# THE FUGITIVE FELON ACT: ITS FUNCTION AND PURPOSE

## I. History of the Act

Following the First World War the United States witnessed an increase in crime with an accompanying increase in the difficulty of apprehending and convicting criminals. Improved methods of transportation made it easy for an individual to commit a crime and flee to another state to avoid capture and local prosecution.[1] In addition, it was frequently necessary to postpone or dismiss local criminal prosecutions because material witnesses had fled interstate to avoid giving testimony. The officer in whose jurisdiction a crime had been committed was powerless to pursue the offender across state boundaries; his only recourse was to request officers in the state of asylum to capture the fugitive, and hold him pending interstate rendition. This procedure, however, was inadequate because most state law-enforcement agencies were overburdened with local problems and unable to conduct investigations to locate out-of-state fugitives. Even if the fugitive were captured, the demanding state could have him returned only by invoking the interstate rendition procedure provided by federal statute—a "slow, cumbersome, and costly" process.[2] On the other hand, federal officers could apprehend one who had violated federal law and fled interstate and return him to the federal district in which the crime was committed via federal removal procedure, a much less cumbersome process than interstate rendition.[3]

To combat the problems of interstate flight, which reached its apex in the gang era of the early thirties, Congress enacted the Fugitive Felon Act.[4] The primary purpose of the act, which made interstate flight from a state crime a federal offense, was to permit the federal government to assist state and municipal law-enforcement agencies in securing custody of fugitives who had

1. Simmons v. Zerbst, 18 F. Supp. 929, 930 (N.D. Ga. 1937).

2. Kopelman, *Extradition and Rendition,* 14 B.U.L. Rev. 591, 642 (1934).

3. *Ibid.* The procedure of federal removal is discussed in note 22 *infra.*

4. Act of May 18, 1934, ch. 302, 48 Stat. 782:

[I]t shall be unlawful for any person to move or travel in interstate or foreign commerce from any State, Territory, or possession of the United States, or the District of Columbia, with intent either (1) to avoid prosecution for murder, kidnaping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, or extortion accompanied by threats of violence, or attempt to commit any of the foregoing, under the laws of the place from which he flees, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of a felony is charged. Any person who violates the provision of this Act shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not longer than five years, or by both such fine and imprisonment. Violations of this Act may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed.

fied interstate.[5] As enacted, the act applied to fugitives who had fled from state prosecution for certain enumerated offenses, or whose flight was to avoid giving testimony.[6] While one decision restricted the application of the act to the enumerated offenses as defined by the common law,[7] this restriction was removed by amendment[8] and the act was gradually expanded to its present form. This expansion was accomplished by application to fugitives who fled *after conviction* for one of the enumerated offenses,[9] by inclusion of arson, when defined as a felony, as an enumerated offense,[10] and finally, in 1961, by deletion of the enumerated offenses to make the act generally applicable to crimes defined as felonies by state law.[11]

---

5. See Barrow v. Owen, 89 F.2d 476 (5th Cir. 1937); Simmons v. Zerbst, 18 F. Supp. 929 (N.D. Ga. 1937); United States v. Miller, 17 F. Supp. 65 (W.D. Ky. 1936); S. REP. No. 539, 73d Cong., 2d Sess. (1934). H.R. REP. No. 1458, 73d Cong., 2d Sess. (1934), contains the following comment by the Attorney General:

> One of the most difficult problems which local law-enforcement agencies have to deal with today is the ease with which criminals are able to flee from the state to avoid prosecution, and witnesses leave the state to avoid giving testimony in criminal proceedings. The above bill is considered the most satisfactory solution of this problem, which the states have never been able to solve effectively. This bill will not prevent the states from obtaining extradition of roving criminals, *but the complicated process of extradition has proved to be very inefficient.* The ability of federal officers to follow a criminal from one state to any other state or states, as provided in the above bill, should furnish the desired relief from this class of law evaders. (Emphasis added.)

6. For a list of the offenses contained in the act before the 1961 amendment, see the statute cited note 4 *supra.*

7. United States v. Brandenburg, 144 F.2d 656 (3d Cir. 1944). Appellant had been convicted in a United States district court of misprision of felony in that he willfully concealed the interstate flight of one Pitts who fled with the intent to avoid state prosecution for "burglary with explosives." The court of appeals reversed and held that the clause "under the laws of the place from which he flees" modified "prosecution," not the offenses named in the Fugitive Felon Act and hence "burglary" should be given its common-law, and not the state's definition. Consequently, since "burglary with explosives" was an offense unknown to the common law, Pitts did not violate the Fugitive Felon Act by fleeing interstate and appellant could not, therefore, be convicted of misprision of felony. *But cf.* Cases v. United States, 131 F.2d 916, 924 (1st Cir. 1942).

8. Act of June 25, 1948, ch. 645, 62 Stat. 755. The phrase "offenses as they are defined either at common law or by the laws of the place from which the fugitive flees" was inserted. Subsequent to this amendment the courts held that the state definitions of the crimes enumerated in the Fugutive Felon Act, as well as the common-law definitions, were controlling. See, *e.g.,* United States v. Turley, 141 F. Supp. 527, 529 (D. Md. 1956); United States v. Kelly, 146 F. Supp. 747, 751-54 (D. Colo. 1956).

9. Act of Aug. 2, 1946, ch. 735, 60 Stat. 789.

10. Act of April 6, 1956, ch. 177, 70 Stat. 100.

11. Fugutive Felon Act, 18 U.S.C. § 1073 (Supp. IV, 1963).

> Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, punishable by death or which is a felony under the laws of the place from which the fugitive flees, or which, in the case of New Jersey, is a high misdemeanor under the laws of said State, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by death or which is

It is the purpose of this note to describe the procedure for return of fugitives via interstate rendition and federal removal, to consider the potential provided by the Fugitive Felon Act for federal removal as an alternative to interstate rendition, and to examine the extent to which this potential is currently employed for return of state law violators.

## II. Return of the "Fugitive From Justice"

Interstate rendition is the surrender of a state law violator by the authorities of the state into which he fled to those of the demanding state for return to its jurisdiction. It derives from the Constitution,[12] which provides for the return of persons "who shall flee from Justice." Denominating a person as a "fugitive" as defined by the statute[13] implementing the Constitution is the touchstone for rendition. Return cannot be accomplished if the subject was not actually present in the demanding state when the crime was committed, because the courts in construing the statute have held "presence" essential to the definition of "fugitive."[14] However, the federal statute is not exclusive in implementing the Constitution, and state legislation which permits return in situations beyond the compass of the statute is not foreclosed.[15] In an effort to supplement and clarify the federal statute, forty-four states have adopted the Uniform Criminal Extradition Act.[16] Under the Uniform Act, return of "fugitives" who were not present in the demanding state at the

---

a felony under the laws of such place, or which in the case of New Jersey, is a high misdemeanor under the laws of said State, is charged, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Violation of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed, or in which the person was held in custody or confinement and only upon formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated.

12. U.S. Const. art. IV, § 2:

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand on the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

13. 18 U.S.C. § 3182 (1958). The first statute was passed in 1893. Its purpose was to clarify the confusion rampant in attempts by the states to utilize rendition under the Constitution. For a detailed history of the several federal rendition statutes and the problems they were adopted to clarify, see Scott, The Law of Interstate Rendition 23-30 (1917).

14. Hyatt v. People *ex rel.* Corkran, 188 U.S. 691 (1903); State v. Hall, 115 N.C. 811, 20 S.E. 729 (1894). The cases have split on whether one who leaves the demanding state involuntarily is a "fugitive" within the meaning of the federal rendition statute. 22 Am. Jur. *Extradition* § 23 (1939).

15. Innes v. Tobin, 240 U.S. 127 (1916); Scott, The Law of Interstate Rendition § 36 (1917).

16. 9 Uniform Laws Ann. 129 (Supp. 1963).

time of the commission of the crime[17] or whose departure was involuntary is sanctioned.[18] Although the Uniform Act does permit return when it would be impossible under the federal statute, all interstate rendition procedures remain inherently inefficient, requiring complex procedural formulae,[19] permitting unchecked gubernatorial discretion,[20] and involving considerable expense and time to effect return.[21]

Return by federal removal[22] avoids these impediments, because it is accomplished by officers with national jurisdiction. It is also unburdened with the concept of "fugitive from justice" because the question of the state in which the crime occurred is usually irrelevant to the process of removal. However, removal for violations of the Fugitive Felon Act, unlike removal for other federal offenses, does carry some impediments.

Peculiar to removal under the Felon Act, are the requirements that the subject must have been present in the state in which the crime occurred and that the *purpose* of his subsequent departure must have been proscribed by the act.[23] These requirements and the fact that the act is, by definition, applicable only to felonies[24] preclude removal in some cases in which return could be accomplished by interstate rendition.[25]

17. This provision was adopted primarily to pierce the extradition immunity of criminal conspirators. 9 UNIFORM LAWS ANN. 260-61, 297.

18. 9 UNIFORM LAWS ANN. 260-61, 295-96.

19. See, *e.g.*, the following articles for an explanation of various state procedures including a copy of current rendition forms. NORTH DAKOTA: Note, *Some Problems and Aspects of Interstate Extradition,* 38 N.D.L. REV. 322 (1962); MISSOURI: Hamilton, *Missouri Extradition Problems and Procedures,* 28 U. KAN. CITY L. REV. 139 (1960); KANSAS: Rauch, *Extradition in Kansas,* 28 U. KAN. CITY L. REV. 150 (1960); LOUISIANA: Bennett, *Extradition—A Comparison of Louisiana Law and the Uniform Act,* 20 LA. L. REV. 32 (1959).

20. See Bennett, *Extradition—A Comparison of Louisiana Law and the Uniform Act,* 20 LA. L. REV. 32 (1959); Larremore, *Inadequacy of the Present Federal Statute Regulating Interstate Rendition,* 10 COLUM. L. REV. 208 (1910).

21. See Kopelman, *Extradition and Rendition,* 14 B.U.L. REV. 591 (1934).

22. Note 48 *infra.* Federal removal as a vehicle for return of a violator of federal law is an essentially simple process. When a person who has been charged with an offense against the United States is found outside the federal district in which the crime was allegedly committed, a complaint is filed with the United States district judge in the district of the asylum state. The judge then issues an ex parte warrant, which permits the accused to be arrested and brought for the purpose of a hearing before the officer to whom the warrant is made returnable. If probable cause is established, the judge will issue an order for removal and the fugitive will be returned to the judicial district where the trial is to be held. See also notes 50-53 *infra* and accompanying text.

23. See statute cited note 11 *supra.*

24. Rendition of misdemeanants is proper under the federal rendition statute (note 13 *supra*), and the Uniform Act (35 C.J.S. *Extradition* § 7 (1960)). It is, of course, infrequent because of the expense. For a concise treatment of the procedure under the Uniform Criminal Extradition Act, see COUNCIL OF STATE GOVERNMENTS, INTERSTATE CRIME CONTROL 30 (1955).

The first clause of the Fugitive Felon Act permits removal of one who "fled . . . [the demanding] state with intent to avoid prosecution [custody or confinement] therein, and mere absence from the state of prosecution, though it renders one a fugitive from justice for interstate rendition . . . is not sufficient proof of the federal crime."[26]

The second clause is violated by one who flees interstate with intent to avoid giving testimony in a pending state "criminal proceeding" in which the commission of a felony is "charged."[27] It has been held that a warrant issued by a one-man grand jury, after a determination of probable cause, "charged" the commission of a felony, and that a hearing before an examining magistrate upon a warrant was a "criminal proceeding."[28] Grand jury investigations also meet the definition of "criminal proceeding,"[29] but a "complaint for possible violations of laws," filed before a federal grand jury has been held not to have "charged" an offense within the meaning of the

---

25. The restrictions on use of removal would not, of course, occur so frequently as to interfere with its potential as an alternative to rendition.

26. Barrow v. Owen, 89 F.2d 476, 478 (5th Cir. 1937); *accord,* Maenza v. United States, 242 F.2d 339, 341 (5th Cir. 1957). The FBI may commence its search when it is apprised of the accused's flight, even before a formal state charge or indictment for commission of a felony has been filed. It is sufficient that the suspect was, prior to his flight, *subject* to state prosecution. United States v. Bando, 244 F.2d 833, 843 (2d Cir. 1957); Barker v. United States, 178 F.2d 803, 805 (5th Cir. 1949); United States v. Lupino, 171 F. Supp. 648 (D. Minn. 1958), *aff'd,* 268 F.2d 799 (8th Cir.), *cert. denied,* 361 U.S. 834 (1959), *motion for order vacating sentence denied,* 185 F. Supp. 363 (D. Minn. 1960). In United States v. Bando, *supra* at 843, the court stated: "The words 'to avoid prosecution' mean 'to avoid being prosecuted.' The statute does not say 'to avoid a pending prosecution.' "

During the legislative debates which led to the 1961 revision of the act, an amendment was proposed which would have limited the scope of the act by requiring local prosecution to be commenced prior to flight. This was rejected on the ground that many serious crimes are not discovered immediately after they are committed and, even if they are, the means of present-day transportation permit the criminal to flee across state lines before local process is initiated. 107 CONG. REC. 16863-66 (1961).

After the suspect is apprehended, however, a federal indictment charging a violation is defective unless it indicates that an indictment or prosecution is pending in the state in which the original crime was committed. United States v. Rappaport, 156 F. Supp. 159, 160 (N.D. Ill. 1957); see Jackson v. United States, 131 F.2d 606 (8th Cir. 1942).

27. United States v. Bando, 244 F.2d 833, 843 (2d Cir. 1957); Hemans v. United States, 163 F.2d 228, 232-33 (6th Cir.), *cert. denied,* 332 U.S. 801 (1947). In *Bando,* the court, at 843, stated:

> Nor is the word "charged" used in the first half of Sec. 1073 in relation to the flight "to avoid prosecution"; but it is used, quite naturally, in the second half of Sec. 1073 in relation to a flight "to avoid giving testimony." The two are separate crimes. The latter requires some pending criminal proceeding. The former does not.

28. Hemans v. United States, 163 F.2d 228, 236 (6th Cir.), *cert. denied,* 332 U.S. 801 (1947).

29. *Ibid. But cf.* Counselman v. Hitchcock, 142 U.S. 547, 563 (1891).

act because there was no evidence that the "grand jury proceeding . . . was instituted upon a formal written complaint, and, if it was, whether such complaint made sworn charges."[30]

## III. When and How Is the Fugitive Felon Act Used?

### A. *The Letter of the Law*

Jurisdiction to conduct investigations under the Fugitive Felon Act lies in the Federal Bureau of Investigation. It appears from a literal reading that as soon as the FBI receives information that a fugitive has fled interstate in violation of the act, it could commence its search. Following apprehension of the fugitive, federal agents would take him before a United States Commissioner, who would determine the existence of probable cause to believe that the fugitive had violated the act. If probable cause were established, he would be returned by the FBI to the federal judicial district in which the original crime was committed and prosecuted for the federal offense. It follows that if the Justice Department were to enforce the letter of the act, federal prosecutions would take precedence over the state charge, and the state could only prosecute, reconfine or use the fugitive as a witness upon his release from federal confinement. However, federal prosecutions for violations of the act are unusual,[31] and an examination of the Congressional purpose suggests that the act was not to provide a federal crime for federal *prosecution.*

### B. *Intended Procedure*

The venue provision requires that a violator be prosecuted only in the federal district in which the original crime was allegedly committed. The act provides no immunity from state civil[32] or criminal process; thus a fugitive returned under the act is subject to state indictment for the original crime.[33] These features[34] coupled with the legislative history of the act[35]

30. Durbin v. United States, 221 F.2d 520, 521 (D.C. Cir. 1954).

31. See note 63 *infra.* The reasons for infrequent federal prosecutions are obvious. First, the state charge is usually for a more serious crime carrying a more severe penalty. Thus, the federal government would not desire to impede state prosecution. Further, in order to convict, the federal prosecutor must establish beyond a reasonable doubt that the fugitive committed the state crime, then fled with the intent to avoid prosecution.

32. See Cozzolino v. Colonial Stores, Inc., 213 Ga. 225, 98 S.E.2d 613 (1957).

33. United States v. Conley, 80 F. Supp. 700 (D. Mass. 1948), 10 Ohio St. L.J. 362, 368 (1949). The court, denying a writ of protection from the state criminal process, commented upon the statute and its legislative history:

> [Petitioner] is required to come here to stand trial for violation of the Fugitive Felon Act and the service he fears is in connection with the very state charge from which it is claimed he is a fugitive. *The terms of that statute no less than its legislative history reveal that its purpose was to supplement ineffective interstate rendition proceeding.* . . . Congress provided not only that an interstate fugitive from state prosecution should be denominated a violator of federal law but that he should be

clearly indicate that Congress envisioned the act as permitting the federal government to aid the states in securing custody of persons who had violated state law and fled interstate. By making interstate flight from state prosecution[36] a federal offense for which federal officers could both *apprehend* and *return* the state law violator (ostensibly for federal prosecution), Congress invested federal removal with the potential to circumvent the cumbrous process of interstate rendition.

If the intended procedure were employed, a federal officer could apprehend the fugitive, return him via federal removal to the state in which the crime had occurred, dismiss the federal charge and thereby render him amenable to state process. When the act was passed there was a widely held belief that this procedure would be followed,[37] and, contrary to the statement of the Justice Department that the act is not used as an alternative to interstate rendition,[38] one case clearly indicates that federal removal has

---

tried only in the state where the original crime was committed. The plain intent was to make it certain not only that he was punished but that he would be subject to service of the state criminal process he had sought to escape. No reasonable court would try a person for evading a state criminal process and simultaneously give him immunity from service of that process. *Id.* at 703-04. (Emphasis added.)

One who commits a felony under state law after he has been released on bond pending appeal of a conviction for a federal offense can be tried, convicted and sentenced for the state offense since he is not in the physical possession of the federal court. Kellett v. United States, 162 F. Supp. 791 (W.D. Mo. 1958). But where defendant had committed a state offense by passing bad checks and fled interstate, and the state had invoked the aid of the FBI under the Fugitive Felon Act to locate and requested the United States to prosecute defendant for interstate transportation of a forged security, the state could not arrest him on the bad check charge after his release on *probation* by the federal court since he had not committed a new offense and the federal probation order was still in effect. United States v. Merriman, 172 F. Supp. 765 (D. Utah 1959). It should be noted that the Justice Department argued strongly for the opposite result.

34. These features are further bolstered by logic. It seems unreal that Congress created a federal crime carrying relatively light penalties which could preempt a state prosecution for what would frequently be a serious state crime, and also make proof of that state crime beyond a reasonable doubt an element of the federal crime. See note 31 *supra.*

35. See H.R. REP. No. 1458, 73d Cong., 2d Sess. (1934).

Of course the state could make it a felony for a witness to flee the jurisdiction of the court, but the *State would have no power to bring the witness back.* In this case, however, if he is an important witness to a murder, or to a gang operation, and flees to another State, he becomes guilty of a felony, and *may be brought back by the district court* or by the Federal Government. . . .

78 CONG. REC. 5736 (1934) (remarks of Senator Copeland). (Emphasis added.)

36. Or flight to avoid giving testimony in a criminal proceeding. A complete description of the elements necessary to invoke the act is contained in part II *supra.*

37. See, *e.g.,* Brabner-Smith, *The Commerce Clause and the New Federal "Extradition" Statute,* 29 ILL. L. REV. 355 (1934); Chamberlain, *Federal Criminal Statutes, 1934,* 20 A.B.A.J. 501, 502 (1934); Toy & Shepherd, *The Problem of Fugitive Felons and Witnesses,* 1 LAW & CONTEMP. PROB. 415, 417-20 (1934); Warner, *Barbed-Wire Entanglements,* 8 STATE GOV'T 285-87 (1935); Legislation, 48 HARV. L. REV. 489, 494-95 (1935); Legislation, 21 VA. L. REV. 568, 570 & n.9 (1935).

38. See note 45 *infra* and accompanying text.

been used to facilitate state prosecution.[39] But the actual procedure under the act shows that the federal government generally utilizes only the act's *apprehension* potential, so that states desiring return of fugitives must use interstate rendition procedure.

### C. *Actual Procedure*

Following the amendment of the act in 1961, the FBI published a set of conditions to be satisfied before investigations would be conducted under its agency:[40]

(1) Facts which indicate that the fugitive moved or travelled in interstate commerce;[41]
(2) The fugitive is sought for a State felonly or offense punishable by death in the case of flight to avoid prosecution, custody, or confinement; or, that a State criminal proceeding charging the commission of a felony has been instituted in the case of flight to avoid giving testimony, and the witness was under subpoena prior to flight;
(3) A definite statement by the State or local prosecutor that the fugitive will be removed to that district for prosecution when apprehended or, in the case of an escapee, that he will be reconfined;
(4) A U. S. attorney has approved the issuance of a federal warrant.[42]

Condition (3), that the state in which the crime occurred must institute rendition proceedings,[43] indicates that the federal government does not intend to use removal to return a violator of the act. This will restrict enforcement of the act to the arrest of the violator and his release to the authorities of the asylum state.[44] This policy is manifested by the statement in

39. United States *ex rel.* Mills v. Reing, 191 F.2d 297, 300 (3d Cir. 1951): "[I]t was conceded by the United States that there have been cases where persons remanded under [federal removal procedure] . . . to answer a federal indictment have been removed to the federal district of indictment and then surrendered forthwith to state custody."

40. 1961 FBI LAW ENFORCEMENT BULL. 18 (November).

41. See United States *ex rel.* Puntari v. Maroney, 220 F. Supp. 801 (W.D. Pa. 1963).

42. Of course, although a federal warrant is not outstanding, FBI agents in the harboring state may lawfully arrest the fugitive if they have reasonable grounds to believe that he violated the act. 18 U.S.C. § 3052 (1958); Bartlett v. United States, 232 F.2d 135, 139 (5th Cir. 1956). See also United States v. Feguer, 192 F. Supp. 377 (N.D. Iowa 1961), *aff'd*, 302 F.2d 214 (8th Cir. 1962). The United States Commissioner in the harboring state will order that the fugitive be held in custody pending the arrival of the federal warrant. Reis v. United States Marshal, 192 F. Supp. 79 (E.D. Pa. 1961).

43. See, *e.g.*, Zavada v. Taylor, 285 F.2d 66, 67 (10th Cir. 1960) (extradition waived); Kellett v. United States, 162 F. Supp. 791, 792 (W.D. Mo. 1958); State *ex rel.* Middlemas v. District Court, 125 Mont. 310, 233 P.2d 1038 (1951).

44. This is a considerable aid to the demanding state as it can still secure return by rendition. It might also occur that the "fugitive" had committed a crime in the state of asylum which would warant prosecution there. However, in the usual case, the restriction by the federal government causes the states to invoke interstate rendition under the un-

the United States Attorneys' Manual that "the Fugitive Felon Act does not supersede nor is it intended to provide an alternative for State extradition proceedings. Its primary purpose is to permit the Federal Government to assist in the location and apprehension of fugitives from State justice."[45] There is some indication of a policy to use removal when the state cannot secure the return of fugitives through rendition.[46] But, excepting this single qualification, the total benefit to the states falls far short of the goal intended by Congress because the time and expense of returning a fugitive for state prosecution have not been substantially reduced.

### D. *Procedure for Federal Prosecution*

In the few instances of federal prosecutions for violation of the Fugitive Felon Act,[47] the fugitive has been returned via federal removal[48] to the federal judicial district in which the original crime was allegedly committed. Approval by an assistant attorney general is required before a federal indictment may be sought or a federal removal proceeding may be instituted.[49] After approval, a removal hearing is conducted before a United States Commissioner or a federal judge in the district in which the arrest was made.[50] To support removal probable cause for believing the fugitive vio-

satisfactory circumstances which existed prior to the passage of the Fugitive Felon Act. The purpose of the federal government's restriction is as yet unexplained. It may be that the policy to not utilize the return potential, which was made approximately at the same time the act was expanded to include all state felonies (see note 45 *infra*), manifests the fear of the federal government that it would be required to return almost *all* state law violators who had fled the state.

45. 107 CONG. REC. 16854 (1961).

46. A statement by the FBI that "it is not the purpose of [the act] . . . to supersede State rendition procedures *when interstate rendition can be accomplished* without the assistance of the Federal Government," implies that the government would use removal in such a situation. 1951 FBI LAW ENFORCEMENT BULL. 4 (October) (Emphasis added.) See notes 13-15 *supra* for a discussion of factors that on occasion prevent rendition.

47. See note 63 *infra*. The cases in which federal prosecutions have occurred frequently involve two federal offenses or some special situation warranting federal prosecution. Williams v. United States, 148 F.2d 923, 924, (5th Cir. 1945) (two federal offenses); Jackson v. United States, 131 F.2d, 606, 609 (8th Cir. 1942); United States v. Clevenger, 105 F. Supp. 333, 335-36 (E.D. Tenn. 1951); United States v. Bruce, 52 F. Supp. 150, 156, (W.D. Ky. 1943) (two federal offenses); Bircham v. Commonwealth, 238 S.W.2d 1008, 1015-16 (Ky.), *cert. denied,* 342 U.S. 805 (1951); see United States v. Miranti, 253 F.2d 135, 137 (2d Cir. 1958). In Jackson v. United States, *supra,* the court also held that one who had voluntarily pleaded guilty to a charged violation of section 1073 and waived his right to counsel under the misapprehension that the state and federal sentences would be served concurrently could not upset the conviction on the ground that he had not waived his constitutional right to the assistance of counsel.

48. FED. R. CRIM. P. 40(b).

49. 107 CONG REC. 20463 (1961).

50. FED. R. CRIM. P. 40(b) (1).

lated the act must be shown.[51] A federal complaint alone is not sufficient proof of probable cause,[52] but the order of removal will issue if a federal indictment is filed with the Commissioner and it is proved or admitted that the person sought to be removed is the one named in the indictment.[53] If either a federal complaint or a federal indictment is filed before the Commissioner, the United States Attorney is not required to prove that the accused committed a felony in the state from which he fled. However, if only a federal complaint is outstanding, evidence must be introduced to show: (1) that a state charging document (for felony) is outstanding; (2) that the accused is the person sought by the state; (3) that an arrest warrant has been issued by a federal court in that state charging the accused with a violation of the act; and (4) that the accused was present in that state at the time the felony was committed.[54] When these elements are proved, the removal warrant will issue and the fugitive will be placed either in custody of federal officers to be returned to the federal district in which the original crime occurred or on bail for appearance in that district.[55] After the removal warrant is issued, the fugitive may petition for a writ of habeas corpus.[56] The court, in determining whether the writ should issue, considers only two facts: (1) identity of the accused, and (2) the regularity of the warrants.[57] The constitutionality of the act upon which the complaint or indictment is based is not properly determinable in a habeas corpus proceeding,[58] nor may

51. *Id.* 40(b) (3). See generally 107 CONG. REC. 16854 (1961).

52. Evidence in a federal removal proceeding of only a *state indictment,* which was returned subsequent to the accused's flight, is not sufficient proof of probable cause, there being no evidence of his intent in traveling interstate. Reis v. United States Marshal, 192 F. Supp. 79, 81 (E.D. Pa. 1961).

53. Barrow v. Owen, 89 F.2d 476 (5th Cir 1937); Reis v. United States Marshal, 192 F. Supp. 79, 81-83 (E.D. Pa. 1961); United States v. Rappaport, 156 F. Supp. 159 (N.D. Ill. 1957); Wright v. Cartier, 10 F.R.D. 21 (D. Mass. 1950); Hemans v. Matthews, 6 F.R.D. 3 (D.D.C. 1946); United States *ex rel.* Channell v. Jaeger, 31 F. Supp. 946 (E.D.N.Y. 1940). "Since [a federal] . . . indictment was returned there is *prima facie* showing that the crime described in the indictment was committed and that Mills committed the crime in Alabama before he left that State. . . ." United States *ex rel.* Mills v. Reing, 191 F.2d 297, 298 (3d Cir. 1951).

54. United States *ex rel.* Channell v. Jaeger, 31 F. Supp. 946 (E.D.N.Y. 1940).

55. United States v. Conley, 80 F. Supp. 700, 703 (D. Mass. 1948).

56. Since the Fugitive Felon Act is a penal statute applicable only to criminal proceedings, it cannot be invoked by the petitioner in a federal habeas corpus proceeding as a means of locating and requiring a witness to give testimony at the hearing. Loper v. Ellis, 224 F.2d 901, 904 (5th Cir. 1955).

57. Barrow v. Owen, 89 F.2d 476 (5th Cir. 1937).

58. *Ibid.* Wright v. Cartier, 10 F.R.D. 21 (D. Mass. 1950); Hemans v. Matthews, 6 F.R.D. 3 (D.D.C. 1946). Of course, if the fugitive is eventually convicted of the federal offense and thereafter petitions for a writ of habeas corpus, he may, during the habeas corpus proceeding, question the constitutionality of the act. Simmons v. Zerbst, 18 F. Supp. 929 (N.D. Ga. 1937).

defenses to the charge in the federal indictment be raised.[59] Consequently, if the issues of identity and regularity of the warrants are decided against the petitioner, the writ will be denied and the fugitive will be returned for federal prosecution to the state from which he fled.

To convict for interstate flight to avoid prosecution, the federal prosecutor must prove beyond a reasonable doubt that the fugitive committed the state felony, that he is subject to prosecution for that offense, and that he fled with intent to avoid prosecution.[60]

## IV. Constitutionality

Numerous unsuccessful challenges to the constitutionality of the Fugutive Felon Act have been advanced since its passage. In general, the theme of the actions has been that the act is an excessive exercise of congressional power over interstate commerce, that it upsets the balance provided by the tenth amendment between the state and federal governments, and that it violates traditional norms of due process.

The argument that the act inflicts cruel and unusual punishment in violation of the eighth amendment has been summarily rejected by the courts; they hold that the maximum penalty—five years imprisonment and a fine of 5,000 dollars—is not disproportionate to the offense.[61]

The allegation that the act is an interference with the extradition process and law enforcement reserved to the states by the tenth amendment has also been dismissed.[62] This argument proceeds from the assumption that return by the federal government of a state law violator for federal prosecution would impede the state's right to invoke interstate rendition and imperil its right to prosecute violators of its laws. While the courts have not squarely considered the possibility that the federal charge *could* take precedence over the state charge, the fact that prosecutions for violation of the act are infrequent[63] and that the obvious purpose of the act is to help, not hinder, state

59. United States *ex rel.* Mills v. Reing, 191 F.2d 297, 298 (3d Cir. 1951).

60. United States v. Miller, 17 F. Supp. 65, 67 (W.D. Ky. 1936); see Maenza v. United States, 242 F.2d 339 (5th Cir. 1957).

61. See, *e.g.*, Hemans v. United States, 163 F.2d 228, 237-38 (6th Cir.), *cert. denied*, 332 U. S. 801 (1947).

62. *Id.* at 239; United States v. Miller, 17 F. Supp. 65, 68 (W.D. Ky. 1936); State *ex rel.* Middlemas v. District Court, 125 Mont. 310, 233 P.2d 1038 (1951); *cf.* Lupino v. United States, 185 F. Supp. 363, 367 (D. Minn. 1960).

63. For example, in the years 1956-1962, of the 8,676 arrests made by state officers and FBI agents for violations of the act, only 27 were prosecuted for the federal offense. 1962 Att'y Gen Ann. Rep. 319; 1961 Att'y Gen. Ann. Rep. 338; 107 Cong. Rec. 20463 (1961). A letter from the U.S. Deputy Attorney General, dated 23 August 1961, stated that "there have been 48 prosecutive applications [under section 1073] . . . in 9,093 possible instances over a 10-year period. . . ." 107 Cong. Rec. 20463 (1961).

prosecutions has resulted in affirmation of its constitutionality against this charge. It would seem that if this assertion has substance, it must be raised by the states themselves to receive serious consideration.[64]

The due process argument advanced is that the act is too indefinite and uncertain for an accused to have full knowledge of the charge. This likewise has been held to be without merit,[65] on the grounds that the act provides a "plain standard of guilt" and that an indictment patterned after its language[66] is sufficient.[67]

Congress has increasingly utilized its power under the commerce clause. The resultant legislation has been generally accepted by the Court as a legitimate exercise of plenary power, so that it seems certain that Congress may legislate to prevent use of interstate commerce as a vehicle to promote crime, obstruct justice and spread harm in the several states.[68] The recent enactment of the "Travel Act"[69] which makes it a felony to travel or use interstate commerce facilities with the intent to aid racketeering enterprises,[70] exemplifies the power of Congress to enact legislation such as the Fugitive Felon Act.[71]

---

64. *Cf.* Holden v. Hardy, 169 U.S. 366 (1898), in which the Court held that the argument made by employers who were being prosecuted for violation of a federal statute that the statute infringed the employees' right to contract "would certainly come with better grace and greater cogency from the [employees]." *Id.* at 397. Of course, a state would probably never consider the act as harmful.

65. See, Azzone v. United States, 190 F. Supp. 376 (D. Minn. 1961); Lupino v. United States, 185 F. Supp. 363, 364, 368 (D. Minn. 1960); United States v. Miller, 17 F. Supp. 65-67 (W.D. Ky. 1936).

66. For example: "Defendant traveled in interstate commerce with intent to avoid giving testimony in a criminal proceeding in such place in which the commission of a felony was charged."

67. Hemans v. United States, 163 F.2d 228, 240 (6th Cir.), *cert. denied,* 332 U.S. 801 (1947). The *Hemans* case further held that the act is not a delegation of the Congressional legislative power to agencies of the states. *Id.* at 238-39.

68. *Id.* at 239; Lupino v. United States, 185 F. Supp. 363, 365-66 (D. Minn. 1960); Simmons v. Zerbst, 18 F. Supp. 929-30 (N.D. Ga. 1937); United States v. Miller, 17 F. Supp. 65, 68 (W.D. Ky. 1936). According to H.R. REP. No. 1458, 73d Cong., 2d Sess. (1934), the Department of Justice, which introduced this act, stated that the bill was based upon the federal power over interstate commerce, relying upon the following statement of the Supreme Court in Hoke v. United States, 227 U.S. 308, 320 (1913): "Commerce among the states . . . consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property; that is, a person may move or be moved, in interstate commerce." *Cf.* Caminetti v. United States, 242 U.S. 470 (1917).

69. 18 U.S.C. § 1952 (Supp. IV, 1962).

70. For an early discussion which invokes the commerce clause in support of the act, see Toy, *Congressional Power to Restrain Interstate Flight of Witnesses in Criminal Cases,* 4 Det. L. Rev. 133 (1934). See generally 1963 DUQUESNE U.L. REV. 181.

71. It has also been held that the privileges and immunities clause of the fourteenth

## Conclusion

The Constitution provides interstate rendition to prevent one state from becoming an asylum from another's justice. Federal and state legislation implementing this provision has proven clumsy and slow, in sharp contrast to federal removal as a vehicle for the return of federal law violators. Because state jurisdiction over a "fugitive" from state law can be obtained when he is returned to the state's boundaries by federal officers using federal removal, a policy of the national government to apprehend and return state law violators whose flight from the state also violated federal law would release states from the need for interstate rendition in almost all cases. This was the apparent purpose of the Fugitive Felon Act when it was passed.

However, the present procedure of the Justice Department is to utilize only the apprehension potential of the act. It is difficult to see how merely locating the fugitive averts many difficulties of interstate rendition. Because the act provides the opportunity to by-pass rendition, and this end is apparently sanctioned by Congress, it is suggested that this opportunity should be exploited whenever it is profitable to the state and feasible for the federal government to do so.

---

amendment which guarantees the right of unfettered ingress and egress is not abridged by the act. Hemans v. United States, 163 F.2d 228, 240 (6th Cir.), *cert. denied,* 332 U.S. 801 (1947); see New York v. O'Neill, 359 U.S. 1, 15 (1959) (dissent).