University of Miami Law Review

Volume 67
Number 1 *Volume 67 Number 1 (Fall 2012)*
Eleventh Circuit Issue

Article 8

10-1-2012

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I. INTRODUCTION

In 2008, Congress enacted the Drug Trafficking Vessel Interdiction Act[1] ("DTVIA") as part of its efforts to decrease the trafficking of drugs

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1. 22 U.S.C. § 2285 (Supp. II 2008). The statute provides in relevant part,

> (a) Offense – Whoever knowingly operates, or attempts or conspires to operate, by any means, or embarks in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of any single country or a lateral limit of that country's territorial sea with an adjacent country, with the intent to evade detection, shall be fined under this title, imprisoned not more than 15 years, or both. . . .
>
> (c) Extraterritorial jurisdiction – There is extraterritorial Federal jurisdiction over an offense under this section, including an attempt or conspiracy to commit such an offense.

into the United States. The DTVIA asserts extraterritorial jurisdiction over stateless semisubmersible and submersible vessels attempting to evade detection on the high seas, irrespective of the contents of the vessel. This article argues that the DTVIA represents a departure from prior assertions of extraterritorial jurisdiction; that enactment of the statute exceeds congressional power and pushes the boundaries of international law; and that the DTVIA further presents potentially negative long-term effects. Overall, the DTVIA demonstrates an overzealous reach of United States jurisdiction on the high seas.

First, this article will explain the purpose and background of the Drug Trafficking Vessel Interdiction Act of 2008. Then it will discuss the statutes and treaties leading up to its enactment, while including the related case law analyzing their constitutionality. To date, all litigation surrounding the constitutionality of the DTVIA has occurred within the Eleventh Circuit. Thus, the article will examine the Eleventh Circuit's analysis of the DTVIA in light of challenges to its constitutionality. Finally, that section and the article will conclude explaining why the Act exceeds congressional power and is inconsistent with principles of international law.

II. BACKGROUND OF THE DRUG TRAFFICKING VESSEL INTERDICTION ACT OF 2008

In recent decades, the United States has launched a war on the drug trade. Despite the government's efforts, millions of dollars' worth of drugs enter the country every year. The United States Coast Guard has played a critical role in seizing drugs both within and outside the territorial waters of the United States. The Coast Guard has made drug-related seizures of thirty-one, forty, fifty-six, and fifty-eight vessels in 2012, 2011, 2010, and 2009, respectively.[2] These events led to the detention of over 750 people and the forfeiture of over one million pounds of marijuana and cocaine.[3] The Drug Trafficking Vessel Interdiction Act of 2008 was enacted in response to the growing problem of drug traffickers transporting large quantities of cocaine and other drugs to the United States and Mexico, specifically in self-propelled semi-submersible vessels.[4] The use of semi-submersible vessels has become a common method of smuggling drugs because the semi-submersible vessels are designed to readily sink upon detection.[5] When crewmembers of the

2. *Coast Guard Drug Removal Statistics*, U.S. COAST GUARD OFFICE OF LAW ENFORCEMENT CG-531, http://www.uscg.mil/hq/cg5/cg531/Drugs/stats.asp (last visited Aug. 24, 2012).

3. *Id.*

4. 154 Cong. Rec. H10,252 (2008).

5. *See* Brian Wilson, *Submersibles and Transnational Criminal Organizations*, 17 OCEAN & COASTAL L.J. 35 (2011).

vessels suspect detection by law enforcement, they quickly scuttle the contents of the vessel into the ocean and sink the submarine. The vessels are financed by massive drug cartels, who even factor in that a certain percentage of the drugs will be seized by law enforcement as a sort of cost of doing business.[6]

The vessels, typically constructed in the jungles of Ecuador and Columbia, are less than one-hundred feet in length.[7] Semi-submersible vessels are similar to submarines, except they typically do not fully submerse, with portions of the vessel remaining at or near the water's surface.[8] The vessels can carry crews of four to five people traveling up to 5,000 miles without refueling.[9] Prior to the enactment of the DTVIA, the Coast Guard needed to have evidence of drugs in order to obtain a conviction following a seizure—a difficult burden to meet. Such a vessel design makes interception of smuggled content by law enforcement nearly impossible because crewmembers can quickly dispose of cargo and jump overboard. Thus, in an effort to curtail drug smuggling by these vessels, Congress enacted the DTVIA to criminalize the mere act of operating a vessel without a national registration on the high seas while attempting to evade detection. Congress also suggested further applicability to combat the use of these vessels beyond drug smuggling to the transportation of weapons of mass destruction and terrorists.[10]

III. PREDECESSOR STATUTES AND RELATED TREATIES

A. *The Comprehensive Drug Abuse Prevention Act*

The DTVIA presents a broad jurisdictional leap taken by the United States on the high seas; however, prior assertions of jurisdiction by federal courts over stateless vessels[11] paved the way for the statute's enactment. The Comprehensive Drug Abuse Prevention and Control Act of 1970 ("the 1970 Act") provided for the prosecution of various drug

6. Deborah Feyerick et al., *Drug Smugglers Becoming More Creative, U.S. Agents Say*, CNN.COM (Apr. 16, 2009), http://www.cnn.com/2009/CRIME/04/16/creative.drug.smugglers/index.html.

7. *$180 Million in Cocaine Seized from Drug Sub in Caribbean Sea, Coast Guard Says*, SUN SENTINEL, Aug. 1, 2011.

8. *Id.*

9. *Id.*

10. 154 Cong. Rec. H10,253.

11. The United Nations Convention on the Law of the Sea, to which the United States is not a signatory, defines a ship without nationality as one that flies the flag of no nation or one that flies the flags of two nations, choosing which to sail under by convenience. United Nations Convention on the Law of the Sea art. 92., para. 2, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. The same definition appears in Article 6 of the Convention on the High Seas, the predecessor treaty, to which the United States was a signatory. United Nations Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11, 82 [hereinafter Convention on the High Seas].

smuggling activities on the high seas.[12] This statute provided for the prosecution of narcotics possession within the territorial waters of the United States, and also on the high seas if there was found to be an intention to distribute within the United States.[13] Under this statute, law enforcement did not have the ability to convict for possession of marijuana by vessels on the high seas, even those registered to the United States, unless it was proven that there was an intention to distribute within the United States.[14] The burden of proof under the 1970 Act made convictions of those aboard vessels apprehended on the high seas difficult, regardless of whether the vessels were stateless; in this way, the Coast Guard's ability to combat drug smuggling to the territorial waters of the United States was limited.

B. *The Marijuana on the High Seas Act of 1980*

In 1980, Congress enacted the Marijuana on the High Seas Act[15] to broaden the scope of the 1970 Act.[16] This statute provides for the prosecution of persons in possession of a controlled substance on board any vessel or aircraft arriving or departing from the United States.[17] At the time of that statute's enactment, the United States was party to the Convention on the High Seas.[18] Many courts expressly relied on this treaty to apply the statute to stateless vessels on the high seas stating that jurisdiction extends to vessels including those "without a nationality or a vessel assimilated to a vessel without a nationality, in accordance with paragraph (2) of article 6 of the Convention on the High Seas, 1958."[19] Under this statute Congress intended to "prohibit all acts of illicit trafficking in controlled substances on the high seas in which the United

12. 84 Stat. 1236 (1970).

13. *Id.*

14. United States v. Hayes, 653 F.2d 8 (1st Cir. 1981).

15. 21 U.S.C. §§ 955a–955d (1982). The Act has been transferred and consolidated to 21 U.S.C. § 955 (2006).

16. For a more detailed analysis of the Marijuana on the High Seas Act of 1980 and its history, see Laura L. Roos, *Stateless Vessels and the High Seas Narcotics Trade: United States Courts Deviate from International Principles of Jurisdiction*, 9 MAR. LAW. 273 (1984).

17. *Id.*

18. Convention on the High Seas, *supra* note 11.

19. 21 U.S.C. § 955b(d) (1982). Article 6 of the Convention on the High Seas provides,

> 1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.
>
> 2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

States can reach under international law."[20] The Act made it unlawful to "knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute a controlled substance."[21] Unlike the 1970 Act, however, the Marijuana on the High Seas Act did not require an intention to distribute *within the United States*, giving a broader reach to law enforcement.[22] Congress explicitly intended the Marijuana on the High Seas Act to have extraterritorial effect.[23] By extending jurisdiction of the statute to stateless vessels extraterritorially, Congress did not explicitly require any nexus between activity on the high seas and activity within the United States. Nonetheless, based on congressional intent, courts should interpret the extraterritorial jurisdictional application of this statute as limited by principles of international law.[24] While courts have been inconsistent in such interpretation, most have instituted a nexus requirement with the United States for prosecution under this statute.[25]

In the Eleventh Circuit's landmark case on the nexus issue, *United States v. Marino-Garcia*,[26] the court tackled the question of whether international law imposes any substantive restrictions upon extending criminal jurisdiction to all crewmembers of stateless vessels on the high seas engaged in the distribution of controlled substances under the Marijuana on the High Seas Act. The court held that there was no such imposition, explaining that jurisdiction "exists solely as a consequence of the vessel's status as stateless."[27] The court explained that vessels "without nationality are international pariahs. They have no internationally recognized right to navigate freely on the High Seas."[28] The court noted that under the principle of freedom of the seas, "international law generally prohibits any country from asserting jurisdiction over foreign vessels on

20. United States v. Gonzales, 776 F.2d 931, 933 (1985).

21. 21 U.S.C. § 955a(a) (1982). The statute defines controlled substances as those contained in Schedules I–IV of the Controlled Substance Act, currently found at 21 C.F.R. § 1308. This means that the statute only applies to substances controlled in the United States.

22. 21 U.S.C. § 955a(a).

23. 21 U.S.C. § 955a(h) (1982). This section states,

> (h) Extension beyond territorial jurisdiction of the United States: This section is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States.

24. *See* Gonzales, 776 F.2d at 933; *see also*, Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 117 (1804) (Chief Justice Marshall explaining that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains").

25. *See, e.g.*, United States v. James-Robinson, 515 F. Supp. 1340 (S.D. Fla. 1981) (explaining that "[s]ome manner of nexus with some interest of the United States is essential to give this Court subject matter jurisdiction over any prosecution for possession of a controlled substance with intent to distribute").

26. 670 F.2d 1373 (11th Cir. 1982).

27. *Id.* at 1383.

28. *Id.* at 1382.

the high seas," but that such an idea does not extend to stateless vessels.[29] British courts have reached similar conclusions about stateless vessels.[30]

On the high seas, the court explained, jurisdiction will also lie over foreign vessels if there is a nexus between the foreign vessel and the nation seeking to assert jurisdiction, if the foreign vessel threatens national security or governmental functions, or if the foreign vessel is engaged in activity universally prohibited, such as the slave trade or piracy.[31] The court concluded that these jurisdictional requirements apply only to foreign vessels, and not stateless vessels.[32]

In reaching these conclusions, the Eleventh Circuit relied in part on Article 6 of the Convention on the High Seas.[33] *United States v. Marino-Garcia* was decided on July 9, 1982. That same year, the Convention on the High Seas, which the United States ratified in 1958, was superseded by the United Nations Convention on the Law of the Sea ("UNCLOS").[34] UNCLOS was the international agreement resulting from the United Nations Conference on the Law of the Sea that took place between 1973 and 1982.[35] The Convention was opened for signature soon after the *Marino-Garcia* case on December 10, 1982.[36] Although 157 countries have signed the treaty to date, the United States has neither signed nor ratified the UNCLOS.[37] The United States' failure to adopt the new treaty plays a critical role in the analysis of the DTVIA because courts interpreting the DTVIA rely on *Marino-Garcia*, which is supported by a treaty that is no longer in force.[38] Moreover, the United States' political stance toward the new treaty poses a tricky situation for the courts.[39]

C. *The Maritime Drug Law Enforcement Act of 1986*

The next large piece of maritime drug trafficking legislation occurred when the Maritime Drug Law Enforcement Act ("MDLEA")

29. *Id.* at 1381.

30. *See, e.g.*, Molvan v. Attorney-General for Palestine, A.C. 351 (1948) (explaining that no "question of comity nor any breach of international law can arise, if there is no State under whose flag the vessel sails").

31. *Marino-Garcia*, 670 F.2d at 1381–82.

32. *Id.*

33. *Id.*; *see also* Article 6 of the Convention on the High Seas, *supra* note 19.

34. UNCLOS, *supra* note 11.

35. *Id.*

36. *Id.*

37. *Status of the United Nations Convention on the Law of the Sea*, UN.ORG, http://www.un.org/Depts/los/reference_files/status2010.pdf (last visited Aug. 28, 2012).

38. *See infra*, Part IV–C.

39. *Id.*

was enacted in 1986.[40] For the twenty years leading up to the enactment of the DTVIA, the United States prosecuted maritime drug offenses primarily through the MDLEA. The MDLEA makes it illegal for an individual to "knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance on board . . . a vessel of the United States or a vessel subject to the jurisdiction of the United States."[41] The statute includes stateless vessels as those subject to the jurisdiction of the United States.[42] Despite the MDLEA being enacted after the UNCLOS treaty was ratified by more than 130 countries, the MDLEA references the definition of stateless vessel from Article 6 of the Convention on the High Seas.[43]

The MDLEA gave the authority needed to pursue a multitude of convictions in the United States' ongoing efforts to combat the international drug trade.[44] The statute cannot reach foreign vessels on the high seas because these vessels are subject to the jurisdiction of the nation to which they are registered.[45] By flying flags of convenience, vessels are able to escape the statutory reach of the MDLEA.[46] Still, numerous bilateral and multilateral treaties allow the United States Coast Guard to stop, board, and search suspicious vessels.[47] These treaties have greatly expanded the reach of the United States' drug interdiction efforts.[48]

Even with its broad reach, the MDLEA faces jurisdictional obstacles because some courts still impose a nexus requirement despite the presence of a bilateral agreement. The Supreme Court has yet to rule on the issue of whether there must be a nexus between a foreign vessel on the high seas and the United States under the MDLEA for United States courts to obtain jurisdiction. In the circuit courts, there is currently a split on this issue. The Courts of Appeals for the First, Third, Fifth, and Eleventh Circuits do not impose such a nexus requirement.[49] Con-

40. 46 U.S.C. §§ 70501–70507 (1986).

41. *Id.* at § 70503(a).

42. *Id.* at § 70502(c).

43. *Id.* at § 70502(c)(1)(B).

44. UNITED STATES DEPARTMENT OF STATE BUREAU FOR INTERNATIONAL NARCOTICS AND LAW ENFORCEMENT AFFAIRS, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT VOLUME I: DRUG AND CHEMICAL CONTROL 48 (Mar. 2011), *available at* http://www.state.gov/documents/organization/156575.pdf [hereinafter NARCOTICS REPORT].

45. *Id.*

46. Flying a flag of convenience is the practice of registering a ship under a foreign country's flag in order to be governed by the laws of that country. *See* Lindo v. NCL, Ltd., 652 F.3d 1257 (11th Cir. 2011).

47. *See* NARCOTICS REPORT, *supra* note 44.

48. *Id.*

49. *See, e.g.*, United States v. Angulo-Hernandez, 565 F.3d 2, 11 (1st Cir. 2009) (holding that the government was not required, under due process, to prove a nexus between the defendant's conduct and the United States under the MDLEA); *see also* United States v. Rendon, 354 F.3d

versely, the Ninth Circuit Court of Appeals requires both constitutional jurisdiction and statutory jurisdiction.

According to the Ninth Circuit, a showing of a nexus between the vessel and the nation satisfies constitutional jurisdiction. Meeting any of the elements of the MDLEA satisfies statutory jurisdiction.[50] For example, in *United States v. Perlaza*, the Court of Appeals for the Ninth Circuit found that the United States Coast Guard did not have jurisdiction over crewmembers found in possession of narcotics on the high seas absent a showing of a nexus between their activity and the United States.[51] The court reached this conclusion even though the Coast Guard obtained permission to board the vessel based on an agreement between the United States and Colombia.[52] Still, although the Ninth Circuit imposes a nexus requirement, the court accepts a very loose definition of nexus. This point was illustrated in *United States v. Medjuck*, where nexus was established by a finding that smuggled narcotics, although not heading for the United States, would eventually end up in the United States.[53]

With the increasing use of stateless vessels as a method to transport drugs, the debate over the MDLEA's nexus requirement may soon become irrelevant. Flying a flag of convenience may be a method to avoid prosecution under the MDLEA in some courts, but there is no such requirement as applied to stateless vessels because the MDLEA provides for jurisdiction over stateless vessels on the high seas.[54] Still, evidence of knowledge of or intent to "manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance on board must be found" to satisfy the elements of the crime against both foreign and stateless vessels under the MDLEA.[55] Because of the trend

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1320 (11th Cir. 2003); United States v. Perez-Oviedo, 281 F.3d 400 (3d Cir. 2002); United States v. Suerte, 291 F.3d 36 (5th Cir. 2002).

50. 46 U.S.C. § 70502 (1980). This section explains that a "vessel subject to the jurisdiction of the United States" includes

> (A) a vessel without nationality;
> (B) a vessel assimilated to a vessel without nationality under paragraph (2) of article 6 of the 1958 Convention on the High Seas;
> (C) a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States;
> (D) a vessel in the customs waters of the United States;
> (E) a vessel in the territorial waters of a foreign nation if the nation consents to the enforcement of United States law by the United States.

51. United States v. Perlaza, 439 F.3d 1149 (9th Cir. 2006).

52. *Id.*

53. United States v. Medjuck, 156 F.3d 916, 919 (9th Cir. 1998) (explaining "both economics and geography dictate that that at least some portion of the [drugs] would at some point be found in the United States").

54. *See, e.g.*, United States v. Rendon, 354 F.3d 1320 (11th Cir. 2003).

55. 46 U.S.C. § 70503 (1986).

of using semi-submersible vessels to transport drugs through international waters, the MDLEA becomes ineffective if smugglers can quickly scuttle illegal cargo and sink the vessel before evidence is obtained. Prior to the enactment of the DTVIA, Coast Guard officials complained that they were being forced to release crewmembers of stopped vessels because all of the evidence was at the bottom of the ocean.[56] The DTVIA eliminates that evidentiary burden by creating a federal offense for the mere act of operating a submersible or semi-submersible vessel without nationality with the intent to evade detection.[57] The DTVIA cross-references a portion of the MDLEA that lists a number of factors to be taken as prima facie evidence of the intent to evade detection, many of which are characteristic of all semi-submersible vessels.[58]

IV. ELEVENTH CIRCUIT ANALYSIS OF THE DTVIA

To date, challenges to the DTVIA have been litigated primarily within the Eleventh Circuit. Those prosecuted under the statute have unsuccessfully challenged the statute from many angles. The Eleventh Circuit has rejected all such challenges, ruling that the statute does not exceed Congress' Article I, section 8 powers, that the statute is not unconstitutionally vague, that it does not impermissibly shift the burden of proof to the defendants, and that the statute does not violate substantive due process.[59] Challenges have also been made to the sentencing guidelines associated with the DTVIA. The DTVIA, and particularly the

56. Feyerick, *supra* note 6, at 2.

57. 18 U.S.C. § 2285 (Supp. II 2008).

58. 46 U.S.C. § 70507 (2006). Such factors include

> (1) The construction or adaptation of the vessel in a manner that facilitates smuggling, including—
>
> (A) the configuration of the vessel to ride low in the water or present a low hull profile to avoid being detected visually or by radar;
>
> (B) the presence of any compartment or equipment that is built or fitted out for smuggling, not including items such as a safe or lock-box reasonably used for the storage of personal valuables; . . .
>
> (F) the presence of a camouflaging paint scheme, or of materials used to camouflage the vessel, to avoid detection; or . . .
>
> (4) The operation of the vessel without lights during times lights are required to be displayed under applicable law or regulation and in a manner of navigation consistent with smuggling tactics used to avoid detection by law enforcement authorities. . . .
>
> (9) The presence of a controlled substance in the water in the vicinity of the vessel, where given the currents, weather conditions, and course and speed of the vessel, the quantity or other nature is such that it reasonably indicates manufacturing or distribution activity.

59. *See, e.g.*, United States v. Ibarguen-Mosquera, 634 F.3d 1370 (11th Cir. 2011), and *infra*, Part IV–A. The first argument that the DTVIA exceeds congressional authority will be discussed separately. *See infra* note 107, and Part IV–C.

Eleventh Circuit's analysis of the congressional authority to grant extra-territorial jurisdiction, presents broader implications in the foreign policy realm, pushing the boundaries of international law and expanding the United States' presence in international justice. The cases that follow demonstrate the problems created by the DTVIA and the Eleventh Circuit's interpretation of the statute.

A. United States v. Ibarguen-Mosquera

The Eleventh Circuit issued its seminal opinion interpreting the DTVIA in *United States v. Ibarguen-Mosquera* in February of 2011.[60] In January of 2009, the United States Coast Guard received a report from a Maritime Patrol Aircraft of a suspicious semi-submersible vessel in the Eastern Pacific Ocean, approximately 163 nautical miles off the coast of Colombia.[61] The aircraft observed four men exit the vessel, inflate life rafts, and jump into the water.[62] Eventually, the crewmembers deflated the rafts, and continued their travel.[63] When a Coast Guard ship arrived, the aircraft illuminated the vessel.[64] The crewmembers exited the vessel, inflated the life rafts again, and jumped into the water.[65] Aircraft personnel observed a "flash of light" and "smoke or steam" emit from the vessel, which then sank.[66] The crewmembers were escorted to a Coast Guard ship and flown to Tampa where they were arrested on January 14, 2009.[67] The crewmembers were charged with violating the DTVIA for the operation of a semi-submersible vessel in international waters without nationality, and with the intent to evade detection.[68]

The defendants in *Ibarguen-Mosquera* claimed that the terms of the DTVIA are vague as to violate due process.[69] To be unconstitutionally vague, phrases in a statute must be vague as applied to the challengers, and not as applied to other potential offenders.[70] The defendants specifically challenged the phrases "semi-submersible," "vessel," and "intent to evade."[71] Because the terms are defined within the statute, and the activity of the crewmembers fell within the ordinary meaning of the words,

60. *Ibarguen-Mosquera*, 634 F.3d at 1370.
61. *Id.* at 1377.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 1380 (citing Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2719 (2010)).
71. *Id.*

the Eleventh Circuit easily disposed of this challenge.[72] The vessel in which the defendants were found was within the definition of "semi-submersible vessel," and the defendants' conduct met more than one of the prima facie indicators of "intent to evade" as enumerated in the statute.[73]

The defendants additionally argued that the DTVIA violates procedural due process because the statute "effectively redefines the offense of drug trafficking, eliminating the requirement of drug-possession."[74] They argued that the burden of proof shifts to the defendants because they would have to raise the element of drug possession, or lack thereof, as an affirmative defense.[75] The Eleventh Circuit explained that although the statute was intended to deter drug trafficking, it is not exclusively a drug trafficking statute.[76] Rather, the statute creates an entirely new offense by criminalizing not only the underlying conduct of drug trafficking, but also by criminalizing the act of operating a stateless vessel.[77] Therefore, the court found, there was no procedural due process violation. The Eleventh Circuit's refusal to classify the statute as a drug trafficking statute seems to be a convenient justification for defeating this challenge. This justification becomes inconsistent with the court's later reliance on the drug trafficking nature of the statute to justify the sentencing guidelines attached to the DTVIA.[78]

Similarly, the defendants further claimed that the DTVIA violates substantive due process because it is not rationally related to any legitimate government interest.[79] The Eleventh Circuit explained that the rational relation test[80] is not rigorous and that the government's assertion that the operation of such vessels is a serious international problem eas-

72. *Id.* As cross-referenced in the DTVIA, 46 U.S.C. § 70502(f) defines a semi-submersible vessel as "any watercraft constructed or adapted to be capable of operating with most of its hull and bulk under the surface of the water, including both manned and unmanned watercraft." A submersible vessel is one that "is capable of operating completely below the surface of the water, including both manned and unmanned watercraft." *Id.*

73. *Ibarguen-Mosquera*, 634 F.3d at 1380.

74. *Id.* at 1381.

75. *Id.*

76. *Id.* ("While it is probably true that the DTVIA was enacted in part to deal with the problem of losing drug evidence to the sinking of semi-submersibles, the DTVIA is not a drug-trafficking statute. In enacting the DTVIA, Congress chose to prohibit an entirely new evil, not to redefine an old one.")

77. *Id.*

78. *See infra* note 88.

79. *Ibarguen-Mosquera*, 634 F.3d at 1382.

80. This challenge is separate from the challenge that due process is violated by the law being arbitrary or unfair without a nexus requirement. Although the court's analysis of the rational relation test appears similar to its analysis of the nexus requirement, the two are distinct issues considered by the court.

ily passes muster as a governmental interest.[81] The *Ibarguen-Mosquera* defendants made several other case-specific challenges, including claims of insufficient evidence, double jeopardy, and inappropriate exclusion of expert testimony, all of which were struck down by the court.[82]

B. *Other Cases Challenging the DTVIA*

1. *United States v. Saac*

Although *Ibarguen-Mosquera* is the seminal Eleventh Circuit case analyzing the DTVIA, additional issues have been raised in other cases. *United States v. Saac* presents four cases consolidated before the Eleventh Circuit to challenge the sentencing guidelines associated with the DTVIA.[83] In the consolidated case, after being charged for operating a stateless semi-submersible in violation of the DTVIA, defendants entered unconditional guilty pleas.[84] The district court sentenced the defendants to 108 months' imprisonment and three years of supervised release for each count, to run concurrently.[85] At the time of sentencing, the district court applied the proposed sentencing guidelines for the DTVIA, although no offense-specific guideline had been officially promulgated for the DTVIA.[86]

In reviewing the district court's sentencing, the Eleventh Circuit explained that when "no offense specific guideline has been promulgated, the district court either must apply the most analogous guideline, or if there is not a sufficiently analogous guideline, [the baseline sentencing factors] of 18 U.S.C. § 3553 control."[87] The Eleventh Circuit agreed with the district court that there was no sufficiently analogous guideline, and that because the district court considered section 3553, the district court committed no procedural error in selecting the sentences.[88] The Eleventh Circuit also analyzed the 108-month sentence itself, as contained in the proposed guideline, and found that it was not substantively unreasonable.[89] The sentencing guidelines as applied to the four defendants achieved the goals of deterring "drug cartels from using submersible vessels to smuggle drugs," protecting the public, and providing "proper punishment especially in light of the seriousness of

81. *Ibarguen-Mosquera*, 634 F.3d at 1382; *see also* 154 Cong. Rec. H10,252, *supra* note 4.
82. *Ibarguen-Mosquera*, 634 F.3d at 1385–86.
83. 632 F.3d 1203 (11th Cir. 2011).
84. *Id.* at 1207.
85. *Id.*
86. *Id.* at 1212. Congress later adopted the proposed DTVIA guidelines that became effective on November 1, 2009. U.S. SENTENCING GUIDELINES MANUAL § 2X7.2 (2009).
87. *Saac*, 632 F.3d at 1213.
88. *Id.* at 1214.
89. *Id.* at 1215.

the offense."[90]

2. *United States v. Valarezo-Orobio*

Contrary to the facts in *Ibarguen-Mosquera*, *United States v. Valarezo-Orobio* is an example of a prosecution under the DTVIA in which there were no drugs on board.[91] In *Valarezo-Orobio*, the defendants were crewmembers on a thirty-five-foot self-propelled semi-submersible vessel that was apprehended by the United States Coast Guard in international waters near Colombia on July 27, 2009.[92] The vessel, which defendants admitted was semi-submersed to evade detection, was traveling from Colombia to Ecuador to pick up cargo for a transportation trip.[93] While at sea, defendant Valarezo spotted a maritime patrol helicopter and notified the vessel's captain.[94] The captain ordered Valarezo to inflate a life raft and to sink the vessel by opening four valves.[95] By the time the Coast Guard arrived, the vessel had completely sunk and all crewmembers had abandoned the vessel to board the life raft.[96] All crewmembers except for the captain were charged with conspiracy and substantive violations of the DTVIA.[97] Both Valarezo and his co-defendant Palomino were sentenced to 108 months' imprisonment followed by thirty-six months of supervised release.[98]

On appeal, the defendants challenged the constitutionality of the DTVIA on the grounds that it exceeds Congress' power to regulate piracy and crimes on the high seas, that the definitions in the statute are unconstitutionally vague, and that it violates due process by presuming that the defendant is guilty of drug trafficking solely upon evidence that he operated a semi-submersible vessel, thus impermissibly shifting the burden of proof to the defendant.[99] While on appeal, these issues were disposed of in *Ibarguen-Mosquera*, and the Eleventh Circuit similarly denied the challenges.[100] The court further analyzed the sentencing guidelines for the DTVIA, and the enhancement that was applied to the defendants. The court found that the district court appropriately applied the sentencing guidelines and the enhancement.[101]

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90. *Id.* at 1214.
91. United States v. Valarezo-Orobio, 635 F.3d 1261 (11th Cir. 2011).
92. *Id.* at 1262.
93. *Id.*
94. *Id.* at 1263.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 1263–64.
100. *Id.* at 1264.
101. *Id.* at 1265.

While the constitutional challenges in *Valarezo-Orobio* to the DTVIA were similar to those in *Ibarguen-Mosquera*, the facts of the case demonstrate the breadth of prosecution under the DTVIA. Although it became evident that eventually the semi-submersible vessel might in fact be used to transport drugs, no drugs were ever detected—scuttled or on board. The defendants were prosecuted exclusively for operating a stateless vessel in international waters with the intent to evade detection.

3. *United States v. Campaz-Guerrero*

Similarly, in *United States v. Campaz-Guerrero*, the Eleventh Circuit addressed constitutional challenges to the DTVIA.[102] In that case, the defendants were detected in a semi-submersible vessel on December 31, 2008, about 195 miles off the coast of Ecuador.[103] The crewmembers were pulled out of the Pacific after sinking the vessel, and were transported to the United States for prosecution.[104] The four defendants were charged with one count of conspiring to operate a semi-submersible vessel and a second count of aiding and abetting in the operation of a semi-submersible vessel in violation of the DTVIA.[105] Again, the defendants' challenges to the statute and the associated sentences were struck down by the Eleventh Circuit, citing *Ibarguen-Mosquera* and *Saac*.[106] Like the defendants in *Valarezo-Orobio*, the *Campaz-Guerrero* defendants were not found to be transporting drugs at the time of the seizure.

C. *Challenges that the DTVIA Exceeds Congressional Power and Principles of International Law*

In *United States v. Ibarguen-Mosquero*, the first challenge addressed congressional power under Article I, section 8 of the Constitution, which grants Congress the authority to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."[107] This clause has been interpreted to give Congress broad authority in punishing criminal offenses outside United States territory. Relying on Supreme Court jurisprudence related to Article I, section 8 to analyze whether the DTVIA is legally given extraterritorial effect, the Eleventh Circuit conducted a two-step analysis. First, Congress must

102. 424 F. App'x 898 (11th Cir. 2011).

103. *Id.* at 900. The court deems this area to be international waters, although Ecuador claims its territorial waters to include the area within 200 nautical miles of its coastline. It is unclear exactly where the ship was stopped, or the reason why these were considered international waters.

104. *Id.*

105. *Id.*

106. *Id.* at 902–04.

107. United States v. Ibarguen-Mosquera, 634 F.3d 1370, 1378 (11th Cir. 2011); *see also* U.S. CONST. art. I, § 8, cl. 10.

intend the law to have extraterritorial effect,[108] which is clearly satisfied by the DTVIA's statement of extraterritorial jurisdiction.[109] Second, the law must comport with due process in that it may not be arbitrary or fundamentally unfair.[110]

1. Due Process and Principles of International Law

In making a determination as to whether a law to be applied extraterritorially comports with due process, appellate courts typically consult international law principles. These principles include the objective principle, the protective principle, the universal principle, and the territorial principle.[111] Under the territorial principle, a state has jurisdiction to prescribe and enforce a rule of law in the territory of another state to the extent provided by international agreement with the other state.[112] Under the protective principle, a nation may assert jurisdiction over a person whose extraterritorial activity threatens the nation's security.[113] The protective principle typically is used only to apply to conduct generally recognized among nations as a crime.[114] Similarly, under the universal principle, a nation may legislate to define and punish conduct considered to be of universal concern or universally condemned.[115] Finally, under the objective principle, a nation may criminalize conduct extraterritorially if there is a nexus between that conduct and the nation.[116]

2. Principles of International Law as Applied to Stateless Vessels

The Eleventh Circuit rejected the defendants' argument that the DTVIA does not comport with due process because it fails to meet both the nexus requirement from the objective principle, and the requirement that the crime be universally condemned from the protective princi-

108. *Ibarguen-Mosquera*, 634 F.3d at 1378 (citing United States v. Flores, 289 U.S. 137, 155 (1933)).

109. 18 U.S.C. § 2285(c) (Supp. I 2008) ("There is extraterritorial jurisdiction over an offense under this section . . . .").

110. *Ibarguen-Mosquera*, 634 F.3d at 1378 (citing United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999)).

111. *Id.*

112. *Cardales*, 168 F.3d at 553 (citing United States v. Robinson, 843 F.2d 1, 4 (1st Cir. 1988)).

113. *Id.*; *see also* Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234–35 (1804) (stating that a nation's "power to secure itself from injury may certainly be exercised beyond the limits of its territory").

114. *Id.*

115. United States v. Saac, 632 F.3d 1203, 1210 (11th Cir. 2011).

116. *Ibarguen-Mosquera*, 634 F.3d at 1379.

ple.[117] Relying on its analysis in *United States v. Marino-Garcia*,[118] the court asserted that these international law principles apply only to govern flagged vessels and have no applicability to stateless vessels.[119] Because the court concluded that international law permits any nation to subject stateless vessels on the high seas to its jurisdiction, the court found that the DTVIA comports with international law and is thus not arbitrary or fundamentally unfair.[120] Again, relying on *Marino-Garcia*, the court explained that international "law permits any nation to subject stateless vessels on the high seas to its jurisdiction. . . . Jurisdiction exists solely as a consequence of the vessel's status as stateless."[121]

Alternatively, in *United States v. Saac*, the Eleventh Circuit found that the DTVIA does nonetheless comport with these principles.[122] The court explained that the DTVIA satisfies the universal principle because Congress' findings show that the DTVIA targets criminal conduct that facilitates drug trafficking, which is condemned universally by law-abiding nations.[123] There, the court relied on the reasoning of the Third Circuit in making such a determination.[124] Based on the same congressional findings, the Eleventh Circuit found that the DTVIA satisfied the protective principle, explaining that those "who engage in conduct the DTVIA targets threaten our nation's security by evading detection while using submersible vessels to smuggle illegal drugs or other contraband, such as illegal weapons, from one country to another, and often into the United States."[125]

The Eleventh Circuit's reasoning is problematic for several reasons. First, the court's analysis of the DTVIA relies on interpretations of predecessor drug trafficking statutes. These previous interpretations rely on the Convention on the High Seas, which is no longer in force and was superseded by the United Nations Convention on the Law of the Sea ("UNCLOS"). Ignoring that point, it is important to note that, although the Convention on the High Seas does not grant rights to stateless vessels on the high seas, it does not subject them automatically to the juris-

117. *Id.*

118. *United States v. Marino-Garcia*, 670 F.2d 1373, 1373 (11th Cir. 1982).

119. *Ibarguen-Mosquera*, 634 F.3d at 1379; *see also* United States v. Rendon, 354 F.3d 1320, 1324 (11th Cir. 2003) ("Because stateless vessels do not fall within the veil of another sovereign's territorial protection, all nations can treat them as their own territory and subject them to their laws.").

120. *Id.*

121. *Id.* (citing *Marino-Garcia*, 670 F.2d at 1383).

122. United States v. Saac, 632 F.3d 1203, 1211 (11th Cir. 2011).

123. *Id.*

124. *See* United States v. Martinez-Hidalgo, 993 F.2d 1052 (3d Cir. 1993); *see also* United States v. Estupinan, 453 F.3d 1336 (11th Cir. 2006).

125. *Saac*, 632 F.3d at 1211.

diction of all nations. In fact, the former Convention explicitly promotes freedom of the seas principles.[126] UNCLOS similarly promotes notions of freedom of the seas, including, in particular, freedom of navigation.[127]

Although the United States never officially signed on to UNCLOS, President Reagan announced that the United States would adhere to the treaty nonetheless. President Reagan declined to sign the treaty because of disagreements with certain deep seabed mining provisions that he claimed were "contrary to the principles of industrialized nations and would not help attain the aspirations of developing countries."[128] However, President Reagan went on to explain that the United States was "prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans."[129] He announced that the United States would "exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention."[130] President Reagan explained that the United States would make efforts to work with other countries to develop an acceptable deep seabed regime.[131] Essentially, instead of formally signing on to UNCLOS because of reservations with one part of the treaty, President Reagan informally adopted a policy of adhering to the Convention's other parts.

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126. Article 2 of the Convention of the High Seas provides,

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. . . These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

127. The language from Article 2 of the Convention on the High Seas, *supra* note 126, is adopted with modifications into Articles 87 and 89 of UNCLOS, which provide,

> Article 87. Freedom of the High Seas:
>
> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
>
> (a) freedom of navigation . . .
>
> 2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.
>
> Article 89. Invalidity of claims of sovereignty over the high seas:
>
> No state may validly purport to subject any part of the high seas to its sovereignty.

128. Statement by the President on United States Ocean Policy, 19 Weekly Comp. Pres. Doc. 383 (Mar. 10, 1983).

129. *Id.*

130. *Id.* In the same statement, President Reagan made an announcement defining the Exclusive Economic Zone of the United States to be within 200 nautical miles of its coast.

131. *Id.* at 384.

Since Reagan's policy pronouncement, UNCLOS has been a contested issue among interested parties in the United States. The Obama administration is pushing for Congress to ratify the thirty-year-old treaty.[132] The United States is the only major industrialized nation that has failed to do so.[133] Supporters of the treaty also include the United States military and others who think ratification is necessary for the United States to maintain its position as the world's leading maritime power.[134] Although the United States has not yet ratified the treaty, it has long maintained a policy of generally abiding by its strictures, and thus the courts should acknowledge UNCLOS and its principles in analyzing the DTVIA.

3. Departure from Jurisdictional Applications of Predecessor Statutes

In applying prior statutes asserting United States criminal jurisdiction on the high seas, courts typically required that there be a nexus between a vessel and the United States, or that the illicit activity be a universally recognized crime condemned by all law-abiding nations. Courts have often liberally construed the nexus requirement, with jurisdiction satisfied if the activity would have any eventual effect on the United States. The DTVIA, however, eliminates this requirement entirely, which is a departure from previously-imposed jurisdictional requirements.[135]

The DTVIA lowers the threshold for jurisdiction, creating a new crime of simply being a stateless vessel intending to evade detection on the high seas. Jurisdiction over such a crime would be proper without a nexus requirement if being a stateless vessel were an internationally condemned activity. The court offers little to no support for the assertion that such conduct is universally condemned.[136] Article 108 of UNCLOS

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132. Lauren Morello, *U.S. Pushes for Law of the Sea Ratification as New Arctic Mapping Project Begins*, N.Y. Times (July 29, 2009), http://www.nytimes.com/cwire/2009/07/29/29climatewire-us-pushes-for-law-of-the-sea-ratification-as-89174.html?scp=1&sq=united%20nations%20convention%20on%20the%20law%20of%20the%20sea&st=cse.

133. *Id.*

134. Thad Allen et al., *Odd Man Out at Sea*, N.Y. Times (Apr. 24 2011), http://www.nytimes.com/2011/04/25/opinion/25allen.html?_r=1&ref=thadwallen.

135. For an argument that imposing a statutory nexus requirement would actually strengthen United States drug trafficking interdiction efforts, see Arthur J. Cook III, *Drug Trafficking on the High Seas: How Consolidation of the Maritime Drug Law Enforcement Act and the Drug Trafficking Vessel Interdiction Act and a Statutory Nexus Requirement Will Improve the War on Maritime Drug Trafficking*, 10 Loy. Mar. L.J. 493 (2012); *see also* John O'Neil Sheehy, *False Perceptions on Limitation: Why Imposing a Nexus Requirement Under the Maritime Drug Law Enforcement Act Would Not Significantly Discourage Efforts to Prosecute Maritime Drug Trafficking*, 43 Conn. L. Rev. 1677 (2011).

136. *See* United States v. Saac, 632 F.3d 1203, 1203 (11th Cir. 2011); *see also* United States v.

does provide for the cooperation among nations for the suppression of illicit narcotics trafficking, but it is arguable whether this provision is adequate for the assertion that drug trafficking is universally condemned among all law-abiding nations.[137] Regardless, all associated activities that could potentially aid in drug trafficking, such as the act of sailing a flagless vessel, are not universally recognized as crimes.

Article 110 of UNCLOS allows any state to approach and board a vessel suspected of being stateless.[138] There is no such provision in the Convention on the High Seas. This disparity provides some support for the notion that the new treaty, which illustrates principles of international law, condemns stateless vessels. However, this provision does not mention going beyond boarding the vessel, leaving open the question of whether the stateless vessel may be seized as provided for in the DTVIA. There are two prevailing interpretations to this question.[139] As previously explained, the courts of the United States and the United Kingdom take the approach that stateless vessels are afforded no rights on the high seas. Under this approach, stateless vessels may be boarded and seized based solely on their stateless status. A second approach is an adoption of the nexus requirement between a nation and the criminal activity. For example, under UNCLOS a nexus exists between all states in relation to piracy.[140] The United States adopted this approach in rela-

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Estupinan, 453 F.3d 1336 (11th Cir. 2006); United States v. Martinez-Hidalgo, 993 F.2d 1052 (3d Cir. 1993). For a more detailed criticism of treating the operation of stateless vessels as a universal crime or as a basis for universal jurisdiction, *see* Allyson Bennett, *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act*, 37 YALE J. INT'L L. 433 (2012).

137. *See generally* articles cited, *supra* note 135, and UNCLOS, *supra* note 11, art. 108., para. 1. This section provides,

> 1. All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.

138. UNCLOS, *supra* note 11, art. 110. para. 1. This section provides,

> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
>
> (a) the ship is engaged in piracy;
>
> (b) the ship is engaged in the slave trade;
>
> (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
>
> (d) the ship is without nationality; or
>
> (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

139. *See generally* Douglas Guilfoyle, *Maritime Interdiction of Weapons of Mass Destruction*, 12 J. CONFLICT & SECURITY L. 9 (2007).

140. R. R. CHURCHILL & A. V. LOWE, THE LAW OF THE SEA 214 (3d ed. 1999).

tion to drug trafficking under the MDLEA.[141] With the enactment of the DTVIA, however, the United States moves entirely to the first approach, adopting general jurisdiction over stateless vessels on the high seas.

It is unclear which of the two approaches for seizures most comports with principles of international law. The inclusion in UNCLOS and not the Convention on the High Seas of a right to board stateless vessels demonstrates that the issue was at least subject to increased attention in treaty discussions. UNCLOS seems to take a harsher stance toward stateless vessels, which would again give support to the Eleventh Circuit's approach to DTVIA seizures. On the other hand, the topic of seizure is notably absent from Article 110 of UNCLOS. The provision simply addresses boarding to investigate the activity of the stateless vessel.[142] If seizure of a stateless vessel were as internationally accepted as boarding to investigate, it would seem curious that such a right was omitted from the treaty. This omission raises doubts about the broad contention of the Eleventh Circuit that stateless vessels are so internationally condemned as to have no rights whatsoever under international law.

V. Conclusions and Long-Term Implications of the DTVIA

The effects of drug trafficking on the United States are undoubtedly destructive. For years, the federal government has tried to deter illicit narcotics activity with varying methods. Drug cartels continue to create innovative ways to circumvent criminal prosecution. With the increased use of flagless semi-submersible vessels, prior narcotics laws have proven inadequate to combat the transport of drugs on these vessels. Congress is faced with a difficult task in enacting laws to prosecute drug offenses when these self-propelled semi-submersible vessels are engineered to so quickly eliminate possession of any contraband. Thus, prosecuting the operators of stateless semi-submersible vessels, whether or not in possession of any drugs, is certainly one logical way of reaching the drug cartels. However, this approach is overbroad. It may reach the conduct of those who are truly unrelated to any wrongdoing. Take the simple situation of an engineer contracted to build a self-propelled semi-submersible vessel. The engineer has no reason to believe that the buyer of the vessel is intending to use the vessel for any wrongdoing or that the buyer is in any way involved in drug trafficking. Perhaps the engineer is even told the vessel is to be used by government intelligence agencies

141. *Id.*

142. If possession or recent possession of contraband were still required, boarding to investigate would presumably lead to a lawful seizure. However, this disparity again highlights the issue of seizing stateless vessels for the mere act of being stateless.

and therefore should not be registered or marked. Suppose further that this engineer takes the vessel on a test drive in deep waters during an early stage of construction before handing over the vessel to the buyer and is then prosecuted under the DTVIA. While the situation may be unlikely to arise, it hardly seems reasonable that the unknowing engineer should be brought to the United States for criminal prosecution, let alone that he be sentenced to the same penalty as a drug trafficker.

Beyond this danger, and perhaps more troublesome, the DTVIA broadens the United States' international police power. For example, the United States could rely on the DTVIA to capture unregistered fishing vessels not just in its own protected areas, but anywhere on the high seas making itself an international fish and wildlife enforcement agency. By asserting jurisdiction over all stateless vessels evading detection on the high seas anywhere in the world, any constraints on United States jurisdiction internationally are quickly eroded. The statute is reactive, designed to combat an immediate and short-term problem the United States is facing. But the statute will be on the books for much longer and could be used to justify much broader reaches of extraterritorial jurisdiction. By continually asserting that the DTVIA is not a drug- trafficking statute, the applications of the statute become even more expansive for the future.

In the end, stateless vessels are not granted many positive rights, but being a stateless vessel is not an internationally recognized crime. By eliminating the nexus requirement and creating a new crime under the DTVIA, the United States has essentially granted itself jurisdiction over all stateless semi-submersible and submersible vessels on the high seas, whether or not they are carrying illicit substances or engaging in otherwise illicit conduct. By ignoring international law principles and stretching jurisdictional bounds in permitting seizures of stateless vessels, the DTVIA presents an overzealous expansion of United States jurisdiction on the high seas.