Boston College Law Review

Volume 59
Issue 9 *Annual Survey of Federal En Banc and Other Significant Cases*
Article 32

5-24-2018

Eleventh Circuit Prematurely Applied the Rule of Lenity in *United States v. Izurieta*

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ELEVENTH CIRCUIT PREMATURELY APPLIED THE RULE OF LENITY IN *UNITED STATES v. IZURIETA*

Abstract: The statute that prohibits smuggling goods into the United States, 18 U.S.C. § 545, requires proof that a defendant knowingly or fraudulently imported merchandise or facilitated the transport of such merchandise "contrary to law." In 2013, in *United States v. Izurieta,* the U.S. Court of Appeals for the Eleventh Circuit held that a regulatory violation carrying only civil implications could not serve as the underlying offense for the smuggling statute's contrary to law provision given the felony criminal penalties associated with a violation of the statute. The Eleventh Circuit's decision diverged from the 1994 and 2008 decisions of the Fourth and the Ninth Circuits in *United States v. Mitchell* and *United States v. Alghazouli*, respectively, which each outlined a different test for how regulations should be treated under the smuggling statute's contrary to law provision. In contrast, the Eleventh Circuit applied the rule of lenity, granting leniency to the defendant because the criminal statute was found to be "grievously ambiguous" after the court attempted to interpret the statute using traditional canons of statutory construction. This Comment argues that the Eleventh Circuit prematurely applied the rule of lenity in *Izurieta* before properly conducting an analysis of the text, history, and structure of the statute.

INTRODUCTION

Smuggling goods into the United States is a criminal offense charged under 18 U.S.C. § 545 (the "smuggling statute").[1] To successfully prosecute an individual or commercial importer under the smuggling statute, a prosecutor must demonstrate that a defendant knowingly or fraudulently imported merchandise "contrary to law" or facilitated the concealment or transportation of merchandise knowing it to have been imported "contrary to law."[2] An indictment for a violation of the smuggling statute must, therefore, al-

[1] 18 U.S.C. § 545 (2018) (the "smuggling statute"); *see also* Jane C. Avery, Annotation, *Validity, Construction, and Application of Federal Statutory Provision (Under 18 U.S.C.A. § 545 and Similar Predecessor Statutes) Making It Offense to Smuggle or Clandestinely Introduce into United States Merchandise Which Should Have Been Invoiced*, 20 A.L.R. Fed. 410, 1c (1974) (outlining the legislative history of the smuggling statute and providing annotated cases in which it has been applied).

[2] 18 U.S.C. § 545.

lege a particular law that has been violated underlying the offense.[3] The U.S Court of Appeals for the Fourth, Ninth, and Eleventh Circuits have diverged over the meaning of the term "law" as it is used in the smuggling statute.[4]

In 2013, in *United States v. Izurieta*, the Eleventh Circuit held that a regulatory violation that carried only civil penalties could not serve as the underlying offense for an indictment under the smuggling statute.[5] The court cited the common law rule of lenity, in which leniency is extended to defendants in cases where a criminal statute is "grievously ambiguous," and found that the smuggling statute's contrary to law provision was unacceptably ambiguous in its effect of criminalizing conduct that would otherwise be subject only to civil penalties.[6] The Eleventh Circuit's ruling departed from prior rulings in the Fourth and Ninth Circuits regarding what constitutes a law under the smuggling statute.[7]

In 1994, in *United States v. Mitchell*, the Fourth Circuit held that a regulatory violation could serve as the underlying offense of an indictment under the smuggling statute if the regulation carried "the force and effect of law."[8] The Fourth Circuit's analysis focused on a textual interpretation of the term law and the Supreme Court's 1976 decision in *Chrysler Corp. v. Brown*.[9] In *Chrysler Corp.*, the Court articulated a three-part test to determine whether agency regulations have the force and effect of law.[10] In contrast, in 2008, in *United States v. Alghazouli*, the Ninth Circuit held that a regulation can form the underlying offense of an indictment under the smuggling statute only if Congress has specified that a violation of that reg-

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[3] *See* Steiner v. United States, 229 F.2d 745, 748 (9th Cir. 1956) (finding that a conviction under 18 U.S.C. § 545 was improper as the government failed to state what law had been violated with respect to the statute's "contrary to law" provision); *see also* United States v. Thian Teh, 535 F.3d 511, 517 (6th Cir. 2008) (finding that the government failed to charge an offense by omitting which law had been violated when charging a defendant under the smuggling statute). This did not constitute plain error upon review as the defendant failed to object, and the error was not prejudicial. *Thian Teh*, 535 F.3d at 517.

[4] *See* United States v. Izurieta, 710 F.3d 1176, 1182–84 (11th Cir. 2013) (finding the contrary to law provision as it pertains to 19 C.F.R. § 141.113(c)(3) (2017) "grievously ambiguous" and applying the rule of lenity); United States v. Alghazouli, 517 F.3d 1179, 1187 (9th Cir. 2008) (holding that the term "law" in the smuggling statute includes a regulation only if Congress has specified that a violation of that regulation would be a crime); United States v. Mitchell, 39 F.3d 465, 470–71 (4th Cir. 1994) (holding that a regulation is a law for purposes of 18 U.S.C. § 545 if it has the "force and effect of law").

[5] *Izurieta*, 710 F.3d at 1182–84 (citing Chapman v. United States, 500 U.S. 453, 463 (1991)).

[6] *Id.*

[7] *See id.* at 1181 (finding the Ninth Circuit's reasoning in *Alghazouli* unpersuasive and the Fourth Circuit's ruling in *Mitchell* too broad to settle the dispute at issue in *Izurieta*).

[8] *Mitchell*, 39 F.3d at 470–71.

[9] *Id.* (citing Chrysler Corp. v. Brown, 441 U.S. 281, 295–96 (1976)).

[10] *Id.* at 468–69.

ulation is a crime.[11] The Ninth Circuit's approach emphasized a historical analysis of the smuggling statute's contrary to law provision, focusing on how the text of the statute differed from other customs and border protection statutes.[12] Rather than reach a broad conclusion defining the limits of the contrary to law provision in the smuggling statute, the Eleventh Circuit's application of the rule of lenity in *Izurieta* resulted in a narrow ruling, principally resolving ambiguity in the statute as it pertained to the regulation the defendants in *Izurieta* allegedly violated.[13]

This Comment argues that the Eleventh Circuit prematurely applied the rule of lenity in *Izurieta* as the court failed to first exhaust all other means of statutory interpretation before finding the smuggling statute grievously ambiguous and granting the defendants leniency.[14] This Comment further argues that the Eleventh Circuit's mistaken application of the rule of lenity overstepped the court's role as an interpreter of congressional will by resorting to the rule of lenity to the detriment of established methods of statutory interpretation.[15] Part I of this Comment reviews the relevant legislative history of the smuggling statute and the factual background of *Izurieta*.[16] Part II analyzes the existing circuit split, highlighting the contrasting approaches of the Fourth and Ninth Circuits in *Alghazouli* and *Mitchell*, respectively, with the Eleventh Circuit's approach in *Izurieta*.[17] Part III argues that the Eleventh Circuit misapplied the rule of lenity in *Izurieta* by finding the contrary to law provision of the smuggling statute grievously ambiguous and resorting to lenity before exhausting all available means of statutory interpretation.[18]

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[11] *Alghazouli*, 517 F.3d at 1187.

[12] *See id.* (finding that the terms "law" as applied in 18 U.S.C. § 545 and "law and regulation" as applied in 18 U.S.C. § 554 could not be equivalent in light of the close affiliation of the two statutes).

[13] *Izurieta*, 710 F.3d at 1181.

[14] *See* Moskal v. United States, 498 U.S. 103, 108 (1990) (finding that resort to the rule of lenity is reserved for instances in which doubt exists about a statute's intended scope even after examining the language, structure, and legislative history of the statute); Callanan v. United States, 364 U.S. 587, 596 (1961) (finding that the rule of lenity is applied at the end of the process of statutory interpretation, not at the beginning as a means of offering a defendant leniency).

[15] *See* Huddleston v. United States, 415 U.S. 814, 831 (1974) (holding that furtherance of the principles underlying the rule of lenity should not lead the court to dictate, where it otherwise might interpret, congressional authority).

[16] *See infra* notes 19–52 and accompanying text.

[17] *See infra* notes 53–83 and accompanying text.

[18] *See infra* notes 84–122 and accompanying text.

I. THE SMUGGLING STATUTE AND *IZURIETA*

Courts often resolve questions regarding statutory ambiguity through an examination of the statute's legislative history.[19] In *Izurieta*, the Eleventh Circuit failed to employ the traditional canons of statutory interpretation often employed by courts to decipher legislative intent.[20] Section A of this Part traces the legislative history of the smuggling statute, focusing on how little the statute and the statute's contrary to law provision have changed since 1866.[21] Section B discusses the factual background and the court's analysis in *Izurieta*.[22]

A. Legislative History of the Smuggling Statute

The smuggling statute in force today, 18 U.S.C. § 545, was enacted in 1948.[23] The statute is derived, however, from Section Four of the Tariff Act of 1866, which was enacted for the purpose of preventing the importation of smuggled goods into the United States.[24] The language of Section Four in many ways tracks the smuggling statute in force today, prohibiting fraudulent or knowing importation of goods contrary to law and the facilitation of the concealment or transportation of goods known to have been imported contrary to law.[25] The Tariff Act was re-enacted in both 1922 and 1930, with the contrary to law provision remaining in force.[26] The enactment of the smuggling statute in 1948 repealed the smuggling provision enacted in the

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[19] *See, e.g.*, Yates v. United States, 135 S. Ct. 1074, 1077 (2015) (rejecting a proposed interpretation of a "tangible object" as defined by the Sarbanes-Oxley Act by applying the traditional tools of statutory construction). *See generally* Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C.L. REV. 1613, 1627–32 (2014).

[20] *See Izurieta*, 710 F.3d at 1181 (finding the contrary to law provision as it pertains to § 141.113(c)(3) grievously ambiguous and applying the rule of lenity before employing traditional canons of statutory construction).

[21] *See infra* notes 23–29 and accompanying text.

[22] *See infra* notes 30–52 and accompanying text.

[23] An Act to Revise, Codify, and Enact into Positive Law, Title 18 of the United States Code, Entitled "Crimes and Criminal Procedure," ch. 645, Pub. L. No. 772, 62 Stat. 683, 716 (1948) (codified at 18 U.S.C. § 545).

[24] An Act Further to Prevent Smuggling and for Other Purposes (Tariff Act of 1866), ch. 201, § 4, 14 Stat. 178, 179; *Alghazouli*, 517 F.3d at 1186 (tracing the legislative history of the smuggling statute to § 4 of the Tariff Act of 1866).

[25] *Compare* § 4, 14 Stat. at 179 ("That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any goods, wares, or merchandise, contrary to law . . . ."), *with* 18 U.S.C. § 545 ("Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law . . . .").

[26] *See Alghazouli*, 517 F.3d at 1186 n.2 (finding that § 4 of the Tariff Act of 1866 was re-enacted in nearly its identical form in the Tariff Act of 1922 and the Tariff Act of 1930).

Tariff Act of 1930, but retained the language of the prior statute, including the contrary to law provision.[27]

Since the enactment of the smuggling statute in 1948, the statute has been amended several times, most notably in 1954 and 2006, to increase the penalties associated with a violation of the statute.[28] Congress has not, however, amended or clarified the statute's contrary to law provision since the statute's enactment in 1948.[29]

B. Factual Background of Izurieta

Yuri and Anneri Izurieta founded Naver Trading Corp., a company that imported dairy products and bread from Central America.[30] The Izurietas were charged with smuggling goods into the United States in violation of the smuggling statute for acts committed in relation to Naver Trading Corp.'s business.[31] As the basis for this charge, the government alleged that the Izurietas violated 19 C.F.R. § 141.113(c)(3) and that this regulatory violation amounted to a form of concealing or transporting merchandise known to have been imported contrary to law as defined by the smuggling statute.[32]

The Izurietas' regulatory violation amounted to an importer's failure to comply with Food and Drug Administration ("FDA") and Customs and Border Protection ("CBP") inspections as required under the Conditional Release Period and CBP Bond Obligations for Food, Drugs, Devices, and Cosmetics.[33] If the FDA refuses admission of a good into the United States,

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[27] *See* § 716, 62 Stat. at 683; Avery, *supra* note 1 (noting that the anti-smuggling provision included in the Tariff Act of 1930 was repealed upon the enactment of 18 U.S.C. § 545 in 1948).

[28] *See* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109–177, § 310, 120 Stat. 192, 242 (2006) (codified at 18 U.S.C. § 545) (increasing the potential sentence resulting from a conviction under the smuggling statute from five to twenty years); Act of Aug. 24, 1954, ch. 890, Pub. L. No. 83–641, § 1, 68 Stat. 782 (codified at 18 U.S.C. § 545) (increasing the potential fine associated with smuggling from $5,000 to $10,000 and the possible sentence from two to five years).

[29] *See Alghazouli*, 517 F.3d at 1186–87 (finding that Congress re-enacted the smuggling statute's contrary to law provision repeatedly, knowing that the term law as used in the statute was not analogous to the phrase law and regulation used in 18 U.S.C. § 554).

[30] *Izurieta*, 710 F.3d at 1178.

[31] *Id.* The Izurietas were also charged with conspiracy to smuggle goods into the United States in violation of 18 U.S.C § 371. *Id.*

[32] *See id.* at 1179 (explaining that charges two through seven of the indictment were premised on an alleged failure to deliver, export, and destroy, with Food and Drug Administration (FDA) supervision, merchandise found to have been contaminated in violation of § 141.113(c)).

[33] *See id.* (describing the applicability of § 141.113(c)(3) to the indictment). Section 141.113(c)(3) has been in force in its current form since 2007. Conditional Release Period and CBP Bond Obligations for Food, Drugs, Devices, and Cosmetics, 72 Fed. Reg. 4423, 4429 (Jan. 31, 2007) (codified at 19 C.F.R. § 141.113). The FDA and Customers and Border Protection ("CBP") permit importers to possess their goods under conditional release pending test results or further inspection, provided the goods are held pursuant to a bond or other security as prescribed by 19 U.S.C. § 1499(a)(1). *Izurieta*,

CBP will demand the re-delivery of the product to CBP custody.[34] Under the regulation, a failure to comply with a demand for re-delivery may result in an assessment of liquidated damages equal to three times the value of the merchandise recalled.[35]

The indictment against the Izurietas alleging a violation of the smuggling statute specifically charged the Izurietas with failing to re-deliver five contaminated shipments to CBP custody to be destroyed.[36] The indictment also charged the Izurietas with failing to hold one shipment and making it available for inspection.[37] Each of smuggling charges were premised on violations of § 141.113(c)(3).[38] The Izurietas were convicted in the U.S. District Court for the Southern District of Florida of all counts related to the smuggling charges after a jury trial.[39] They appealed their convictions on the grounds that the proceedings violated their Sixth Amendment right to confront witnesses and that the prosecutor made improper statements during trial.[40]

On appeal, at oral argument, the Eleventh Circuit *sua sponte* raised the question of whether the indictment that led to the Izurietas' smuggling convictions charged a federal crime, thereby granting the court subject-matter jurisdiction over the case.[41] The court specifically questioned whether a

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710 F.3d at 1178. At such time, however, the goods are placed on hold and may not enter the U.S. market until authorization is provided by the FDA pursuant to 21 U.S.C. § 381. *Id.*

[34] *See Izurieta*, 710 F.3d at 1178 (providing contextual background regarding CBP and FDA requirements for importers).

[35] § 141.113(c)(3); *see Liquidated Damages*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining liquidated damages as "an amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches").

[36] *Izurieta*, 710 F.3d at 1178 n.3 (noting that the Izurietas stipulated for trial that the shipments in question had been contaminated with bacteria such as E. coli, Staphylococcus aureus, and Salmonella).

[37] *Id.* at 1178.

[38] *Id.* at 1179.

[39] *Id.* at 1178.

[40] *Id.*

[41] *See id.* at 1178–79 (questioning whether an indictment for smuggling premised on a violation of § 141.113(c)(3) sufficiently charges a crime). Without the Izurietas having been charged with a federal crime, neither the district nor appellate court would have had subject matter jurisdiction to hear the case because the court did not otherwise have jurisdiction under 28 U.S.C. § 1332. 28 U.S.C. § 1331 (2018); *see* MOORE'S MANUAL: FEDERAL PRACTICE AND PROCEDURE § 5.03 (2017) (stating that the original subject matter jurisdiction of federal courts is limited to two types of claims—those arising under the U.S. constitution or federal laws (federal question jurisdiction under 28 U.S.C. § 1331) and those involving an amount in controversy in excess of $75,000 and parties from different states (diversity jurisdiction under 28 U.S.C. § 1332)); *Sua Sponte,* BLACK'S LAW DICTIONARY (10th ed. 2014) (defining sua sponte as "without prompting or suggestion" or "on its own motion"); *Subject Matter Jurisdiction*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining subject matter jurisdiction as "jurisdiction over the nature of the case and the type of relief sought" or "the extent to which a court can rule on the conduct of persons or the status of things").

failure to comply with § 141.113(c)(3), which typically gives rise to a civil remedy and not criminal punishment, fell within the ambit of a law as defined by the smuggling statute which imposes criminal penalties.[42]

In 1994, in *Mitchell*, the Fourth Circuit held that a regulatory violation could serve as the underlying offense for an indictment under the smuggling statute if the regulation carried the force and effect of law.[43] In contrast, in 2008, in *Alghazouli*, the Ninth Circuit held that a regulation could form the underlying offense for an indictment under the smuggling statute only if there is an existing statute specifying that the violation of that regulation is a crime.[44] The Eleventh Circuit departed from the approaches of both the Fourth and Ninth Circuits and instead looked strictly at the regulation at issue in *Izurieta*.[45] This analysis led the Eleventh Circuit to find it unnecessary to reach such sweeping rulings as the Fourth or Ninth Circuits with implications beyond the regulation at issue before the court.[46] Rather, the court applied the common law rule of lenity, construing the contrary to law provision narrowly so as not to include the regulation at issue in *Izurieta*.[47]

The rule of lenity is premised on two principles: (1) that criminal defendants are given fair notice, through the plain words in a statute, of what the law intends to do when a crime is committed; and (2) that legislatures, and not courts, should define criminal activity.[48] The rule requires that where statutory ambiguity remains after considering the text, structure, and purpose of a criminal statute, any ambiguity should be resolved in favor of a defendant.[49] The application of the rule, however, is narrow; the rule of lenity is only applied where courts find that there is a grievous ambiguity or uncertainty in the statute.[50] The Eleventh Circuit cited the Supreme Court's 1991 decision in *Chapman v. United States* as authority for the finding that the smuggling statute's contrary to law provision is grievously ambiguous.[51] Applying the prin-

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[42] *See Izurieta*, 710 F.3d at 1178–79 (raising, *sua sponte*, the question of whether the Izurietas' indictment sufficiently charged a crime).

[43] *Mitchell*, 39 F.3d 465, 470–71.

[44] *See Alghazouli*, 517 F.3d at 1187 (holding that the term law in the smuggling statute includes a regulation only if Congress has specified that a violation of that regulation would be a crime).

[45] *Izurieta*, 710 F.3d at 1181–82.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 1182.

[49] *Id.* (quoting United States v. Bass, 404 U.S. 336, 347 (1971)); *see* Barber v. Thomas, 560 U.S. 474, 488 (2010) (holding that the rule of lenity only applies if a grievous ambiguity still exists after the text, legislative history, and purpose of a statute have been examined).

[50] *Izurieta*, 710 F.3d at 1182 (quoting *Chapman*, 500 U.S. at 456).

[51] *Id.*

ciples of lenity, the court resolved the ambiguity in the statute in favor of the Izurietas and vacated their convictions under the smuggling statute.[52]

II. CIRCUITS DISPUTE THE MEANING OF "LAW" IN THE SMUGGLING STATUTE

The smuggling statute does not directly specify which regulations, if any, can form the basis of an indictment under the statute.[53] In 1994, the Fourth Circuit confronted this ambiguity in *United States v. Mitchell* and found that the contrary to law provision in the statute included any regulation that carried the force and effect of law.[54] In 2008, in *United States v. Alghazouli,* the Ninth Circuit came to an alternative conclusion, finding that a regulation could serve as an underlying offense for a smuggling indictment only if Congress clearly intended a violation of the regulation to carry criminal penalties.[55] In 2013, in *United States v. Izurieta*, the Eleventh Circuit expressly disagreed with the approaches of the Ninth and Fourth Circuits as applied to the regulation at issue in *Izurieta*.[56]

Section A of this Part discusses the Fourth Circuit's interpretation of the contrary to law provision of the smuggling statute in *Mitchell*, and Section B examines the Ninth Circuit's interpretation of the statue in *Alghazouli.*[57] Section C examines the Eleventh Circuit's decision to apply the rule of lenity in *Izurieta* rather than follow the approaches of the Fourth or Ninth Circuit.[58]

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[52] *See id.* at 1182–84 (finding the contrary to law provision as it pertains to § 141.113(c)(3) grievously ambiguous and applying the rule of lenity). Finding that the sole remaining count of the seven-count indictment was based primarily on conspiracy to commit the crime alleged in counts two through seven, the Eleventh Circuit likewise vacated the Izurietas' conviction of conspiracy under 18 U.S.C. § 371. *Id.* at 1184–85.

[53] 18 U.S.C. § 545 (2018); *see* Steiner v. United States, 229 F.2d 745, 748 (9th Cir. 1956) (finding that a conviction under 18 U.S.C. § 545 was improper as the government failed to state what law had been violated with respect to the statute's contrary to law provision).

[54] *See* United States v. Mitchell, 39 F.3d 465, 470–71 (4th Cir. 1994) (holding that a regulation is a law for purposes of 18 U.S.C. § 545 if it has the force and effect of law).

[55] *See* United States v. Alghazouli, 517 F.3d 1179, 1187 (9th Cir. 2008) (holding that the term law in the smuggling statute includes a regulation only if Congress has specified that a violation of that regulation would be a crime).

[56] *See* United States v. Izurieta, 710 F.3d 1176, 1182–84 (11th Cir. 2013) (disagreeing with the conclusions of the Fourth and Ninth Circuits and finding that the smuggling statute is grievously ambiguous as it pertains to the regulation at issue, 19 C.F.R. § 141.113(c)(3) (2017), and that the rule of lenity should therefore apply).

[57] *See infra* notes 59–66 and accompanying text; *see also infra* notes 67–75 and accompanying text.

[58] *See infra* notes 76–83 and accompanying text.

A. The Fourth Circuit's Approach: "Force of Law"

In *Mitchell*, an American hunter returning from Africa was charged under the smuggling statute after allegedly transporting exotic animal hides and horns into the United States and failing to declare the products or complete applicable paperwork.[59] The Fourth Circuit found that the term law in the smuggling statute was not defined and thus sought to apply the word's plain meaning.[60] In doing so, the court scrutinized the Supreme Court's 1976 decision in *Chrysler Corp. v. Brown,* in which the Court held that the term law included regulations having the force and effect of law. [61] There, the Court established a three-prong test for determining whether a regulation carries the force and effect of law.[62] For a regulation to have the force and effect of law, it must be (1) a substantive or legislative type rule as opposed to a general statement of policy or rule of agency organization or procedure; (2) promulgated in conformity with congressionally-imposed procedural requirements, such as the notice and comment provisions of the Administrative Procedure Act; and (3) issued pursuant to delegated legislative authority.[63] The Fourth Circuit employed the *Chrysler Corp.* test to the regulations at issue in *Mitchell*—three regulations that had been violated as a result of the appellant's undeclared importation of animal hides—and found that each carried the force and effect of law under the test.[64]

The Fourth Circuit's analysis of the contrary to law provision led the court to conclude that Congress clearly intended the provision only to include administrative regulations that carry the force and effect of law; thus, the court found the provision unambiguous.[65] This conclusion drove the court to note that the rule of lenity was inapplicable to the defendants in *Mitchell* because the rule does not apply unless a grievous ambiguity remains after a court looks at a statute's language, structure, and history.[66]

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[59] *Mitchell*, 39 F.3d at 470–71. The defendant was specifically charged with smuggling after he failed to (1) declare the items to a customs officer as required by 19 C.F.R. § 148.11 (1987); (2) file a completed form required by the Fish and Wildlife Services of the U.S. Department of the Interior as prescribed by 50 C.F.R. § 14.61 (1986); and (3) identify the country of origin of the hides and horns to the Deputy Administrator of Veterinary Services as required by 9 C.F.R. § 95.2 (1987). *Id.* at 467.

[60] *Id.* at 468–69.

[61] *See id.* (finding that "properly promulgated, substantive agency regulations have the 'force and effect of law'") (citing Chrysler Corp. v. Brown, 441 U.S. 281, 295–96 (1976)).

[62] *See Chrysler Corp.*, 441 U.S. at 301–03.

[63] *Id.*

[64] *Mitchell*, 39 F.3d at 470–71.

[65] *Id.* at 470.

[66] *See id.* (finding the rule of lenity inapplicable to the smuggling statute because it is not grievously ambiguous) (citing Chapman v. United States, 500 U.S. 453, 463 (1991)).

B. The Ninth Circuit's Approach: Clear Legislative Intent of Criminal Punishment

The Ninth Circuit adopted a narrower reading of the smuggling statute's contrary to law provision in *Alghazouli*.[67] The court found that Congress intended the term law to include a regulation only when a statute specifies that a violation of that regulation constitutes a crime.[68] In reaching this conclusion, the court examined Supreme Court precedent involving prior iterations of the Tariff Act.[69] The court found that the Supreme Court had applied caution in imposing criminal penalties where the underlying violation was regulatory in nature and did not provide clear notice of possible criminal implications.[70] The court further reasoned that in re-enacting the smuggling statute against the backdrop of these cases, Congress intended that a criminal prohibition against violating a law include a criminal prohibition against violating a regulation only where the statute clearly specifies that a violation of that regulation carries criminal, not civil, penalties.[71]

The Ninth Circuit also examined 18 U.S.C. § 554, which was codified through the amendment of the smuggling statute in 2006 as part of the USA PATRIOT Improvement and Reauthorization Act of 2005.[72] Section 554 imposes criminal penalties for the fraudulent and otherwise improper *export* of goods from the United States and largely traces the language of the smuggling statute.[73] Unlike the smuggling statute, which prohibits only violations of law, § 554 prohibits the violation of any law or regulation.[74] The court concluded that the term law in the smuggling statute is not synonymous with the more expansive phrase law and regulation in § 554 and

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[67] *See Alghazouli*, 517 F.3d at 1187 (holding that the term law in the smuggling statute includes a regulation only if Congress has specified that a violation of that regulation would be a crime).

[68] *See id.* at 1187 (finding, after analyzing the history and structure of the smuggling statute compared to 18 U.S.C. § 554, that Congress did not intend the word law in the smuggling statute to include all regulations).

[69] *See id.* at 1184–86 (examining the Supreme Court's treatment of criminal convictions for violations of a regulation under the Tariff Act of 1866) (citing United States v. Eaton, 144 U.S. 677 (1892); United States v. Grimmaud, 220 U.S. 506 (1911)).

[70] *Id.*

[71] *Id.* at 1186 (finding that Congress's awareness of the findings in *Eaton* and *Grimmaud* at the time the smuggling statute was re-enacted indicates the legislature's intention that a law only includes a regulation when the statute specified that a violation of that regulation was a crime).

[72] *Id.* at 1186–87.

[73] 18 U.S.C. § 554; *see Alghazouli*, 517 F.3d at 1186–87 (comparing the smuggling statute to 18 U.S.C. § 554).

[74] *Compare* 18 U.S.C. § 554 ("Whoever fraudulently or knowingly exports or sends from the United States . . . any merchandise, article, or object *contrary to any law or regulation* of the United States . . ."), *with* 18 U.S.C. § 545 ("Whoever fraudulently or knowingly imports or brings into the United States, any merchandise *contrary to law* . . .") (emphasis added).

should be construed narrowly so as to only include regulations if there is a statute that specifies that violation of that regulation is a crime.[75]

C. The Eleventh Circuit's Divergence from Prior Rulings on the Smuggling Statute

The Eleventh Circuit found the respective approaches of the Fourth and Ninth Circuits flawed for the purposes of answering the question presented in *Izurieta*.[76] The Eleventh Circuit noted that the Fourth Circuit's interpretation of the meaning of a law aligned with that of the former Fifth Circuit, which split into the current Fifth and Eleventh Circuits and whose decisions are binding on the Eleventh Circuit.[77] The Eleventh Circuit was concerned though by the far-reaching implications of the Fourth Circuit's approach in light of the fact that the test the court adopted from *Chrysler Corp*. was derived from a non-criminal context.[78] The Eleventh Circuit was similarly concerned with the breadth of the Ninth Circuit's ruling in *Alghazouli* and was unconvinced by the Ninth Circuit's analysis of the smuggling statute's legislative history.[79] Despite the close relationship between the nature of the conduct criminalized by § 554 and the smuggling statute, the Eleventh Circuit found the *Alghazouli* court's statutory comparison of these two offenses inappropriate because § 554 was enacted decades after the smuggling statute.[80]

The finding that the regulation at issue in *Izurieta* had not specifically been addressed in any cases discussing the smuggling statute motivated the Eleventh Circuit's rejection of the approaches of the Fourth and Ninth Circuits.[81] Further, the Eleventh Circuit found that an adoption of the broad holdings of either *Mitchell* or *Alghazouli* was unnecessary to answer the question

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[75] *Alghazouli*, 517 F.3d at 1187.

[76] *See Izurieta*, 710 F.3d at 1181 (finding the Ninth Circuit's reasoning in *Alghazouli* unpersuasive and the Fourth Circuit's ruling in *Mitchell* too broad to settle the dispute at issue in *Izurieta*).

[77] *Id*. The Eleventh Circuit was established in 1981 pursuant to the Fifth Circuit Court of Appeals Reorganization Act of 1980. Fifth Circuit Court of Appeals Reorganization Act of 1980, 96 Pub. L. No. 452, 94 Stat. 1994, 1994 (codified at 28 U.S.C. § 41). Upon the Eleventh Circuit's inception, the former Fifth Circuit was divided into the Fifth and Eleventh Circuits. *Id.* In 1981, the Eleventh Circuit held that decisions of the former Fifth Circuit serve as binding precedent in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981).

[78] *See Izurieta*, 710 F.3d at 1181 (rejecting the approach of the Fourth Circuit in *Mitchell* in favor of a narrower analysis with implications affecting only the regulation at issue in *Izurieta*).

[79] *See id.* (finding the Ninth Circuit's comparison of the smuggling statute and 18 U.S.C. § 554 unconvincing in light of the fact that the smuggling statute was enacted decades before 18 U.S.C. § 554).

[80] *Id.*

[81] *See id.* (noting that the regulation at issue in *Izurieta* had not been discussed in prior rulings focusing on the smuggling statute).

in *Izurieta*.[82] The Eleventh Circuit instead found that the smuggling statute's effect in criminalizing conduct with otherwise civil repercussions in *Izurieta* made the rule of lenity particularly applicable to the defendants in that case.[83]

III. THE ELEVENTH CIRCUIT MISAPPLIED THE RULE OF LENITY IN *IZURIETA*

The rule of lenity is a rule of last resort in statutory interpretation, reserved for instances in which statutory ambiguity remains after a court has attempted to deduce legislative intent from all other available means.[84] In 2013, in *United States v. Izurieta*, the Eleventh Circuit applied the rule of lenity after finding the smuggling statute's contrary to law provision grievously ambiguous.[85] Section A of this Part argues that the Eleventh Circuit improperly employed the rule of lenity by resorting to the rule before applying all other means of statutory interpretation.[86] Section B argues that the existing circuit split over the smuggling statute's contrary to law provision does not have such significant practical implications as to require immediate redress from the Supreme Court or Congress.[87]

A. The Eleventh Circuit Failed to Employ Traditional Means of Statutory Interpretation Before Applying the Rule of Lenity

The central requirement in applying the rule of lenity is a finding of statutory ambiguity.[88] Grave statutory ambiguity, however, is not alone sufficient for the court to apply the rule.[89] Nor is a statute sufficiently ambiguous for the purposes of applying the rule of lenity if courts of like authority are split in their interpretation of the statute in question. [90] The rule of lenity

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[82] *Id.*

[83] *See id.* at 1181–82 (finding that lenity is a concern for the court in criminal cases such as *Izurieta* where a regulation with civil penalties could be transformed into a criminal law).

[84] *See* Moskal v. United States, 498 U.S. 103, 108 (1990) (finding that resort to the rule of lenity is reserved for instances in which doubt exists about a statute's intended scope even after examining the language, structure, and legislative history of the statute); Callanan v. United States, 364 U.S. 587, 596 (1961) (finding that the rule of lenity is applied at the end of the process of statutory interpretation, not at the beginning, as a means of offering a defendant leniency).

[85] *See* United States v. Izurieta, 710 F.3d 1176, 1181 (11th Cir. 2013) (finding the contrary to law provision as it pertains to 19 C.F.R. § 141.113(c)(3) (2017) grievously ambiguous and applying the rule of lenity).

[86] *See infra* notes 88–110 and accompanying text.

[87] *See infra* notes 111–122 and accompanying text.

[88] *See Moskal*, 498 U.S. at 107 (finding that statutory ambiguity is the "touchstone of the rule of lenity").

[89] *See* Smith v. United States, 508 U.S. 223, 239 (1993) (holding that the mere possibility of narrower statutory construction is not sufficient to warrant the application of the rule of lenity).

[90] *See* Reno v. Koray, 515 U.S. 50, 64 (1995) (holding that a statute is not ambiguous for the purposes of lenity solely because there is an existing division of authority).

is only applied if grievous ambiguity remains *after* the court has consulted all traditional canons of statutory construction.[91] Courts are required to exhaust all means of traditional statutory construction before applying the rule of lenity in recognition of the court's role to interpret, not direct, congressional will.[92] As a result, courts apply the rule of lenity at the end of the process of statutory interpretation to resolve statutory ambiguity, not in the beginning of the process as a means to offer leniency to a defendant.[93]

The Eleventh Circuit found the approaches of the Fourth and Ninth Circuits in *United States v. Mitchell,* in 1994, and *United States v. Alghazouli,* in 2008, respectively, inapplicable to the regulation at issue in *Izurieta*.[94] The Eleventh Circuit instead applied the rule of lenity after finding the contrary to law provision grievously ambiguous.[95] The Eleventh Circuit erred, however, by failing to apply available means of statutory construction before finding the contrary to law provision in the smuggling statute grievously ambiguous.[96]

Citing the Supreme Court's 1991 decision in *Chapman v. United States*, the Eleventh Circuit stated that the rule of lenity should only apply where a criminal statute contains a grievous ambiguity.[97] A complete reading of the sentence in *Chapman* quoted by the Eleventh Circuit, however, reveals that the Eleventh Circuit omitted a crucial element of the Court's holding in *Chapman.*[98] The Court found in *Chapman* that the rule of lenity applies only if a statute remains grievously ambiguous even after the court has applied all other available means to interpret the statute.[99] Not only did the Eleventh Cir-

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[91] *See* Barber v. Thomas, 560 U.S. 474, 488 (2010) (holding that that the rule of lenity only applies if a grievous ambiguity remains after the court has applied traditional means of statutory interpretation such that the court must "guess as to what Congress intended") (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980)); *Moskal*, 498 U.S. at 108 (finding that resort to the rule of lenity is reserved for instances in which doubt exists about a statute's intended scope after examining the statute using traditional canons of statutory construction).

[92] *See* Huddleston v. United States, 415 U.S. 814, 831 (1974) (holding that furtherance of the principles underlying the rule of lenity should not eclipse the understanding that rules of statutory interpretation exist to discern and not guide congressional will).

[93] *See supra* notes 84–89 (describing the appropriate application of the rule of lenity).

[94] *Izurieta*, 710 F.3d at 1181.

[95] *Id.*

[96] *See id.* at 1181–82 (finding that "lenity remains an important concern in criminal cases" but failing to analyzing the text, legislative history, or structure of the smuggling statute's contrary to law provision).

[97] *Id.* at 1182.

[98] *Compare id.* ("The rule is a limited one, however, applying only where there is a 'grievous ambiguity or uncertainty'in the statute."), *with* Chapman v. United States, 500 U.S. 453, 463 (1991) ("The rule of lenity, however, is not applicable unless there is a 'grievous ambiguity in the language and structure of the Act,' such that even after the court has 'seized everything from which can be derived,' it is still 'left with an ambiguous statute.'") (citations omitted).

[99] *Chapman*, 500 U.S. at 463.

cuit omit *Chapman*'s holding regarding the need to first exhaust all forms of traditional statutory interpretation before resorting to lenity, the court also failed to address this well-founded requirement of the rule of lenity at all.[100] In contrast, in *Mitchell,* the Fourth Circuit cited *Chapman* in finding that the rule of lenity does not apply unless a grievous ambiguity remains after the court has looked at the language, structure, and legislative history of the statute in question.[101] The Fourth Circuit found that the smuggling statute was not ambiguous and that the rule of lenity was inapplicable after examining the plain text of the statute and the term law in particular.[102]

The Eleventh Circuit's error in failing to first apply other methods of statutory construction before resorting to the rule of lenity led the court to focus primarily on determining whether the smuggling statute is grievously ambiguous.[103] Without citing to prior authority, the court held that lack of reference in the smuggling statute to regulations creates an ambiguity that should be considered grievous if the ambiguity criminalizes conduct that would otherwise only give rise to civil penalties.[104] This finding led the court to scrutinize the regulation at issue, 19 C.F.R. § 141.113(c)(3), rather than the smuggling statute itself.[105] The court examined the legislative history of the regulation and related statutes concerning the conditional release protocol for imported goods to determine that the regulation is a law with only civil implications.[106] As a result, the court reasoned that the smuggling statute, at least as it pertains to the regulation at issue in *Izurieta*, met the standard of grievously ambiguous required by the rule of lenity.[107]

The practical impact of the court's error in prematurely applying the rule of lenity may have been negligible—even if the court had conducted its own analysis of the text, structure, and legislative history of the smuggling

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[100] *Izurieta*, 710 F.3d at 1181–82; *see supra* notes 84–89 and accompanying text (describing the appropriate application of the rule of lenity).

[101] *See* United States v. Mitchell, 39 F.3d 465, 470 (4th Cir. 1994) (declining to apply the rule of lenity after finding the smuggling statute unambiguous) (citing *Chapman*, 500 U.S. at 463).

[102] *Id.* at 468, 470.

[103] *See Izurieta*, 710 F.3d at 1182–84 (holding that the smuggling statute is grievously ambiguous for the purposes of lenity by primarily analyzing the legislative history of the regulation at issue and not the contrary to law provision in the smuggling statute).

[104] *See id.* at 1182 (noting that ambiguity in the smuggling statute with regards to regulations should be considered grievous ambiguity if such an ambiguity could result in criminalizing otherwise civil conduct).

[105] *See id.* at 1182–84 (examining whether a violation of § 141.113(c)(3) under the smuggling statute gives rise to a criminal punishment where a defendant could only have reasonably anticipated civil penalties).

[106] *See id.* (finding that § 141.113(c)(3) primarily establishes contractual terms between customs and importers and that a defendant could only reasonably anticipate civil penalties resulting from a violation of the regulation).

[107] *Id.*

statute, it may have found the statute grievously ambiguous and applied the rule of lenity anyway.[108] The rule of lenity, however, is a rule of last resort in statutory interpretation because it offers the court an opportunity to dictate, where it might otherwise interpret, legislative intent.[109] By prematurely applying the rule, the Eleventh Circuit overstepped its role as an interpreter of legislative authority.[110]

B. Relatively Immaterial Impact of Divided Authority over Smuggling Statute Likely to Leave Circuit Split Unresolved

Following the Eleventh Circuit's decision in *Izurieta*, three federal circuits have reached different conclusions regarding what constitutes a law as defined by the smuggling statute.[111] Although the Eleventh Circuit tacitly endorsed the Fourth Circuit's approach in *Mitchell* in some circumstances, stating that the *Mitchell* court's analysis may reflect congressional intent in some cases, the Eleventh Circuit diverged from the Fourth Circuit.[112] The resulting division of authority has the potential to create uncertainty for individuals and importers regarding what regulations, if any, can serve as the underlying basis for an indictment under the smuggling statute.[113] This potential for uncertainty is evident when considering the fluidity of international transportation and commerce in the United States, where many U.S. gateways to international markets, such as airports with international service and ports engaged in international shipping, are located outside of the jurisdiction of the Fourth, Ninth, or Eleventh Circuits.[114]

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[108] *Id.*

[109] *See supra* notes 84–89 and accompanying text (describing the appropriate application of the rule of lenity).

[110] *See Huddleston*, 415 U.S. at 831 (holding that furtherance of the principles underlying the rule of lenity should not lead the court to direct where it otherwise might interpret congressional authority); *supra* notes 84–89 and accompanying text (describing the appropriate application of the rule of lenity).

[111] *Izurieta*, 710 F.3d 1176, 1182–84; United States v. Alghazouli, 517 F.3d 1179, 1187 (9th Cir. 2008); *Mitchell*, 39 F.3d 465, 470–71.

[112] *See Izurieta*, 710 F.3d at 1181 (concluding that the Fourth Circuit's interpretation of a law in *Mitchell* as including any regulation having the force and effect of law may reflect the intent of Congress in some instances).

[113] *See supra* notes 4–12 and accompanying text (outlining the existing circuit split regarding the smuggling statute).

[114] *See* U.S. DEP'T OF TRANSP., PORT PERFORMANCE FREIGHT STATISTICS PROGRAM: ANNUAL REPORT TO CONGRESS 7 (2016), https://www.bts.gov/sites/bts.dot.gov/files/docs/PPFS_Annual_Report.pdf [https://perma.cc/R4WN-LGTK] [hereinafter PORT PERFORMANCE STATISTICS] (listing the top twenty-five largest ports in the United States in 2016 by total tonnage); U.S. DEP'T OF TRANSP., U.S. INTERNATIONAL AIR PASSENGER AND FREIGHT STATISTICS TABLE 6 (2016), https://www.transportation.gov/sites/dot.gov/files/docs/mission/office-policy/aviation-policy/282961/us-international-air-passenger-and-freight-statistics-report-december-2016.pdf [https://perma.cc/AVL8-

Although a split between the Fourth, Ninth, and Eleventh Circuits over the smuggling statute indicates a lack of uniformity regarding this particular federal statute, conflict between circuits is not necessarily a problem for the federal judiciary or individuals likely to be impacted by the statute in question.[115] Congress first directed the study of inter-circuit conflicts in 1972, and the issue was studied again in 1990 by the Federal Courts Study Committee (the "Committee").[116] The Committee focused its attention on inter-circuit conflicts it deemed "intolerable" and noted that many of the direct inter-circuit conflicts rejected by the Supreme Court did not meet this classification.[117] An intolerable conflict can be distinguished from those that are merely "undesirable" or simply "insignificant."[118] An inter-circuit conflict is intolerable if it results in any or all of the following: (1) economic costs or harm to multi-circuit actors, such as firms engaged in interstate commerce; (2) forum shopping among circuits; (3) unfairness to litigants in different circuits; and (4) the encouragement of "non-acquiescence" by federal administrative agencies by forcing agencies to choose between judicial authority in their respective circuits and the uniform administration of statutes.[119]

In practice, the existing division of authority in the Fourth, Ninth, and Eleventh Circuits over what constitutes a law under the smuggling statute

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7X5P] (listing the top forty U.S. international country "passenger gateways" to the world in 2016, ranked by scheduled service). In 2016, nine of the top twenty-five largest U.S. ports by total tonnage fell within the jurisdiction of the Fourth, Ninth, and Eleventh Circuits. PORT PERFORMANCE STATISTICS, *supra*. In the same year, thirteen of the largest twenty-five U.S. international airports by passenger service fell within the jurisdiction of the Fourth, Ninth, and Eleventh Circuits. *Id.*

[115] *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1589–90, 1605–06 (2008) (arguing that the effects of non-uniformity of federal law are not, on the whole, problematic); Arthur D. Hellman, *Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 726–27 (1995) (distinguishing between circuit conflicts that are "intolerable" from those that are "undesirable" or merely "insignificant").

[116] Hellman, *supra* note 115, at 695–96. The Commission on Revision of the Federal Court Appellate System (the "Commission") was established in 1972 in response to the growing case load facing federal courts and the inability of the Supreme Court to resolve increasing division among the federal courts of appeal; the Commission unsuccessfully advocated for the establishment of a national court of appeals to aid in resolving the increasing uncertainty allegedly resulting from growing inconsistency in law between the federal circuits. *Id.* The issue was studied again in 1990 by the Federal Courts Study Committee (the "Committee"). *Id.* The Committee found that the Supreme Court reviewed fewer than 1% of all federal appeals in 1989 and predicted that percentage to decrease as the number of appeals rose. FED. JUDICIAL CTR., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 124–25 (1990).

[117] *See* FED. JUDICIAL CTR., *supra* note 116 (recommending that the Federal Judicial Center study the number and frequency of inter-circuit conflicts that meet the criteria of an intolerable conflict yet remain unresolved).

[118] Hellman, *supra* note 115, at 726–27.

[119] FED. JUDICIAL CTR., *supra* note 116, at 125.

impacts a narrow group of individuals and importers.[120] Only those who have violated or may violate a regulation that could serve as the underlying charge for an indictment under the smuggling statute are practically affected by the existing circuit split over the smuggling statute.[121] In light of this narrow impact, the inconsistency between the Fourth, Ninth, and Eleventh Circuits regarding the smuggling statute likely does not meet the standard of an intolerable circuit conflict as defined by the Committee.[122]

CONCLUSION

The Fourth, Ninth, and Eleventh Circuits have come to different conclusions regarding what regulations are included within the meaning of a law under the smuggling statute, a criminal offense for smuggling goods into the United States. In diverging with the approaches taken by the Fourth and Ninth Circuit, the Eleventh Circuit in *Izurieta* found the smuggling statute to be grievously ambiguous as it pertained to the regulation underlying the indictment in the case. The court's application of the rule of lenity in this case was premature.

The rule of lenity is a rule of last resort in statutory interpretation, reserved for instances in which a statute remains ambiguous even after the court has applied all available means to determine congressional intent. In this case, the Eleventh Circuit applied the rule of lenity to the detriment of well-founded methods of statutory interpretation, overstepping its role as an interpreter rather than an administrator of congressional will. The practical impact of the Eleventh Circuit's decision and the existing inter-circuit conflict, however, is negligible. Inconsistency among the Fourth, Ninth, and Eleventh Circuits regarding the smuggling statute affects a narrow group of individuals and minimally burdens the federal judiciary.

C. ALEX DILLEY

Preferred Cite: C. Alex Dilley, *Eleventh Circuit Prematurely Applied the Rule of Lenity in* United States v. Izurieta, 59 B.C. L. REV. E. SUPP. 554 (2018), http://lawdigitalcommons.bc.edu/bclr/vol59/iss9/554/.

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[120] *See supra* notes 4–12 and accompanying text (outlining the existing circuit split regarding the smuggling statute).

[121] *See supra* notes 4–12 and accompanying text (outlining the existing circuit split regarding the smuggling statute).

[122] FED. JUDICIAL CTR., *supra* note 116, at 125; *see supra* notes 4–12 and accompanying text (outlining the existing circuit split regarding the smuggling statute).