government "could have discovered [the defendant's] illegal presence."[114] In this case, it held that the INS discovered the defendant when an INS agent interviewed him in prison, rather than when state authorities identified him three years earlier, because the INS had no procedures or leads that it failed to follow prior to the interview, and because the knowledge of state authorities could not be imputed to the INS.[115] Nonetheless, because the term "illegal presence" in the court's test seems to refer to both the presence and status of an illegal reentrant, the Eleventh Circuit would likely be willing to impute knowledge of either factor in future cases.[116]

While these circuits all seem to endorse a full constructive discovery standard, there is a subsidiary issue, namely what amount of available information is sufficient for a court to determine that law enforcement could have, through the exercise of diligence typical of law enforcement authorities, found an illegal reentrant. As of yet, there is no clear answer to this question, nor can such an answer be easily obtained given the varying contexts of each illegal reentry case. As a result, the standard would likely be subject to substantial judicial discretion, its bounds defined by what the court decided law enforcement reasonably could have, and should have, discovered in a given case.[117] Consequently, if a constructive

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112. Id. at 1037 ("[K]nowledge of Gomez's status should be attributed to the government.").

113. 312 F.3d 1343, 1346–48 (11th Cir. 2002).

114. Id. at 1348.

115. Id. at 1346–48.

116. See, e.g., id. at 1347 ("[I]t was the date that the INS, not the state officials, discovered or could have discovered the defendant's illegal presence that mattered to the court's analysis."). Notably, the *Clarke* court also misconstrued the *DiSantillo* holding. Without mentioning the difference in the charged offense in each case, the *Clarke* court distinguished *DiSantillo* by explaining that more information was available to law enforcement in that case, implying it was a "found in" case where the imputation of constructive knowledge was justified. See id. at 1348 n.4 (explaining *DiSantillo* as "finding that defendant was found and § 1326 offense completed when defendant entered United States through recognized immigration port of entry . . . because immigration authorities knew of his entry and 'could have, through the exercise of diligence typical of law enforcement authorities, discovered his violations at that time'").

117. For example, in *United States v. Bencomo-Castillo*, the Tenth Circuit refused to impute knowledge of a reentrant's status because (a) such knowledge could not have been discovered during routine screening procedures (and the government had "no legal duty under § 1326 to conduct a more exhaustive investigation") and (b) though the government must exercise "'diligence typical of law enforcement authorities,'" the court

discovery standard were adopted, this indeterminacy would likely cause ICE to be even more cautious in managing the statute of limitations.[118]

2. *No Constructive Discovery: Fourth and Seventh Circuits.* — An alternative to the approach of the first group of circuits is to reject the application of a constructive discovery standard entirely. The Fourth and Seventh Circuits endorse this approach, adopting an "actual discovery" standard whereby only the knowledge that the federal government possesses—rather than what it *should* or *could* possess—determines when the statute of limitations begins to run.[119]

The Fourth Circuit, in *United States v. Uribe-Rios*, made clear its refusal to adopt a constructive discovery standard. Based on a plain meaning interpretation of the "found in" clause, the court stated that the statute "does not support a theory of constructive knowledge."[120] For this reason, the *Uribe-Rios* court stated that the time at which "'the government "should have discovered" a deportee's illegal presence in the United States is irrelevant to when the statute of limitations begins to run.'"[121] Granted, this analysis was not central to the holding in the case: The *Uribe-Rios* court upheld the conviction in question, noting that whether or not it were to adopt a constructive discovery standard, the federal government could not be imputed with knowledge of the illegal reentrant's presence because he had used an alias upon reentry.[122]

The Seventh Circuit espoused a position identical to that of the *Uribe-Rios* court in *United States v. Are*. Upon his arrest for an unrelated offense following reentry, the defendant in *Are* provided a false name, though city law enforcement provided fingerprints that, together with further investigation, revealed his actual identity.[123] These facts notwithstanding, the district court held that the federal government had gained constructive knowledge of the defendant's illegal presence several years prior to his arrest.[124] The district court reasoned that "the government should have investigated more diligently" given that ICE had both opened an investigative file on the defendant after a previous failed reentry and received a confidential tip about the defendant's location.[125] It therefore ruled that the prosecution was time-barred.[126] Following pre-

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would not "second-guess the FBI's priorities in processing suspects' fingerprints." 176 F.3d 1300, 1304 (10th Cir. 1999).

118. For a discussion of this issue, see infra Part III.B.2.

119. United States v. Uribe-Rios, 558 F.3d 347, 354 (4th Cir. 2009); United States v. Are, 498 F.3d 460, 462 (7th Cir. 2007).

120. *Uribe-Rios*, 558 F.3d at 354.

121. Id. (quoting United States v. Gordon, 513 F.3d 659, 664–65 (7th Cir. 2008)).

122. Id. at 354–55.

123. *Are*, 498 F.3d at 461.

124. Id. at 461–62.

125. Id.

126. Id.

vious holdings in the circuit, however, the Seventh Circuit reversed, holding that "[a] 'constructive knowledge' interpretation—one that starts the statute of limitations clock when the government 'should have found' the deportee—is inconsistent with the straightforward text and obvious purpose of the statute."[127] Thus, the court held that constructive knowledge of an illegal reentrant's presence was "simply irrelevant" to the statute of limitations—i.e., that a constructive discovery standard should not apply.[128]

While the perspective of these circuits is quite clear—constructive discovery does not apply to the "found in" clause—interpretations of the clause are not limited to the view endorsed by these circuits or the aforementioned interpretation advanced by the Third, Eighth, and Eleventh Circuits. Three other circuits, the Second, Fifth, and Tenth, have found a middle ground.[129]

3. *Modified Constructive Discovery: Second, Fifth, and Tenth Circuits.* — The Second, Fifth, and Tenth Circuits have interpreted the "found in" clause by treating an illegal entrant's physical presence and illegal status differently. In these circuits, constructive discovery of only the latter element—status—can be imputed to the federal government. Therefore, the federal government cannot be found to have constructively discovered an illegal reentrant's physical presence in the United States; that presence must be actually discovered. In other words, as articulated by the Second Circuit in *United States v. Rivera-Ventura,* "the offense of being 'found in' the United States . . . is not complete until the authorities both discover the illegal alien in the United States and know, *or with the exercise of diligence typical of law enforcement authorities could have discovered*, the illegality of his presence."[130]

In *Rivera-Ventura*, the Second Circuit evaluated whether or not a prosecution for illegal reentry was time-barred.[131] In discussing the "found in" test quoted above, the *Rivera-Ventura* court noted that the statute of limitations would normally have barred the prosecution in question because the defendant had been apprehended by immigration authorities in 1987 for illegal reentry.[132] It found, however, that the prosecution was not time-barred on other grounds: Because the defendant had absconded after being released on bail, the court held that the

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127. Id. at 462.

128. Id. at 466 & n.2.

129. While Second, Fifth, and Tenth Circuit decisions are sometimes cited incorrectly by courts that endorse a different interpretation of the "found in" clause, their position is decidedly different from the extremes endorsed by the other circuits.

130. 72 F.3d 277, 282 (2d Cir. 1995) (emphasis added) (citation omitted). Note that at least one author has interpreted this test as simply an articulation of a full constructive discovery standard. See Mroczkowski, supra note 9, at 555–58 (discussing *Rivera-Ventura*).

131. *Rivera-Ventura*, 72 F.3d at 279–81.

132. Id. at 281–82.

statute of limitations was tolled because the defendant was a fugitive from justice.[133] Still, though the *Rivera-Ventura* court did not have an opportunity to apply its own test, its interpretation of the "found in" clause is frequently cited.[134]

In a case involving the application of sentencing enhancements—*United States v. Santana-Castellano*—the Fifth Circuit adopted a similar approach to that of the Second Circuit when interpreting the "found in" clause.[135] In *Santana-Castellano*, an INS agent discovered that the defendant was an illegal reentrant during an interview while the defendant was in prison for an unrelated state charge.[136] While the *Santana-Castellano* court favorably cited *United States v. Gomez*, an Eighth Circuit case adopting a full constructive discovery standard discussed above,[137] the "found in" test it articulated reflected the adoption of only a modified constructive discovery standard, wherein immigration authorities could be imputed with knowledge of status—the illegality of a reentrant's presence—after they had actually "discovered and noted" his presence.[138]

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133. Id. at 282, 284–85.

134. E.g., United States v. Mercedes, 287 F.3d 47, 54 (2d Cir. 2002); United States v. Acevedo, 229 F.3d 350, 355 (2d Cir. 2000). Prior to his elevation to the Second Circuit, Judge Chin articulated this test as requiring that immigration authorities "physically locate the alien," finding that knowledge of an illegal reentrant's prior presence in the United States was insufficient to meet the test. United States v. Thomas, 492 F. Supp. 2d 405, 412 (S.D.N.Y. 2007).

135. 74 F.3d 593, 598 (5th Cir. 1996).

136. Id. at 595–96.

137. See supra text accompanying notes 105–112. Notably, the court's reading of *Gomez* seems inaccurate. *Gomez* applied diligence language not only to the illegal status element of a § 1326(a)(2) offense, but to the entire violation. See United States v. Gomez, 38 F.3d 1031, 1037 (8th Cir. 1994) ("[W]e believe that the statute of limitations for a 'found in' violation should also begin running when immigration authorities could have, through the exercise of diligence typical of law enforcement authorities, discovered the violation.").

138. See *Santana-Castellano*, 74 F.3d at 598 ("[A] previously deported alien is 'found in' the United States when his physical presence is discovered and noted by the immigration authorities, and the knowledge of the illegality of his presence, through the exercise of diligence typical of law enforcement authorities, can reasonably be attributed to the immigration authorities." (citing *Gomez*, 38 F.3d at 1037)). Some language in the court's decision in this case and at least one subsequent case seems to suggest that it might, in fact, be willing to apply a full constructive discovery standard. See United States v. Gunera, 479 F.3d 373, 376 (5th Cir. 2007) (holding prosecution was time-barred because "immigration authorities [could] reasonably be attributed with actual knowledge that Gunera was present illegally in the U.S. . . . when the NAILS system identified him as having a prior deportation based on a prior conviction for an aggravated felony . . . [and] provided a U.S. address at which Gunera could be physically located"); *Santana-Castellano*, 74 F.3d at 597 ("[T]he five year statute of limitations under § 1326 begins to run at the time the alien is 'found,' barring circumstances that suggest that the INS should have known of his presence earlier."). However, in a recent illegal reentry decision, the Fifth Circuit again suggested that the test only accommodates imputing knowledge of an illegal reentrant's status. See United States v. Compian-Torres, No. 11-10921, 2013 WL 1135808,

Applied to the facts of the case, the court held that the federal government had not discovered the defendant prior to the interview with an INS agent because the defendant's "physical presence was not noted by immigration authorities at the time of his reentry, nor could awareness of his presence [have been] reasonably attributed to them until his interview with the INS agent in [prison]."[139]

The Tenth Circuit, in *United States v. Bencomo-Castillo*, used the same test.[140] In a case concerning the application of an aggravated felony sentencing enhancement passed after the defendant's illegal reentry, the court held that the federal government had not constructively discovered the illegality (status) of the defendant's presence in the United States prior to the passage of the enhancement.[141] It reasoned that because the defendant used an alias and was in prison over a weekend, a time at which the INS did not routinely check the criminal history of prisoners, the federal government could not be expected to know of the illegality of the defendant's presence.[142] Moreover, the court found that a delay in the FBI's processing of the defendant's fingerprints, a delay that may have caused immigration authorities to discover the defendant a year later than they would have otherwise, was not relevant to the federal government's knowledge of the defendant as the court "decline[d] to second-guess the FBI's priorities in processing suspects' fingerprints."[143] This articulation of the test brings the investigative "duty" of law

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at *4 (5th Cir. Mar. 19, 2013) ("[I]n order to be found, (1) immigration authorities must have specifically discovered and noted the alien's physical presence, and (2) knowledge of the illegality of the alien's presence must be reasonably attributable to immigration authorities."). The *Compian-Torres* court characterized the *Gunera* case as applying only the second prong of this test, given that in that case "immigration authorities . . . had already discovered and noted Gunera's presence" by virtue of his submission of a Temporary Protected Status application. Id.

139. *Santana-Castellano*, 74 F.3d at 598. It is also worth noting that this case was decided prior to the 2008 start of the Secure Communities initiative, which facilitates the identification of criminal aliens among those who are currently incarcerated. See Secure Communities, U.S. Immigration & Customs Enforcement, http://www.ice.gov/secure_communities/ (on file with the *Columbia Law Review*) (last visisted Apr. 24, 2013).

140. 176 F.3d 1300, 1303 (10th Cir. 1999). Notably, in reciting this test, the court cited the Fifth Circuit's *Santana-Castellano* decision, further suggesting that the Fifth Circuit is properly grouped with the Second and Tenth Circuits. Id.

141. Id. at 1304 ("In the instant case, the government had neither constructive nor actual knowledge of Mr. Bencomo-Castillo's prior deportation . . . .").

142. Id.

143. Id. While the court did mention that the government must exercise "'diligence typical of law enforcement authorities'" in attempting to locate deportees, id. (quoting *Santana-Castellano*, 74 F.3d at 598), its refusal to second guess the fingerprint-processing priorities of the FBI indicates that the Tenth Circuit would likely give ICE's resource allocations similar deference.

enforcement officers back into the interpretive picture, a concept discussed earlier in this Note.[144]

4. *Resolving the Circuit Split.* — As of this writing, the First,[145] Sixth,[146] and Ninth[147] Circuits have yet to conclusively decide if the "found in" clause should be interpreted to include a constructive discovery standard, while the D.C. Circuit has yet to even consider the issue.[148] Thus, there remains substantial support for each of the three interpretations of the "found in" clause: adoption, rejection, or adoption of a modified constructive discovery standard.

As noted in Part I, the legislative history fails to provide clear guidance on how to interpret the "found in" clause.[149] Faced with this ambiguity, one possible way forward is to employ the rule of lenity. The rule of lenity provides that those ambiguities in penal statutes should be resolved in favor of the defendant.[150] The doctrine is premised on the idea that a "citizen is entitled to fair notice of what sort of conduct may give rise to punishment,"[151] and that, because of the seriousness of criminal penalties, the legislature, and not the courts, should define what constitutes criminal activity.[152]

Applied to illegal reentry, the rule of lenity counsels the adoption of a full constructive discovery standard. Such a standard would benefit defendants by making it more difficult for them to be prosecuted. As the *Uribe-Rios* court noted, however, finding an implicit constructive discovery standard would require more than just an interpretation of the phrase

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144. See supra note 71 (discussing relevance of duty of law enforcement officers).

145. See United States v. DeLeon, 444 F.3d 41, 52 (1st Cir. 2006) ("We do not, however, resolve the broad question of whether constructive knowledge can be attributed to the government.").

146. See United States v. Garcia-Moreno, 626 F. Supp. 2d 826, 830 (W.D. Tenn. 2009) ("For the purpose of this motion, the Court need not determine whether the Sixth Circuit recognizes a constructive knowledge theory . . . .").

147. See United States v. Hernandez, 189 F.3d 785, 791 (9th Cir. 1999) (stating illegal reentrant must be "discovered and identified" by immigration authorities in order for statute of limitations to run, remaining silent on applicability of constructive discovery standard).

148. Carpenter, supra note 91, at 686 ("[T]he D.C. Circuit has yet to address the issue of when an alien is found under 18 U.S.C. § 1326.").

149. See supra notes 33–36 and accompanying text (noting scant legislative history on "found in" clause).

150. See, e.g., United States v. Bass, 404 U.S. 336, 347–48 (1971) ("[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."); 3 Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 59:3, at 167 (7th ed. 2008) ("[P]enal statutes should be strictly construed against the government . . . .").

151. McNally v. United States, 483 U.S. 350, 375 (1987), superseded by statute, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346 (2006)), as recognized in Skilling v. United States, 130 S. Ct. 2896, 2927 (2010).

152. *Bass,* 404 U.S. at 348.

"found in"—the standard must essentially be read into the text.[153] Moreover, the rule of lenity today only sporadically drives judicial interpretation;[154] some claim it no longer applies at all.[155]

The rule of lenity thus does not provide sufficient guidance for interpreting the "found in" clause. The policy implications of each interpretation can help fill this interpretive void. Given the robust support in subsequent history for interpreting the illegal reentry statute as having a public safety and national security purpose, the potential effect on ICE's enforcement of the law, balanced against any unfair disadvantage suffered by potential defendants, weighs heavily on which interpretation should be adopted. As illustrated by *Gomez* and *Gunera*, courts that apply a constructive discovery standard are not unwilling to hold a "found in" prosecution time-barred on that basis. The resolution of the circuit split thus may have a significant impact on the enforcement of illegal reentry and, given the frequency and importance of illegal reentry prosecutions, on immigration law more generally.

Notably, the Fifth, Ninth, and Tenth Circuits are home to most immigration prosecutions, including those for illegal reentry.[156] The positions of these circuits, however—the circuits in which courts likely wrestle with the issues presented in this Note most often—are not entirely consistent: The Fifth and Tenth Circuits apply a modified constructive discovery standard, while the Ninth Circuit has yet to take a definitive stand.[157] While such positions at the very least suggest that a constructive discovery standard is not incompatible with current enforcement practices, the effect of adopting such a standard across the board may be quite different (and more impactful), as ICE would be forced to change its practices nationwide.

In light of these considerations, Part III of this Note will argue that the approach of the Second, Fifth, and Tenth Circuits—a modified constructive discovery standard—is the best resolution to the circuit split.

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153. United States v. Uribe-Rios, 558 F.3d 347, 354 (4th Cir. 2009) ("[T]he plain text of section 1326 does not support a theory of constructive knowledge.").

154. See Zachary Price, The Rule of Lenity as a Rule of Structure, 72 Fordham L. Rev. 885, 885–86 (2004) (arguing "rule has lately fallen out of favor with both courts and commentators").

155. See Note, The New Rule of Lenity, 119 Harv. L. Rev. 2420, 2420 (2006) ("[C]ritics explain the routine invocations of the rule of lenity as mere lip service: courts may nominally acknowledge the rule, but they find statutes to be unambiguous and therefore decline to apply it unless they would have found for the defendant on other grounds anyway.").

156. See TRAC, Top Charge, supra note 4 (outlining immigration prosecutions by federal district for 2011 fiscal year); Immigration Prosecutions for December 2011, Transactional Records Access Clearinghouse (Mar. 12, 2012), http://tracfed.syr.edu/tracreports/bulletins/immigration/monthlydec11/fil/ (on file with the *Columbia Law Review*) (listing immigration prosecutions by federal district in December 2011).

157. See supra Part II.C (describing positions of the circuits).

Given the overarching public safety and national security rationale, this interpretation achieves the best balance between the effect on law enforcement and fairness to potential defendants.

III. POLICY IMPLICATIONS AND THE PRUDENCE OF A MODIFIED CONSTRUCTIVE DISCOVERY STANDARD

This section will discuss the policy implications of each interpretation of the "found in" clause. Part III.A will briefly discuss how ICE currently enforces the illegal reentry statute and the resource constraints it faces. Part III.B will then outline and evaluate arguments for and against the use of a constructive discovery standard, concluding that adopting a modified constructive discovery standard is the best means of resolving the circuit split.

A. *Enforcement of the Illegal Reentry Statute*

ICE enforces the illegal reentry statute according to its discretion and as resources permit. This subsection will take up each of these issues in turn.

1. *Discretion.* — On an average day, ICE deports 1,057 illegal immigrants, arrests 108 immigrants, and causes United States Attorneys' Offices to accept thirty-five cases for prosecution.[158] In the process, ICE exercises a broad degree of discretion, including deciding "whom to stop, question, and arrest; how to initiate removal; whether to grant voluntary departure (whereby aliens agree to waive their rights to a hearing and are escorted out of the United States to their home countries by ICE officers); and whether to detain an alien in custody."[159] ICE makes such decisions based on its available resources, the national security or public safety threat that a particular illegal immigrant poses, and a number of other contextual factors, including that illegal immigrant's family situation and any contributions he has made to the community.[160] ICE can thus, for example, "consider alternative ways to initiate removal proceedings—other than immediate apprehension and detention—when they encounter aliens who are sole caretakers for minor children or who are

158. U.S. Immigration & Customs Enforcement, Fact Sheet, supra note 57.

159. GAO, Improve Controls, supra note 59, at 2–3 (footnote omitted). See generally Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs. et al., U.S. Immigration & Customs Enforcement (June 17, 2011) [hereinafter Morton Memo, June 17, 2011], available at http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (on file with the *Columbia Law Review*) (discussing prosecutorial discretion and factors influencing its exercise).

160. GAO, Improve Controls, supra note 59, at 3; see also Morton Memo, June 17, 2011, supra note 159, at 2–5 (discussing prosecutorial discretion and factors that influence its exercise, e.g., "the person's ties and contributions to the community, including family relationships").

ill and are undergoing medical treatment."[161] In fact, in some circumstances, ICE may choose not to arrest or question an illegal immigrant at all.[162]

2. *Resources.* — The discretion that ICE officials can exercise is limited by their resources. Put simply, ICE does not have enough manpower to investigate every illegal immigrant that it would like.[163] While the apprehension of criminal aliens increased eighty-five percent from 2007 to 2010,[164] ICE only has the resources to remove less than four percent of the estimated illegal immigrant population each year.[165] The results are not ideal: ICE's inability to "detain and remove illegal aliens with final orders of removal" has led to a number of "mini-amnesties," whereby illegal immigrants are exonerated by default.[166] As a result, despite a

161. GAO, Improve Controls, supra note 59, at 3.

162. See id. at 2–3 (noting ICE officers make enforcement decisions "taking into account all facts and circumstances of each case" including "whom to stop, question, and arrest; how to initiate removal; whether to grant voluntary departure . . . and whether to detain an alien in custody").

163. See Brownback Statement, supra note 16 ("[I]f we shut down the border to a point at which no one crosses illegally, and successfully end 100 percent of the visa overstays and double the number of DRO agents, . . . it will take . . . 25 to 30 years to deport the estimated 11 million to 13 million illegal aliens . . . ."); see also H.R. Rep. No. 109-345, pt. 1, at 461 (2005) (offering dissenting view, noting "well-worn pattern that has emerged over the last five years, wherein the President declines to ask Congress for the resources necessary to secure our border, the Majority, [sic] declines to authorize specific amounts of funding for those resources, and the Majority fails to appropriate adequate resources for those purposes"); Sklansky, supra note 48, at 211 ("Immigration officers do not, and as a practical matter could not, seek to deport everyone they have reason to believe is illegally in the country.").

164. Keller, Re-thinking, supra note 1, at 138.

165. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All U.S. Immigration & Customs Enforcement Emps. 1 (Mar. 2, 2011) [hereinafter Morton Memo, March 2, 2011], available at http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf (on file with the *Columbia Law Review*).

166. Office of the Inspector Gen., Dep't of Homeland Sec., Detention and Removal of Illegal Aliens 1–2 (2006), available at http://www.oig.dhs.gov/assets/Mgmt/OIG_06-33_Apr06.pdf (on file with the *Columbia Law Review*) (noting inability to secure departure has led to release of 280,987 illegal immigrants). In anticipation of budget cuts, one such "mini-amnesty" occurred in late February 2013, when several hundred "low-risk" and "'noncriminal'" ICE detainees were released. Kathleen Hennessey, Detained Immigrants Released; Officials Cite Sequester Cuts, L.A. Times: Politics Now (Feb. 26, 2013, 1:47 PM), http://www.latimes.com/news/politics/la-pn-detained-immigrants-sequester-20130226,0,7739089.story (on file with the *Columbia Law Review*).

recent increase in its manpower,[167] ICE's resources are barely sufficient for carrying out its mission.[168]

Resource constraints first became a major concern when the enforcement of immigration law grew in the 1990s.[169] Illegal reentry prosecutions were a major burden on prosecutors and law enforcement alike because of the sheer number of cases, particularly in border districts.[170] The DOJ, at that time still responsible for immigration law enforcement, responded in two ways. First, it focused enforcement efforts on those who had prior criminal records.[171] Second, it created a number of "fast track" programs.[172] Designed to increase the efficiency of immigration prosecutions, these programs allowed prosecutors, at their discretion, to offer illegal reentry defendants a preindictment plea bargain in exchange for a reduced sentence.[173] Such programs are now mandatory in every federal district.[174]

Today, in addition to utilizing these fast track programs, ICE copes with its resource limitations in two ways: prioritization and partnership. ICE's prioritization measures are designed to ensure its manpower is used as efficiently as possible to carry out its mission, namely protecting public safety.[175] For example, ICE Fugitive Operations Teams, which target immigrants who fail to leave the United States after the issuance of a final order of deportation, exclusion, or removal (who are already a "national priority"[176]), use a tiered system of resource allocation.[177]

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167. See Immigration and the Alien Gang Epidemic: Problems and Solutions: Hearing Before H. Subcomm. on Immigration, Border Sec., & Claims of the H. Comm. on the Judiciary, 109th Cong. 30 (2005) (statement of Rep. John Hostettler) ("Last year, . . . the President . . . effectively tripl[ed] the number of ICE agents . . . .").

168. United States Attorneys' Offices also have extremely limited resources; they often resort to "thresholds for the number of reentries aliens must commit before they will be prosecuted." H.R. Rep. No. 109-345, pt. 1, at 62 (2005).

169. Keller, Re-thinking, supra note 1, at 105–08.

170. Id. (discussing DOJ strategy for increased enforcement).

171. Id. at 106–07.

172. Id. at 103–04.

173. Id. at 90–91, 107–08. Keller criticizes this practice for reducing the amount of process afforded to immigrants. Id. at 91, 114, 122.

174. Memorandum from James M. Cole, Deputy Att'y Gen. of the United States, Department Policy on Early Disposition or "Fast-Track" Programs 3 (Jan. 31, 2012) [hereinafter Cole Memo, January 31, 2012], available at http://www.justice.gov/dag/fast-track-program.pdf (on file with the *Columbia Law Review*).

175. Morton Memo, June 17, 2011, supra note 159, at 2.

176. U.S. Immigration & Customs Enforcement, Fugitive Operations, supra note 15.

177. Memorandum from John Morton, Assistant Sec'y, U.S. Immigration & Customs Enforcement, to Field Office Dirs. and All Fugitive Operation Team Members, U.S. Immigration & Customs Enforcement 2 (Dec. 8, 2009) [hereinafter Morton Memo, December 8, 2009], available at http://www.ice.gov/doclib/detention-reform/pdf/nfop_priorities_goals_expectations.pdf (on file with the *Columbia Law Review*) (describing responsibilities of Fugitive Operation Teams).

National security risks are at the top of the hierarchy, followed in the next tier by illegal reentrants (referred to as "previously removed aliens").[178] Additionally, the "teams are expected to focus resources on cases with the most current investigative leads," namely those that are "likely to contain up-to-date contact information."[179] As recently as late May 2011, ICE used these teams in targeted efforts to track down illegal immigrants with criminal records, initiatives that, according to ICE Director John Morton, are "'the best way to use [ICE's] limited resources.'"[180] Similarly, ERO "prioritizes the apprehension, arrest and removal of convicted criminals, those who pose a threat to national security, fugitives and recent border entrants."[181] ICE's immigration law enforcement efforts are thus best understood as focused on (a) public safety and national security threats, including illegal reentrants, and (b) the leads that are most likely to bear fruit.[182]

ICE's other means of dealing with its lack of resources is partnership. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[183] which added section 287(g) to the INA—now codified at 8 U.S.C. § 1357(g)—that delegated some immigration authority to state and local entities.[184] Like fast track

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178. Id.; see also Morton Memo, March 2, 2011, supra note 165, at 2 (outlining prioritization structure).

179. Morton Memo, December 8, 2009, supra note 177, at 2–3.

180. Brian Bennett, U.S. Steps Up Deportation Efforts for Criminal Immigrants, L.A. Times (May 26, 2012), http://articles.latimes.com/2012/may/26/nation/la-na-immigration-20120526 (on file with the *Columbia Law Review*).

181. U.S. Immigration & Customs Enforcement, Enforcement and Removal Operations, supra note 60.

182. Trainings to reinforce these priorities are ongoing. See Julia Preston, Agents' Union Stalls Training on Deportation Rules, N.Y. Times (Jan. 7, 2012), http://www.nytimes.com/2012/01/08/us/illegal-immigrants-who-commit-crimes-focus-of-deportation.html ("[A]dministration officials want to transform the way immigration officers work, asking them to make nuanced decisions to speed deportations of high-risk offenders while halting those of illegal immigrants with clean records and strong ties to the country.").

183. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C).

184. § 133, 110 Stat. at 3009-563 to -564; U.S. Gov't Accountability Office, GAO-09-109, Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws 1–2 (2009) [hereinafter GAO, Better Controls], available at http://www.gao.gov/new.items/d09109.pdf (on file with the *Columbia Law Review*). The statute authorizing cooperation provides, in relevant part, that

> the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry

programs, the section was designed to ease the law enforcement burden of illegal entry and reentry cases.[185] ICE relies heavily on § 1357(g)[186]: State and local efforts currently account for ten percent of the total number of individuals identified for removal from the country on immigration charges.[187] While these partnerships continue to grow,[188] public dissatisfaction and criticism of state and local enforcement of immigration law have become concerns.[189]

In the context of ICE's limited resources, the interpretation of the "found in" clause—whether or not the federal government can be found to have constructively discovered an illegal reentrant—may have a substantial impact on the enforcement of federal immigration law. Given that illegal reentry is the most prosecuted federal crime, that ICE places a high priority on finding and prosecuting illegal reentrants (particularly those who pose a threat to public safety), and that ICE is already strug-

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> out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

8 U.S.C. § 1357(g)(1) (2006). There are some limitations on the use of this power, e.g., the subject must have committed a felony and the subject's illegal status has to be confirmed by the INS. See United States v. Vasquez-Alvarez, 176 F.3d 1294, 1296 (1999) (discussing limitations imposed by 8 U.S.C. § 1252(c)); Randy Capps et al., Migration Policy Inst., Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement 8–9 (2011) (discussing history of 287(g)). Delegations of this sort could also affect whose knowledge matters, discussed supra Part II.B.2.

185. See Jessica M. Vaughan & James R. Edwards, Jr., Ctr. for Immigration Studies, The 287(g) Program: Protecting Home Towns and Homeland 3 (2009), available at http://www.cis.org/articles/2009/287g.pdf (on file with the *Columbia Law Review*) ("Memoranda of agreement would enable local police to assist federal authorities in the investigation, arrest, detention, and transportation of illegal aliens and gain better cooperation from the INS in dealing with the burgeoning population of foreign nationals committing crimes.").

186. Department of Homeland Security Law Enforcement Operations: Hearing Before H. Subcomm. on Crime, Terrorism, & Homeland Sec. of H. Comm. on the Judiciary, 110th Cong. 18 (2005) (joint prepared statement of the U.S. Department of Homeland Security); see also Capps et al., supra note 184, at 1 ("287(g) . . . authorizes state and local officers to screen people for immigration status, issue detainers to hold them on immigration violations until the federal government takes custody, and generate the charges that begin the process of their removal from the United States.").

187. Capps et al., supra note 184, at 18.

188. Legomsky, supra note 47, at 496–98; see also GAO, Better Controls, supra note 184, at 2 (noting growing interest in cooperation).

189. See GAO, Better Controls, supra note 184, at 2 (noting concern about proper role of local law enforcement and unwillingness to report crimes in immigrant communities); Fandl, supra note 19, at 23 (discussing controversial state immigration enforcement measures); Maria Fernanda Para-Chico, An Up-Close Perspective: The Enforcement of Federal Immigration Laws by State and Local Police, 7 Seattle J. for Soc. Just. 321, 330–37 (2008) (highlighting negative effect of 287(g) on local law enforcement, including inadequate funding, tradeoffs with enforcing criminal laws, and distrust of police); Michael J. Wishnie, State and Local Police Enforcement of Immigration Laws, 6 U. Pa. J. Const. L. 1084, 1085 (2004) (calling cooperation "dangerous and enduring").

gling to keep up with its enforcement responsibilities due to its lack of resources, the adoption of a constructive discovery standard could substantially change ICE's day-to-day enforcement practices.[190]

B. *Interpretive Implications*

Taking ICE's current enforcement practices into account, this section will discuss arguments both for and against the utilization of some type of constructive discovery standard. Given the lack of scholarship on the "found in" clause,[191] this section proceeds mainly by extrapolating from both the reasoning of the federal circuits and the context surrounding illegal reentry prosecutions. It ultimately recommends a moderate course—the adoption of a modified constructive discovery standard—whereby a court may only impute the federal government with knowledge of an illegal reentrant's status, and not knowledge of his physical presence in the United States.

1. *Arguments for Constructive Discovery.* — The rationale for the adoption of a constructive discovery standard is rooted in the statute of limitations.[192] Designed to protect the rights of those accused of committing crimes, the statute of limitations limits prosecutorial discretion, inhibiting its abuse.[193] In the context of illegal reentry, while the statute of limitations prevents perpetual jeopardy, it is also a check on circumstances in which a would-be defendant charged with illegal reentry may be unduly disadvantaged by untimely enforcement.[194] First, if prosecutors choose not to charge an illegal reentrant until after he has served time for another crime, he may lose the opportunity to serve a

190. Courts and prosecutors are also significantly burdened by immigration cases: As of July 2011, 259,038 immigration cases awaited resolution. TRAC, Immigration Backlog, supra note 16.

191. See supra note 9 (noting dearth of scholarly pieces discussing clause).

192. See Mroczkowski, supra note 9, at 535–36, 566–72 (discussing impact of constructive discovery standard in context of statute of limitations); see also United States v. Gomez, 38 F.3d 1031, 1037 (8th Cir. 1994) (arguing failure to apply constructive discovery would "essentially strike the statute of limitations from the United States Code" and standard should instead mirror discovery rule in civil cases).

193. See, e.g., United States v. Guzman-Bruno, 27 F.3d 420, 432 (9th Cir. 1994) ("Guzman-Bruno argues that . . . immigration authorities should not be allowed unlimited discretion in establishing the date on which a violation is complete for sentencing purposes. He argues that treating the offense as continuing for sentencing purposes could allow authorities to wait to prosecute until penalty provisions have been increased.").

194. See Toussie v. United States, 397 U.S. 112, 114–15 (1970) (noting purpose of statute of limitations is to prevent prosecutions when "basic facts may have become obscured" by passage of time, prevent punishment for acts in the "far-distant past," and "encourag[e] law enforcement officials promptly to investigate suspected criminal activity"); United States v. Scott, 447 F.3d 1365, 1370 (11th Cir. 2006) ("[I]t is only fair to hold that Scott was constructively 'found in' the United States during his August 25 interview. To do otherwise would penalize Scott for a delay that was no fault of his own.").

concurrent sentence.[195] Second, an illegal reentrant may be subject to increased punishment if the sentencing guidelines change prior to his prosecution, e.g., if an aggravated sentence is made available for circumstances that apply to that reentrant.[196] Third, prosecutors may delay action against illegal reentrants for so long after the commission of the crime that the basic facts are obscured (e.g., the circumstances of the reentry due to the deterioration of the memories of witnesses, etc.), making a just result more difficult to reach.[197]

The statute of limitations also ensures that, in some circumstances, immigrants are able to start new lives in the United States. While some illegal reentrants enter the country to commit crimes, many others do so to join family and/or forge ties with the community.[198] In effect, then, the statute of limitations can be thought of as requiring that illegal reentrants be prosecuted prior to the solidification of these ties.[199] With-

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195. Mroczkowski, supra note 9, at 535, 546–47, 552. For an example of such a circumstance, see United States v. Villegas-Miranda, 579 F.3d 798, 800 (7th Cir. 2009) (remanding case for resentencing due to inability to serve concurrent sentence caused by exercise of prosecutorial discretion).

196. Cf. United States v. Lennon, 372 F.3d 535, 538 (3d Cir. 2004) (applying sentencing enhancement passed after reentry but before defendant was "found" by law enforcement). Likewise, a defendant's circumstances may change following reentry, but before actual discovery, making him subject to additional sentencing enhancements absent a constructive discovery standard. Compare United States v. Santana-Castellano, 74 F.3d 593, 596 (5th Cir. 1996), wherein the defendant was subjected to two criminal history points and a consecutive, rather than concurrent, sentence because the court found that he was not discovered until after the commission of an unrelated state crime.

197. United States v. DiSantillo, 615 F.2d 128, 134 (3d Cir. 1980) (noting statute of limitations is "'designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past'" (quoting *Toussie*, 397 U.S. at 114–15)). The court also noted that "'[s]uch a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.'" *DiSantillo*, 615 F.2d at 134 (quoting *Toussie*, 397 U.S. at 115).

198. See, e.g., Julia Preston, In Test of Deportation Policy, 1 in 6 Get a Fresh Look and a Reprieve, N.Y. Times, Jan. 20, 2012, at A13 [hereinafter Preston, Deportation Policy] (explaining how changes in immigration law were fueled by familial concerns); Andrea Grimes, When Operation Streamline Deters: One Immigrant's Story, Dall. Observer (Oct. 21, 2010), http://www.dallasobserver.com/2010-10-21/news/when-operation-streamline-deters-one-immigrants-story/ (on file with the *Columbia Law Review*) (relating story of Adalid Arteaga, who was imprisoned for illegal reentry several years after starting new life in United States).

199. Regardless of the resolution of the "found in" circuit split, these individuals could be deported, assuming they are in the country illegally. Government officials, however, can also exercise discretion in deciding whether or not to deport a given immigrant when no criminal charge mandates it. The issue with adopting a constructive discovery standard is that it limits the time that would ordinarily be available for immigration authorities and prosecutors to decide if a particular immigrant's behavior warrants criminal charges.

out it, the lives of at least some immigrants would be turned on end if they became subject to criminal prosecution years after reentering the country.[200] In fact, the Obama administration has addressed this issue on its own: It now allows many illegal immigrants who pose no security risk to remain in the country in order to "ease the impact of enforcement on immigrant . . . communities," including families who may be separated by removals.[201]

The adoption of a constructive discovery standard strengthens the statute of limitations. It bridges the divide between the purpose of the statute of limitations and the realities of enforcing § 1326(a)(2) by causing the statute of limitations to run as soon as ICE has the means of tracking down a potential illegal reentrant, regardless of whether or not ICE chooses to diligently pursue the suspect at that time.[202] Indeed, according to the court in *United States v. Gomez*, without a constructive discovery standard, the "found in" clause would so undermine the statute of limitations that it would functionally strike it from the United States Code because an illegal reentrant would live in "perpetual fear of prosecution."[203] A constructive discovery standard would thus serve as an extra check on discretion, helping to curb opportunistic prosecutions and prevent the disruption of the lives of illegal reentrants who have forged strong ties over many years.

2. *Arguments Against Constructive Discovery.* — The case against adopting a constructive discovery standard rests upon two central concerns: perverse incentives and a harmful effect on law enforcement. The former, put simply, reflects a desire not to reward illegal reentrants for evading detection. If the federal government can be imputed with knowledge of an illegal reentrant, then those who are able to avoid being taken into custody may ultimately evade punishment for their crime.[204] No such issue would exist in the absence of a constructive discovery standard because the crime of illegal reentry would not be complete—and the statute of limitations would not begin to run—until law enforcement had actually discovered the illegal reentrant.

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200. See Grimes, supra note 198 (describing story of immigrant who, after establishing ties in country, including marrying and fathering three children, was imprisoned for illegal reentry).

201. Preston, Deportation Policy, supra note 198.

202. Cf. Mroczkowski, supra note 9, at 568 ("[A]n actual discovery standard improperly extends the statute of limitations . . . .").

203. See United States v. Gomez, 38 F.3d 1031, 1037 (8th Cir. 1994) ("Were we to refuse to apply the discovery rule, Gomez . . . would be in a worse position than would be a defendant in a civil action. [He] . . . would be required to live in perpetual fear of prosecution . . . essentially strik[ing] the statute of limitations from the United States Code.").

204. See Mroczkowski, supra note 9, at 568–70 (addressing argument that constructive discovery standard would allow illegal reentrants to evade prosecution via statute of limitations).

Of course, the adoption of a constructive discovery standard does not simply result in the provision of amnesty to those illegal reentrants who are able to hide out until the statute of limitations expires. Indeed, Congress has legislated that "no statute of limitations shall extend to any person fleeing from justice."[205] While this statute ensures that those who blatantly flee from law enforcement will not escape prosecution, it does not completely eliminate the incentive for illegal aliens to hide. To be considered a fugitive from justice, a defendant generally needs to have fled the jurisdiction where he committed the crime in order to avoid prosecution.[206] Therefore, as long as an illegal reentrant does not leave the jurisdiction in which he was found (presumably wherever that illegal reentrant was located when he could have been found under a constructive discovery standard), attempting to avoid detection will not render him a fugitive. An illegal reentrant can avoid a "blatant flight from justice" and instead "subtly fly under the government's radar" until the five-year statute of limitations expires by simply avoiding activities that would make him easy to locate,[207] such as committing another crime.[208] In fact, a number of federal courts have expressed concern about precisely this type of behavior, wherein after law enforcement authorities get a "sniff" of an illegal reentrant's presence, he hides out until the statute of limitations expires.[209]

The fact that illegal reentrants seek to evade prosecution exacerbates one of the primary constraints on effective law enforcement: resources. If courts universally adopted a constructive discovery standard, (a) ICE would have to invest more resources to keep meticulous track of the available information on suspected illegal reentrants, and (b) when ICE determined it had sufficient information about a particular suspect

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205. 18 U.S.C. § 3290 (2006).

206. See Appleyard v. Massachusetts, 203 U.S. 222, 227 (1906) ("A person charged . . . who, after the date of the commission of such crime, leaves the state—no matter for what purpose or with what motive, nor under what belief—becomes, from the time of such leaving . . . a fugitive from justice."); Roberts v. Reilly, 116 U.S. 80, 97 (1885) ("To be a fugitive . . . , having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, [the defendant must have] left its jurisdiction, and [be] found within the territory of another."). However, "[t]he intent to flee from prosecution or arrest may be inferred from a person's failure to surrender to authorities once he learns that charges against him are pending." United States v. Catino, 735 F.2d 718, 722 (2d Cir. 1984).

207. United States v. Gordon, 513 F.3d 659, 664 (7th Cir. 2008) ("[If] . . . an alien hides well for five years after giving the government a mere sniff of his presence, he cannot be prosecuted. While blatant flight from justice may toll the statute of limitations, we need not provide an incentive to illegal aliens to subtly fly under the government's radar."), abrogated on other grounds by United States v. Bartlett, 567 F.3d 901 (7th Cir. 2009).

208. Cf. United States v. Are, 498 F.3d 460, 462 (7th Cir. 2007) (noting defendant was discovered because he committed another crime).

209. See, e.g., *Gordon*, 513 F.3d at 664.

to meet the constructive discovery standard (as opposed to when it had sufficient information to make an intelligent investigative decision), ICE would have to decide whether to invest the resources necessary to pursue that suspect. In light of the public safety implications of these decisions, and the fact that ICE already prioritizes locating and apprehending illegal immigrants,[210] ICE would likely play it safe and initiate more investigations based on limited information.[211] Such investigations might also require an even greater investment of resources than usual because (a) as described above, often less information about a given illegal reentrant would be available prior to the onset of the investigation than in the case of "actual" discovery, and (b) the reentrant may already actively be evading detection.

To handle the resource burden of these additional investigations, ICE would likely rely further on prioritization as well as state and local authorities; as previously mentioned, fast track programs are already in place to deal with the "compelling, and otherwise potentially intractable, resource issue."[212] Further prioritization could have adverse effects on immigration enforcement. ICE may, for example, increase its focus on the recency of investigative leads at the expense of their quality. Increased partnerships would also pose a problem. State and local enforcement of federal immigration law is often criticized.[213] It sometimes requires the diversion of resources and thus can undermine the effectiveness of local law enforcement more generally.[214] The adoption of a constructive discovery standard may, in this way, not only stretch ICE's resources to a dangerous level, but also reduce the efficacy of local law enforcement.

Moreover, the increase in prosecutions and reduced time to make investigative decisions may also undermine ICE's discretion, the exercise of which not only benefits ICE, but also those who commit illegal reentry themselves. As the Supreme Court recognized in *United States v. Lovasco*,

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210. See supra note 178 and accompanying text (noting prioritization of illegal reentrants); see also GAO, Improve Controls, supra note 59, at 3 (stating ICE prioritizes removal of illegal reentrants subject to removal as resources permit).

211. ICE may believe that failing to conduct these investigations could have dire consequences for national security, especially given its priorities. Cf. GAO, Improve Controls, supra note 59, at 3 (stating ICE prioritizes removal of "aliens who pose a threat to national security and public safety").

212. Cole Memo, January 31, 2012, supra note 174, at 1.

213. See, e.g., GAO, Better Controls, supra note 184, at 2 (noting concern about proper role of local law enforcement and resultant unwillingness to report crimes in immigrant communities); Wishnie, supra note 189, at 1085, 1087 (noting initiative "may come to rank among the most dangerous and enduring" and "[t]he federal effort to enlist, or even conscript, state and local police in routine immigration enforcement has also prompted numerous policy criticisms" (citation omitted)).

214. See Para-Chico, supra note 189, at 330, 332, 336–37 (discussing downfall of state and local enforcement of immigration law).

albeit in the context of preindictment delay, there are several benefits to potential defendants when prosecutors are afforded more time. Indeed, short prosecution timeframes may (a) cause the government to "resolv[e] doubtful cases in favor of early and possibly unwarranted prosecutions," and (b) "preclude the Government from giving full consideration to the desirability of not prosecuting in particular cases," including the consideration of factors beyond a suspect's guilt, such as culpability and fairness.[215]

Applying that reasoning to illegal reentry cases, the additional time and information available to ICE by virtue of the rejection of a constructive discovery standard could allow the ICE to consider sparing those illegal reentrants who may not be worth prosecuting. It could then focus instead on those reentrants who pose an actual threat to public safety or national security. ICE has the ability to exercise such discretion, and already takes into account factors external to guilt, including "humanitarian circumstances, such as medical issues or being the sole caregiver for minor children."[216] Illegal reentrants who enter the country simply to be with family or escape poverty, particularly those that have no criminal record other than their initial illegal entry (a factor the *Lovasco* Court considered relevant),[217] often pose little threat to the public safety. The Obama Administration, too, has recognized the benefit of not prosecuting such individuals.[218] Without sufficient time to exercise this discretion (and gather information that may weigh against initiating a prosecution), however, ICE may still pursue even the most sympathetic illegal reentrants.

More generally, ICE's ability to exercise discretion in illegal reentry cases is consistent with the high level of deference afforded to the executive branch in matters that implicate national security.[219] The deference

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215. United States v. Lovasco, 431 U.S. 783, 793–95 (1977).

216. GAO, Improve Controls, supra note 59, at 6; see also supra notes 158–162 and accompanying text (discussing ICE's ability to exercise discretion).

217. *Lovasco*, 431 U.S. at 794–95 (discussing example where respondent over sixty years old had no prior criminal record).

218. See Preston, Deportation Policy, supra note 198 (discussing Obama Administration decision to forgo prosecution of immigrants "who pose no security risk").

219. See Dep't of Navy v. Egan, 484 U.S. 518, 529–30 (1988) (collecting cases noting national security is province of executive branch); William N. Eskridge, Jr. & Lauren E. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*, 96 Geo. L.J. 1083, 1100 (2008) (noting "strongest form of deference . . . [is] super-strong deference to executive department interpretations in matters of foreign affairs and national security"). The courts have also traditionally afforded Congress substantial deference in immigration law because Congress has plenary authority in that field. Larry Kupers, Aliens Charged with Illegal Re-entry Are Denied Due Process and, Thereby, Equal Treatment Under the Law, 38 U.C. Davis L. Rev. 861, 862 (2005) ("The courts, operating under the principle that Congress has plenary authority in all matters relating to immigration, have generally been reluctant to interfere with or curb Congressional action in the immigration sphere." (citation omitted)).

stems from recognition of the President's statutory authority over national security issues and the executive branch's relative expertise in making decisions that affect national security.[220] Adopting a constructive discovery standard would be antithetical to this deferential tradition and run afoul of the separation of powers, subjecting procedural law enforcement decisions to additional judicial scrutiny.[221] The standard would allow a judge to, in effect, find illegal reentry prosecutions untimely based on his or her perception of the capacity of law enforcement to discover illegal reentrants. Rulings of this sort may, as noted, have an adverse effect on ICE's ability to do its job effectively.

The indeterminacy of the constructive discovery standard itself also amplifies the power of judges in these cases. While many courts focus on when law enforcement can locate an illegal reentrant through the exercise of "diligence typical of law enforcement authorities,"[222] it is unclear exactly what this type of diligence entails. Because the term is vague, in every case in which constructive discovery is at issue courts will have to engage in counterfactual examinations of law enforcement capabilities and retroactively determine what would have been found had law enforcement "reasonably" pursued information available to it at a given time. Law enforcement agencies are far better at gauging their own abilities and determining what allocation of resources is "reasonable" at a given time than are courts.[223] Thus, the impact on the separation of powers also counsels against the adoption of a constructive discovery standard.

3. *Adopting a Modified Constructive Discovery Standard.* — Given the arguments for and against the adoption of a constructive discovery standard, the moderate approach of the Second, Fifth, and Tenth Circuits seems most reasonable. Under this interpretation, courts would be able to impute the federal government with knowledge of the *illegality* of a given illegal reentrant's presence, but not knowledge of that illegal reentrant's physical presence itself. Such a standard would have less of a negative impact on ICE's enforcement practices than a full constructive

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220. See Krikorian v. Dep't of State, 984 F.2d 461, 464 (D.C. Cir. 1993) (stressing deference to expertise of agencies who handle national security); Eskridge & Baer, supra note 219, at 1100 ("The source of this discretion in statutory enforcement is the inherent power of the President . . . to protect America's security interests.").

221. Cf. Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973) ("[T]he problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary [because] [t]he reviewing courts would be placed in the undesirable and injudicious posture of becoming 'superprosecutors.'").

222. See, e.g., United States v. Rivera-Ventura, 72 F.3d 277, 282 (2d Cir. 1995) (referring to "diligence typical of law enforcement authorities"); United States v. Gomez, 38 F.3d 1031, 1037 (8th Cir. 1994) (same).

223. Cass R. Sunstein, Cost-Benefit Analysis and the Separation of Powers, 23 Ariz. L. Rev. 1267, 1272 (1981) ("[I]t is an accepted part of our political traditions that issues of resource allocation are best decided by the political branches of government.").

discovery standard, yet would still provide a measure of protection to illegal reentrants and give the statute of limitations its intended effect.

Unlike locating an illegal reentrant, which may require a large outlay of investigative resources, determining the legality of a reentrant's presence in the United States is likely better characterized as an administrative responsibility. Checking all available data sources on a given individual is unlikely to be a major drain on resources, particularly when an illegal reentrant is already in custody. Indeed, thorough collection and data-checking is already a hallmark of ICE's Secure Communities initiative, which aims to have the fingerprints of all arrestees checked against DHS records to determine if an arrestee is in the country illegally.[224] Moreover, in the hardest cases, such as when a defendant uses an alias upon arrest, at least one court has refused to impute knowledge of that illegal reentrant's status to the federal government.[225]

Furthermore, because ICE would likely have significantly more information about a given reentrant after having *actually* found him (and, in many cases, taken him into custody) than it would under a full constructive discovery standard, the adoption of a modified discovery standard would neither force premature investigative decisions nor undermine prosecutorial discretion. The standard, however, would still provide an additional incentive for law enforcement authorities to maintain up-to-date information on illegal reentrants so that an arrestee's status can quickly and easily be determined.

The limited history of the illegal reentry statute and its "found in" clause is also consistent with a modified constructive discovery standard. As outlined above, the provision's subsequent history suggests that its purpose is to (a) promote public safety and national security, (b) deter the most dangerous illegal reentrants, and (c) avoid overburdening law enforcement.[226] Limiting ICE's discretion and forcing premature investigative decisions through a full constructive discovery standard may undermine these goals. A modified constructive discovery standard, however, is sensitive to ICE's mandate and resource constraints, yet still helps to protect potential defendants from the specter of perpetual jeopardy.

In sum, the moderate interpretation of the "found in" clause advanced by the Second, Fifth, and Tenth Circuits is both consistent with

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224. Sklansky, supra note 48, at 187. ICE's National Fugitive Operations Program also already utilizes data available from the National Crime Information Center as a "virtual force multiplier." U.S. Immigration & Customs Enforcement, Fugitive Operations, supra note 15.

225. United States v. Bencomo-Castillo, 176 F.3d 1300, 1304 (10th Cir. 1999) (noting unlikelihood of agency ascertaining arrestee's illegal status due to use of alias); see also United States v. Uribe-Rios, 558 F.3d 347, 354-55 (4th Cir. 2009) (refusing to impute knowledge of illegal reentrant to federal government due to use of alias).

226. See supra Parts I.B, III.A (outlining legislative history of "found in" clause and ICE enforcement tactics).

the history of the statute and helps to solve many of the policy issues raised by this Note.

CONCLUSION

Given the preeminence of the crime of illegal reentry and the importance of the resolution of the "found in" clause circuit split, the lack of scholarship on the issue is troubling. While it remains unclear whether the federal government can be imputed with knowledge of an illegal reentrant, the answer to this question may have a dramatic effect on the day-to-day enforcement of immigration law.

The method by which illegal reentrants are investigated and prosecuted hangs in the balance. The approach of the Second, Fifth, and Tenth Circuits, whereby courts may impute the federal government with knowledge of the illegal status of a reentrant, but not with knowledge of his physical presence in the United States, best balances ICE's limited resources with the fairness interests of potential defendants. It offers the best way forward for prosecutors, law enforcement officials, and immigrants alike.

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