

D.A.R.E. TO CUT BACK: THE COURTS HAVE EXPANDED UNITED STATES’
JURISDICTION TOO FAR

By: Jackson Scott *

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I. Introduction

The Maritime Drug Law Enforcement Act (hereinafter “MDLEA”) has recently been the subject of controversy due to the ambiguity of the act in defining a vessel without nationality.² As the principal mechanism for the government to combat the trafficking of illicit narcotics on the high seas, the MDLEA allows for the domestic prosecution of foreign nationals apprehended on extraterritorial seas.³ Such application has led the United States to convict and house foreign nationals domestically in the federal penal system.

Apprehending and housing these foreigners year after year is costing the United States taxpayers an astronomical amount of money. According to a report issued by the Department of Justice Bureau of Prisons in September of 2021, the average cost of incarcerating a single prisoner in the year 2020 was between \$35,000 and \$40,000.⁴ Additionally, the United States Coast Guard is requesting 13.1 million dollars from Congress for its 2022 budget in part to enforce the MDLEA.⁵ Considering the amount of money involved and the severity of consequences for violating the MDLEA, the scope of its application should be thoroughly understood—after all, the MDLEA has been in effect for nearly forty years.⁶ Unfortunately, the widespread implications of the MDLEA and its enforcement are not widely understood.

This comment will focus on the recent difficulties surrounding the application of the MDLEA and present information relevant to the MDLEA’s extraterritorial reach. It will start by providing background as to what the MDLEA is and what the MDLEA implies. The comment will then proceed to address the current federal circuit split involving vessels without nationality. Further, it will present two bases to support a stricter interpretation of the MDLEA.

II. Background

Congress enacted the MDLEA in 1986, officially making it unlawful for any individual on board a covered vessel to “knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance.”⁷ The MDLEA was passed pursuant to Congress’s constitutional authority “to define and punish Piracies and Felonies committed on the high Seas.”⁸ In enacting the MDLEA, Congress effectively expanded United States’ jurisdiction extraterritorially by criminalizing certain acts committed outside the territorial jurisdiction of the United States.⁹

²See generally *United States v. Nunez*, 1 F.4th 976 (11th Cir. 2021); *United States v. Prado*, 933 F.3d 121 (2d Cir. 2019); *United States v. Davila-Reyes*, No. 16-2089, 16-2143, 2022 WL 178854 (1st Cir. Jan. 20, 2022).

³ 46 U.S.C.A. § 70503(b).

⁴ Annual Determination of Average Cost of Incarceration Fee, 86 Fed. Reg. 49,060 (Sept. 1, 2021).

⁵ U.S. Coast Guard, Posture Statement 2022 Budget Overview, at 26.

⁶ Debra Oakes, Annotation, *What Constitutes “Vessel Without Nationality,” so as to Be Subject to Jurisdiction of United States Under Maritime Drug Law Enforcement Act*, 46 U.S.C.A. § 70502(d)(1), and Predecessor Statutes, 63 A.L.R. Fed. 2d § 2 (2012).

⁷ 46 U.S.C.A. § 70503(a)(1).

⁸ U.S. Const. art. I, § 8, cl. 10.

⁹ 46 U.S.C.A. § 70503(b).

In its current form, the MDLEA applies to individuals on board any vessel of the United States and any vessel subject to the jurisdiction of the United States—which includes any vessel “without nationality.”¹⁰ However, whether or not a vessel is subject to the jurisdiction of the United States, i.e., “without nationality,” is not a prerequisite for an offense under the MDLEA; instead, it is a preliminary question of law for the determination of a trial judge.¹¹ The MDLEA enumerates three instances in which a vessel can be deemed to be without nationality (stateless) and thus subject to the jurisdiction of the United States.¹² First, a vessel is considered stateless when the master or individual in charge asserts a claim of registry that is subsequently denied by the nation whose registry is claimed.¹³ Second, a vessel is stateless when the master or individual in charge of the vessel fails to make a claim of nationality or registry on behalf of the vessel after being requested to do so by an officer of the United States.¹⁴ Third, a vessel can be deemed properly to be “without nationality” when the master or individual in charge asserts a claim of registry or nationality that the claimed nation fails to affirmatively and unequivocally assert that the vessel is in fact of that nation’s nationality.¹⁵

The MDLEA acknowledges three ways for the master or individual in charge of a vessel to assert a claim of nationality or registry.¹⁶ An individual can manifest a claim of registry or nationality only by (1) flying a nation’s flag or ensign upon the vessel,¹⁷ (2) producing documentation evidencing the vessel’s nationality or registry,¹⁸ or (3) by verbally asserting a claim of nationality or registry if the individual is the master of or in charge of the vessel.¹⁹ The scope of the MDLEA’s application and subsequent jurisdiction seems straightforward—it applies to unlawful acts committed on vessels subject to the jurisdiction of the United States.²⁰ However, as the rest of this comment will explore, the exact scope of the MDLEA’s jurisdiction is riddled with controversy.

Congress passed the MDLEA as part of the Anti-Drug Abuse Act of 1986, which was fast-tracked through the enactment process and received substantial bipartisan support seeking to create a drug-free America.²¹ Upon enactment Congress found the legislation “necessary to ‘facilitate enforcement by the Coast Guard of laws relating to the importation of illegal drugs.’”²² The MDLEA embodies an outward manifestation of Congressional intent to enable aggressive

¹⁰ *Id.* §§ 70503(e)(1), 70502(c)(1)(A).

¹¹ *Id.* § 70504(a).

¹² *Id.* § 70502(d)(1).

¹³ *Id.* § 70502(d)(1)(A).

¹⁴ 46 U.S.C.A. § 70502(d)(1)(B).

¹⁵ *Id.* § 70502(d)(1)(C).

¹⁶ *Id.* § 70502(e).

¹⁷ *Id.* § 70502(e)(2).

¹⁸ *Id.* § 70502(e)(1).

¹⁹ 46 U.S.C.A. § 70502(e)(3).

²⁰ *Id.* § 70503.

²¹ Elaina Aquila, *Courts Have Gone Overboard in Applying the Maritime Drug Law Enforcement Act*, 86 FORDHAM L. REV. 2965, 2975 (2018).

²² *Id.* (quoting Charles R. Fritch, Note, *Drug Smuggling on the High Seas: Using International Legal Principles to Establish Jurisdiction over the Illicit Narcotics Trade and the Ninth Circuit’s Unnecessary Nexus Requirement*, 8 WASH. U. GLOBAL STUD. L. REV. 701 (2009)).

prosecution of maritime drug trafficking.²³ Due to its broad scope and aggressive application, the MDLEA has been the subject of numerous constitutional challenges and scrutiny from non-citizen defendants being prosecuted, resulting in discord between the federal appellate courts. Unfortunately, the Supreme Court of the United States (SCOTUS) has yet to grant any writs of certiorari to resolve issues involving the MDLEA since its enactment in 1986.

III. Circuit Split

As previously noted, section 70502(d)(1) of the United States Code enumerates three ways in which a vessel can be deemed to be “without nationality” and thus subject to the jurisdiction of the United States.²⁴ Currently, a split exists among the circuits. The Eleventh Circuit, in *United States v. Nunez*,²⁵ as well as the First²⁶ and Third Circuits,²⁷ treat the enumerated list as mere suggestions that leave room for other determinations of stateless vessels in congruence with customary international law. The Second Circuit, on the other hand, in *United States v. Prado*, treats the enumerated list as exhaustive and does not rely on customary international law in determining what constitutes a “vessel without nationality.”²⁸

Recently, in June 2021, the Eleventh Circuit handed down *Nunez*, in which the court disagreed with the Second Circuit’s holding in *Prado*.²⁹ As a result of the Eleventh Circuit’s decision, a Petition for Writ of Certiorari has been filed with the Supreme Court of the United States.³⁰ The Petition for Writ of Certiorari seeks to resolve the question of “whether the three ways to identify nationless vessels enumerated in § 70502(d)(1) are exhaustive.”³¹ Essentially the Petition is seeking clarification regarding the scope of a “vessel subject to the jurisdiction of the United States”—or, what constitutes a vessel without nationality.³²

A. The Second Circuit in *United States v. Prado*

In *Prado*, the Second Circuit held that when there is no identified master, or individual, in charge of the vessel, the Coast Guard must request a claim of nationality, or registry, from the individuals on board the vessel.³³ If the Coast Guard does not then the vessel cannot properly be deemed to be without nationality.³⁴ This decision arose from the Coast Guard receiving a tip about

²³ *Davila-Reyes*, 2022 WL 178854, at *8.

²⁴ 46 U.S.C. § 70502(d)(1).

²⁵ *Nunez*, 1 F.4th at 984.

²⁶ See *United States v. Matos-Luchi*, 627 F.3d 1, 4 (1st Cir. 2010) (the listed examples are not exhaustive as to the scope of § 70502(d)—instead, § 70502(d) extends to all vessels that could be deemed stateless pursuant to customary international law).

²⁷ See *United States v. Rosero*, 42 F.3d 166, 169-70 (3d Cir. 1994) (Congress by using “includes” intended for the list found in § 70502(d) to not provide an exhaustive definition of a vessel without nationality).

²⁸ *Prado*, 933 F. 3d at 129-31.

²⁹ *Nunez*, 1 F.4th at 987-88.

³⁰ Petition for Writ of Certiorari, *Nunez*, 1 F.4th 976 (No. 21-728).

³¹ *Id.* at i.

³² *Id.* at 5.

³³ *Prado*, 933 F.3d at 132.

³⁴ *Id.*

a “go-fast” boat carrying drugs between Nicaragua and Costa Rica.³⁵ The Coast Guard spotted a “go-fast” boat traveling at a high speed in international waters, intercepted the vessel, and recovered 680 kilograms of cocaine.³⁶ Manning the vessel were three individuals who claimed to be of Ecuadorian nationality; however, none of the individuals claimed to be in charge of the vessel or to be the master of the vessel.³⁷ Subsequently the individuals were detained and pleaded guilty to conspiracy and possession in violation of the MDLEA in the United States District Court for the Southern District of New York.³⁸

The pertinent issue on appeal was whether or not the trial court erred in determining that the vessel was properly qualified as a vessel without nationality and, thus, subject to the jurisdiction of the United States.³⁹ According to the MDLEA, a vessel is considered to be without nationality and, consequently, subject to the United States' jurisdiction when the master, or individual in charge, fails to respond to a request made by a U.S. officer for the master to assert a claim of nationality for the vessel.⁴⁰ In reaching its decision, the Second Circuit noted that “the absence of a master’s claim of registration does not, by itself, establish absence of registration.”⁴¹ Instead, the failure to assert a claim of nationality or registry upon request by an authorized officer constitutes the vessel’s qualification as a vessel without nationality.⁴²

The Second Circuit ultimately determined the vessel was not “without nationality” and thus not subject to the jurisdiction of the United States.⁴³ With sound reasoning, the court explained that if the master, or individual in charge of the vessel, fails to state the vessel’s nationality when asked, it creates a dispositive inference that the vessel is, in fact, stateless.⁴⁴ On the other hand, the court reasoned that the mere failure to volunteer such information without being asked by proper authority does not create the same dispositive inference.⁴⁵ Therefore, the Second Circuit determined that when no claim of nationality is made, the burden is on the government to show that the Coast Guard requested an assertion of nationality from the individuals on board the vessel.⁴⁶ If the government cannot meet that burden, as they were unable to do in *Prado*, there is no jurisdiction to prosecute defendants in violation of the MDLEA.⁴⁷

B. The Eleventh Circuit in *United States v. Nunez*

The Eleventh Circuit issued a decision in direct opposition of the Second Circuit when the court was presented with a similar set of core facts.⁴⁸ The decision stemmed from an incident that occurred approximately 50 nautical miles off the coast of the Dominican Republic, in which the

³⁵ *Id.* at 126.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Prado*, 933 F.3d at 126.

³⁹ *Id.* at 127.

⁴⁰ 46 U.S.C. § 70502(d)(1)(B).

⁴¹ *Prado*, 933 F. 3d at 130.

⁴² *Id.*

⁴³ *Id.* at 153.

⁴⁴ *Id.* at 131.

⁴⁵ *Id.*

⁴⁶ *Prado*, 933 F.3d at 129.

⁴⁷ *Id.* at 153.

⁴⁸ *See Nunez*, 1 F.4th at 987.

Coast Guard intercepted a small vessel carrying four individuals and approximately 182 kilograms of cocaine.⁴⁹ The Coast Guard observed no flag, could not ascertain any registration documents and perceived no other indicia of nationality.⁵⁰ Upon questioning the individuals as to which among the men was the master or individual in charge of the vessel, none stepped forward.⁵¹ The Coast Guard subsequently detained the men who were later charged in violation of the MDLEA for possession and conspiracy.⁵²

On appeal, the defendants alleged that the court lacked jurisdiction to prosecute the men because the vessel apprehended by the Coast Guard was not a vessel without nationality pursuant to § 70502(d)(1)(B).⁵³ In assessing this claim, the Eleventh Circuit turned to customary international law noting that a vessel seeking the protection of a nation's exclusive jurisdiction will usually seek to make its flag state obvious.⁵⁴ The defendants' vessel offered no customary signs of nationality—there were no registration papers, identification markings, flag, or verbal claim of nationality by anyone.⁵⁵

The Eleventh Circuit held that the requirement for the Coast Guard to request a verbal assertion of registry only exists when there is a master or individual in charge of the vessel.⁵⁶ Customary international law provides procedures to determine statelessness, but when addressed the court merely noted that the provided procedures did not undermine its conclusion.⁵⁷ The panel concluded that pursuant to customary international law a vessel could be deemed nationless if it flies no flag or carries no registration papers.⁵⁸ Consequently, the court held that when there is no indicia of nationality, a vessel is properly deemed to be without nationality absent a verbal claim of its registry.⁵⁹

C. The Petition for Writ of Certiorari

As noted above, the Petition for Writ of Certiorari seeks clarification as to the proper interpretation of § 70502(d)(1).⁶⁰ The MDLEA was designed by Congress with the intent to combat the illicit trafficking of narcotics while maintaining minimal friction with foreign nations.⁶¹ Petitioners claim this intent was manifested by Congress when it chose to only extend jurisdiction over “covered” vessels, and subsequently, provided that such a determination was a question for

⁴⁹ *Id.* at 980-82.

⁵⁰ *Id.* at 982.

⁵¹ *Id.* at 981.

⁵² *Id.* at 981-82.

⁵³ *Nunez*, 1 F.4th at 986.

⁵⁴ *Id.* at 985.

⁵⁵ *Id.*

⁵⁶ *Id.* at 986.

⁵⁷ *Id.* at 987.

⁵⁸ *Nunez*, 1 F.4th at 987.

⁵⁹ *Id.* at 986.

⁶⁰ Petition for a Writ of Certiorari, *supra* note 30.

⁶¹ *Id.* at 1.

the judge—not an element of the offense to be presented to a jury.⁶² The Petition presented several reasons to elicit a prompt intervention by the Supreme Court of the United States.⁶³

As a basic principle, Petitioners relied on the fact that the MDLEA extends jurisdiction extraterritorially.⁶⁴ In doing so, the MDLEA represents paramount Congressional policy decisions that require uniform interpretation across the nation.⁶⁵ Because Congress failed to “affirmatively and unmistakably instruct [the] courts to supplement the Act to reach vessels not identified in the statute,” the First, Third, and Eleventh Circuits interpret § 70502(d)(1) broadly and apply an indeterminate standard.⁶⁶ Such a standard, Petitioners claimed, is “contrary to the careful balance Congress struck between combat[ting] drug trafficking, on the one hand, and respecting the sovereignty of nations abroad, on the other.”⁶⁷

The three-to-one split between the circuits is outcome-determinative as to jurisdiction.⁶⁸ The MDLEA specifically provides that the venue is proper in any district when an unlawful act is committed on the high seas.⁶⁹ Consequently, the United States’ government can choose where to prosecute individuals apprehended on the high seas.⁷⁰ If jurisdiction over an individual is based on the intercepted vessel being categorized as one “without nationality” the government would be motivated to bring suit in one of the three circuits that treat § 70502(d)(1) as a mere list of examples that can be supplemented by customary international law.⁷¹ However, if the same suit were to be brought in the Second Circuit, there is a chance it would be dismissed due to a lack of jurisdiction because the Second Circuit requires the government to satisfy the detailed provisions of the statute.⁷²

Petitioners further alleged that the Eleventh Circuit was erroneous in *Nunez* relying on several canons of statutory interpretation.⁷³ In doing so the Petitioners meticulously presented an argument in favor of the Second Circuit’s interpretation of § 70502(d)(1).⁷⁴ Whether or not the Second Circuit’s interpretation of § 70502(d)(1) is proper is a question for the Supreme Court of the United States if it chooses to grant writ. That being said, the rest of this comment will present ways in which a broad interpretation of the MDLEA can be challenged.

IV. Canons of Statutory Interpretation

As the Petitioners argued in their writ, there are several canons of statutory interpretation that can be employed to challenge a broad interpretation of what constitutes a vessel without

⁶² *Id.* at 5.

⁶³ *See generally id.*

⁶⁴ *Id.* at 23.

⁶⁵ Petition for Writ of Certiorari, *supra* note 30, at 23.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 33.

⁶⁹ *Id.* at 24.

⁷⁰ Petition for Writ of Certiorari, *supra* note 30, at 24.

⁷¹ *Id.*

⁷² *Id.* at 33.

⁷³ *Id.*

⁷⁴ *Id.*

nationality.⁷⁵ The First, Third, and Eleventh Circuit’s interpretation of § 70502(d)(1) hinges on the fact that Congress, in enacting the MDLEA, chose to introduce the enumerated ways in which a vessel can be deemed to be without nationality with the word “includes.”⁷⁶ The argument is that if Congress intended for the enumerated list to be exhaustive it would have chosen to use the phrase “includes only.”⁷⁷ Congress used the same language when it enacted § 70502(e), which lists how a vessel may assert a claim of nationality to the MDLEA.⁷⁸ The non-exhaustive nature of § 70502(d)(1) is bolstered by a canon of statutory interpretation that provides a presumption of non-exclusivity when the Legislature uses the verb “to include.”⁷⁹

Specifically, the canon states: “[t]he verb *to include* introduces examples, not an exhaustive list.”⁸⁰ Justice Scalia and Bryan Garner explain in *Reading Law*, that the word “include” does not ordinarily introduce an exhaustive list; however, they mention that the courts have not invariably held this to be the case.⁸¹ The fact that the courts have not invariably held this to be the case has led many drafters to use some variation of “including but not limited to.”⁸² When faced with that phrase, drafters focus on defeating the “negative-implication canon.”⁸³ In any event, *Reading Law* specifies that the word “include” still attaches a presumption of exemplariness.⁸⁴

Like many presumptions under the law, the presumption of non-exclusivity with the use of the word “include” can be overcome. The Whole-Text Canon provides that the text of a statute must be construed as a whole.⁸⁵ Legislative interpreters must look to the particular statutory language and seek to balance it with the language and design of the statute as a whole.⁸⁶ The plain meaning of statutory language is determined based on context.⁸⁷ Because many statutes contain interrelated parts that make up the whole, the entirety of the document provides context for each of its subparts.⁸⁸ Consequently, the meaning of § 70502(d)(1) turns on the entirety of the MDLEA.

The principle of interrelating canons provides that “[no] canon of interpretation is absolute.”⁸⁹ Each canon of interpretation can be overcome by differing principles that point the interpreter in another direction.⁹⁰ Therefore, the presumption of exemplariness that is attached using the word “include” can be overcome by other canons of interpretation. For instance, the negative-implication canon provides that “[t]he expression of one thing implies the exclusion of

⁷⁵ See generally Petition for Writ of Certiorari, *supra* note 30, at at 24-33.

⁷⁶ *Matos-Luchi*, 627 F.3d at 4; *Rosero*, 42 F.3d at 170-71; *Nunez*, 1 F.4th at 984.

⁷⁷ *Matos-Luchi*, 627 F.3d at 4.

⁷⁸ *Id.*

⁷⁹ Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* § 15 (2012).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See *Reading Law: The Interpretation of Legal Texts*, *supra* note 79, at 132-33.

⁸⁵ *Id.* § 24 at 167.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Reading Law: The Interpretation of Legal Texts*, *supra* note 79, § 3 at 59.

⁹⁰ *Id.*

others.”⁹¹ The canon is properly applied when the *unis*, the thing specified, can reasonably be construed as an expression of all that shares in the grant or prohibition provided by the statutory language.⁹² However, the application of the negative-implication canon is highly dependent on context.⁹³ The canon is given more weight when the statutory enumeration is specific.⁹⁴ If the legislature in enacting a statute that speaks only of specific things or specific situations, it is legitimate to draw the inference that the particulars addressed exhaust the legislative intent of those drafting the statute.⁹⁵

Additionally, the omitted case canon provides that “[n]othing is to be added to what the text states or reasonably implies.”⁹⁶ A matter that is not specifically covered by a statute is to be treated as not covered.⁹⁷ Therefore, a judge should not have the power to enlarge, improve, or change the law.⁹⁸ That being said, the canon must be applied with the principle that a text includes both express and implicit provisions.⁹⁹ Consequently, when interpreting a statute the judiciary must distinguish between real gaps and imagined gaps.¹⁰⁰ The omitted case canon of statutory interpretation prevents a judge from filling a “real gap”. A real gap exists when the statute neither expressly nor implicitly provides for a particular situation.¹⁰¹ It is in this situation a judiciary will effectively be legislating what the gap-finding judge determines to be desirable—an act that is beyond the scope of the judiciary.¹⁰²

V. Alternative Approach to Challenge a Broad Interpretation of § 70502(d)(1)

The First Circuit in *United States v. Davila-Reyes* introduced the notion that § 70502(d)(1) cannot be interpreted in a manner that allows for a vessel to be deemed without nationality if it would not be qualified as a vessel without nationality under customary international law.¹⁰³ As noted above, the First Circuit interprets § 70502(d)(1) as a non-exhaustive list to be interpreted in conjunction with principles of international law.¹⁰⁴ Because the First, Third, and Eleventh Circuits all interpret § 70502(d)(1) in conjunction with customary international law, it is important to discern what exactly international law considers as a vessel without nationality.¹⁰⁵

⁹¹ *Id.* § 10 at 107.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Reading Law: The Interpretation of Legal Texts*, *supra* note 79, § 10 at 107.

⁹⁵ *Id.*

⁹⁶ *Id.* § 8 at 93.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Reading Law: The Interpretation of Legal Texts*, *supra* note 79, § 8 at 94-96.

¹⁰⁰ *Id.*

¹⁰¹ *See generally id.* at 93-100.

¹⁰² *Id.*

¹⁰³ *Davila-Reyes*, 2022 WL 178854, at *31.

¹⁰⁴ *Matos-Luchi*, 627 F.3d at 4.

¹⁰⁵ *See generally* Petition for Writ of Certiorari, *supra* note 30, at 15-19.

A. A Vessel without Nationality Pursuant to Customary International Law

Customary international law provides that when a vessel flies the flag of more than one nation, the vessel can properly be categorized as a vessel without nationality.¹⁰⁶ The United States recognizes the United Nations Convention on the Law of the Sea (UNCLOS) as a codification of customary international law.¹⁰⁷ UNCLOS was adopted on December 10, 1982, as a comprehensive legal framework meant to govern acts involving the ocean.¹⁰⁸ In pertinent part, UNCLOS grants two rights to all nations concerning the high seas.¹⁰⁹ First, any nation can treat a vessel as a vessel without nationality when said vessel flies the flag of two or more states. Second, it grants authority to the warship of any nation to verify a foreign vessel's nationality.¹¹⁰

UNCLOS requires each nation to fix conditions for the grant of its nationality to a vessel and the vessel's right to fly the nation's flag.¹¹¹ Furthermore, each nation is required to issue a ship, to which the nation granted the right to fly its flag, documents evidencing the vessel's right to fly the nation's flag.¹¹² A vessel's right to fly a nation's flag exposes the vessel to the jurisdiction and control of said nation concerning administrative, technical, and social matters.¹¹³ Article 110 grants every state's warship the right to visit a suspicious vessel on the high seas.¹¹⁴ This right allows a nation to verify a ship's right to fly a nation's flag but does not allow officers onboard a warship to board the suspicious vessel absent exigent circumstances.¹¹⁵

Officers that suspect a vessel to be without nationality may only board a foreign vessel on the high seas if suspicion persists after they have checked registration documents.¹¹⁶ Once on board the foreign vessel, the officers are permitted to conduct a further examination but must do so with "all possible consideration."¹¹⁷ Absent exigent circumstances, officers on board a warship of any nation cannot board a foreign vessel on the high seas unless they are conferred the power to do so pursuant to a treaty.¹¹⁸

By applying principles of international law, laid out by UNCLOS, the courts have determined that a vessel without nationality is simply a vessel that has not been granted nationality by any state.¹¹⁹ If there is a question as to whether a vessel is stateless, under the right of visit, a clearly marked law enforcement ship of any state may board a private ship if there is reasonable

¹⁰⁶ United Nations Convention on the Law of the Sea art. 92, Dec. 10, 1982, 1833 U.N.T.S. 397. (Hereinafter UNCLOS).

¹⁰⁷ Eugenia Lopez-Jacoiste, *Law of the Sea*, OXFORD BIBLIOGRAPHIES (Feb. 24, 2021), <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0162.xml>.

¹⁰⁸ *Id.*

¹⁰⁹ *See generally* UNCLOS, *supra* note 106, Part VII.

¹¹⁰ *Id.* at art. 92.

¹¹¹ *Id.* at art. 110.

¹¹² *Id.* at art. 91.

¹¹³ *Id.* at art. 94.

¹¹⁴ UNCLOS, *supra* note 106, at art. 110.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Davila-Reyes*, 2022 WL 178854, at *22.

suspicion that said vessel is without nationality.¹²⁰ Such an inquiry is not necessary for a vessel to be deemed without nationality when a vessel either claims more than one nationality or when it refuses to claim any nationality.¹²¹

B. The First Circuit in *United States v. Davila-Reyes*

On January 20, 2022, the First Circuit in *United States v. Davila-Reyes* ruled that one of the enumerated three ways in which a vessel can be deemed to be without nationality was unconstitutional.¹²² Specifically, the court concluded “that Congress exceeded its authority under Article I of the Constitution in enacting § 70502(d)(1)(C) of the MDLEA” noting that the cited provision unconstitutionally expands the definition of “a vessel without nationality” to extend United States’ jurisdiction to foreigners on board foreign vessels.¹²³

The decision stemmed from an incident in which the United States Coast Guard boarded and searched a vessel approximately 30 nautical miles from the Colombian coast.¹²⁴ The Coast Guard conducted a chemical test that revealed trace amounts of cocaine.¹²⁵ Consequently, the three individuals on board were detained.¹²⁶ Upon questioning, the master of the vessel asserted Costa Rican nationality but was unable to produce supporting documentation.¹²⁷ Costa Rica was unable to confirm the vessel’s registry;¹²⁸ subsequently, the men were charged with trafficking in violation of the MDLEA.¹²⁹ After entering guilty pleas, the men appealed their convictions and argued in pertinent part that the statute that allowed for the arrest and prosecution of foreign nationals for acts committed in international waters exceeded Congress’s authority under Article I of the Constitution.¹³⁰

In addressing the issues on appeal, the court turned to customary international law, first opining that the well-established protective principle does not support United States’ jurisdiction over drug trafficking on the high seas committed by foreign nationals on foreign vessels.¹³¹ The protective theory of criminal jurisdiction grants national jurisdiction over a criminal when said criminal’s actions affect, or were intended to affect a national interest of the forum state.¹³² For a state to exercise jurisdiction per the protective principle and applicable international law, the criminal’s conduct must threaten national security, sovereignty, or some important governmental function.¹³³ The court held that the MDLEA’s application to drug trafficking committed by foreign

¹²⁰ *Id.* at *23.

¹²¹ *Id.*

¹²² *See generally Davila-Reyes*, 2022 WL 178854.

¹²³ *Id.* at *1.

¹²⁴ *Id.* at *1-2.

¹²⁵ *Id.* at *2.

¹²⁶ *Id.*

¹²⁷ *Davila-Reyes*, 2022 WL 178854, at *1.

¹²⁸ *Id.* at *2.

¹²⁹ *Id.*

¹³⁰ *Id.* at *1.

¹³¹ *Id.* at *3-4.

¹³² *Aquila*, *supra* note 21, at 2977.

¹³³ *Id.*

nationals on foreign vessels on the high seas was not supported by the protective principle of international law.¹³⁴

After fleshing out other trivial issues, the court addressed the constitutional challenge of 46 U.S.C. §70502(d)(1)(C).¹³⁵ As noted above, this provision is one of the enumerated ways in which a vessel is deemed to be “without nationality” and is at the center of the split amongst the circuits.¹³⁶ The statute defines a “vessel without nationality” to encompass a vessel whose occupants assert a claim of registry or nationality that the claimed nation fails to affirmatively and unequivocally confirm.¹³⁷ The constitutional challenge presented an issue of first impression for the federal courts—specifically, courts have not considered the authority for the statutory definition of a vessel without nationality.¹³⁸ Rather, they have simply assumed that the MDLEA applies exclusively to vessels that would be subject to the jurisdiction of the United States pursuant to international law.¹³⁹

The First Circuit concluded that § 70502(d)(1)(C) is unconstitutional by first determining that the Constitution is limited by principles of international law, and then applying principles of international law to determine that the statutorily enumerated definition extends the definition of a stateless vessel beyond the scope of international law.¹⁴⁰ Because the MDLEA was passed pursuant to the Define and Punish Clause of the Constitution, the court primarily focused on the Framers’ intent in enacting the clause.¹⁴¹ The court relied on the wording of the clause and the relevant material surrounding the clause and determined that the Framers intended to grant Congress the ability to create laws in accordance with existing international law.¹⁴² Therefore, legislation passed pursuant to the Define and Punish Clause is limited by principles of customary international law.¹⁴³

Once the court determined such limitations existed, it pivoted its attention to applicable international law.¹⁴⁴ Pursuant to international law, all nations have an untrammelled and equal right to navigate on the high seas.¹⁴⁵ This right led to a system of flag-state jurisdiction that governs acts committed on the high seas.¹⁴⁶ The notion of flag-state jurisdiction allows for the United States and any other country to exercise jurisdiction over any stateless vessel.¹⁴⁷ Under international law, a stateless vessel is a vessel that has not been granted registry by any state.¹⁴⁸ Diving deeper into what constitutes a stateless vessel, the court noted that customary international law recognizes that

¹³⁴ *Davila-Reyes*, 2022 WL 178854, at *4.

¹³⁵ *Id.* at *11.

¹³⁶ 46 U.S.C.A § 70502(d)(1); *See also* Petition for Writ of Certiorari, *supra* note 30.

¹³⁷ 46 U.S.C.A. § 70502(d)(1)(C).

¹³⁸ *Davila-Reyes*, 2022 WL 178854, at *13-14.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at *14.

¹⁴¹ *Id.* at *14-19.

¹⁴² *Id.* at *22.

¹⁴³ *Davila-Reyes*, 2022 WL 178854, at *22.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at *20.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Davila-Reyes*, 2022 WL 178854, at *22.

an oral assertion of the registry made by the master of a vessel establishes a presumption of nationality.¹⁴⁹

Consequently, the mere oral assertion of nationality or registry by the master or individual in charge of a vessel equates to a *prima facie* showing of nationality.¹⁵⁰ The court then determined that § 70502(d)(1)(C), in allowing a claimed nation's failure to respond to an inquiry or its inability to confirm nor deny registry to establish a vessel as stateless, is inconsistent with international law.¹⁵¹ Because the oral assertion of registry establishes a presumption of nationality, a claimed nation's failure to respond or its inability to confirm nor deny a vessel's registry is not dispositive as to the veracity of the master's claim of the registry.¹⁵² Accordingly, the panel held that §70502(d)(1)(C) unconstitutionally displaces a *prima facie* showing that arises under customary international law from an oral assertion of nationality or registry without any affirmative evidence to the contrary.¹⁵³

VI. MDLEA Strict Interpretation

The MDLEA grants the United States the ability to prosecute individuals engaged in conduct in violation of the MDLEA onboard a covered vessel.¹⁵⁴ A covered vessel is a vessel of the United States or a vessel subject to the jurisdiction of the United States; or any other vessel if the individual is a citizen of the United States.¹⁵⁵ Further, the MDLEA provides that vessels subject to the jurisdiction of the United States “includes” vessels without nationality.¹⁵⁶

As stated above, a vessel without nationality “includes” three enumerated scenarios.¹⁵⁷ First, a vessel is considered to be without nationality when the master or individual in charge asserts a claim of registry that is subsequently denied by the nation whose registry is claimed.¹⁵⁸ Second, a vessel is deemed to be without nationality when the master or individual in charge of the vessel fails to make a claim of nationality or registry on behalf of the vessel after being requested to do so by an officer of the United States.¹⁵⁹ Third, a vessel can be deemed to be without nationality when the master or individual in charge asserts a claim of registry or nationality that the claimed nation fails to affirmatively and unequivocally assert that the vessel is in fact of the nation's nationality.¹⁶⁰ A claim of registry or nationality can manifest itself in one of three ways.¹⁶¹ The statute specifically provides that a claim of registry or nationality “includes only” (1) the flying of a nation's flag or ensign upon the vessel, (2) the production of documentation evidencing the

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at *24.

¹⁵² *Id.* at *27.

¹⁵³ *Davila-Reyes*, 2022 WL 178854, at *29-30.

¹⁵⁴ 46 U.S.C.A. § 70502(a).

¹⁵⁵ *Id.* § 70503(e).

¹⁵⁶ *Id.* § 70502(c)(1)(A).

¹⁵⁷ *Id.* § 70502(d)(1).

¹⁵⁸ *Id.* § 70502(d)(1)(A).

¹⁵⁹ 46 U.S.C.A. § 70502(d)(1)(B).

¹⁶⁰ *Id.* § 70502(d)(1)(C).

¹⁶¹ *Id.* § 70502(e).

vessel's nationality or registry, or (3) the verbal assertion of a claim of nationality or registry by the individual in charge or master of the vessel.¹⁶²

The Interpretive-Direction Canon provides that when drafters of legislation specify the meaning of the terms they use, the enumerated definitions are to be carefully followed.¹⁶³ In pertinent part when a definitional section provides that a phrase “includes” certain things, it is usually construed to mean that the phrase may include other things as well.¹⁶⁴ The drafters enacted the MDLEA and included a definitional section in 46 U.S.C.A. § 70502.¹⁶⁵ In that section the drafters enumerated several vessels which were to be classified as vessels subject to the jurisdiction of the United States and introduced the definitional list with the word “includes.”¹⁶⁶ Likewise, Congress in enacting § 70502(d) chose to introduce the enumerated definitions of a vessel without nationality with the word “includes.”¹⁶⁷ On the other hand, the drafters chose to enumerate the ways in which a vessel could assert a claim of nationality in § 70502(e) by introducing the list with the phrase “includes only.”¹⁶⁸

The choice of wording in the introduction of said enumerated lists is not the only difference between the definitions laid out in § 70502. Both § 70502(c) and § 70502(d) conjoin the enumerated definitions with the word “and”; whereas, § 70502(e), which introduces the list with “includes only,” conjoins the enumerated definitions with the word “or.”¹⁶⁹ The Interpretive-Direction Canon recognizes the fact that legal drafters have the power to limit the implication of defined terms.¹⁷⁰ For instance, drafters can exclude the negative-implication canon of statutory interpretation by using the phrase “including without limitation.”¹⁷¹ An argument can be made that the drafters intended to exclude the application of the negative-implication canon by their choice of words; however, such limitation was not clearly manifested.¹⁷² Nonetheless, for sake of argument, this comment will proceed as if the negative-implication canon is not applicable.

The First, Third, and Eleventh Circuits treat § 70502(d)(1) as a non-exhaustive list due to the non-exclusive presumption that attaches to “includes.”¹⁷³ The Third Circuit in *United States v. Rosero* first introduced this notion in 1994 when it addressed what exactly constituted a vessel

¹⁶² *Id.*

¹⁶³ *Reading Law: The Interpretation of Legal Texts*, *supra* note 79, § 36 at 225.

¹⁶⁴ *Id.*

¹⁶⁵ *See generally*, 46 U.S.C.A. § 70502.

¹⁶⁶ *Id.* § 70502(c)(1).

¹⁶⁷ *Id.* § 70502(d).

¹⁶⁸ *Id.* § 70502(e).

¹⁶⁹ Compare 46 U.S.C.A. § 70502(c)(1) & 46 U.S.C.A. § 70502(d)(1) with 46 U.S.C.A. § 70502(e).

¹⁷⁰ *Reading Law: The Interpretation of Legal Texts*, *supra* note 79, § 36 at 233.

¹⁷¹ *Id.*

¹⁷² *Reading Law: The Interpretation of Legal Texts*, *supra* note 79, § 15 at 132-33 (Courts have not invariably held “include” to introduce an exemplary list which has led drafters to employ some variation of “included but not limited to” to delineate the exemplary nature of the enumerated list); *Id.* § 36, at 233 (the phrase “including without limitation” excludes the application of the negative-implication canon).

¹⁷³ *See generally Matos-Luchi*, 627 F.3d at 4; *Rosero*, 42 F.3d at 170-71; *Nunez*, 1 F.4th at 984.

without nationality applying an earlier version of the MDLEA.¹⁷⁴ The panel noted that “the word ‘include’ means ‘to list . . . as a part or component of a whole or larger group, class, or aggregate.’”¹⁷⁵ Therefore, the court applied the ordinary usage of “includes” to conclude that the enumerated list of vessels without nationality were merely parts or components of the entire set of vessels without nationality.¹⁷⁶ Further, the First Circuit in *United States v. Matos-Luchi* expanded on *Rosero* by noting that the non-exhaustive scope of § 70502(d) was confirmed by Congress’s contrasting use of the phrase “includes only” in a subsequent provision.¹⁷⁷ Elaborating on what the panel felt to be a manifestation of broad scope, the court relied on the Coast Guard Authorization Act of 1996.¹⁷⁸ The Act amended the former language of the MDLEA (as enacted in 1986) and provided that the jurisdiction of the United States pursuant to the MDLEA was not an element of the offense but rather was to be determined by the trial judge.¹⁷⁹

However, the First Circuit’s reasoning is flawed in that the court failed to take into account other applicable principles of statutory interpretation. The principle of interrelating canons provides that no canon of statutory interpretation is absolute.¹⁸⁰ Therefore, the presumption of non-exhaustiveness that attaches by the term “includes,” as well as the interpretive direction canon, can be overcome.¹⁸¹ There are “special rules applicable to statutes and other authoritative governmental dispositions.”¹⁸² One such rule is the Reenactment Canon which provides that when Congress amends or reenacts a provision, a significant change in language is presumed to entail a change in meaning.¹⁸³ The 1996 amendment to the MDLEA changed the language of the statute.¹⁸⁴ It specified that whether or not a vessel is subject to the jurisdiction of the United States was to be a question of subject matter jurisdiction for a trial judge to decide.¹⁸⁵ The amendment also stripped a defendant of standing to claim that enforcement of the MDLEA violated international law.¹⁸⁶ By leaving jurisdiction to the discretion of the trial judge and simultaneously stripping international law as a defense, an argument can be made that the 1996 amendment of the MDLEA manifested congressional recognition that the MDLEA did not extend jurisdiction to the extent permitted by international law.

Several other canons of statutory interpretation favor a strict interpretation of the MDLEA. First and foremost, the Whole Text Canon provides that the stipulations of a statute must be interpreted in accordance with the entirety of the statute.¹⁸⁷ A proper discernment as to the scope of § 70502(d) requires it to be balanced in accordance with the context of the MDLEA, which lies

¹⁷⁴ *Rosero*, 42 F.3d at 169.

¹⁷⁵ *Id.* at 170.

¹⁷⁶ *Id.*

¹⁷⁷ *Matos-Luchi*, 627 F.3d at 4.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Reading Law: The Interpretation of Legal Texts*, *supra* note 79, § 3 at 53.

¹⁸¹ *Id.* (Different canons of statutory interpretation suggest different outcomes when it comes to accessing the proper statutory interpretation).

¹⁸² *Id.* at 243.

¹⁸³ *Id.* § 40, at 256.

¹⁸⁴ *Aquila*, *supra* note 21, at 2976 (The amendment added provisions to the MDLEA).

¹⁸⁵ *Matos-Luchi*, 627 F.3d at 4.

¹⁸⁶ *Id.*

¹⁸⁷ *Reading Law: The Interpretation of Legal Texts*, *supra* note 79, § 24 at 167.

in the design and language of the whole.¹⁸⁸ Here, the MDLEA provides for extraterritorial application.¹⁸⁹ Such application defeats the presumption of domestic application provided by the extraterritoriality canon.¹⁹⁰ “Congress does not intend a statute to apply to conduct outside the territorial jurisdiction of the United States unless it clearly expresses its intent to do so.”¹⁹¹

The MDLEA clearly manifests a congressional intent to apply extraterritorially to acts committed on covered vessels.¹⁹² The statute sets forth a layered definition of a covered vessel, in which Congress limited the extraterritorial application of the MDLEA to a vessel of the United States, a vessel subject to the jurisdiction of the United States, or any other vessel if the individual is a citizen or resident alien of the United States.¹⁹³ Congress enumerated six ways in which a vessel could be subject to the jurisdiction of the United States.¹⁹⁴ First, a vessel subject to the jurisdiction of the United States “includes” a vessel without nationality.¹⁹⁵ Second, a vessel subject to the jurisdiction of the United States “includes” a vessel that could be assimilated to be a vessel without nationality under paragraph two of article six of the 1958 Convention on the High Seas.¹⁹⁶

Article 6 paragraph two provides: “A ship which sails under the flags of two or more states, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.”¹⁹⁷ None of the other six enumerated ways in which a vessel can be qualified as a vessel subject to the jurisdiction of the United States hinges on international law.¹⁹⁸ Furthermore, the drafters of § 70502(d) made no mention of international law in providing three ways in which a vessel can be deemed to be without nationality and thus subject to the jurisdiction of the United States.¹⁹⁹

Congress specifically provided a narrow definition of a vessel subject to the jurisdiction of the United States and consulted international law with reference to one type of vessel—a vessel that flies the flag of two or more nations.²⁰⁰ The omitted-case canon would provide that the absence of reference to international law in the remainder of § 70502(c) and its absence entirely from § 70502(d)(1) is indicative that the drafters did not intend for the MDLEA to extend United States jurisdiction to encompass the breadth permitted by customary international law.²⁰¹ Specifically the canon of statutory interpretation prevents a judge from enlarging, improving, or changing the law.²⁰² The text and structure of the MDLEA, coupled with its sparse reliance on international law

¹⁸⁸ *Id.*

¹⁸⁹ 46 U.S.C.A. § 70503(b).

¹⁹⁰ *Reading Law: The Interpretation of Legal Texts*, *supra* note 79, § 43 at 268.

¹⁹¹ *Id.* at 271.

¹⁹² 46 U.S.C.A. § 70503(b) (“Extension beyond territorial jurisdiction. —Subsection (a) applies even though the act is committed outside the territorial jurisdiction of the United States.”).

¹⁹³ *Id.* § 70503(a); *Id.* § 70503(e).

¹⁹⁴ *Id.* § 70502(c)(1).

¹⁹⁵ *Id.* § 70502(c)(1)(A).

¹⁹⁶ *Id.* § 70502(c)(1)(B).

¹⁹⁷ Convention on the High Seas art. 6, Apr. 29, 1958, 6465 U.N.T.S. 413.

¹⁹⁸ *See generally* 46 U.S.C.A. § 70502(c)(1).

¹⁹⁹ *Id.* § 70502(d)(1).

²⁰⁰ *Id.* § 70502(c)(1)(B); Convention on the High Seas, *supra* note 197, at art. 6.

²⁰¹ *See generally Reading Law: The Interpretation of Legal Texts*, *supra* note 79, § 8 at 93.

²⁰² *Id.*

does not reasonably imply that a vessel without nationality is any vessel that is considered stateless under international law. Consequently, the First, Third, and Eleventh Circuits by interpreting §70502(d)(1) as a non-exhaustive list have enlarged the scope of the MDLEA and effectively changed the law to extend the extraterritorial application of the MDLEA beyond the scope of the statute.

VII. The MDLEA When There is no Master or Individual in Charge

Even if the presumption of exemplariness of § 70502(d)(1) prevails, a broad interpretation of the MDLEA that extends United States jurisdiction to vessels that bear no indicia of nationality and do not have a master or individual in charge on board would likely fail. The First Circuit in *Davila-Reyes* introduced the notion that the MDLEA must be interpreted in a manner that conforms to principles of international law for it to be a constitutional exercise of authority.²⁰³ Consequently, the relevant question is: under principles of international law, is a vessel properly deemed to be without nationality when officers do not demand a verbal claim of nationality from individuals on board an interdicted vessel?

There are two basic categories of vessels without nationality— (1) vessels that do not have a valid grant of nationality from any nation-state and (2) vessels that are assimilated as such due to their occupant's attempts to obscure the vessel's nationality.²⁰⁴ As previously stated the United States recognizes UNCLOS to be a codification of customary international law.²⁰⁵ UNCLOS provides that each nation has the right to confer its nationality upon a vessel.²⁰⁶ The nation must set conditions for the grant of nationality, make provisions for the registration of vessels, and issue documents of nationality to those vessels on which the nation has conferred its nationality.²⁰⁷ Because each nation is entitled to set its own conditions for registration there is no universal requirement that small vessels must be registered to enjoy the nationality of a flag state.²⁰⁸ Most of the time these vessels are used in smuggling operations, in relevant parts, across the Caribbean towards the United States.²⁰⁹

The fact that small vessels can enjoy the nationality of a nation without being formally registered infers the fact that a determination of statelessness is not proper just because the vessel does not fly a flag, bear marks of registry, or carry documentation.²¹⁰ A vessel can be deemed stateless only in two scenarios.²¹¹ First, a vessel can be deemed to be without nationality when it flies the flag of two or more nations, and second, when the occupants of the vessel refused to claim

²⁰³ See *Davila-Reyes*, 2022 WL 178854.

²⁰⁴ Barry Hart Dubner & Mary Carmen Arias, *Under International Law, Must a Ship on the High Seas Fly the Flag of a State in Order to Avoid Being a Stateless Vessel: Is a Flag Painted on Either Side of the Ship Sufficient to Identify It*, 29 U.S.F. MAR. L.J. 99, 124-25 (2016).

²⁰⁵ Lopez-Jacoiste, *supra* note 107.

²⁰⁶ The Oxford Handbook of the Law of the Sea 214-15 (Donald Rothwell, Alex Oude Elfrink, Karen Scott, Tim Stephens et al. eds. 2015).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 214.

²⁰⁹ *Id.* at 217.

²¹⁰ *Id.*

²¹¹ The Oxford Handbook of the Law of the Sea, *supra* note 206, at 216; see also *Davila-Reyes*, 2022 WL 178854.

nationality.²¹² International law recognizes the flying of a flag or carrying of papers evincing registration to a particular nation as proper claims of nationality.²¹³ “Absent a flag or papers, ‘a vessel may also traditionally make an oral claim of nationality when a proper demand is made.’”²¹⁴ Traditionally, this must be done by the master or individual in charge of the vessel because it is a well-established principle that the master speaks on behalf of the vessel.²¹⁵

Article 94 provides that each flag state shall take measures “for ships flying its flag” to ensure safety at sea including but not limited to ensuring that each vessel is in the charge of a master that possesses appropriate qualifications.²¹⁶ Tradition and custom provide that a vessel is in the command of a master or individual in charge who asserts control over the other occupants on board the vessel.²¹⁷ However, because small vessels are not universally required to be registered presumptively a flag state is not required to ensure that it is under the command of a qualified master.

Therefore, it follows that a small vessel can have a nationality without having a master or individual in charge. Under international law, “a vessel may be deemed ‘stateless’ and subject to the enforcement jurisdiction of any nation on the scene, if it fails to display or carry insignia of nationality and seeks to avoid national identification.”²¹⁸ In other words, for a vessel to be properly deemed stateless pursuant to international maritime law, the vessel must not display or carry an insignia of nationality and actively attempt to hide its national identity from law enforcement.²¹⁹ The Eleventh Circuit in *Nunez* recognized the principle that a vessel may be deemed stateless when it “obscures the cognoscibility of its [nationality] repeatedly, deliberately, and successfully.”²²⁰ How can a vessel actively seek or deliberately obscure the cognoscibility of the vessel’s nationality if officers do not demand an oral assertion of nationality?

In *Nunez*, the vessel intercepted was 20 to 25 feet long.²²¹ There were four men on board.²²² As noted above, some nations do not require and may not permit the registration of vessels below a certain size.²²³ Some nations require a vessel to meet a specific tonnage before the vessel is able to register with the flag-nation.²²⁴ Further, documentation and the flying of a flag are indicators of a vessel’s nationality—not the source of the vessel’s nationality.²²⁵ Consequently, “even when a vessel is unregistered, has no documents to show nationality, nor has a flag of a particular state,

²¹² *Davila-Reyes*, 2022 WL 178854, at *23.

²¹³ *Id.* at *22.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ UNCLOS, *supra* note 106, at art. 94.

²¹⁷ *Id.*; *see also Davila-Reyes*, 2022 WL 178854, at *22; *Nunez*, 1 F.4th at 986.

²¹⁸ *Davila-Reyes*, 2022 WL 178854, at *20 (citing *Matos-Luchi*, 627 F.3d 1).

²¹⁹ *Id.*

²²⁰ *Nunez*, 1 F.4th 976 at 987.

²²¹ *Id.* at 981.

²²² *Id.* (If interested in seeing what the vessel looked like, there is a picture of the vessel on page 981 of the opinion).

²²³ The Oxford Handbook of the Law of the Sea, *supra* note 206, at 217.

²²⁴ Dubner & Arias, *supra* note 204, at 126.

²²⁵ *Id.* at 125.

the vessel can still possess the nationality of a state.”²²⁶ International law recognizes that a vessel can be deemed to be a vessel without nationality when an individual refuses to claim any nationality on behalf of the vessel without reasonable excuse.²²⁷ The omission of a request by a law enforcement officer for an individual on board an intercepted vessel to assert an oral claim of nationality arguably grants the individual on board the vessel a reasonable excuse to omit a claim of registry.

In *Nunez*, the Eleventh Circuit interpreted the MDLEA broadly which was in violation of customary international law. The “right of visit” allows officers to conduct an inquiry that is reasonably tailored to elicit information as to the nationality of a suspicious vessel.²²⁸ In the absence of a flag, documents evincing registration, or a master or individual in charge, it is reasonable for a law enforcement officer to ask each individual on board the vessel if they would like to assert a claim of nationality on behalf of the vessel.²²⁹ Interpreting the MDLEA in a manner that does not require an officer to demand an oral assertion of nationality is incongruous with international maritime law. Consequently, upholding the Eleventh Circuit’s decision would constitute an unconstitutional exercise of authority.²³⁰

VIII. Conclusion

The 1996 Amendment to the MDLEA made a vessel’s “covered status” a jurisdictional question for a judge to decide.²³¹ In doing so, the amendment also took away the ability of a defendant charged in violation of the MDLEA to assert that the United States violated international law as a defense.²³² The only way for such a defense to be raised is for a foreign nation to come forward and contend that the United States failed to comply with international law in enforcing the MDLEA.²³³ The fact that some nations lack adequate systems of registry that place the nation’s officials in a position where they can neither confirm nor deny a vessel’s registry or nationality when asked to do so²³⁴ is indicative that not every nation will come forward and assert a claim that the United States violated international law in its enforcement of the MDLEA. Consequently, individuals detained in violation of the MDLEA in a manner prohibited by international law are wrongfully subjected to the jurisdiction of the United States absent a foreign nation coming to their rescue.

At the very least, the Eleventh Circuit was erroneous in *Nunez*. In the instance where a vessel does not fly a flag, is unable to produce documentation as to registry, and does not have a master or individual in charge on board; demand for an oral assertion of nationality or registry must be made.²³⁵ International law allows for a vessel to be considered “without nationality” despite an outward manifestation of nationality when an oral declaration of nationality is

²²⁶ *Id.*

²²⁷ *Davila-Reyes*, 2022 WL 178854, at *23.

²²⁸ UNCLOS, *supra* note 106, at art. 110.

²²⁹ *See generally Prado*, 933 F.3d 121.

²³⁰ *Davila-Reyes*, 2022 WL 178854 (the MDLEA must be interpreted in a manner that conforms to principles of international law for it to be a constitutional exercise of authority).

²³¹ *Matos-Luchi*, 627 F.3d at 4.

²³² *Id.*

²³³ 46 U.S.C.A. § 70505.

²³⁴ *Davila-Reyes*, 2022 WL 178854, at *27.

²³⁵ *See generally Prado*, 933 F.3d 121.

inconsistent with surrounding circumstances.²³⁶ In other words, a vessel intercepted, according to the right to visit, can still be deemed to be stateless despite an oral assertion of nationality when reasonable suspicion remains.²³⁷ Consequently, it would be in the best interest of the United States to require law enforcement officers to demand a claim of nationality or registry regardless of the situation. Such a requirement would ensure compliance with international law. Had the Coast Guard asked the defendants in *Nunez* for an oral assertion of nationality, it would have been within the officers' right to conclude that the vessel was without nationality anyway.

From a broader standpoint, the First, Third, and Eleventh Circuits' interpretation of § 70502(d)(1) as an exhaustive list is erroneous. Despite two canons of statutory interpretation backing the courts' interpretation that the list is exemplary in nature due to the inclusion of the word "includes," there are more canons of statutory interpretation that support the opposite conclusion.²³⁸ Consequently, the Second Circuit's interpretation of § 70502(d)(1) should be adopted by all circuits. Congress, in amending the MDLEA, manifested an intent to avoid friction with foreign nations.²³⁹ It would be advantageous for the circuits to strictly interpret the MDLEA. Such an interpretation would result in a consistent and equitable application of the law.

In its broadest scope, the MDLEA was enacted to combat the importation of illicit narcotics into the United States via ocean-going trafficking routes. This goal would not be hindered by adopting a stricter interpretation of the MDLEA. International law allows for the formation of bilateral agreements between nations—which the United States has with several Central American countries.²⁴⁰ Such agreements allow the United States to intercept suspicious vessels to combat the trafficking of illicit narcotics.²⁴¹ Therefore, a strict interpretation of the MDLEA, and in particular § 70502(d)(1), would still allow the Coast Guard to combat drug trafficking in compliance with principles of international law. A strict interpretation would merely result in the imprisonment of fewer individuals apprehended on the high seas and save American taxpayers a large sum of money that could be spent on more pressing issues.

²³⁶ *Davila-Reyes*, 2022 WL 178854, at *29.

²³⁷ *Id.*

²³⁸ *See generally Reading Law: The Interpretation of Legal Texts*, *supra* note 79.

²³⁹ Petition for Writ of Certiorari, *supra* note 30.

²⁴⁰ *Davila-Reyes*, 2022 WL 178854, at *31 (“the United States has entered into twenty-seven such agreements, including with countries in South America, Central America, and the Caribbean, providing a ‘process by which the two [or more] nations can operate to suppress drug trafficking while also respecting flag state jurisdiction’”).

²⁴¹ *Id.*