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SUBMERSIBLES AND TRANSNATIONAL CRIMINAL ORGANIZATIONS

*Brian Wilson**

I. INTRODUCTION

In 2007, the U.S. Coast Guard approached a crudely constructed, aqua-blue vessel, containing nearly six tons of cocaine.¹ The four crewmen aboard the self-propelled semi-submersible (SPSS)² appeared to be well aware that they could avoid criminal prosecution if they destroyed all evidence of their drug trafficking before law enforcement officials arrived.³ As the boarding team neared the SPSS, the crew opened the scuttling valves to sink the fiber-glassed submersible.⁴ However, the Coast Guard was fortunate in this case; the crewmembers were unable to scuttle the eleven bales of cocaine valued at more than \$350 million, though they did manage to sink their vessel before the boarding team arrived.⁵

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1. John Otis, *High Seas Drug Bust*, HOUSTON CHRON., Aug. 24, 2007, <http://www.chron.com/disp/story.mpl/front/5080002.html>.

2. SPSS refers to self-propelled semi-submersibles; SPFS refers to self-propelled fully-submersibles. For purposes of this article only, the term SPSS may refer to both SPSS and SPFS vessels. Definitions of SPSS and SPFS are provided in the Drug Trafficking Vessel Interdiction Act of 2008, discussed in detail below.

3. Otis, *supra* note 1.

4. *Id.*

5. *Id.*

The interdiction,⁶ while successful, underscored two gaps in U.S. drug trafficking law at the time: first, that drug smugglers could skirt prosecution if law enforcement officials failed to recover evidence of illegal activity; and, second, that the existing enforcement structure did not account for the national security danger that a new vehicle—the SPSS—presented. The ensuing legislative action to close these gaps is a narrative regarding the illicit narcotics industry, its intersection with other threats, and the law.

The use of submersibles by traffickers is on the rise and presents a transnational security threat.⁷ From 2001 through 2010, approximately 175 documented drug transits from South America to global destinations occurred on SPSS-type platforms.⁸ While transporting illicit cargo in the maritime domain is not new, the stealthy SPSS—a long-range vessel that is extremely difficult to identify and track—raised significant national security concerns.⁹ “If [SPSS vessels] can smuggle drugs, what else can they smuggle?” asked Drug Enforcement Administration spokesman Rusty Payne.¹⁰ In 2008, Congressman Daniel E. Lungren of California asserted that the SPSS is one of the most “significant threats we face in

6. The Department of Defense Dictionary of Military and Associated Terms defines “interdiction in support of law enforcement” as: “activities conducted to divert, disrupt, delay, intercept, board, detain, or destroy, under lawful authority, vessels, aircraft, people, cargo, and money.” DEP’T OF DEFENSE, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 167 (2012), available at http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf. The Joint Staff publication defines “drug interdiction” as: “[a] continuum of events focused on interrupting illegal drugs smuggled by air, sea, or land. Normally consists of several phases – cueing, detection, sorting, monitoring, interception, handover, disruption, endgame, and apprehension – some of which may occur simultaneously.” *Id.* at 103.

7. See, e.g., OFFICE OF COUNTERNARCOTICS ENFORCEMENT, DEP’T OF HOMELAND SEC., FISCAL YEAR 2010 ANNUAL REPORT 8 (2011), available at <http://www.dhs.gov/xlibrary/assets/cne-annualreport-2010.pdf>.

8. See *id.*; see also Captain Wade F. Wilkenson, U.S. Navy, *A New Underwater Threat*, PROC. MAG., Oct. 14, 2008, <http://www.usni.org/magazines/proceedings/2008-10/new-underwater-threat> (discussing the emergence of self-propelled semi-submersibles in the 1990s).

9. See Brief of United States of America at 15, *United States v. Campaz-Guerrero*, Nos. 09-14475-CC, 09-14525-CC, 09-14577-CC, 09-14578-CC 2010, WL 4057770 (11th Cir. May 3, 2010) [hereinafter Brief of United States of America, *United States v. Campaz-Guerrero*] (“Submersible and semi-submersible vessels are submarine-like boats that skim just below the surface of water [and] incorporate advanced technology, including a design that reduces their ability to be detected by radar and utilizing water-cooled exhaust mufflers to reduce their heat signal.”).

10. Matthew Harwood, *Drug War’s Rough Waters*, SECURITY MGMT. (June 4, 2009), <http://www.securitymanagement.com/print/5658>.

maritime law enforcement today,”¹¹ but noted that without a law proscribing the operation of these platforms, narco-traffickers often avoid criminal consequences.¹¹

The United States closed the legal gap in 2008 with the passage of the Drug Trafficking Vessel Interdiction Act (DTVIA).¹² This federal statute criminalizes the operation of fully submersible or semi-submersible vessels that are without nationality¹³ and are navigating or have navigated outside of a nation’s territorial sea with the intent to evade detection.¹⁴ Essentially, the conveyance was outlawed regardless of its contents.

At present, dozens of defendants have been convicted under the DTVIA, yet scant legal review of DTVIA’s constitutionality, either academically or judicially, existed prior to four Eleventh Circuit opinions issued in the first half of 2011.¹⁵ In these cases, the courts considered whether the DTVIA exceeds congressional authority, whether its application violates due process, whether its text is too vague, and whether the statute improperly shifts the burden of proof to the defendant. Although limited in number, these rulings provide guidance for addressing other asymmetric maritime threats that are increasingly transnational, complex, and lethal.

This Article examines the economic and environmental incentives that led to the development of semi- and fully-submersibles, the DTVIA’s legislative history and enactment, the issues raised in the

11. 154 CONG. REC. H7239 (daily ed. July 29, 2008) (statement of Rep. Daniel E. Lungren) (quoting testimony from the U.S. Coast Guard).

12. Drug Trafficking Vessel Interdiction Act of 2008, Pub. L. No. 110-407, 122 Stat. 4296 (2008) (codified at 18 U.S.C.A. § 2285 (West 2010)).

13. Subsection 70502(d)(1) of the Maritime Drug Law Enforcement Act classifies a vessel as being without nationality when:

(A) . . . the master or individual in charge of the vessel makes a claim of registry that is denied by the nation whose registry is claimed; (B) . . . the master or individual in charge fails, on request of an officer of the United States authorized to enforce applicable provisions of United States law, to make a claim of nationality or registry; [or] (C) . . . the master or individual in charge makes a claim of registry and the claim nation does not affirmatively and unequivocally assert that the vessel is of its nationality.

46 U.S.C.A. § 70502(d)(1) (West 2010). In addition, a vessel is without nationality if it sails under the flag of two or more states. Geneva Convention on the High Seas art. 6, Sept. 30, 1962, 13 U.S.T. 2315.

14. See 18 U.S.C.A. § 2285.

15. See generally *United States v. Saac*, 632 F.3d 1203 (11th Cir. 2011); *United States v. Ibarquen-Mosquera*, 634 F.3d 1370 (11th Cir. 2011); *United States v. Valarezo-Orobio*, 635 F.3d 1261 (11th Cir. 2011); *United States v. Campaz-Guerrero*, Nos. 09–14475, 09–14525, 09–14577, 09–14578, 2011 WL 1522386 (11th Cir. Apr. 22, 2011).

appellate cases that affirmed the Act's constitutionality, and the unresolved legal and operational issues to address the SPSS threat.¹⁶ Part II details the international narco-trafficking business and the rise of the SPSS as a drug-smuggling tool, as well as the logistical difficulties faced by drug enforcement agencies. Part III discusses the existing domestic and international efforts to confront the international drug trade. Part IV outlines the swift congressional response to the SPSS threat—the DTVIA. In turn, Part V examines the judicial review of appeals arising out of the DTVIA.

II. THE DRUG CHALLENGE

Nearly 8,000 people a day use drugs illegally for the first time in the United States alone.¹⁷ And, a United Nations' study pegs the global number of illicit drug users at more than 200 million and rising.¹⁸ Supplying this market depends on smuggling illicit drugs across oceans and national borders and generates an estimated \$320 billion annually.¹⁹

16. This article does not examine social policy issues related to countering illicit narcotics threats. See GLOBAL COMM'N ON DRUG POLICY, *WAR ON DRUGS* (2011), available at <http://www.globalcommissionondrugs.org/Report>, for a discussion of social policy issues related to drug use. The report notes that

[w]hen the United Nations Single Convention on Narcotic Drugs came into being 50 years ago, and when President Nixon launched the US government's war on drugs 40 years ago, policymakers believed that harsh law enforcement action against those involved in drug production, distribution and use would lead to an ever-diminishing market in controlled drugs such as heroin, cocaine and cannabis, and the eventual achievement of a 'drug free world'. In practice, the global scale of illegal drug markets — largely controlled by organized crime — has grown dramatically over this period [Thus, t]he starting point for . . . review is the recognition of the global drug problem as a set of interlinked health and social challenges to be managed, rather than a war to be won.

Id. at 4. See also Jimmy Carter, Op-Ed., *Call Off the Global Drug War*, N.Y. TIMES, June 16, 2011, <http://www.nytimes.com/2011/06/17/opinion/17carter.html> (discussing the Global Commission on Drug Policy's report).

17. OFFICE OF NAT'L DRUG CONTROL STRATEGY, NATIONAL DRUG CONTROL STRATEGY 5 (2010), available at <http://www.whitehouse.gov/sites/default/files/ondcp/ndcs2011.pdf>.

18. UNITED NATIONS OFFICE ON DRUGS & CRIME, 2008 WORLD DRUG REPORT 3 (2008), [hereinafter 2008 WORLD DRUG REPORT], available at http://www.unodc.org/documents/wdr/WDR_2008/WDR_2008_eng_web.pdf.

19. UNITED NATIONS OFFICE ON DRUGS & CRIME, 2005 WORLD DRUG REPORT 2 (2005), available at http://www.unodc.org/pdf/WDR_2005/volume_1_web.pdf. In discussing the global market for illicit drugs, the report states: "[f]or all the caveats that one may put on such a figure, [\$320 billion] . . . it is still larger than the individual GDPs

Among illicit drugs, cocaine distribution is particularly lucrative. For example, while the wholesale value of a kilogram of cocaine in Peru and Colombia is approximately \$1,300 and \$2,300, respectively, the same kilogram yields approximately \$27,000 in the United States, \$60,000 in Europe, \$150,000 in Russia, and more than \$170,000 in Saudi Arabia.²⁰

Some narcotics are produced and distributed locally and regionally, while others, such as cocaine, move globally.²¹ Transporting products to more profitable destinations without detection is key, and transnational criminal organizations (TCOs) operating in South America recognize the value of the oceans as critical routes, given the anonymity a ship enjoys over large, ungoverned stretches of space, the relative complexities in jurisdiction, and the limited capacity of most countries' coastal law enforcement.²² The oceans also pose considerable operational, communications, and logistics challenges. Overcoming those hurdles has enabled the TCOs' business model to remain strong even though more than 1.6 million drug seizure cases occurred globally in 2006 and 1.5 million in 2005, resulting in the interdiction of more than 700 metric tons of cocaine, among other drugs, in each of those years.²³

of nearly 90% of the countries of the world. This is not a small enemy against which we struggle. It is a monster." *Id.*

20. UNITED NATIONS OFFICE ON DRUGS & CRIME, 2010 WORLD DRUG REPORT 170 (2010), available at http://www.unodc.org/documents/wdr/WDR_2010/World_Drug_Report_2010_lo-res.pdf. One maritime platform could hold more than \$100 million in cocaine if distributed in the United States. See Dane Schiller, *Experts: 'Nothing Amateur' About Narco Submarine*, HOUSTON CHRON., Feb. 7, 2011, <http://www.chron.com/disp/story.mpl/chronicle/7415756.html>.

21. JEREMY HAKEN, GLOBAL FIN. INTEGRITY, TRANSNATIONAL CRIME IN THE DEVELOPING WORLD 3 (2011), available at http://www.gfip.org/storage/gfip/documents/reports/transcrime/gfi_transnational_crime_web.pdf.

22. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-661, HOMELAND DEFENSE: ACTIONS NEEDED TO IMPROVE DOD PLANNING AND COORDINATION FOR MARITIME OPERATIONS 7 (2011), available at <http://www.gao.gov/products/GAO-11-661>. The report notes that

challenges unique to the maritime domain include the need for international cooperation to ensure improved transparency in the registration of vessels and identification of ownership, cargoes, and crew of the world's multinational, multiflag merchant marine. Environmental factors unique to the maritime domain also contribute to maritime domain awareness challenges, such as the vastness of the oceans, the great length of shorelines, and the size of port areas that can provide concealment and numerous access points to the land.

Id.

23. 2008 WORLD DRUG REPORT, *supra* note 18, at 26. Cannabis accounted for sixty-five percent of the total seizures in 2006. *Id.*

Although the cost of constructing a submersible vessel is high—around \$2 million—those costs are mitigated by the fact that such vessels can transport several tons of cocaine in one voyage.²⁴ Thus, as a result of the tremendously higher street value of cocaine in areas outside of Peru, Colombia, and Bolivia, a TCO could “[d]eploy five vessels at a combined total lay out of \$100 million, successfully deliver one, and you double your investment.”²⁵

Stopping vessels before they get underway is certainly preferable, but because the construction and deployment of SPSS platforms occur in rough, rural, and isolated terrain, doing so is not always possible.²⁶ This is, in part, due to the fact that smugglers are “constantly adapting their techniques to counter U.S. law enforcement activities.”²⁷ Consequently, identifying and tracking illicit vessels on millions of nautical miles of ocean space poses multiple operational challenges, because “traffickers have created intricate . . . methods involving multiple at-sea transfers between commercial and fishing vessels, complex logistics chains along circuitous routes, and extensive use of decoy vessels to confuse interdiction forces.”²⁸

In addition, TCOs modified where they operate. Admiral James G. Stavridis, former Commander, U.S. Southern Command, in prepared remarks to the Senate Armed Services Committee, stated:

In 2008, we observed that traffickers had expanded their presence in West Africa as a springboard to Europe, while also exploring new Middle Eastern and Asian markets. We also noted that traffickers have shifted from high seas routes to multi-staging tactics along the Central American littorals, attempting to evade international interdiction efforts.²⁹

24. See Wilkenson, *supra* note 8.

25. *Id.*

26. John Otis & Bahia Malaga, *The Cocaine Wars: Invasion of the Drug Submarines*, TIME, Mar. 29, 2011, <http://www.time.com/time/world/article/0,8599,2061934,00.html>. (“The subs are . . . a testament to the ingenuity of traffickers working at secluded dry docks deep inside the equatorial jungles.”)

27. OFFICE OF COUNTERNARCOTICS ENFORCEMENT, DEP’T OF HOMELAND SEC., *supra* note 7, at 8. See also Otis & Malaga, *supra* note 26 (“Colombian traffickers have now taken ‘a quantum leap in technology . . . It’s the difference between building a motor-scooter and building a car,’” said Jay Bergman of the Drug Enforcement Administration).

28. Wilkenson, *supra* note 8.

29. *Department of Defense Authorization for Appropriations For Fiscal Year 2010: Hearings Before the Comm. on Armed Serv.*, 111th Cong. (2009) (statement of Admiral James G. Stavridis), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg52620/html/CHRG-111shrg52620.htm>.

Thus, successful pursuit of TCOs involves more than just interdicting illicit drugs: “it is widely understood that groups engaging in drug trafficking also engage in other sorts of violent and criminal enterprise, from mass murders and human smuggling in Mexico, to the funding of militant insurgents and terrorists such [as] Al Qaeda, the FARC in Colombia, and possibly Hezbollah in Lebanon.”³⁰

III. LEGAL BASIS FOR CURRENT OPERATIONAL COOPERATION AND JUDICIAL CONSEQUENCES

Although the DTVIA proscribes operating a stateless submersible internationally with the intent to evade detection (but does not expressly proscribe drug trafficking), existing legal authority, as well as international cooperation and operational action against narco-trafficking over the past century, are critical components of the Act’s development.

A. Existing Legal Authorities

The 1912 International Opium Convention represents the first multilateral counter-narcotics treaty,³¹ and more recently, the 1982 United Nations Convention on the Law of the Sea (LOS Convention) addressed drugs, providing that “[a]ll States shall co-operate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.”³² The 1988 U.N. Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances contains guidance

30. HAKEN, *supra* note 21, at 3.

31. International Opium Convention, Jan. 23, 1912, 38 Stat. 1912, T.S. No. 612, 8 L.N.T.S. 187. The United Nations Office on Drugs and Crime stated the 1912 International Opium Convention was

far from perfect, but it contained many elements of a comprehensive drug control treaty. Moreover, as an official declaration on the dangerous practices of opium smoking and the non-medical trade in opium and other drugs, it had value as an advocacy tool. It also inspired national drug control legislation, such as the 1913 Harrison Act in the United States, the foundation of U.S. drug law in the 20th century.

U.N. Office on Drugs & Crime, *The 1912 Hague International Opium Convention*, U.N. OFFICE ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/frontpage/the-1912-hague-international-opium-convention.html> (last visited Sept. 8, 2011).

32. U.N. Convention on the Law of the Sea art. 108, Dec. 10, 1982, 1833 U.N.T.S. 397 (“Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the co-operation of other States to suppress such traffic.”).

regarding partnering and cooperation and requires state parties to establish criminal offenses for the production, manufacture, sale, distribution, delivery, importation, and exportation of narcotic drugs.³³ The 1961 Single Convention on Narcotic Drugs and its protocol,³⁴ as well as the 1971 Convention on Psychotropic Substances, also provide guidance on illicit drug repression.³⁵

In the United States, multiple agencies work to counter the drug threat, including the Departments of Defense, Homeland Security, Justice, and State.³⁶ Within those agencies, the Joint Interagency Task Force South,³⁷ the U.S. Coast Guard,³⁸ and the Drug Enforcement Administration³⁹ have particularly influential roles.

33. U.N. Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 28 I.L.M. 493 [hereinafter U.N. Convention Against Illicit Trafficking]. Article 17 provides, in part, that “[p]arties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.” *Id.* at 517.

34. Single Convention on Narcotic Drugs, May 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204, available at http://www.incb.org/pdf/e/conv/convention_1961_en.pdf.

35. Convention on Psychotropic Substances, Feb. 21 1971, 1019 U.N.T.S. 175, available at http://www.unodc.org/pdf/convention_1971_en.pdf.

36. See CURT A. KLUN, WAR ON DRUGS: LESSONS LEARNED FROM 35 YEARS OF FIGHTING ASYMMETRIC THREATS 3 n.10 (2010), available at <http://www.pnsr.org/data/images/klun%20-%20war%20on%20drugs%20-%20lessons%20learned%20from%2035%20years%20of%20fighting%20asymmetric%20threats.pdf> (examining interagency cooperation and challenges in counter-drug operations).

37. See generally Evan Munsing & Christopher J. Lamb, Inst. for Nat’l Strategic Studies, Joint Interagency Task Force-South: The Best Known, Least Understood Interagency Success (2011), available at <http://www.ndu.edu/press/lib/pdf/strategic-perspectives/Strategic-Perspectives-5.pdf> (“Joint Interagency Task Force-South . . . is well known within the U.S. Government as the ‘gold standard’ for interagency cooperation and intelligence fusion.”). In 2009, the Joint Interagency Task Force-South “accounted for more than 40 percent of global cocaine interdiction. . . . [And] the disruption of approximately 220 tons of cocaine.” *Id.* at 3.

38. See 14 U.S.C. § 89(a) (2006) (authorizing the U.S. Coast Guard to stop and board any vessel on the high seas without a warrant, provided the vessel is “subject to the jurisdiction, or to the operation of any law, of the United States.”).

39. U.S. Drug Enforcement Admin., *DEA Mission Statement*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/agency/mission.htm> (last visited July 26, 2011) (“The mission of the Drug Enforcement Administration (DEA) is to enforce the controlled substances laws and regulations of the United States and to bring to the criminal and civil justice system of the United States, or any other competent jurisdiction, those organizations and principal members of organizations, involved in the growing, manufacture, or distribution of controlled substances appearing in or destined for illicit traffic in the United States.”). See generally KLUN, *supra* note 36 (detailing the role of the DEA).

Domestic guidance for boarding authorities includes an array of statutes, case law, and ship boarding agreements between the United States and more than thirty other nations.⁴⁰ However, the seminal U.S. criminal statute on narcotics trafficking is the Maritime Drug Law Enforcement Act (MDLEA),⁴¹ which addresses nexus⁴² and jurisdiction, among other issues. Although the MDLEA superseded the Marijuana on the High Seas Act (MHSA),⁴³ both Acts enabled prosecutions for illicit conduct occurring beyond the U.S. territorial sea on vessels that may or may not be registered in the United States, recognizing the global drug

40. See 14 U.S.C. § 2 (2006); 14 U.S.C. § 89; 10 U.S.C. § 124 (2006); 21 U.S.C. §§ 801-971 (2006); 22 U.S.C. § 2291 (2006); 46 U.S.C. §§ 70501-70507; 21 U.S.C. § 959 (2006). See also 22 U.S.C. § 2291(a)(2) (“In order to promote such cooperation, the President is authorized to conclude agreements, including reciprocal maritime agreements, with other countries to facilitate control of the production, processing, transportation, and distribution of narcotics analgesics, including opium and its derivatives, other narcotic and psychotropic drugs, and other controlled substances.”); U.N. Convention Against Illicit Trafficking, *supra* note 33, at 517 (with regard to ship boarding agreements, “the Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.”).

41. 46 U.S.C. §§ 70501-70507. The MDLEA was passed in 1986 and subsequently amended. *Id.*

42. The issue of nexus is beyond the scope of this Article; however, for an extensive discussion of the nexus requirement, see CHARLES DOYLE, CONG. RESEARCH SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW (2010), available at http://assets.opencrs.com/rpts/94-166_20100326.pdf.

43. 21 U.S.C. § 955(a) (2006). See also Joseph R. Brendel, *The Marijuana on the High Seas Act and Jurisdiction Over Stateless Vessels*, 25 WM. & MARY L. REV. 313, 313-314 (1983) (“The United States government has been conducting a campaign against drug abuse and narcotics trafficking since 1914. In the mid-1970’s, the federal government extended its campaign beyond the territorial limits of the United States and began to fight its drug war on the high seas. As a result, United States Coast Guard seizures of drug-laden vessels increased dramatically during the 1970’s. Prosecutions actually declined, however, as drug smugglers quickly discovered a loophole in the law. . . . [U]nless prosecutors could prove that the crewmembers were attempting or conspiring to import illicit narcotics into the United States, the prosecutions failed. Upon boarding drug-laden vessels, Coast Guard authorities often found that crewmembers had destroyed any evidence that might have supported a conspiracy prosecution, such as charts marked with United States destinations.”). Enactment of the Marijuana on the High Seas Act closed this gap. Eugene Kontorovich, *Beyond the Article I Horizon: Congress’s Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1198 (2009) (“The main relevant innovation of the MHSA was to extend U.S. jurisdiction on the high seas not just to ‘U.S. vessels,’ but also to a new category, ‘vessels subject to the jurisdiction of the United States.’ . . . Thus, the [MHSA] swept in cases involving foreigners on the high seas, on non-American vessels, without proof that the vessel or cargo was destined for America.”).

threat and the “difficulty of catching traffickers in the relatively short time they are in U.S. waters [as well as the need for] enforcement . . . far from its shores.”⁴⁴ Both Acts also stoked considerable academic and judicial review.⁴⁵

The MDLEA establishes jurisdiction for U.S. law enforcement officials over: the trafficking of controlled substances that occurs on the high seas and in a foreign state’s territorial sea, with the consent of the coastal nation;⁴⁶ U.S. registered vessels; foreign-flagged vessels with the consent of the flag state;⁴⁷ and stateless vessels.⁴⁸ The MDLEA thus created a framework to enable U.S. prosecutions, under certain conditions, for maritime drug trafficking occurring virtually anywhere on earth.

The MDLEA provides that “[j]urisdiction with respect to a vessel subject to this chapter is not an element of an offense. Jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge.”⁴⁹ President Clinton remarked in a signing statement on October 19, 1996, that

44. Kontorovich, *supra* note 43, at 1197.

45. *Id.* See, e.g., *United States v. Davis*, 905 F.2d 245 (9th Cir. 1990); *United States v. Martinez-Hidalgo*, 993 F.2d 1052 (3rd Cir. 1993); *United States v. Moreno-Morillo*, 334 F.2d 819 (9th Cir. 2003); Jennifer J. Berthiaume, Note, *United States v. Juda: Fifth Amendment Due Process and Stateless Vessels on the High Seas*, 73 B.U. L. REV. 477 (1993); James A. Tate, Comment, *Eliminating the Nexus Obstacle to the Prosecution of International Drug Traffickers on the High Seas*, 77 U. CIN. L. REV. 267 (2008); Stephanie M. Chaissan, Comment, “*Minimum Contacts*” Abroad: *Using the International Shoe Test to Restrict the Extraterritorial Exercise of United States Jurisdiction Under the Maritime Drug Law Enforcement Act*, 38 U. MIAMI INTER-AM. L. REV. 641 (2007).

46. MDLEA “applies even though the act is committed outside the territorial jurisdiction of the United States.” 46 U.S.C. § 70503(b). The Act details vessels subject to U.S. jurisdiction:

(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; and (F) a vessel in the contiguous zone of the United States, as defined in Presidential Proclamation 7219 of September 2, 1999.

Id. § 70502(c)(1). See also *id.* § 70502(d) (discussing the definition of vessels without nationality).

47. See *id.* § 70502(c)(1)(C).

48. *Id.* § 70502(c)(1)(A). See also *id.* § 70502(d).

49. *Id.* § 70504(a).

[t]he Act makes clear that persons arrested in international waters will not be able to challenge the arrest on the ground that the vessel was of foreign registry unless such claim was affirmatively and unequivocally verified by the nation of registry when the vessel was targeted for boarding. By eliminating this commonly raised jurisdictional defense, the Act strengthens the hand of prosecutors in drug smuggling cases.⁵⁰

Additionally, passage of the MDLEA provided clarity regarding the status of the vessel, a fundamental issue in any criminal proceeding based on illicit conduct on the high seas.⁵¹

Defendants interdicted on the high seas on stateless vessels have repeatedly, and unsuccessfully, raised jurisdictional challenges. Most recently, the Ninth Circuit in *United States v. Caicedo*, a MDLEA case, found that “[b]ecause 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.”⁵² The court reasoned that “[t]he radically different treatment afforded to stateless vessels as a matter of international law . . . is [not] . . . arbitrary or unfair.”⁵³ Similarly, the Ninth Circuit in *United States v. Juda* found that a nexus between a defendant and the United States was not needed for the United

50. Presidential Statement on Signing the Coast Guard Authorization Act of 1996, 32 Weekly Comp. Pres. Doc. 2112 (Oct. 19, 1996).

51. 46 U.S.C. § 70502(d). A vessel registered in a state enjoys the protections, along with the responsibilities, of that particular state. *See generally* Craig H. Allen, *Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention*, 10 SAN DIEGO INT’L L. J. 265, 321 (2009) (“The LOS Convention assigns the primary responsibility for exercising such jurisdiction and control to the vessel’s flag State. It then prescribes the performance standards the flag State must meet: it must exercise that jurisdiction and control “effectively.”); *see also* U.N. Convention on the Law of the Sea, *supra* note 32, at 433. The LOS Convention and customary international law generally provide exclusive jurisdiction to a state for ships flying its flag, though several exceptions exist. *See id.* at 438-39 (interference may “derive from powers conferred by treaty”); *see generally* James Kraska, *Broken Taillight at Sea: The Peacetime International Law of Visit, Board, Search, and Seizure*, 16 OCEAN & COASTAL L. J. 1 (2010). In contrast, an unregistered vessel or one claiming registry in two states is a stateless vessel that enjoys virtually no protection and may be assimilated to the laws of the interdicting state. *See generally* *United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir. 1982); *United States v. Alvarez-Mena*, 765 F.2d 1259 (5th Cir. 1985); *United States v. Martinez-Hidalgo*, 993 F.2d 1052 (3rd Cir. 1993); *United States v. Juda*, 46 F.3d 961 (9th Cir. 1995); *United States v. Caicedo*, 47 F.3d 370 (9th Cir. 1995).

52. *Caicedo*, 47 F.3d at 373.

53. *Id.* at 372.

States to prosecute crimes committed by stateless vessels.⁵⁴ To hold otherwise, the court reasoned, would allow such vessels to become “floating sanctuaries from authority.”⁵⁵

Jurisdictional clarity is significant in legally combating cocaine transits, which, along with heroin, comprise the majority of long-distance trafficking.⁵⁶ Other drugs are primarily sold either domestically or regionally, but the surging use of the SPSS to transport drugs, along with the possibility of other illicit cargo, prompted legislative interest.⁵⁷

B. Collaboration

Successful pursuit of submersibles requires multilateral collaboration because the operating environment is simply too large for any nation to address individually.⁵⁸ Similarly, partnering against narco-trafficking is critical and unfolds in multiple forums.⁵⁹ Although language barriers, training, equipment, and the level of political support represent challenges, a shared commitment exists in combating drug trafficking.

In addition, domestic legal authority and judicial capacity are critical to effectively pursuing narco-traffickers and other illicit maritime threats.⁶⁰ Some countries, like the United States and Colombia, have

54. *Juda*, 46 F.3d at 967

55. *Id.* See also *United States v. Passos-Paternina*, 918 F.2d 979 (1st Cir. 1990) (holding that a ship with both Colombian and Panamanian flags was subject to the jurisdiction of the United States); *United States v. Martinez*, No. 05-14533, 2006 WL 2974135 (11th Cir. 2006) (holding that a vessel with no indicia of nationality was properly deemed to be a vessel without nationality); *United States v. Matute*, 767 F.2d 1511 (11th Cir. 1985) (holding that a ship sailing under the authority of two nations was a vessel without nationality).

56. *HAKEN*, *supra* note 21, at 3. Amphetamine-type stimulants and cannabis are also trafficked internationally. *Id.*

57. 154 CONG. REC. H7239 (2008) (Statement of Rep. Daniel E. Lungren) (“These submersible and semi-submersible vessels . . . usually carry between 5 and 6 tons of illicit cargo, everything from drugs, guns, people, and potentially weapons of mass destruction.”).

58. *International Drug Control Cooperation*, OFFICE OF NAT’L DRUG CONTROL POL’Y, <https://www.ncjrs.gov/ondcppubs/publications/policy/99ndcs/iv-h.html> (last visited June 19, 2011).

59. *Id.* See also *Santo Domingo Pact Strengthens Regional Cooperation to Fight Drugs and Crime in the Caribbean*, UNITED NATIONS OFFICE ON DRUGS & CRIME (Mar. 10, 2009), <http://www.unodc.org/unodc/en/frontpage/santo-domingo-pact-strengthens-regional-cooperation-to-fight-drugs-and-crime-in-the-caribbean-.html>.

60. Colombian Navy Admiral Edgar Cely stated: “[t]his enemy is supremely intelligent and has lots of money. It shows that the narco-traffickers are betting on [the SPSS].” *Fact Sheet: Self-Propelled Semi-Submersible*, JOINT INTERAGENCY TASK FORCE

enacted legislation to criminalize the operation of self-propelled semi- and fully-submersibles, but most countries have not. Operationally, Colombia and Ecuador, among other nations, have partnered to seize submersibles.⁶¹

Representatives from the United States and Central and South American nations meet twice a year (and more frequently on a bilateral basis) to discuss counter-drug operations and legal authorities.⁶² Separately, the International Drug Enforcement Conference, led by the U.S. Drug Enforcement Agency and held annually, is considered a “major contributor to international cooperation and capacity building.”⁶³

SOUTH, http://media.mcclatchydc.com/smedia/2008/07/18/17/Hall-SPSS-factsheet.source.prod_affiliate.91.pdf. Colombian Navy Captain Gustavo Angel remarked: “What’s most striking is the logistical capacity of these criminals to take all this material into the heart of the jungle, including heavy equipment like propulsion gear and generators.” *Id.* However, the SPSS and SPFS threats are not the first time narco-traffickers have exploited legal gaps. In a review of a criminal act targeting drug trafficking in the 1970s, a legal commentator remarked that

Coast Guard authorities often found that crewmembers had destroyed any evidence that might have supported a conspiracy prosecution, such as charts marked with United States destinations. Narcotics traffickers further exploited the . . . loophole by successfully employing a “mother ship” technique, anchoring large vessels loaded with marijuana just beyond the territorial waters of the United States. Under the cover of darkness, smugglers transferred the marijuana to smaller pleasure craft capable of unloading the cargo in shallow, isolated coves along the coastline. Although the Coast Guard seized many mother ships, the government often could not gather sufficient evidence to prove that the crewmembers had conspired to import the drugs into the United States.

Brendel, *supra* note 43, at 314.

61. See Schiller, *supra* note 20; OFFICE OF COUNTERNARCOTICS ENFORCEMENT, DEP’T OF HOMELAND SEC., *supra* note 7, at 8; Munsing & Lamb, *supra* note 37, at 74.

62. BUREAU OF INT’L NARCOTICS & LAW ENFORCEMENT AFFAIRS, U.S. DEP’T OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT: VOLUME I DRUG AND CHEMICAL CONTROL 13, 49-50 (2011), *available at* <http://www.state.gov/documents/organization/156575.pdf>. The Multilateral Counterdrug Summit seeks

to identify and implement measures by which partner nation entities and the [U.S. government] . . . can cooperate to combat maritime drug trafficking through interdiction and delivery of consequences in smuggling cases. The success of these summits is dependent on the continued participation and cooperation of partner nation counterparts to facilitate regional counterdrug interoperability.

Id. at 238. See also U.S. COAST GUARD, REPORT OF THE JUDGE ADVOCATE GENERAL OF THE UNITED STATES COAST GUARD 9 (2011), *available at* http://www.uscg.mil/legal/Home_doc/ABA_Report.pdf, which notes that a multilateral “emerging legal issues” working group “was by far the most successful engagement in recent years, attracting representatives from 10 Central and South American Countries.”

63. OFFICE OF THE WHITE HOUSE, STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME: ADDRESSING CONVERGING THREATS TO NATIONAL SECURITY 25 (2011), *available*

Such partnering supports the U.S. strategy to combat Transnational Organized Crime (TOC).⁶⁴ The U.S. strategy states that TOC threatens

the security and well-being of people around the world and jeopardizes the functioning of the global economy. . . . The United States will leverage all possible areas of cooperation . . . to obtain the assistance of international partners and to raise international criminal justice, border security, and law enforcement standards and norms.⁶⁵

The strategy also discusses counter drug efforts, stating:

In recent years, new developments in technology and communications equipment have enabled TOC networks involved in drug trafficking and other illicit activities to plan, coordinate, and perpetrate their schemes with increased mobility and anonymity. . . . The United States will continue to aggressively target the nexus among TOC networks involved in drug trafficking, terrorist groups, piracy on the high seas, and arms traffickers.⁶⁶

Because the operating space of TOC networks includes land, sea, and air, effectively confronting TOC networks involves navigating multiple environments and jurisdictions. Addressing these varied challenges highlights the importance of collaborative information sharing between agencies and foreign nations, as well as partnering in operational and judicial capacities.

at http://www.whitehouse.gov/sites/default/files/Strategy_to_Combat_Transnational_Organized_Crime_July_2011.pdf.

[The International Drug Enforcement Conference (IDEC)] brings the top drug law enforcement leaders and senior investigators from over 100 nations to a single venue where yearly agendas are set for cooperation, intelligence sharing, and case prioritization. IDEC—the world’s largest international drug law enforcement conference—has produced concrete results year after year. During the conferences, DEA and partner nations jointly develop plans to build greater law enforcement and investigatory capacity. In addition, host nation personnel and U.S. law enforcement exchange information on priority investigatory targets.

Id.

64. *Id.* at 24.

65. *Id.* at 26.

66. *Id.* at 24. See also OFFICE OF THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY 77 (2010), available at <http://drugcaucus.senate.gov/ndcs2010.pdf> (“The United States seeks to work bilaterally as well as on a regional or multilateral basis. . . . Experience has shown that drug-trafficking organizations are resilient, but experience has also shown that long-term international initiatives can and will produce real results that benefit the citizens of the United States as well as international partners abroad.”).

At the tactical level, the Department of Defense-led Joint Interagency Task Force South (JIATF-South) provides an important venue for operational counter-drug partnering with multiple nations.⁶⁷ JIATF-South seeks to maximize “the disruption of drug transshipment, collecting, integrating and disseminating intelligence, and guiding detection and monitoring forces for tactical action”⁶⁸ over their 42 million square mile operating area.⁶⁹ JIATF-South has been extremely effective in executing their mission and integrating multiple interagency and multinational partners, underscoring the value of cooperation.⁷⁰

IV. THE SELF-PROPELLED AND SEMI-SUBMERSIBLE THREAT AND LEGISLATIVE ACTION

The deployment of SPSS vessels by TCOs in South America to transport cocaine increased throughout the first decade of the twenty-first century.⁷¹ The low-freeboard SPSS spurred a shift in illicit narcotics

67. Munsing & Lamb, *supra* note 37, at 1. JIATF-South includes representatives from, among other countries, Argentina, Brazil, Canada, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, France, Great Britain, Mexico, Netherlands, Peru, and Spain, and representatives from the United States, the Army, Navy, Air Force, Marine Corps, Coast Guard, Customs and Border Protection, Drug Enforcement Administration, Federal Bureau of Investigation, and intelligence agencies. *Id.* at 6.

68. *Id.* at 23 (internal quotations omitted).

69. *Id.* at 29.

70. *Id.* at 27. A JIATF-South report discussed “Don’ts” for mission success, including

[d]on’t command the presence of interagency personnel on your team; [d]on’t segregate interagency staff in separate buildings; [d]on’t disrespect smaller partners, because they can make big contributions; [d]on’t demand binding agreements on cooperation (at least initially); [d]on’t ignore any partner’s need to feel they make a contribution; [d]on’t make binding decisions without substantial vetting and support; [d]on’t forget to build a culture of trust and empowerment; [and] [d]on’t take the credit for collaborative success.

Id. at 84-85.

71. *See* OFFICE OF COUNTERNARCOTICS ENFORCEMENT, DEP’T OF HOMELAND SEC., *supra* note 7, at 8. However, illicit use of vessels operating below the surface existed well before the use of SPSS and SPFS:

Although the use of [these] vessels . . . is somewhat novel in international crime, the threat those vessels present to the security of the United States and to the international community is neither new nor theoretical. During World War II, German agents, who had been trained at a German sabotage school ‘in the use of explosives and in methods of secret writing journeyed by submarine to the beaches of New York and Florida, carrying large quantities of explosives and other sabotage devices,’ where, fortunately, they were intercepted by FBI agents. Their mission had been to destroy United States’ war industries and facilities.

movement, representing approximately thirty percent of cocaine flow to the United States annually,⁷² and seventy percent of the cocaine leaving Colombia's Pacific coast in 2009.⁷³ Estimates compiled by the Department of Homeland Security's Office of Counternarcotics documented twenty-three SPSS events between fiscal years (FY) 2001-2007, seventy-seven events in FY 2008, sixty events in FY 2009, and fourteen events in FY 2010.⁷⁴

Documented submersible events clearly declined in 2010, though the platform continues to be regularly used by TCOs and remains a transnational threat.⁷⁵ The submersible became an attractive platform not just because of legal gaps, but also because of the challenges in identifying and tracking such a vessel:

The SPSS is effective because it combines the most desirable aspects of two historically successful methods of conveyance – the go-fast and the fishing vessel – while adding new dimensions to the drug challenge. Similar to the go-fast, its low profile is difficult to detect. Better than the go-fast, its range offers greater flexibility in planning potential drop locations. Similar to a fishing vessel, it has the capacity to carry larger, more profitable payloads. Better than a fishing vessel, traffickers launch them in secrecy, denying actionable intelligence that stymies counterdrug efforts.⁷⁶

Brief of United States of America, *United States v Campaz-Guerrero*, *supra* note 9, at 25 n.3 (internal citations omitted).

72. U.S. COAST GUARD, UNITED STATES COAST GUARD FISCAL YEAR 2009 PERFORMANCE REPORT 22 (2010), *available at* http://www.uscg.mil/history/allen/docs/USCG_FY09_Performance_Report.pdf (estimating that SPSS vessels carried 332 metric tons (731,728 pounds) in the 2009 fiscal year).

73. Otis & Malaga, *supra* note 26.

74. *See* OFFICE OF COUNTERNARCOTICS ENFORCEMENT, DEP'T OF HOMELAND SEC., *supra* note 7, at 8 (recording 423 metric tons [MT] of cocaine seized in 2008, 281 MT of cocaine in 2009, and 71 MT of cocaine in 2010); *see also* U.S. COAST GUARD, *supra* note 62, at 22 (estimating that SPSS vessels carried 332 MT (731,728 pounds) in FY 2009).

75. *See* OFFICE OF COUNTERNARCOTICS ENFORCEMENT, DEP'T OF HOMELAND SEC., *supra* note 7, at 8. The reduction in documented SPSS events could be partially based on the increased operational focus by domestic law enforcement and foreign law enforcement efforts, as well as the passage of recent legislation providing for greater enforcement jurisdiction.

76. Wilkenson, *supra* note 8.

By filling fuel tanks with seawater as they empty, they maintain a steady, ultra-low profile that makes them nearly impossible to spot by eye at any distance over one nautical mile. . . . Equipped with GPS, SPSS vessels navigate independently without need for external communication. They can cruise faster than eight knots

Legislative debate over the DTVIA focused on the national security implications of difficult-to-detect platforms with extensive operational reach.⁷⁷ Representative Lungren, a sponsor of the bill, noted that “[t]he potential that someone might seek to import a weapon of mass destruction into the United States is perhaps of the greatest concern for us and why we need an aggressive response to alter the calculus of deterrence with respect to the use of these vehicles.”⁷⁸

Representative Poe remarked:

The U.S. Coast Guard tells us at any given time, there are 100 . . . [SPSS vessels] on the high seas, all coming to the United States bringing drugs. . . . These things can bring in weapons of mass destruction, explosives, and work their way up the riverways of our Nation, going to our ports, like the Port of Houston and some of these other ports, and cause tremendous damage. We want to capture these people on the high seas before they get that opportunity.⁷⁹

Representative Poe, in a press statement, further noted:

Nothing prevents [the SPSS] from falling into the hands of terrorists If these vessels can carry 13 tons of cocaine, they can carry weapons of mass destruction just as easily. The uncontrolled environment in which these vessels operate is prime for an act of terrorism off our coasts.⁸⁰

but tend to operate at slower speeds to minimize wake detection. Such technological enhancements and tactics make the SPSS increasingly complex and better capable of defying surveillance and detection.

Id. The go-fast is similar to a SPSS in that it is small, long, narrow, and constructed of fiber-glass, but unlike the SPSS, the go-fast can achieve speeds of eighty miles per hour. Otis & Malaga, *supra* note 26.

77. 154 CONG. REC. H7239 (2008) (statement of Rep. Daniel E. Lungren).

78. 155 CONG. REC. H10253 (2008) (statement of Rep. Daniel E. Lungren).

79. *Id.* Representative Poe also remarked:

Some have said, why don't we just shoot them out of the water as soon as we see them? I guess we are too civilized for that. We want to prosecute them instead. This is important legislation. It will help our law enforcement guys, the Navy and U.S. Coast Guard, who are doing a tremendous job already in tracking these people, with cooperation from other navies throughout the world. It is time that we make this legislation law.

Id.

80. Press Release, Sen. Ted Poe, Poe/Lungren File Legislation to Tighten Border Security—At Sea Bill Outlaws Submarines Operating without Nationality (June 22, 2008), *available at* <http://poe.house.gov/news/DocumentSingle.aspx?DocumentID=95168>.

President George W. Bush signed the DTVIA on October 13, 2008, culminating an unusually fast legislative response once the relevant threats and legal issues were identified.⁸¹

The legislative history regarding the DTVIA emphasizes that SPSS platforms “pose a formidable security threat because they are difficult to detect and easy to scuttle or sink. These vessels therefore facilitate the destruction of evidence and hinder prosecution of smuggling offenses.”⁸² Moreover, “Congress determined to criminalize *not only* the underlying conduct—whatever that conduct may be—but also traveling on the vessel itself.”⁸³

Thus, in passing the DTVIA, Congress emphasized the security threat posed by SPSS vessels:

Trafficking in controlled substances aboard vessels is a serious international problem, is universally condemned, and presents a threat to the security and societal well-being of the United States and . . . operating or embarking in a submersible vessel or semi-submersible vessel without nationality and on an international voyage is a serious international problem, facilitates transnational crime, including drug trafficking, and terrorism, and presents a specific threat to the safety of maritime navigation and the security of the United States.⁸⁴

Accordingly, the DTVIA amended 18 U.S.C. § 2285 and provides:

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 a 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.⁸⁵

81. See Drug Trafficking Interdiction Act of 2008, Pub. L. No. 110-407, 122 Stat. 4296 (2008) (codified at 18 U.S.C.A. § 2285 (West 2010)).

82. *United States v. Saac*, 632 F.3d 1203, 1211 (11th Cir. 2011) (citing 154 Cong. Rec. H7238-39 (daily ed. July 29, 2008); 154 Cong. Rec. H10153-54, H10252-54 (daily ed. Sept. 27, 2008); H.R. REP. NO. 110-941, at 182-83 (2009); H.R. REP. NO. 110-936, at 28 (2009)).

83. *United States v. Ibarquen-Mosquera*, 634 F.3d 1370, 1381 (11th Cir. 2011).

84. 46 U.S.C.A. § 70501 (West 2010).

85. 18 U.S.C.A. § 2285(a) (West (2010)).

The DTVIA also amended 46 U.S.C. § 70502 with the following definitions:

The term “semi-submersible vessel” means 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. . . . [T]he term “submersible vessel” means a vessel that is capable of operating completely below the surface of the water, including both manned and unmanned watercraft.⁸⁶

The DTVIA addresses “evidence of intent to evade detection” by providing that the “presence of any of the indicia described in [various sections of the Maritime Drug Law Enforcement Act] may be considered, in the totality of the circumstances, to be prima facie evidence of intent to evade detection.”⁸⁷

Additionally, the DTVIA also provides affirmative defenses, including that the vessel is:

(A) a vessel of the United States or lawfully registered in a foreign nation as claimed by the master or individual in charge of the vessel . . . ; (B) classed by and designed in accordance with the rules of a classification society; (C) lawfully operated in

86. 46 U.S.C.A. § 70502(f).

87. 18 U.S.C.A. § 2285(b). The DTVIA further provides that [t]he following indicia, among others, may be considered, in the totality of the circumstances, to be prima facie evidence that a vessel is intended to be used to commit, or to facilitate the commission of, such an offense: (1) [t]he 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; . . . (E) the presence of materials used to reduce or alter the heat or radar signature of the vessel and avoid detection; . . . (F) the presence of a camouflaging paint scheme, or of materials used to camouflage the vessel, to avoid detection . . . ; (G) the display of false vessel registration numbers, false indicia of vessel nationality, false vessel name, or false vessel homeport . . . ; (4) [t]he 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 . . . ; (5) [t]he failure of the vessel to stop or respond or heave to when hailed by government authority, especially where the vessel conducts evasive maneuvering when hailed . . . ; (6) [t]he declaration to government authority of apparently false information about the vessel, crew, or voyage or the failure to identify the vessel by name or country of registration when requested to do so by government authority.

Id. § 70502(b).

government-regulated or licensed activity, including commerce, research, or exploration; or (D) equipped with and using an operable automatic identification system, vessel monitoring system, or long range identification and tracking system.⁸⁸

Enactment of the DTVIA involved the intersection of operational, legislative, and judicial interests. The DTVIA represents important statutory authority to confront an evolving, asymmetric, and transnational threat that previously eluded judicial consequences.

V. DTVIA PROSECUTIONS, LEGAL ISSUES, AND APPELLATE REVIEW

The issues raised by prosecutions brought under the DTVIA are similar to many raised by the MDLEA. Defendants have challenged the constitutionality of U.S. prosecutions of foreign defendants for conduct committed beyond the U.S. territorial seas on non-U.S.-flagged vessels; the scope and extent of congressional authority under the High Seas Clause of the Constitution;⁸⁹ and whether the burden of proof is unlawfully shifted to the defendant.⁹⁰ While not every legal issue related to DTVIA's constitutionality has been litigated, the cases discussed below represent the sole appellate reviews of the DTVIA and warrant examination.⁹¹

The defendants in *Ibarguen-Mosquera* were arrested after being detected by the United States Coast Guard Cutter *Alert* in international waters in 2009.⁹² With a maritime patrol aircraft providing support, an approaching boarding team on a rigid-hull inflatable boat observed a “flash of light” and “smoke or steam” from the SPSS.⁹³ The crew

88. 18 U.S.C.A. § 2285(e).

89. *See* U.S. CONST. art. 1, § 8, cl. 10 (granting Congress the power to “define and punish Piracies and Felonies committed on the high Seas, and Offenses to the Law of Nations”).

90. *See, e.g.*, Brief of United States of America, *United States v. Campaz-Guerrero*, *supra* note 9, at 39-43. Appellate courts in unrelated cases have previously addressed the issue of burden shifting. *See, e.g.*, *United States v. Gray*, 260 F.3d 1267, 1278-79 (11th Cir. 2001) (involving a “three strikes” statute); *United States v. Duran*, 596 F.3d 1283, 1294 (11th Cir. 2010) (involving a drug trafficking statute); *United States v. McEvoy*, 820 F.2d 1170, 1173 (11th Cir. 1987) (involving a Trademark Counterfeiting Act prosecution); *United States v. Laroche*, 723 F.2d 1541, 1543 (11th Cir. 1984) (a Gun Control Act prosecution involving antique weapons).

91. *See supra* Part I.

92. *Ibarguen-Mosquera*, 634 F.3d at 1377.

93. *Id.* at 1377.

“calmly exited the hatch, donned life-jackets, and inflated the life-rafts.”⁹⁴ Shortly thereafter, the SPSS sank and the crew awaited rescue.⁹⁵

Unlike the interdiction off the El Salvador coast discussed in Part I, no drugs were recovered and the vessel was not retrieved;⁹⁶ thus, prior to DTVIA’s enactment, the crew of this stateless vessel would likely have avoided prosecution. Instead, on January 13, 2009, the defendants were indicted on two counts of operating and conspiring to operate a semi-submersible vessel.⁹⁷

The trial court sentenced the defendants to confinement for 108 months.⁹⁸ Three of the four appellants challenged their convictions, asserting the DTVIA is unconstitutional because:

(1) its enactment exceeds Congress’s power under Article I; (2) the phrases “semi-submersible vessel” and “intent to evade” are unconstitutionally vague; (3) it shifts the burden “onto defendants to prove they are not engaging in drug trafficking and therefore denies them procedural due process; and (4) it is not rationally related to a legitimate government interest and therefore violates substantive due process.⁹⁹

Likewise, in *United States v. Saac*, the Eleventh Circuit considered a separate interdiction by the U.S. Coast Guard in international waters, where the crew of a SPSS also scuttled their vessel upon approach.¹⁰⁰ Here, too, the semi-submersible “lacked a flag, registration number, homeport, or navigational lights.”¹⁰¹ Consequently, the four defendants in *Saac* received 108 months confinement and raised similar appellate challenges as the defendants in *Ibarguen-Mosquera*.¹⁰²

The *Saac* and *Ibarguen-Mosquera* opinions were the first issued on the DTVIA in the Eleventh Circuit; as such, subsequent rulings in the Eleventh Circuit courts have held that challenges “are foreclosed by this Court’s recently published opinions.”¹⁰³ Accordingly, the remainder of

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1377-1378.

100. 632 F.3d 1203, 1207 (11th Cir. 2011).

101. *Id.*

102. *Id.* at 1207-08.

103. *United States v. Valarezo-Orobio*, 635 F.3d 1261, 1262 (11th Cir. 2011). *See also* *United States v. Campaz-Guerrero*, Nos. 09-14475, 09-14525, 09-14577, 09-14578, 2011 WL 1522386, at *901 (11th Cir. Apr. 22, 2011). The four appellants in *Campaz-Guerrero* were convicted of violating the DTVIA for operating a stateless, semi-

this section shall focus primarily on analysis in *Saac* and *Ibarguen-Mosquera*.

A. High Seas Clause Challenges

The *Ibarguen-Mosquera* court, which attached a vivid color picture of the aqua-blue, zero freeboard SPSS to its opinion, addressed the contention that Congress exceeded its power by broadly reading the High Seas Clause of the U.S. Constitution, which authorizes Congress to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”¹⁰⁴

The scope of Article I, Section 8, along with the issue of a nexus requirement, has also been raised in appellant challenges to MDLEA convictions, where defendants have contended that Congress lacks the authority to criminalize foreign conduct on the high seas by foreigners on non-U.S.-flagged vessels outside the U.S. territorial sea.¹⁰⁵ Though appellants have previously raised this issue, “no published opinion deals squarely with the question of Congress’s Article I power over purely foreign ‘Felonies.’”¹⁰⁶

submersible in international waters with the intent to evade detection. *Id.* at 900. The submersible, which was approximately 195 miles off the Ecuadorian coast “had no flag, registration number, homeport, or navigational lights.” *Id.* As U.S. Coast Guard boarding officers approached the SPSS, the four defendants wearing life jackets departed their submersible, leaving the hatch open. *Id.* Water consumed the SPSS and it sank shortly thereafter. *Id.* The court said that the only issue not previously decided was “whether two terms in § 2285—‘semi-submersible vessel’ and ‘intent to evade’—are unconstitutionally vague as applied to those defendants.” *Id.* at 901. *See also* United States v. Valarezo-Orobio, 635 F.3d 1261 (11th Cir. 2011) (also involving a scuttled SPSS in international waters). The SPSS had no flag or visible markings on the platform when it was interdicted near Colombia in 2009. *Id.* at 1262. One of the defendants received about \$1,525 for the transit and subsequently admitted that the vessel was semi-submerged to evade detection. *Id.* at 1263. The defendants completely sank and abandoned the SPSS before the Coast Guard reached the vessel. *Id.*

104. U.S. CONST. art. 1, § 8, cl. 10.

105. *See* Kontorovich, *supra* note 43, at 1193 (“[Although c]ourts have said MDLEA fits under Congress’s power to ‘define and punish Piracies and Felonies committed on the high Seas[,]’ [t]his raises the unexplored question of whether that provision has any jurisdictional limitations.”).

106. *Id.* at 1204. *See also id.* at 1207-08 (“Congress has only those powers given to it. The question raised by the MDLEA is whether the Define and Punish Clause, and in particular its provisions for ‘Piracies and Felonies committed on the high Seas,’ is an open-ended authorization for Congress to punish *any* crimes on the high seas and *any* offenses against the law of nations, regardless of whether they have a connection with the United States.”).

Counsel for appellants in *Ibarguen-Mosquera* asserted that

[t]he United States Constitution simply does not allow Congress to punish wholly foreign conduct committed in foreign waters by foreign nationals on a foreign vessel. . . . Both the Third and Eleventh Circuits . . . suggest that there is a limit to Congress’s High Seas power, and their reasoning indicates that the scope of the power must be a function of whether the conduct being regulated is generally recognized as a crime by law-abiding countries. Unlike drug trafficking, operating a semi-submersible vessel, with the intent to evade detection, has not been universally condemned.¹⁰⁷

In *Campaz–Guerrero* Government counsel responded to similar challenges, arguing that

[i]n enacting the Act (DTVIA), Congress . . . exercised its power under the High Seas Clause, and it likewise did so narrowly, limiting the statute’s reach to “vessels without nationality”. . . . Any due process concerns in this case are satisfied by the “protective principle” of international law . . . [permitting] “a nation to assert jurisdiction over a person whose conduct outside the nation’s territory threatens the nation’s security or could potentially interfere with the operation of its governmental functions.”¹⁰⁸

The *Ibarguen-Mosquera* court framed the issues as being “whether and in what circumstances Congress can grant extraterritorial jurisdiction over foreign defendants traveling outside of the United States territorial waters.”¹⁰⁹ The two requirements to enable a law to have extraterritorial effect are that: (1) Congress must have stated “that it intends the law to have extraterritorial effect” and (2) application of the law must not be “arbitrary or fundamentally unfair.”¹¹⁰

18 U.S.C.A. § 2285(c) states: “There is extraterritorial jurisdiction over an offense under this section” Thus, the DTVIA’s text explicitly provides clarity regarding Congressional intent on the issue of extraterritorial application.

107. Appellant *Ibarguen-Mosquera*’s Initial Brief, at 16-18, *United States v. Ibarguen-Mosquera*, 634 F.3d 1370 (11th Cir. 2011) (No. 09–14476).

108. Brief of United States of America, *United States v. Campaz-Guerrero*, *supra* note 9, at 18, 20 (quoting *United States v. Gonzales*, 776 F.3d 931, 938, 940-41 (11th Cir. 1985)).

109. *United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1378 (11th Cir. 2011).

110. *Id.* (quoting *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999)).

The *Saac* court noted that “[t]hose 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.”¹¹¹ The *Saac* court concluded that

Congress acted properly within its constitutional authority under the High Seas Clause in passing the DTVIA. The fact that defendants are challenging the constitutionality of a statute other than MDLEA does not alter our conclusion about the scope of Congress’s power under the High Seas Clause. We declined to embellish one statute passed under the High Seas Clause with a nexus requirement. We now decline defendants’ invitation to rewrite the Constitution to create one.¹¹²

Ibarguen-Mosquera also examined the MDLEA, prior case law, and the status of vessels without nationality.¹¹³ Vessels that are registered in a country fly the flag of that country and, as discussed above, are, as a general rule, subject to their exclusive jurisdiction.¹¹⁴ The DTVIA proscribes submersibles that are stateless, or without nationality, operating internationally with the intent to evade detection. The *Ibarguen-Mosquera* court noted, “in the past we have held that the objective, protective, and territorial principles, have ‘no applicability in connection with stateless vessels,’ because such vessels are ‘international pariahs,’ that have, ‘no internationally recognized right to navigate freely on the high seas.’”¹¹⁵

The *Ibarguen-Mosquera* court noted that “[b]ecause 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.”¹¹⁶ The court in *Ibarguen-Mosquera* further noted “that international law permits any nation to subject stateless vessels on the

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

112. *Id.*

113. *See generally Ibarguen-Mosquera*, 634 F.3d at 1370.

114. Geneva Convention on the High Seas art. 6, Sept. 30, 1962, 13 U.S.T. 2315.

115. *Ibarguen-Mosquera*, 634 F.3d at 1379 (quoting *United States v. Marino-Garcia*, 697 F.2d 1373, 1382 (11th Cir. 1982)). Moreover, registering a vessel in a State carries responsibilities and obligations, as well as certain benefits, whereas being in a stateless status denies a platform flag state privileges and protections; thus, “[t]he registration of ships is essential to the maintenance of order on the high seas.” *See Brendel, supra* note 43, at 332.

116. *Ibarguen-Mosquera*, 634 F.3d at 1379 (quoting *United States v. Rendon*, 354 F.3d, 1320, 1325 (11th Cir. 2003)).

high seas to its jurisdiction. . . . Jurisdiction exists solely as a consequence of the vessel's status as stateless."¹¹⁷

B. Due Process Challenges

The void-for-vagueness challenge centered primarily on the phrases: "semi-submersible vessel" and "intent to evade."¹¹⁸ *Saac* and *Ibarguen-Mosquera* appellants asserted that those phrases are vague and subject to "arbitrary enforcement":¹¹⁹

[T]here is no intuitive limitation on the meaning of the modifier "most" as it refers to the hull and bulk and the amount underwater during operation. Does "most" refer to more than half of the hull and bulk? What is the denominator in the ratio that presumably would need to be utilized to assess the meaning of "most?"¹²⁰

However, the *Ibarguen-Mosquera* court cited to the facts of the case, common sense, and Webster's Dictionary, among other sources, to conclude:

117. *Id.* (quoting *Marino-Garcia*, 697 F.2d at 1383).

118. *Id.* at 1380. The DTVIA defines a semi-submersible as "any watercraft constructed or adapted to be *capable* of operating with *most* of its hull and bulk under the surface of the water." 46 U.S.C.A. § 70502(f)(1) (West 2010) (emphasis added). *Ibarguen-Mosquera* also concluded that the phrase "intent to evade" is not vague and covers the appellant's conduct:

Defendants traveled in a Vessel that sat very low in the water, was painted ocean-blue, and had no head-lights or signals. Rather than using one of Colombia's major ports to get the Vessel to sea, Defendants surreptitiously guided it down a small estuary near the Ecuadorian coast. The Vessel bore no registration numbers or other markings. It traveled more slowly in the day than at night, and was configured to create very little wake when moving and no wake when still. The Vessel sank upon arrival of the Rescue.

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

119. *Ibarguen-Mosquera*, 634 F.3d at 1379-80.

120. Appellant *Ibarguen-Mosquera*'s Initial Brief, *supra* note 108, at 20. The appellant brief continued: "[t]he difficulty in assessing the meaning of this measure can be seen when trying to apply it to a vessel like an oil tanker. An oil tanker, when laden with its cargo, rides very low in the water, and a good portion of its mass rides below the surface." *Id.* at 21 n.8. See also Appellant's Initial Brief at 26, *United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1378 (11th Cir. 2011) (No. 09-14476-0) [hereinafter *Estubinan* Appellant's Brief]. One of the co-defendants in *Ibarguen-Mosquera* asserted that "[t]here is no standard provided here to reign in policing of this statute, since, it gives law enforcement unbridled discretion, without minimal objective guidelines, to determine when any vessel is capable (as opposed actually) of operating in such as manner on the High Seas." *Id.*

[T]he facts clearly show that this Vessel was operating only 4 to 12 inches above the water while stationary and was nearly completely underwater while moving. Since the Vessel was operating with the ‘greatest amount’ of its bulk underwater at the time of detection, it clearly had ‘features permitting’ it to do so. Therefore the phrase ‘semi-submersible vessel’ covers the Vessel.¹²¹

Appellants further asserted that “[t]he ‘intent to evade’ element of the new offense is also problematic. It is not even defined.”¹²² Appellant’s arguments were not persuasive because of the totality of their conduct, which included the deceptive deployment of a stateless submersible and duplicitous operations.¹²³

C. Burden Shifting Challenges

The *Estubinan* defendants also argued that the DTVIA is unconstitutional because it “relieve[s] the Prosecutor (and the Coastguard [sic] and Navy) the Burden of Proving actual ‘Trafficking Amounts of Drugs’ . . . under the guise of making highly illegal presence aboard a ‘semi-submersible vessel.’”¹²⁴ Appellants then contended the DTVIA “effectively redefines a drug trafficking offense, presuming a defendant

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

122. Appellant *Ibarguen-Mosquera*’s Initial Brief, *supra* note 107, at 21. *See also id.* at 22 (“‘[i]ntent to evade,’ an element of the new offense, is characterized by reference both to another element of the offense and to itself. In other words, the new offense is circular in how it characterizes what is illegal – a person commits an offense if he is operating a semi-submersible (whatever that is) on the high seas without nationality with the intent to evade, and he has the intent to evade if he is operating a vessel resembling a semi-submersible that is designed to avoid detection. The statute is unconstitutionally vague, and this circularity denies the due process guaranteed by the Fifth Amendment.”). In a different case, Government counsel argued that “the terms ‘most’ and ‘capable of’ are terms of common understanding,” and asserted that the court should give them “their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import. . . . [Moreover] these terms are ‘so simple and obvious they need no further explanation in the statute.’” Brief of United States of America, *United States v. Campaz-Guerrero*, *supra*, note 9, at 33-4 (quoting *Williams v. Taylor*, 529 U.S. 420, 431 (2000) and *United States v. Thomas*, 567 F.2d 299, 300 (5th Cir. 1978)). Government counsel also noted “Congress has identified several indicia that ‘may be considered, in the totality of the circumstances, to be prima facie evidence of intent to evade detection.’” *Id.* at 34.

123. *Ibarguen-Mosquera*, 634 F.3d at 1381.

124. *Estubinan* Appellant’s Brief, *supra* note 120, at 29.

guilty if there are indicia he is drug trafficking, unconstitutionally shifting the burden to him to prove he was not. . . .”¹²⁵

The *Ibarguen-Mosquera* court noted that

the Constitution prohibits presuming an ingredient of an offense upon the proof of other facts, or shifting certain elements of an offense from an element to an affirmative defense. The Constitution would therefore prohibit redefining an offense so that the absence of an element of the original crime becomes an affirmative defense.¹²⁶

The court held, however, that

this provision does not shift the burden onto Appellants for at least two reasons. First, that the design of the vessel can serve as *prima facie* evidence of intent to evade merely means that such evidence is legally sufficient to find such an intent, and does not shift the burden of persuasion onto Appellants. The government is still charged with convincing the fact-finder that the defendant intended to evade detection. Second, there is much more evidence here of “intent to evade” than merely the fact that the Vessel is semi-submersible: the Vessel’s camouflage, its lack of headlights, its surreptitious route to the ocean, and its statelessness.”¹²⁷

The *Ibarguen-Mosquera* court anchored its holding primarily on the fact that the DTVIA is not a drug-trafficking statute.¹²⁸ It is, after all, the DTVIA’s text, not its title, which provides the substantive provisions. As Government counsel noted in their *Campaz-Guerrero* brief, “[d]espite . . . [the DTVIA’s] popular name, . . . section 2285 is not a drug trafficking statute, and it does not prohibit drug trafficking.”¹²⁹

DTVIA’s national security underpinnings and its focus on the means of conveyance, not the cargo, were dispositive for the court:

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

125. *Id.* at 28.

126. *Ibarguen-Mosquera*, 634 F.3d at 1381.

127. *Id.*

128. *Id.*

129. Brief of United States of America, *United States v. Campaz-Guerrero*, *supra* note 9, at 39 (citing *United States v. Lurz*, 666 F.2d 69, 80 (4th Cir. 1981) (referencing the Drug Kingpin Act, 21 U.S.C. § 848 (2006), which “refer[s] to ‘any person’” rather than just “the dominant person in a conspiracy.”).

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.¹³⁰

The DTVIA prosecutions over the past three years have demonstrated the value of legislation targeted against a transnational threat. Closing the loophole that previously existed regarding submersibles is operationally beneficial and judicially sound. It is probable that those prosecuted under the DTVIA will continue to challenge its constitutionality, though the opinions in *Saac* and *Ibarguen-Mosquera* are precedential Eleventh Circuit cases and will provide important guidance for other circuits.

VII. CONCLUSION

Transnational criminal threats are corrosive to stability, national security, and governance. The deployment of submersibles by TCOs poses a threat not just to the United States, but to all nations. While currently believed to be only carrying drugs and arms, TCOs could transport considerably more dangerous items, such as WMD, or even use the SPSS itself as a weapon. As such, Congress rightly criminalized stateless submersibles operating internationally with the intent to evade detection.

Appellate cases in 2011 affirming convictions under the DTVIA have demonstrably added to the law's authoritative force.¹³¹ Nevertheless, defendants in subsequent prosecutions may very well revisit issues related to vagueness and burden shifting, among others. Neither contention should have legal resonance when the underlying conduct remains operating a stateless submersible internationally with an intent to evade detection.

As TCOs modify their tactics with potentially new platforms, courts may have to address whether those vessels fall under the ambit of the DTVIA. Policy questions include how U.S. agencies will prioritize the SPSS threat, the development of use of force guidance, potential efforts to recover scuttled vessels/cargo, fiscal issues and ensuring there are consequences for failing to heave to.

As states explore how to address maritime threats most effectively, it is important to assess them in the context of a continually changing environment, with the expectation that criminals and terrorists will

130. *Ibarguen-Mosquera*, 634 F.3d at 1381.

131. *See infra* Part V.

develop new methods and new technology. An at-sea presence will remain critical to interdiction and apprehension efforts, but robust legal capabilities are also critical.¹³² A gap that existed between an emergent transnational threat and the law was closed with the enactment of the DTVIA in 2008. As the transportation of narcotics and other illicit cargo continues to evolve, it will be critical that laws similarly evolve to support operations and ensure judicial accountability.

132. See CRAIG H. ALLEN, MARITIME COUNTERPROLIFERATION OPERATIONS AND THE RULE OF LAW 80 (2007) (“Maritime interception and enforcement actions are an indispensable element in maintaining order in the oceans. No one has yet suggested a feasible substitute for an adequate and effective at-sea monitoring and enforcement presence.”).

