The Drug Trafficking Vessel Interdiction Act

By

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I. Introduction

The Drug Trafficking Vessel Interdiction Act is one of the latest responses to the disaster and national crime of drug trafficking. The United States has one of the worst drug trafficking problems in the world.\(^1\) By the same token that means it is one of the most profitable illegal drug markets in the world, “attracting ruthless, sophisticated, and aggressive drug traffickers.”\(^2\) The drug trafficking market hit a home run when they created the semisubmersible vessel that allows them to smuggle huge amounts of drugs into our country several times a week.\(^3\) Congress said the use of these vessels is “a serious international problem, facilitating transnational crime, including drug trafficking, and terrorism, as well as posing a specific threat to the safety of maritime navigation and the security of the United States.”\(^4\) Drugs are a dangerous problem worldwide, including the U.S., and this is one of many responses to the disaster of the drug trade. The issue is: is it Constitutional?

II. The History of the Drug Trafficking Vessel Interdiction Act

President George W. Bush signed the Drug Trafficking Vessel Interdiction Act into law on October 18 2008\(^5\). Part of the act reads:

Whoever knowingly operates, or attempts or conspires to operate, by any means, or embarks in any submersible vessel or semi-submersible vessel

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\(^1\) Drug Enforcement Administration, *Drug Intelligence Brief: Drug Trafficking in the United States-September 1999*, U.S. Department of Justice at 1.

\(^2\) Id.


\(^4\) Id.

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 county 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.  

The Senate passed the act by unanimous consent on September 28, 2008. The bill was passed in response to a new way for smugglers to get drugs into the country: the use of self-propelled semi-submersible vessels (“SPSS vessels”). The vessels usually deliver drugs to other vessels at sea who transport them to land. In the end, the drugs usually end up in the United States by routes via land. These types of vessels are very stealthy and can operate partially or completely below the surface of the water, and have enhanced ability to evade detection. The use of these vessels began in the early 1990s but then their travel was limited. Now with advances in technology and ship-building these vessels can carry much larger loads.

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9 Douglas Kash, Supra note 3.
11 Id.
and can travel much further distances. In fact, they can travel up to 3000 miles without ever stopping to refuel. SPSS vessels are very difficult to track and to detect allowing them to more readily evade authorities. The routes currently being used by authorities allow the SPSS vessels to leave from the both the coasts of South America and travel to the United States. The bill was unanimously passed because of the increasing threat created by the vessels. In the years 2001-2007, twenty-three incidents using the SPSS vessels were known to have happened. Yet in 2008, twenty-nine incidents had occurred to the date of the article and passing of the Act. It is estimated that SPSS vessels are responsible for at least 32% of all cocaine traffic from Columbia to the United States. In addition, to avoid being caught, the traffickers scuttle or “sink” their vessels upon approach by the Coast Guard. Most if not all of these vessels are “flagless vessels”: that is they do not operate under any country (they are not registered with a “flag state”). The vessels are usually anywhere from forty to eighty feet long and can carry four crewmembers and more than four twelve metric tons of drugs in one delivery. The specific makeup of the

12 Id.
13 Id.
14 Id.
15 Douglas Kash & Eli White, supra note 3.
16 Press Release, supra note 8.
17 Id.
18 Id.; Douglas Kash & Eli White, supra note 3.
19 Douglas Kash & Eli White, supra note 3.
20 Id.
21 Id.
vessels usually consists of low-signature wood and fiberglass so as to evade
detection. 22 They also utilize a special shape to decrease the wake, and the pipes are
constructed to decrease the vessel’s thermal reading.23 Based on the amount of
drugs they carry and what they are worth, a 10-ton vessel can carry easily twenty
million dollars worth of illegal drug product. 24 The Coast Guard was capturing
several of these vessels before the Act came into law. 8 The problem was when the
Coast Guard approached the SPSS vessels the crewmembers sink or “scuttle” their
vessels, and sink the evidence of paraphernalia down to the ocean. As the drugs sink,
so do the chances of a conviction under the then existing Maritime Drug Law
Enforcement Act 25.

Congress passed the act with a declaration stating that, “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.” 26

A. Marijuana on The High Seas Act

22 Id.
23 Id.
24 Douglas Kash & Eli White, supra note 3.
The Marijuana on the High Seas Act (MHSA) was passed in 1980.\textsuperscript{27} The import of drugs had greatly increased in the 1970’s with the War on Drugs.\textsuperscript{28} The Coast Guard interdiction efforts became a major party of the fight against the “mothership” strategy implemented by smugglers.\textsuperscript{29} The mothership strategy was just utilizing one large ship with all the drugs, which positioned itself on the high seas right outside U.S. custom waters, and then smaller boats would load up and bring the contraband to shore.\textsuperscript{30} Even if the motherships were captured, they were usually foreign-flagged and foreign-crewed vessels, therefore prosecution was not readily available because there was no evidence or real ability to prove conspiracy.\textsuperscript{31} The biggest “innovation” of the MHSA was its extension of jurisdiction beyond “U.S. Vessels”.\textsuperscript{32} It extended the jurisdiction to a new category called, “vessels subject to the jurisdiction of the U.S.” which became known as “stateless vessels” which were those vessels that flew no flag, or had fraudulent or multiple registries.\textsuperscript{33} Constitutional issues were not the main concern of the act, but rather

\textsuperscript{27} Eugene Kontrovich, \textit{Beyond the Article I Horizon: Congress’s Enumerated Powers and Universal Jurisdiction Over Drug Crimes}. 93 Minn. L. Rev. 1191, 1197 (2009).

\textsuperscript{28} Id.

\textsuperscript{29} Id.

\textsuperscript{30} Id.

\textsuperscript{31} Id.


\textsuperscript{33} Id.
international law which was generally understood as requiring a nexus for prosecution. 34 The MHSA quickly started involving cases that included foreigners on the High Seas, and non-American vessels without any proof of a final destination of America. 35 The MHSA quickly became outdated due to the cocaine boom in the 1980’s. 36 The MHSA, obviously noticeable from its name, was only directed at marijuana, so it proved completely unhelpful in drug smuggling of anything besides Marijuana. For that reason the Maritime Drug Law Enforcement Act became the next phase of legislation.

B. The Maritime Drug Law Enforcement Act

The Maritime Drug Law Enforcement Act (MDLEA) is the “principal statute through which the United States prosecutes those suspected of engaging in maritime smuggling of narcotics.”37 MDLEA was an enhancement of the jurisdictional provisions under the Marijuana on the High Seas Act.38 The MDLEA extended U.S. jurisdiction to any vessels that had some kind of connection the

34 Id.
35 Id.
36 Id.
38 Id.
United States. This included “anyone aboard vessels registered in the United States, owned or formerly owned, in whole or party by U.S. national corporations, U.S. nationals and resident aliens aboard any vessels; as well as any vessel in U.S. territorial customs waters. The expansion of jurisdiction did not stop there. It also extended jurisdiction to apply U.S. drug laws (and not just importation laws) to “any foreign vessels on the high seas” and even in territorial waters as long as there was consent from that foreign nation. The MDLEA also expanded the definition of stateless vessels to include ships that do not produce evidence of registry when requested. The MDLEA was passed pursuant to Article I, Sec. 8, § 10 of the Constitution. The Act prosecutes those ships and individuals who are in possession of drugs on foreign vessels in foreign or international waters. The statute does not address the issue of extraterritoriality. Evidence of conspiracy was not needed in these situations because the vessels were deemed “subject to U.S.

39 Id.

40 Id.

41 Eugene Kontorovich, 93 MINN. L. REV. 1191 at 1299 (2009).


jurisdiction" under the statute. 46 For this reason, the MDLEA’s constitutionality has been challenged over the years, but the courts have refused to find the Act unconstitutional 47 To date, (with the exception of the codification of the DTVIA separately from the MDLEA) the MDLEA seems to be the only statute where the United States asserts universal criminal jurisdiction. Courts have universally upheld the law under the principle that drug trafficking is an international problem that is universally condemned by law-abiding nations. 48 The DTVIA was codified in its criminal version and also included in the civil MDLEA as well. 49 The DTVIA specifically pertains to the use of semi-submersible vessels and is codified individually in a criminal form under shipping and is also codified as a part of the MDLEA 50

B. The DTVIA

The DTVIA is an enhancement under the already existing MDLEA, its own separate crime under Shipping Law of the United States. 51 The addition of the use of semi-submersible vessels, and the ability to easily scuttle them in order to avoid liability, left the Coast Guard with no remedy to prosecute obvious drug smuggling

46 Id. at 1200.
47 Davis, 905 F.2d; Garcia, 182 Fed.Appx; Martinez-Hidalgo, 993 F.2d 1052.
48 Brief for Appellant, U.S. v. Ibarguen-Mosquera, 634 F.3d 1370 (11th Cir. 2011) (No. 09-14476), 2009 WL 5175140
51 Supra, note 48.
attempts. Without the presence and confiscation of drugs there was no ability to prosecute what was certain to be drug-smugglers under the already existing MDLEA. The new section of the MDLEA\textsuperscript{52}, known as the DTVIA, and the independent criminal statute seek to prohibit the specific behavior of operating semi-submersible vessels without nationality\textsuperscript{53}. The offense described under the statutes is,

“Whoever knowingly operates, or attempts or conspires to operate, by any means, or embarks in any submersible vessel or semi-submerissble 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 fifteen years, or both.” 54

The statute specifically grants the ability to exercise extraterritorial jurisdiction.\textsuperscript{55} The statute also provides for several affirmative defenses in the scenarios where there is no possibility of engaging in illicit acts such as drug smuggling, human trafficking, or importing weapons of mass destruction. These defenses account for an individuals operating these specific SPSS vessels who in fact had registered their vessels,\textsuperscript{56} was lawfully operating in government-regulated or licensed activity \textsuperscript{57}, or was equipped with

\textsuperscript{52} 46 U.S.C. §70508 (2008)
\textsuperscript{53} 18 U.S.C. § 2285; 46 U.S.C. §70508
\textsuperscript{54} 18 U.S.C. § 2285(a) (2010).
\textsuperscript{55} 18 U.S.C. § 2285(c) (2010)
\textsuperscript{57} 18 U.S.C. § 2285(e)(1)(C) (2010).
and using some type of monitoring and/or identification system\textsuperscript{58}. \textsuperscript{59}Although there is really no reason for someone to operate this type of vessel without nationality, unless they are engaging in some illegal activity, the statute provides these defenses as an additional protection to make sure a truly innocent person is not prosecuted under the act.\textsuperscript{60}

III. Is the DTVIA Necessary?

A. Constitutional Claims and Issues

The DTVIA is obviously extreme with its extraterritorial jurisdiction, and lack of evidence of drugs necessary, but it’s combating a monster of a problem. Many argue the DTVIA is in fact unconstitutional. The gist of the arguments challenging the constitutionality of 18 U.S.C. § 2285 is that it is unconstitutional because it does not fit under the High Seas Clause of the Constitution, and therefore is not within Congress’s enumerated powers.\textsuperscript{61} Even if the clause is within Congress’s enumerated powers under the Constitution, the defendants argue the Act must also follow due process under the Constitution.\textsuperscript{62} To comport with due process in the situation of extraterritorial jurisdiction they argue the statute must comply with International Law. They argue that the act is unconstitutional for failure to comply


\textsuperscript{59} 18 U.S.C. § 2285(e) (2010)

\textsuperscript{60} Brief for Appellee, U.S. v. Saac 632 F.3d 1203 (11th Cir. 2011); Brief for Appellee, U.S. v. Ibarguen Mosquera.

\textsuperscript{61} U.S. v. Saac, 632 F.3d 1203; U.S. v. Ibarguen-Mosquera, 634 F.3d 1370.

\textsuperscript{62} Brief for Appellant, U.S. v. Estupian, 632 F.3d 1203 (11th Cir. 2011).
with due process because it does not comport with International Law. Another argument adding to the due process requirement is that there needs to be a nexus with the United States in order for the felony to be punished on the high seas. They argue without evidence that drugs are destined for the United States or even evidence of drugs at all shows lack of a nexus.

There has been debate on the issue of extraterritorial jurisdiction and a nexus requirement beyond the DTVIA. Defendants argue there cannot be a nexus if there is no evidence of drugs on board or evidence that drugs were directed to the United States. Without this nexus they argue that it is purely foreign conduct on a foreign vessel that has no connection with the United States, and therefore no jurisdiction exists to prosecute the individuals on these vessels.

Article I, Section 8, cl. 10 of the Constitution gives Congress the power, “to define and punish Piracies and Felonies committed on the high seas, and offences against the Law of the Nations”. There is little case law interpreting the scope of the High Seas Clause, but many courts have held that, “the Clause authorizes

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63 Brief of Appellant, U.S. v. Renegifo, 632 F.3d 1203 (11th Cir. 2011).
64 U.S. v. Saac; U.S. v. Ibarguen-Mosquera.
65 Id.
67 U.S. v. Ibarguen-Mosquera, 634 F.3d 1370, 1379 (11th Cir. 2011)
69 U.S. CONST. Art. I, Sec. 8, Cl. 10.
Congress to criminalize drug trafficking on the high seas.\textsuperscript{70} The third circuit found that it was not “fundamentally unfair” for Congress to punish individuals caught with narcotics on the high sea under the power of the High Seas Clause.\textsuperscript{71} “Conduct may be forbidden if it has a potentially adverse affect and is generally recognized as a crime by nations that have reasonably developed legal systems.”\textsuperscript{72} It seems that drug trafficking easily fits under this law, but the issue is that the DTVIA does not deal specifically with drug trafficking; it concerns the use of a specific type of semi-submersible types of vessels under the assumption that they are engaged in drug trafficking or some other illegal activity (human trafficking, moving weapons of mass destruction). In the same case that provided that prosecution of narcotics on the high seas does not seem fundamentally unfair, they also said,

“We, of course, are not suggesting that there is no limitation on Congress’s power to declare that conduct on the high seas is criminal is thus subject to prosecution under United States law. To the contrary, we acknowledge that there might be a due process problem if congress provided for the extraterritorial application of United States law to conduct on the high seas

\textsuperscript{70} U.S. v Garcia, 182 Fed.Appx.873 (11th Cir. 2006)

\textsuperscript{71} Initial Brief for Appellant Ibarguen-Mosquera, U.S. v. Ibarguen Mosquera, 634 F.3d 1370 (11th Cir. 2011) (No 09-14476), WL 5175140 (citing Martinez-Hidalgo, 993 F.3d at 1056).

\textsuperscript{72} U.S. v. Garcia.
without regard for a domestic nexus if that conduct were generally lawful through out the world. 73

This quote basically presents the “nexus” requirement, and whether or not the United States has a sufficient nexus to this issue in order to regulate it. I will discuss below why I think there is a sufficient nexus.

B. Finding a Nexus and the Power to Regulate

I would argue the United States has a sufficient enough interest in regulating theses vessels. The effect of drugs on the market and crime has been researched ad nauseum. 74 The fact that these boats could potential smuggle drugs, humans, and weapons of mass destruction 75 into our country is more than enough to threaten our security. “The global drug trade destabilizes governments, corrupts officials, funds terrorist organizations, breeds large-scale organized crime, and results in significant loss of human life.” 76 Drugs are a source of serious problems throughout the world. A list of drug trafficking related crimes includes but is not limited to,

73 Initial Brief for Appellant Ibarguen-Mosquera, supra note 73.

74 Drug Enforcement Administration, Drug Intelligence Brief: Drug Trafficking in the United States-September 1999, U.S. Department of Justice; UN General Assembly: Special Session on the World Drug Problem, Judicial Cooperation to Promote Drug Control, June 8-10 1998.

75 Brief for Appellee, Ibarguen-Mosquera.

“murder, firearms offenses, racketeering, conspiracy, bribery, tax evasion, banking, violations, and money laundering.”\textsuperscript{77}

Specifically, in this new era of the war on terror it is especially important to control drug trafficking because there is a link between drug trafficking and terrorism.\textsuperscript{78} Often, drug traffickers and terrorists have very common interests because they both benefit from, “military skills, weapons supply, and access to clandestine organizations.”\textsuperscript{79} As an example of a specific link between the drug trafficking and the U.S., prior to the invasion of Afghanistan, “it was used as a staging ground for terrorist training and served as one of the world’s largest suppliers of heroin.”\textsuperscript{80} The two groups work and benefit off of each other.

It is estimated that in the year 2000, 19,698 people died from causes related to the consumption of narcotics.\textsuperscript{81} In the U.S. it is estimated that in 1998, 795 people were murdered because they participated in the use or sale of drugs.\textsuperscript{82} That same year, 138,000 inmates said they were on drugs when they committed their crimes and 61,000 of them said the committed the crime in order to get money for drugs.\textsuperscript{83} Not only are drugs dangerous, but they are also a financial drain on our economy. In 2000, it is estimated that the total cost of drug use to society in the United States


\textsuperscript{78} Anne H. Geraghty, \textit{supra} note 76.

\textsuperscript{79} Id.

\textsuperscript{80} Anne H. Geraghty, \textit{supra} note 76.

\textsuperscript{81} Anne. H. Geraghty at 374.

\textsuperscript{82} Id.

\textsuperscript{83} Id.
was 160.7 billion dollars. Humans are not the only ones touched by the issue of drug trafficking. It is costly to our environment as well. Some environmental losses include six million acres of rainforest to produce cocoa, failure to follow environmental regulations regarding fertilizers and pesticides, and dumping of toxic waste from cocaine production into local waterways.

The Bureau of International Narcotics and Law Enforcement Affairs recently wrote, “As the single greatest source of illegal revenue, the drug trade has long been the mainstay of violent political insurgencies, rouge regimes, international terrorist organizations, and terrorists of every stripe. Whether through heroin that financed the former Taliban regime in Afghanistan or the cocaine that sustains the decades old insurgency in Colombia, the drug trade generates the money that is the lifeblood of the violence that increasingly threatens global peace and security.

IV. Conclusion

It is easy to see that drugs are a disaster as far as the world, including the U.S. is concerned. They are reeking havoc on our way of life, health, stability of government, crime rates, our environment, etc. It does not seem that the courts will be changing their mind any time soon as to the Constitutionality of the DTVIA. The extraordinary need for the law is probably what has carried it so long and far.

While I do agree that there is a constitutional basis for the DTVIA, I think the court could do a more thorough job of addressing it. With the current case law available, I think there is a good backing for the DTVIA, because there is nothing really against it. I think it would be useful for the Supreme Court to take a closer look at the matter and investigate the power held within the High Seas Clause of the

84 Id. at 375.
85 Id at 375-376.
86 Id at 376.
Constitution. As of now, there is little left to argue on the defense side. The Defense Newsletter Blog has even made posts on the DTIVA’s Constitutionality.  

The DTIVA is one of our best tools for combating drug trafficking because it aims at its roots: the beginning of the cycle. Drugs are a man-made disaster, and the DTIVA is our man-made response.

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