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## Article

# Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes

Eugene Kontorovich<sup>†</sup>

In March 2007, the United States Coast Guard boarded a suspicious Panamanian vessel that had been spotted by a surveillance plane.<sup>1</sup> The boarding resulted in the largest maritime cocaine seizure to date: over forty-two thousand pounds uncut.<sup>2</sup> Fourteen crewmembers were arrested, and the eleven non-Panamanian detainees were brought to Florida for prosecution.<sup>3</sup>

Yet the seizure did not take place in U.S. waters.<sup>4</sup> It took place in Panamanian territorial waters, approximately one thousand nautical miles from Miami.<sup>5</sup> Moreover, none of the

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1. News Release, U.S. Drug Enforcement Admin., DEA, Coast Guard Make Record Maritime Cocaine Seizure (Mar. 21, 2007), *available at* <http://www.dea.gov/pubs/states/newsrel/wdo032107.html> [hereinafter U.S. Drug Enforcement Admin. News Release]; Press Release, U.S. Dep't of Homeland Sec., Remarks by Homeland Sec. Sec'y Michael Chertoff, U.S. Coast Guard Commandant Admiral Thad Allen and Drug Enforcement Admin. Adm'r Karen Tandy at a Press Conference Announcing the Coast Guard's Record Maritime Cocaine Seizure (Mar. 21, 2007), *available at* [http://www.dhs.gov/xnews/releases/pr\\_1174566428378.shtm](http://www.dhs.gov/xnews/releases/pr_1174566428378.shtm) [hereinafter U.S. Dep't of Homeland Sec. Press Release].

2. U.S. Drug Enforcement Admin. News Release, *supra* note 1; U.S. Dep't of Homeland Sec. Press Release, *supra* note 1.

3. U.S. Dep't of Homeland Sec. Press Release, *supra* note 1 (stating that the U.S. Coast Guard would turn over custody of the three Panamanian crew members to the Panamanian government and bring the eleven Mexican nationals to the United States).

4. U.S. Drug Enforcement Admin. News Release, *supra* note 1; U.S. Dep't of Homeland Sec. Press Release, *supra* note 1.

5. U.S. Dep't of Homeland Sec. Press Release, *supra* note 1 (noting that

crew—now facing decades or life in U.S. jails—were Americans.<sup>6</sup> Finally, the Drug Enforcement Administration (DEA) conceded the drugs were not bound for the United States.<sup>7</sup>

This case, while exceptional in the amount seized, is otherwise not unusual. It repeats itself dozens of times each year, as the United States enforces its own drug laws in foreign territory.<sup>8</sup> This Article examines which if any of Congress's enumerated powers authorize it to regulate such purely foreign drug trafficking.<sup>9</sup>

The international law doctrine of universal jurisdiction (UJ) holds that a nation can prosecute certain serious international offenses even though it has no connection to the conduct or participants.<sup>10</sup> It has increasingly been used by European national courts and international tribunals to prosecute alleged human rights violations around the world.<sup>11</sup> The United States, however, has been wary of these developments.<sup>12</sup>

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the Coast Guard seized the cocaine from a vessel approximately twenty miles off the coast of Panama). Thus, the seizure occurred in Panama's "contiguous zone," which runs up to twenty-four nautical miles from its coast. *See* United Nations Convention on the Law of the Sea, art. 33, Dec. 10, 1983, 1833 U.N.T.S. 409 (defining contiguous zones and giving states some police powers over them).

6. *See* U.S. Drug Enforcement Admin. News Release, *supra* note 1; U.S. Dep't of Homeland Sec. Press Release, *supra* note 1.

7. *See* U.S. Dep't of Homeland Sec. Press Release, *supra* note 1 (stating that the vessel was bound for Mexico).

8. *See, e.g., id.* (reviewing the DEA's recent cash and drug seizures abroad).

9. The wisdom or propriety of such action as a matter of drug policy, international relations, or even international law is not the subject of this Article.

10. *See* *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 371 (E.D. La. 1997) ("Where a state has universal jurisdiction, it may punish conduct although the state has no links of territoriality or nationality with the offender or victim." (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 cmt. a (1987))). *See generally* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J., 183, 190–92 (2004) (discussing the origins of and basis for UJ).

11. *See generally* LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL PERSPECTIVES* (2003) (providing an overview of UJ in international law and specifically describing the use of UJ in fourteen countries); David B. Rivkin, Jr. & Lee A. Casey, Op-Ed., *Europe's Runaway Prosecutions*, WASH. POST, Feb. 28, 2007, at A19 (discussing the use of UJ by European nations in attempting to prosecute American officials for alleged violations of international law).

12. The United States, for example, opposed granting UJ to the International Criminal Court. *See* Kontorovich, *supra* note 10, at 200 & n.101. Even the U.S. statute criminalizing genocide, widely regarded as the paradigmatic modern UJ crime, only applies to crimes that directly involve the United

However, under a little-known statute, America uses UJ far more than any other nation, and perhaps even more than all other nations combined. For two decades, the United States has been punishing drug crimes (including possession) committed entirely by foreigners outside U.S. territory, with no demonstrable connection to the United States.<sup>13</sup> Under the Maritime Drug Law Enforcement Act (MDLEA),<sup>14</sup> the U.S. Coast Guard apprehends vessels carrying drugs on the high seas, often thousands of miles from American waters; the crews of these vessels are prosecuted in U.S. courts for violating U.S. drug law, and are sentenced to terms in U.S. jails. In none of these cases is there any evidence the drugs were destined for the United States. While European UJ prosecutions in war crimes and genocide cases attract a great deal of attention because they involve major wars and high government officials, the MDLEA cases have gone almost unnoticed—perhaps because the defendants are undistinguished members of the Latin American drug trade.

The MDLEA's UJ provisions raise fundamental questions about the source and extent of Congress's constitutional power to regulate purely foreign conduct. Courts have said the MDLEA fits under Congress's power to "define and punish Piracies and Felonies committed on the high Seas."<sup>15</sup> This raises the unexplored question of whether that provision has any jurisdictional limits.

Perhaps no Article I power of Congress has received less attention than "Piracies and Felonies."<sup>16</sup> This Article is the second in a two-part project examining the limits of Congress's power under the Define and Punish Clause and related is-

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States. 18 U.S.C. § 1091(d) (2006) (requiring the offense to be committed by a U.S. national or in U.S. territory).

13. Congress passed the Maritime Drug Law Enforcement Act in 1986. See Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 46 U.S.C.A. §§ 70501–70507 (2007)).

14. 46 U.S.C.A. § 70502(a), (c)(1)(A), (c)(1)(C) (2007).

15. U.S. CONST. art. I, § 8, cl. 10 ("Define and Punish Clause"). When speaking of particular parts of the Clause, this Article will refer to the high seas power as the "Piracies and Felonies" provision, and to the law of nations power as the "Offenses" provision.

16. See *United States v. Biermann*, 678 F. Supp. 1437, 1445 (N.D. Cal. 1988) ("The courts of the United States have not had many occasions to interpret this constitutional provision."); THE HERITAGE GUIDE TO THE CONSTITUTION 126 (Edward Meese III et al. eds., 2005) (stating that the Clause "attracted little discussion at the Founding and has not proven controversial"); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 337 ("[T]he scope of the Define and Punish Clause is unclear").

sues.<sup>17</sup> It is the first academic work examining the scope of these powers. The companion article shows that the Define and Punish Clause authorizes UJ over—at most—crimes that international law has established as universally cognizable.<sup>18</sup> This limit applies both to the “Felonies” power and the “Offences against the Law of Nations” provision.<sup>19</sup> Thus the Define and Punish Clause does not generally authorize Congress to regulate foreign conduct with no demonstrable U.S. connection.<sup>20</sup> Congress cannot punish dog-fighting by Indonesians in Java because Congress has not been authorized *by the Constitution* to make such laws. Some UJ may be permissible, but only in narrowly defined circumstances involving offenses treated as universally cognizable by international law. This Article contends that most or all of the MDLEA’s jurisdictional provisions go beyond Congress’s Article I powers in several ways.

The point can be seen most clearly by looking at the “Piracies and Felonies” provision in isolation from the Offenses power. The former consists of two distinct powers—one over piracies, the other over felonies. The powers are mentioned separately because they are in practice different. Piracy was at the time of the Framing, and has been until recently, the *only* UJ crime.<sup>21</sup> UJ was synonymous with the jurisdiction that applied to pirates.<sup>22</sup> Indeed, UJ was the only characteristic that fundamentally distinguished piracy from other high seas felonies.<sup>23</sup>

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17. See Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149 (2009), for the first part of the project.

18. *See id.* at 151.

19. *See id.*

20. *See id.* at 192–93.

21. *See* Kontorovich, *supra* note 10, at 190, 205 (discussing piracy’s status as the prototypical UJ crime).

22. *See id.* at 190.

23. *See id.*; *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820) (noting the “general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever”); *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159–60 (1795) (“[A]ll piracies and trespasses committed against the general law of nations, are inquirable, and may be proceeded against, in any nation . . . .”); *United States v. Robins*, 27 F. Cas. 825, 862 (D.S.C. 1799) (No. 16,175) (“[P]iracy under the law of nations which *alone* is punishable by all nations” (quoting Hon. John Marshall, Speech Delivered in the House of Representatives, in 4 THE PAPERS OF JOHN MARSHALL 10 (Charles T. Cullen & Leslie Tobias eds., 1984) (emphasis added))); *see also* *United States v. Yousef*, 327 F.3d 56, 104 (2d Cir. 2003) (“The

Piracy's unique status as a UJ offense suggests that its enumeration as a separate power specifically allows Congress to exercise UJ only over piracy, but not over other high seas felonies or international law offenses. To allow non-UJ crimes to be punished on a UJ basis would be to erase the distinction that was made in the Constitution between "Piracies" and "Felonies." The same argument applies to "Offences against the Law of Nations," of which piracy was also one. This understanding, while only suggested by the text, is confirmed by examining the view of those Founders who expressed themselves on the matter, as well as the leading jurists of the early Republic. It is reflected in Supreme Court decisions, as well as Congress's interpretation of its own powers. These lessons have apparently been forgotten, and the MDLEA cases barely mention the Piracies and Felonies power.<sup>24</sup>

In short, the MDLEA can only be a valid exercise of the Felonies power if the drug offenses are UJ offenses in international law—which they are not. The Piracies and Felonies power has another limit: it only applies on the high seas.<sup>25</sup> Yet as this Article shows, many applications of the MDLEA extend beyond the high seas, suggesting they are invalid for an additional reason.

The issue has both practical and theoretical importance. Hundreds if not thousands of foreigners are in jail under this statute, which lies, at best, at the far edge of Congress's Article I powers. Furthermore, exploring the potential Article I basis for the MDLEA exposes several important and novel questions of constitutional and international law in addition to the issue of UJ under the Define and Punish Clause explored in the companion Article. Analyzing the MDLEA takes one on a journey through many of the Constitution's foreign relations provisions. Can Congress "define" a crime as an offense against international law when international law does not seem to treat it as such? To what extent can Congress assert UJ over acts committed not just in international waters but in foreign territory? Can the Foreign Commerce Clause be used to regulate conduct with no U.S. nexus? Can a treaty retroactively validate an oth-

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class of crimes subject to universal jurisdiction traditionally included only piracy.").

24. *But see* United States v. Shi, 525 F.3d 709, 721 (9th Cir. 2008) (noting that the U.S. Supreme Court has "treat[ed] 'Piracies,' 'Felonies,' and 'Offenses' . . . as three separate offenses" (citing United States v. Smith, 18 U.S. (5 Wheat.) 153, 158–59 (1820)).

25. *See* U.S. CONST. art. I, § 8, cl. 10.

erwise unconstitutional statute? Do Senate declarations made when ratifying count as part of the treaty for the purpose of Congress's lawmaking powers?

Part I explains the history and purposes of the MDLEA and outlines the provisions that apply without any nexus to the United States. Part II explains that the Felonies power does not authorize UJ over offenses that international law does not treat as universally cognizable. It goes on to discuss how much discretion Congress has to define whether an offense is universally cognizable when international law is unclear on the matter. Part III then applies this framework to drug smuggling and finds no support in international custom for treating it as a UJ crime. Thus Congress cannot treat it as piracy. Rather, it can only punish drug trafficking if it has a U.S. nexus. Part III considers ways in which other international jurisdictional rules might expand the definition of piracy or otherwise support some aspects of the MDLEA. It also explains that some applications of the statute will be unconstitutional for an additional reason: they do not happen on the high seas. Part IV looks to other potential powers that might provide a constitutional basis for the MDLEA, such as the treaty power and Foreign Commerce Clause. The Article concludes that there is no clear Article I source for many of the MDLEA's provisions applying U.S. law in the absence of a U.S. nexus. Other applications would depend on difficult interpretations of novel issues that would at least require more careful analysis and explicit discussion than the cursory treatment courts have thus far given such cases.

## I. BACKGROUND

### A. EXPANDING JURISDICTION ON THE HIGH SEAS

The increasing flow of drugs from Central and South America into the United States—first marijuana in the 1970s and then the more profitable cocaine in the 1980s<sup>26</sup>—and the increasing sophistication of the smugglers led Congress to gradually expand the scope of its extraterritorial lawmaking.<sup>27</sup>

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26. See, e.g., DRUG ENFORCEMENT ADMIN., DRUG ENFORCEMENT ADMINISTRATION: A TRADITION OF EXCELLENCE 1973–2003, at 31, 35–36 (2003), available at [http://www.usdoj.gov/dea/pubs/history/history\\_part1.pdf](http://www.usdoj.gov/dea/pubs/history/history_part1.pdf).

27. See, e.g., Marijuana on the High Seas Act, Pub. L. No. 96-350, 94 Stat. 1159 (1980) (codified as amended at 46 U.S.C.A. §§ 70501–70507 (2007)) (extending U.S. jurisdiction over foreigners on the high seas).

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Because of the difficulty of catching traffickers in the relatively short time they are in U.S. waters, the United States began projecting its enforcement increasingly far from its shores.<sup>28</sup> Today the Coast Guard patrols the oceans thousands of miles away—and often just off the coasts of other states—as part of U.S. anti-drug efforts.<sup>29</sup> And to ensure the Coast Guard’s ability to catch those with drugs bound for the United States, Congress cast a net that pulls in—and makes subject to U.S. law—even those foreign vessels whose cargo is not demonstrably destined here.

### 1. Marijuana on the High Seas Act

The MDLEA built on and expanded the jurisdictional provisions of its predecessor, the Marijuana on the High Seas Act (MHSA), passed in 1980.<sup>30</sup> Drug importation had significantly increased in the 1970s, and Coast Guard interdiction efforts became an important part of the War on Drugs.<sup>31</sup> Smugglers adopted a “mothership” strategy, where a large drug-laden ship would hover on the high seas, just outside of U.S. customs waters, and bring the contraband to shore via many small and difficult to detect boats.<sup>32</sup> When the motherships were seized on the high seas, successful prosecution proved elusive.<sup>33</sup> The motherships themselves were generally foreign-flagged and foreign-crewed, and proving a conspiracy to import was apparently difficult.<sup>34</sup> The House Report on the bill complained that the impunity of the foreign drug traffickers hurt Coast Guard morale.<sup>35</sup>

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28. See H.R. REP. NO. 96-323, at 4 (1979) (stating that a majority of smuggling vessels penetrated the blockade off the U.S. coasts and that the Coast Guard was only able to seize “at best, 8 to 10 percent” of the drugs transported by them).

29. *Coast Guard Drug Interdiction, We Are Still in the Business*, EVENING COLORS (U.S. Coast Guard), Apr. 2004, at 2, available at <http://www.uscg.mil/HQ/CG1/PSC/retnews/2004/April2004News.pdf> (“The Coast Guard’s mission is to reduce the supply of drugs from the source by denying smugglers the use of air and maritime routes in the Transit Zone, a six million square mile area, including the Caribbean, Gulf of Mexico and Eastern Pacific.”).

30. Pub. L. No. 96-350, 94 Stat. 1159 (1980).

31. See H.R. REP. NO. 96-323, at 5.

32. See *id.* at 3–4.

33. See *id.* at 4 (“The only prosecutable offense in many cases was conspiracy to import, a very difficult crime to prove.”).

34. See *id.* at 5.

35. See *id.* at 7 (“[M]orale suffers severely when recidivist smugglers, apprehended repeatedly . . . are released from custody and the smuggling organ-

The main relevant innovation of the MHSA was to extend U.S. jurisdiction on the high seas not just to “U.S. vessels,” but also to a new category, “vessels subject to the jurisdiction of the United States.”<sup>36</sup> This latter category was defined as stateless vessels, meaning a vessel flying no flag, or bearing fraudulent or multiple registries.<sup>37</sup> Earlier drafts of the legislation sought to extend jurisdiction to genuinely foreign vessels whenever the flag state consents.<sup>38</sup> However, the Committee on Merchant Marine and Fisheries reported “[v]arious jurisdictional and constitutional” objections to using a state’s “prior consent as a basis for . . . domestic criminal jurisdiction.”<sup>39</sup> The constitutional concerns were not made explicit, and the chief worry seemed to be about international law, which was understood to require a nexus for prosecution.<sup>40</sup> The statute’s authors seemed to think that as a matter of international law, flag state consent would still be an inadequate basis given that drug trafficking “is not generally accepted as an international crime.”<sup>41</sup> However, under the MHSA, a “purported flag state” could reject a vessel’s claim of nationality.<sup>42</sup> Thus the Marijuana on the High Seas Act swept in cases involving foreigners on the high seas, on non-American vessels, without proof that the vessel or cargo was destined for America. Moreover, the alleged flag state’s ability to deny claims of registry at its discretion could function as an informal version of consent jurisdiction.

## 2. Adopting the MDLEA

The MHSA proved anachronistic almost as soon as it was adopted.<sup>43</sup> The cocaine boom of the 1980s led to a vast increase in drug smuggling and a correlate demand for more aggressive action.<sup>44</sup> The 1980 statute, designed for the marijuana

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ization merely writes off the lost cargo and vessel as the cost of doing business.”).

36. Pub. L. No. 96-350, 94 Stat. 1159 (1980).

37. *Id.* § 2(d).

38. See H.R. REP. NO. 96-323, at 7.

39. *Id.*

40. See *id.* at 7, 20.

41. *Id.* at 20.

42. *Id.* at 23.

43. See Marijuana on the High Seas Act, Pub. L. No. 96-350, 94 Stat. 1159 (1980) (codified as amended at 46 U.S.C.A. § 70501–70507 (2007)); S. REP. NO. 96-855, at 1 (1980).

44. See *Stopping “Mother Ships”—A Loophole in Drug Enforcement: Hearing Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary*, 95th Cong. 1 (1978) (statement of Hon. John C. Culver) (“Re-

era, now seemed weak.<sup>45</sup> Thus, in 1986, Congress expanded the jurisdictional provisions of its maritime drug laws once again.<sup>46</sup>

The Senate Report claimed the MHSAs were troublesome to enforce.<sup>47</sup> Extraterritorial jurisdiction over foreign vessels turned on defects in registry.<sup>48</sup> However, evidence of a vessel's nationality took several days to obtain from the defendant's home state.<sup>49</sup> It could be hard to prove whether a vessel was stateless.<sup>50</sup> Obtaining such evidence that would be "sufficient to withstand evidentiary objections in a U.S. courtroom can take months."<sup>51</sup> The MDLEA sought to avoid such problems by expanding jurisdiction far beyond stateless vessels.<sup>52</sup>

First, the MDLEA extended jurisdiction to any vessel with some U.S. connection.<sup>53</sup> This included anyone aboard vessels registered in the United States, owned or formerly owned, in whole or part by U.S. nationals or corporations;<sup>54</sup> U.S. nationals and resident aliens aboard any vessels;<sup>55</sup> as well as any vessel in U.S. territorial or customs waters.<sup>56</sup> However, the statute

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cently we have been witnessing an increase in smuggling of cocaine . . . into our country from South America. . . . The overall impact of this smuggling is enormous.").

45. *Id.* ("Unfortunately, current law requires that U.S. authorities often must witness the distribution of the drugs from the mother ships to the smaller boats. Mere possession of illegal drugs on the high seas in itself is not a crime.").

46. *See* 46 U.S.C. app. § 1903 (2000) (current version at 46 U.S.C.A. § 70502 (2007)).

47. S. REP. NO. 95-797, at 15 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5986, 5993 [hereinafter 1986 SENATE REPORT] ("Section 17 is needed because defendants in cases involving foreign or stateless vessel boardings and seizures have been relying heavily on international jurisdictional questions as legal technicalities to escape conviction.").

48. *Id.* ("[T]he Coast Guard does not board a vessel claiming foreign registry until the foreign nation involved has indicated its consent or has denied the vessel's claim of registry.").

49. *Id.* at 16, *as reprinted in* 1986 U.S.C.C.A.N. 5986, 5994 ("It is estimated that acquiring such documentation consumes from 2.5 to 8 days of U.S. Government personnel time for each case.").

50. *Id.* at 15, *as reprinted in* 1986 U.S.C.C.A.N. 5986, 5993.

51. *Id.*

52. *Id.* at 16, *as reprinted in* 1986 U.S.C.C.A.N. 5986, 5994 ("Section 17 defines 'vessel subject to the jurisdiction of the United States' to include a vessel without nationality . . .").

53. 46 U.S.C. app. § 1903(c) (2000 & Supp. V 2005) (current version at 46 U.S.C.A. § 70502(e) (2007)).

54. *Id.* § 1903(b)(2)–(3) (current version at 46 U.S.C.A. § 70502(b)(2)–(3) (2007)).

55. *Id.*

56. *Id.* § 1903(a) (current version at 46 U.S.C.A. § 70502(a) (2007)).

also applied U.S. drug laws (not just importation laws) to vessels that fall outside this broad description, and even to foreign-crewed vessels in foreign waters.<sup>57</sup> Indeed, the MDLEA expanded on the MHSAs by extending U.S. jurisdiction to any foreign vessels on the high seas, or even in foreign territorial waters, so long as the relevant foreign nation consents.<sup>58</sup>

This consent is broadly defined—it may be “oral”—and not subject to challenge in court: it “may be verified or denied by radio, telephone, or similar oral or electronic means.”<sup>59</sup> Moreover, the MDLEA expanded the definition of stateless vessels to include those that do not produce evidence of their registry when requested by the Coast Guard<sup>60</sup>—a request which, on the high seas or in foreign territorial waters, they may feel fully entitled to reject—as well as those whose registry is not “affirmatively and unequivocally” confirmed by the foreign state.<sup>61</sup> Given that the Senate Report makes clear that obtaining any kind of registry confirmation from foreign states is slow, difficult, and confusing, this provision would sweep in many genuinely foreign (not actually lacking a legitimate registry) vessels.<sup>62</sup>

Because these vessels are classified as “vessels subject to the jurisdiction of the United States,” no conspiracy to import need be proven;<sup>63</sup> they are treated exactly as if they were U.S. ships, which fall within Congress’s broad admiralty powers.<sup>64</sup> Thus, the statute criminalizes mere “possession” on the foreign vessels in foreign or international waters.<sup>65</sup> Moreover, the statute brushes aside any presumptions against extraterritoriality,<sup>66</sup> and bars any jurisdictional or substantive defenses based

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57. *Id.* § 1903(c)(1)(C) (current version at 46 U.S.C.A. § 70502(c)(1)(C) (2007)).

58. *Id.*

59. *Id.* § 1903(c)(2) (current version at 46 U.S.C.A. § 70502(c)(2) (2007)).

60. *Id.* § 1903(c)(2)(B) (current version at 46 U.S.C.A. § 70502(c)(2)(B) (2007)).

61. *Id.* § 1903(c)(2)(C) (current version at 46 U.S.C.A. § 70502(c)(2)(C) (2007)).

62. 1986 SENATE REPORT, *supra* note 47, at 16, as reprinted in 1986 U.S.C.C.A.N. 5986, 5994.

63. 46 U.S.C. app. § 1903(c) (2000 & Supp. V 2005) (current version at 46 U.S.C.A. § 70502(c) (2007)).

64. See *United States v. Flores*, 289 U.S. 137, 149–54 (1933) (holding that Congress has a general power of legislation within admiralty jurisdiction, which includes U.S. vessels).

65. 46 U.S.C. app. § 1903(b)(2)–(3) (2000) (current version at 46 U.S.C.A. § 70502(b)(2)–(3) (2007)).

66. *Id.* § 1903(h) (current version at 46 U.S.C.A. 70503(b) (2007)) (“This

on the United States' "failure to comply with international law."<sup>67</sup> Indeed, a 1996 amendment sought to keep all questions of statelessness away from a jury by providing that "[j]urisdiction of the United States with respect to vessels subject to this chapter is not an element of any offense . . . [and instead] are preliminary questions of law to be determined solely by the trial judge."<sup>68</sup> With the cocaine epidemic raging, the "constitutional objections" that had dissuaded Congress from adopting a state-consent model of jurisdiction for the MHSA were absent from the discussion of the MDLEA.

Congress did not specify which head of Article I authority it exercised when enacting the MDLEA or its predecessor. However, courts have consistently seen the law as authorized by the Define and Punish Clause because "that clause is the only specific grant of power to be found in the Constitution for the punishment of offenses outside the territorial limits of the United States."<sup>69</sup> A few courts have implied that the act must be an exercise of the *felonies* power in particular, though most have mistakenly spoke of "Piracies and Felonies" as if they are synonymous or interchangeable.<sup>70</sup> Since this clause speaks directly to criminal legislation for the high seas, it seems to be the natural place to seek authority for the MDLEA.

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section is intended to reach acts of possession, manufacture, or distribution committed outside the United States.").

67. *Id.* § 1903(d) (current version at 46 U.S.C.A. § 70505 (2007)).

68. Coast Guard Authorization Act of 1996, Pub. L. No. 104-324, § 1138(a)(5), 110 Stat. 3901 (codified as amended at 46 U.S.C. app. § 1903 (2000 & Supp. V 2005) (current version at 46 U.S.C.A. §§ 70501-70507 (2007))).

69. *See* United States v. Suerte, 291 F.3d 366, 375 (5th Cir. 2002) (internal citations omitted); *see also* United States v. Davis, 905 F.2d 245, 248-49 (9th Cir. 1990) ("In order to apply extraterritorially a federal criminal statute to a defendant consistent with due process, there must be a sufficient nexus between the defendant and the United States."); United States v. Burke, 540 F. Supp. 1282, 1288 (D.P.R. 1982) ("Extra-territorial application of penal laws is authorized by Article I, Section 8, Clause 10 of the Constitution, which authorizes Congress 'to define and punish Piracies and Felonies committed on the high seas, and offenses against the Laws of Nations.'").

70. *See, e.g.,* United States v. Moreno-Morillo, 334 F.3d 819, 824-25 (9th Cir. 2003) (holding that drug smuggling in international waters is a "piracy or felony within the meaning of Article I, Section 8, Clause 10" without specifying whether it is justified by the power over "piracies" or over "felonies"); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) (noting that the MDLEA is justified by Congress's authority under "Piracies and Felonies" clause without specifying whether drug smuggling is either a piracy or felony).

## B. ENFORCEMENT

Under standard rules of international law, the Coast Guard cannot stop or board foreign vessels on the high seas or in foreign waters.<sup>71</sup> Thus, the United States has negotiated “bilateral maritime agreements” with twenty-six Caribbean and Latin American states since the enactment of the MDLEA.<sup>72</sup> These agreements have been negotiated country by country over the past twenty years.<sup>73</sup> They set out frameworks for the United States to stop, search, and sometimes board the other state’s vessels if they are suspected of drug trafficking.<sup>74</sup> The agreements coordinate numerous technical and tactical aspects of joint counter-narcotics enforcement, including the “shiprider” program, where a law enforcement officer from one country embarks on the other’s vessels, carrying the authority to board and make arrests in the name of his home state.<sup>75</sup> The agreements generally follow a standard six-part form apparently drafted by U.S. officials.<sup>76</sup> However, the particular arrangement with each country often varies somewhat from the basic template, depending on particular local concern.<sup>77</sup>

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71. See United Nations Convention on the Law of the Sea, art. 110, Nov. 16, 1994, 1833 U.N.T.S. 438 [hereinafter UNCLOS].

72. See U.S. DEP’T OF STATE, BUREAU OF INT’L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, INT’L NARCOTICS CONTROL STRATEGY REPORT, March 2007, available at <http://www.state.gov/p/inl/rls/nrcrpt/2007/vol1/html/80853.htm> [hereinafter STATE DEP’T REPORT]. Only a few nations in the area, such as Ecuador and Cuba, have not signed such an agreement. U.S. GEN. ACCOUNTING OFFICE, DRUG CONTROL: UPDATE ON U.S. INTERDICTION EFFORTS IN THE CARIBBEAN AND EASTERN PACIFIC 16 (1997) (“There are 12 countries in the region with which the United States currently has no formal counterdrug agreements. These include . . . Cuba . . . [and] Ecuador . . .”).

73. See STATE DEP’T REPORT, *supra* note 72.

74. See, e.g., *United States v. Perlaza*, 439 F.3d 1149, 1168 (9th Cir. 2006) (stating that seizure of a vessel is allowed pursuant to the Colombian Government’s consent under the Bilateral Agreement); see also Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 76 AM. J. INT’L L. 374, 377–79 (1982) (explaining the U.S.-U.K. Agreement on Vessels Trafficking in Drugs).

75. Agreement Concerning Cooperation for the Suppression of Illicit Maritime Traffic in Narcotics Drugs and Psychotropic Substances, with Implementing Agreement, U.S.-Hond., art IV, Mar. 29, 2000, Temp. State Dep’t No. 02-4, 2000 U.S.T. LEXIS 159 [hereinafter U.S.-Hond. Agreement].

76. See *International Law: The Importance of Extradition: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Res. of the H. Comm. on Gov’t Reform*, 106th Cong. 79–80 (1999) (statement of Ernest R. Riutta, Rear Admiral, Dep’t of Transp., U.S. Coast Guard) [hereinafter Statement of Admiral Riutta].

77. See *id.*

The agreements primarily provide a framework for the United States to interdict and potentially seize foreign vessels, in coordination and with the approval of the flag state.<sup>78</sup> They do not address prosecution of the crew in any detail.<sup>79</sup> The typical agreement contains a clause that reserves primary jurisdiction over the vessel and crew to the flag state, while noting that the flag state could later choose to waive jurisdiction in favor of the United States.<sup>80</sup> Of course, the flag state could authorize U.S. prosecution even in the absence of an agreement saying that they might do so. These clauses make clear that no automatic or ex ante authorization to prosecute should be inferred from the boarding and seizure provisions. Some of the agreements make this point explicitly.<sup>81</sup>

The MDLEA has quietly become the largest font of universal jurisdiction in U.S. courts, dwarfing the more high-profile Alien Tort Statute litigation. Indeed, the MDLEA appears to be the only statute under which the United States asserts universal *criminal* jurisdiction.<sup>82</sup> The practical consequences are significant. Prosecutions under the MDLEA often involve a vessel's entire crew.<sup>83</sup> Given the large quantities of drugs on these vessels, these foreigners, captured on foreign vessels in international waters, can face decades in federal prison.<sup>84</sup> This is

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78. *Id.* at 77 (“The operational goal of these regional agreements is to streamline the lengthy diplomatic process required to obtain flag state authority for law enforcement actions against foreign suspect vessels on the high seas.”).

79. *Cf. id.* at 76–82.

80. U.S.-Hond. Agreement, *supra* note 75, art. VII(1).

81. *See, e.g.*, Agreement U.S.-Jam. Concerning Cooperation in Suppressing Illicit Maritime Drug Trafficking, U.S.-Jam., art. 3(5), May 6, 1997, 1997 U.S.T. LEXIS 21 [hereinafter U.S.-Jam. Agreement], available at [http://www.caricom.org/jsp/secretariat/legal\\_instruments/agreement\\_jamaica\\_us\\_drugtraffic.jsp?menu=secretariat](http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_jamaica_us_drugtraffic.jsp?menu=secretariat) (“Nothing in this Agreement shall be construed as a waiver by a Party of its right to exercise jurisdiction over its nationals.”); Agreement U.S.-Barb. Concerning Cooperation in Suppressing Illicit Maritime Drug Trafficking, U.S.-Barb., art. 15(2), June 25, 1997, 1997 U.S.T. LEXIS 5 [hereinafter U.S.-Barb. Agreement] (“Nothing . . . [in the agreement] shall be construed as authority for one Party to enforce its laws against nationals of the other Party.”).

82. *See* CHARLES DOYLE, CRS REPORT FOR CONGRESS, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 18 (2006) (“The Maritime Drug Law Enforcement Act . . . is somewhat unusual in that it authorizes extraterritorial coverage of federal criminal law . . .”).

83. *See* United States v. Humphries-Brant, 190 F. App'x 837, 839–40 (11th Cir. 2006) (affirming denial of a minor participant sentence reduction to the 135-month sentence of a simple crew member).

84. *See, e.g.*, United States v. Vilches-Navarrete, 523 F.3d 1, 32 (1st Cir.

despite the fact that these individuals potentially never have set foot in, or directed their activities towards, the United States. The exact number of UJ prosecutions under the MDLEA is uncertain, though it is probably at least several dozen.<sup>85</sup>

### C. MDLEA IN THE COURTS

The MDLEA has been subject to a wide variety of largely unsuccessful legal challenges.<sup>86</sup> However, no published opinion deals squarely with the question of Congress's Article I power over purely foreign "Felonies."

#### 1. Due Process Issues

Constitutional challenges to the MDLEA have focused on due process.<sup>87</sup> Defendants argue that the Fifth Amendment requires they have some "nexus" or factual connection with the prosecuting forum.<sup>88</sup> This would rule out UJ, which is defined by the lack of such a nexus. But this nexus argument is framed

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2008) (holding that the defendant's 365-month sentence was reasonable); *Tenorio v. United States*, No. 8:03-CV-2558-T-30MSS, 2006 WL 1428469, at \*3 (M.D. Fla., May 17, 2006) (affirming defendant's 360-month and 252-month sentences).

85. A precise tabulation of UJ cases is difficult because the statute applies to both UJ situations and those where the vessel has an American crew, destination, or other nexus. *See* 46 U.S.C. app. § 1903(c) (2000 & Supp. V 2005) (current version at 46 U.S.C.A. § 70502(c) (2007)). There are, however, some suggestive data. The Coast Guard arrests roughly 200 people per year in drug seizures. *See* OFFICE OF LAW ENFORCEMENT, U.S. DEPT OF HOMELAND SEC., U.S. COAST GUARD, COAST GUARD DRUG REMOVAL STATISTICS (2008) *available at* <http://www.uscg.mil/hq/cg5/cg531/Drugs/stats.asp>. In one recent year, 199 people were arrested on Colombian vessels or waters alone. *Id.* It is doubtful that all the arrestees would ultimately be tried in the United States. *See Plan Colombia: Major Successes and New Challenges: Hearing Before the H. Comm. on International Relations*, 109th Cong. 53 (2005) (statement of Ralph D. Utey, RADM (Ret.), Acting Counternarcotics Officer and Interdiction Coordinator, U.S. Dep't of Homeland Sec.). District court cases in the Westlaw databases show roughly 20 UJ cases annually in recent years, and some cases involve multiple defendants. Of course, there are many more UJ prosecutions, since defendants, as in other criminal cases, generally plead guilty and waive appeals, or otherwise have their cases decided without a published opinion. *Cf.* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 329 (noting that the trend toward resolving cases through guilty pleas in state and federal courts is increasing).

86. *See* DOYLE, *supra* note 82, at 19.

87. *See, e.g., United States v. Tinoco*, 304 F.3d 1088, 1101, 1111–12 (11th Cir. 2002).

88. *See, e.g., id.* at 1111–12.

in terms of individual rights rather than the Article I limits.<sup>89</sup> Most courts of appeals (including the Eleventh Circuit, which gets most MDLEA cases)<sup>90</sup> have held that the Fifth Amendment requires no nexus.<sup>91</sup> The Ninth Circuit, on the other hand, requires some nexus with the United States.<sup>92</sup> Courts that do not require a nexus argue that any due process requirement is waived by the consent given by the defendant's home state,<sup>93</sup> which is routine in MDLEA cases.<sup>94</sup> This highlights an important difference in whether a nexus requirement is located in the Fifth Amendment or in Article I limits on Congress's legislative power. Structural limits—unlike personal rights—cannot be waived by individual defendants, to say nothing of foreign nations.

## 2. Article I Issues

The question of whether the MDLEA exceeds Congress's Article I limits has not been fully addressed by any court.<sup>95</sup> However, in the past few years some defendants have begun to point to a pair of early nineteenth-century Supreme Court cases—*United States v. Palmer*<sup>96</sup> and *United States v. Furlong*<sup>97</sup> as indicating limits on UJ under the Felonies power.<sup>98</sup> These ar-

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89. *See id.* at 1110 n.21.

90. *See, e.g.,* *United States v. Gonzalez*, 776 F.2d 931, 938, 940–41 (11th Cir. 1985).

91. *Id.*

92. *United States v. Perlaza*, 439 F.3d 1149, 1160–61 & n.14 (9th Cir. 2006).

93. *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993). *But see* *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1255–57 (9th Cir. 1998) (requiring for Fifth Amendment purposes evidence that drugs were bound for the United States, even when home country consented to prosecution).

94. *United States v. Rodriguez-Duran*, 507 F.3d, 749, 757 n.9 (1st Cir. 2007) (describing the processes for obtaining foreign state consent).

95. *United States v. Madera-Lopez*, 190 F. App'x 832, 835 (11th Cir. 2006) (“[T]here is no precedent from either the Supreme Court or this Court resolving the issue of whether the MDLEA's enactment exceeded Congress's authority under the ‘Piracies and Felonies Clause.’”).

96. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818).

97. *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820).

98. *See, e.g.,* Appellant's Initial Brief at 3, *United States v. Garcia*, 182 F. App'x 873 (11th Cir. 2006) (No. 05-10666-HH). The author of this Article participated in drafting the first of these defense motions. Though unsuccessful, the argument was quickly echoed by other defendants, though usually not in a timely manner, and thus received only perfunctory attention from the courts. While the position developed in this Article and the companion piece grew out of the original motion to dismiss in *Garcia*, the argument presented here in-

guments have usually been raised in a cursory manner, usually for the first time on appeal and thus have faced an uphill battle under a plain error standard.<sup>99</sup> The Eleventh Circuit has denied such appeals with almost no discussion, simply noting that other courts have found the MDLEA to be an exercise of the Piracies and Felonies power.<sup>100</sup> However, those cases simply cited the clause, and did not discuss the issue of its limits.<sup>101</sup>

To the extent courts have considered arguments from the Piracies and Felonies Clause, they misread *Palmer* and *Furlong* as purely statutory cases about the scope of the 1790 Crimes Act,<sup>102</sup> or as based on international rather than constitutional law principles.<sup>103</sup> Furthermore, litigants only began to mention the Define and Punish Clause after most courts had ruled that the Fifth Amendment does not require a nexus in MDLEA cases.<sup>104</sup> Thus judges mistakenly saw the Felonies argument as simply a repleading of the oft-rejected nexus argument, and treated it as a matter of stare decisis.<sup>105</sup> This con-

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volves far more extensive evidence and analysis, most of it never considered by any court. The conclusions here are also, in some ways, different from those positions advanced in *Garcia*.

99. See, e.g., *Madera-Lopez*, 190 F. App'x at 836 (holding that the district court did not plainly err).

100. See, e.g., *Garcia*, 182 F. App'x at 876 (noting that other circuits have found the MDLEA to be constitutional).

101. Compare *id.* at 876 (“[W]hile there is little case law interpreting the scope of the High Seas Clause, other circuits have upheld the constitutionality of the MDLEA. . . . [w]ithout specifically discussing the High Seas Clause’s limits . . . .”), with *Madera-Lopez*, 190 F. App'x at 835 n.1 (recognizing that cases cited in *Garcia* “did not discuss the limits of Congress’s authority under the Piracies and Felonies Clause”). Even less persuasively, the court in *United States v. Suerte* took the astonishing step of refusing to follow *Furlong* based on a notion that it “may be at loggerheads, however, with more recent pronouncements by the Court.” *United States v. Suerte*, 291 F.3d 366, 374 (5th Cir. 2002). Of the two “pronouncements” relied on by *Suerte*, one is a dissent, and the other a dictum that does not deal with the Define and Punish Clause at all. See *id.*

102. *Madera-Lopez*, 190 F. App'x at 836 (holding that because *Furlong* did not specifically “hold that Congress exceeded its authority under the Pirates and Felonies Clause by seeking to regulate drug trafficking on the high seas,” the district court did not err by failing to declare the MDLEA unconstitutional).

103. See *Suerte*, 291 F.3d at 374.

104. See *id.* at 375.

105. See *United States v. Estupinan*, 453 F.3d 1336, 1338 (11th Cir. 2006) (holding that the district court did not err in failing to strike down the MDLEA sua sponte as exceeding Congress’s Define and Punish power because the circuit has not previously “embellished” the MDLEA with a nexus requirement); *Garcia*, 182 F. App'x at 876 (citing Fifth Amendment cases and

flates inquiries based on two totally different provisions—the Fifth Amendment and the Define and Punish Clause.<sup>106</sup> That the Fifth Amendment does not require a nexus says nothing about the logically prior question of whether Congress has the power to legislate absent a nexus.

As the next Part will show, there is good reason to believe that much of the MDLEA's UJ application exceeds Congress's Article I limits. This was indeed recognized by the Marshall Court in *Palmer* and *Furlong*, as a close reading of those cases suggests. It is also corroborated by a wide range of other evidence not yet considered by any court in an MDLEA case: strong statements made by Justices James Wilson and Joseph Story in their grand jury instructions, John Marshall's famous House of Representatives speech in the Thomas Nash affair, and Congress's decision that it could not extend UJ to the slave trade before it had become universally cognizable in international law. Nor have courts considered the lessons that might be learned from the drafting history and purposes of the clause.

Indeed, judicial discussions of the Piracies and Felonies power treat these "parallel provisions within the same constitutional clause" as having the same scope.<sup>107</sup> This renders "Piracies" entirely redundant: all piracies are felonies. As the next Part will show, piracy was different from all other felonies in one crucial way: it was universally cognizable. The separate enumeration of piracy suggests that its unique jurisdictional trait applies only to it, and not to other felonies on the high seas.

## II. "PIRACIES AND FELONIES" AND THE LIMITS ON UNIVERSAL JURISDICTION

Congress has only those powers given to it.<sup>108</sup> The question raised by the MDLEA is whether the Define and Punish Clause, and in particular its provision for "Piracies and Felo-

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noting that the court has "previously rejected the argument that the MDLEA is unconstitutional because the conduct at issue lacks a nexus to the United States").

106. See *Suerte*, 291 F.3d at 374–75 ("The opinions addressing the reach of the 1790 Act are of significance to our consideration of the MDLEA's reach [under the Fifth Amendment].").

107. See *id.* at 374 (observing in an MDLEA case that since piracy can be punished with no U.S. nexus, this "should apply with equal weight to *felonies* such as at issue here").

108. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

nies committed on the high Seas,”<sup>109</sup> is an open-ended authorization for Congress to punish *any* crimes on the high seas and *any* offenses against the law of nations, regardless of whether they have a connection with the United States. The companion Article, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, shows that while “Piracies” can be punished without regard to nexus, “Felonies” and “Offences” require a direct connection to the United States.<sup>110</sup> Thus while assaults on ambassadors were paradigmatic violations of the law of nations, an attack on the Fijian ambassador to Vanuatu by a citizen of the latter would not fall within Congress’s power over “Offences.” Similarly, while rape is a felony, when committed among Vanuatians on one of their national vessels, it would not fall within Congress’s “Felonies” power.

The companion Article shows the limits of the Define and Punish Clause by examining its historical sources, text, ratification, and purposes, as well as the views taken by the courts, the executive branch, and Congress during the early Republic—the last time the jurisdictional scope of the clause was an issue. The full analysis shall not be reprised here. Rather, this Part summarizes the main lines of evidence suggesting that Congress’s power over “Felonies” and “Offences” as being limited to offenses with some connection to the United States, unlike the power over “Piracies.”<sup>111</sup> Even if the evidence for this proposition as an original matter is not entirely compelling, its adoption by figures such as James Wilson, and by the Supreme Court under John Marshall should, as a practical matter, make it hard for a court today to take a different approach to such an obscure and poorly documented provision.

It bears stressing that the argument is not that Congress is directly bound by international law.<sup>112</sup> Rather, the Define and Punish Clause, by using various terms of art drawn from cus-

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109. U.S. CONST. art. I, § 8, cl. 10.

110. See Kontorovich, *supra* note 17, at 159–68.

111. The companion article explores these sources in greater detail and considers potential objections, methodological questions, and a few pieces of inconsistent evidence.

112. *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993) (“Congress may override international law by clearly expressing its intent to do so.”); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 214 (S.D.N.Y. 2000) (“It is well-established that Congress has the power to override international law.”); *cf. Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (observing that statutes will not be construed to contradict international law absent clear congressional intent).

tomary international law, requires an interpreter to consult that body of law to define those terms.

#### A. THE DRAFTING OF THE CLAUSE AND THE LEGAL BACKGROUND

The Define and Punish Clause received little “serious” discussion at the Philadelphia Convention or during ratification.<sup>113</sup> Yet on its face, the clause requires further analysis, as it contains a striking double redundancy. Piracy is a subspecies of felony.<sup>114</sup> Moreover, piracy has long been an offense against the law of nations.<sup>115</sup> Constitutional construction disfavors readings that render certain provisions superfluous.<sup>116</sup> Indeed, Justice Story insisted that other potentially overlapping words in the Define and Punish Clause should bear separate meanings.<sup>117</sup> A *double* redundancy begs the question whether anything distinguishes piracy both from other felonies and from other law of nations crimes. Such a difference would likely be the reason that the Constitution mentions piracy separately.

One major difference existed between piracy and the other powers listed in the Define and Punish Clause. Piracy was the only UJ offense at the time of the Framing (and up until recent decades).<sup>118</sup> The definition of piracy in international law was narrow, specific, and undisputed: robbery on the high seas.<sup>119</sup> Piracy and its notorious UJ status (referred to at the time as *hostis humani generis*, enemy of all mankind), were congruent, almost synonymous.<sup>120</sup>

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113. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1165 (Melville M. Bigelow ed., Little, Brown, & Co. 1891) (1833).

114. See WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 107 (2d ed. 1829) (“Felony . . . when committed on the high seas, amounts to piracy.”).

115. See 4 WILLIAM BLACKSTONE, COMMENTARIES \*68, \*71 (observing that piracy is both a felony under English law and an offense against the law of nations); THE FEDERALIST No. 42 (James Madison).

116. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 391 (1821) (arguing against a suggested interpretation of Constitution that would render another provision “mere surplusage”).

117. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158 (1820).

118. See *United States v. Robins*, 27 F. Cas. 825, 862 (D.S.C. 1799) (No. 16,175) (“Piracy under the law of nations . . . *alone* is punishable by all nations . . .” (emphasis added)); *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159–60 (1795) (“[A]ll piracies and trespasses committed against the general law of nations, are inquirable, and may be proceeded against, in any nation . . .”).

119. See *Smith*, 18 U.S. (5 Wheat.) at 161–62.

120. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 124 (George

However, in addition to piracy under the law of nations, each nation could make diverse offenses “municipal” or “statutory” piracies.<sup>121</sup> Such statutory piracy could only be punished within the particular state’s municipal jurisdiction.<sup>122</sup> As Wheaton, the American diplomat, reporter of Supreme Court decisions, and author of the leading early nineteenth-century American treatise on international law, put it: “piracy created by municipal statute [could] only be punished by that State within whose territorial jurisdiction, and “on board whose vessels, the offence thus created was committed.”<sup>123</sup> The distinction between “municipal” and “international” or true piracy obviously tracks the constitutional distinction between felonies and piracies. It suggests that Congress can punish piracy consistent with its UJ status, but that that power should not spill over to felonies.

#### B. EARLY INTERPRETATIONS

With one exception, Congress did not use the Piracies and Felonies power to legislate universally over anything except piracy until the MDLEA. The first Congress exercised the Piracies and Felonies power when it enacted the first criminal statute in 1790.<sup>124</sup> It purported to criminalize “murder or robbery” when committed by “any person” on the high seas.<sup>125</sup> The sec-

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Grafton Wilson ed., Oxford Univ. Press 1936) (1836).

121. *See id.*

122. *Id.*

123. *Id.*

124. ALFRED P. RUBIN, *ETHICS AND AUTHORITY IN INTERNATIONAL LAW* 85 (1997).

125. Section 8 of the statute provided that:

[I]f any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, *murder or robbery*, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted shall suffer death: and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought.

Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113–14 (1790) (emphasis added).

tion also proclaimed that “any person” shall be punished for a variety of maritime misdeeds, such as “running away with a vessel,” revolt, assaulting commanders,<sup>126</sup> and attempts and conspiracies to do those things.<sup>127</sup> Robbery on the high seas was, of course, the international law crime of piracy, or “general” piracy.<sup>128</sup> But the other offenses that the statute dubbed “piracy” were made punishable when committed by “any person,” without restriction.<sup>129</sup> A literal reading would extend U.S. legislative power universally to a wide variety of major and minor crimes aboard any vessel on the high seas,<sup>130</sup> and even to some ancillary offenses on land.<sup>131</sup>

The constitutionality of punishing “all persons” for anything other than international piracy was immediately called into doubt by Justice James Wilson,<sup>132</sup> a member of the constitutional convention and subsequent state ratification process, as well as a Justice on the first Supreme Court.<sup>133</sup> Instructing a grand jury, Wilson noted the well-known distinction between general piracy and other maritime crimes that a nation may penalize.<sup>134</sup> This distinction exists regardless of whether the latter are dubbed “piracies” by statute.<sup>135</sup> If Congress intended the murder provision to apply to foreigners on foreign vessels, it would be unconstitutional.<sup>136</sup>

Similarly, John Marshall, while a congressman from Virginia, attacked the constitutionality of the statute during his famous speech on the House floor in the affair of Jonathan Robbins.<sup>137</sup> First, he argued that the idea that Congress’s pow-

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126. *Id.*

127. *Id.* § 10.

128. *Id.* § 8 (“[I]f any person or persons shall commit upon the high seas . . . robbery . . . such offender shall be deemed, taken and adjudged to be a pirate.”); see RUBIN, *supra* note 124, at 72 (stating that piracy was considered unquestionably to be “under the 1787 conception of the ‘law of nations’”).

129. Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113–14.

130. *Id.*

131. *Id.* § 10.

132. Hon. James Wilson, A Charge to the Grand Jury in the Circuit Court of the United States, for the District of Virginia, in May 1791, in 2 THE WORKS OF JAMES WILSON 803, 813 (Robert Green McCloskey ed., 1967).

133. Robert Green McCloskey, *Introduction* to 1 THE WORKS OF JAMES WILSON 1, 2 (Robert Green McCloskey ed., 1967).

134. Wilson, *supra* note 132, at 813.

135. *Id.*

136. *Id.* at 813–14 (expressing his “doubts concerning” that the extension of the murder provisions to foreigners is consistent with the law of nations).

137. Hon. John Marshall, Speech Delivered in the House of Representa-

er to punish felonies on the high seas was unlimited would lead to consequences too absurd to accept.<sup>138</sup> Could the United States punish desertion by British seamen from a British vessel to a French one, or pick-pocketing among British sailors?<sup>139</sup> Such a general jurisdiction over high seas offenses had never been suggested, and certainly could never have been intended by those who drafted and ratified it.<sup>140</sup> If the text does not expressly forbid UJ, Marshall argued, it is only because it was too silly for the Framers to have contemplated.<sup>141</sup>

Moreover, even if Congress for some reason wanted to legislate for purely foreign causes, it could not: "Any general expression in a legislative act, must, necessarily be restrained to objects within the jurisdiction of the legislature passing the act."<sup>142</sup> Thus if the Crimes Act attempted to attach UJ to anything but piracy, it would go too far, regardless of any findings or statements by the legislature.

[T]hat [Define and Punish] clause can never be construed to make to the government a grant of power, which the people making it did not themselves possess. It has already been shown that the people of the United States have no jurisdiction over offences, committed on board a foreign ship, against a foreign nation. Of consequence, *in framing a government for themselves, they cannot have passed this jurisdiction to that government.* The law [the Crimes Act], therefore, cannot act upon the case. But this clause of the constitution cannot be considered and need not be considered, as affecting acts which are piracy under the law of nations.<sup>143</sup>

Thus both Marshall and Wilson doubted that Congress could have constitutionally extended UJ to anything but piracy, which was the only offense universally cognizable under the law of nations.

### C. SUPREME COURT PRECEDENTS

The Supreme Court did not confront the question until nearly two decades later, in *United States v. Palmer*.<sup>144</sup> The case was a classic international law piracy—the armed robbery

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tives, in 4 THE PAPERS OF JOHN MARSHALL 95–96 (Charles T. Cullen & Leslie Tobias eds., 1984).

138. *Id.* at 86.

139. *See id.*

140. *Id.* at 92–93, 96.

141. *See id.* at 102.

142. *Id.* at 91.

143. *Id.* at 96 (emphasis added).

144. 16 U.S. (3 Wheat.) 610 (1818).

of a Spanish vessel by a foreign defendant.<sup>145</sup> The Court held that while Congress could constitutionally extend UJ to genuine piracies,<sup>146</sup> the 1790 Act had not done so.<sup>147</sup> This conclusion was surprising given the statute's capacious language of "any person"—the same language used in the MDLEA.<sup>148</sup> Moreover, it went against what was generally perceived as Congress's goal in passing the statute—to punish piracy to the same extent all other nations do, namely, universally.<sup>149</sup> Marshall's reasoning followed the same lines he had laid down twenty years earlier in the Robbins' affair.<sup>150</sup> The statute must be interpreted non-literally even in the case of piracy, because if "any person" were read literally, it would be quite problematic to apply to all the non-piratical offenses listed in the statute.<sup>151</sup>

Because of the narrowing construction, Marshall did not have to directly express the constitutional issue of the limits on legislative power.<sup>152</sup> But the arguments for reading the statute narrowly in *Palmer* were the same ones he had used in the House to explain why a broad reading would be unconstitutional.<sup>153</sup> Moreover, the U.S. Attorney, arguing for a broad scope for the law, conceded it could not constitutionally apply universally to non-piratical offenses,<sup>154</sup> and Justice Johnson wrote sepa-

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145. *Id.* at 611.

146. *Id.* at 630.

147. *Id.* at 633–34.

148. 46 U.S.C. app. § 1903(a) (2000) (current version at 46 U.S.C.A. § 70505 (2007)).

149. John Quincy Adams, Diary Entry (May 13, 1819), in 4 MEMOIRS OF JOHN QUINCY ADAMS 363 (Charles Francis Adams ed., 1875). Indeed, Congress promptly passed a new statute to provide clear authorization for piracy UJ. See Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14 (1819) (clarifying intent to assert UJ over piracy through language stating "[t]hat if any person or persons *whatsoever*, shall, on the high seas, commit the crime of *piracy, as defined by the law of nations . . .*" (emphasis added)). See generally United States v. Chapels, 25 F. Cas. 399, 399 (D. Va. 1819) (No. 14,782) (discussing background to the 1819 Act).

150. Compare *Palmer*, 16 U.S. (3 Wheat.) at 630; with Marshall, *supra* note 137, at 91.

151. Marshall, *supra* note 137, at 95–96.

152. See *Palmer*, 16 U.S. (3 Wheat.) at 630–31 ("[T]here can be no doubt of the right of the legislature to enact laws punishing pirates . . . . The only question is, has the legislature enacted such a law?").

153. Compare *id.* at 633, with Marshall, *supra* note 137, at 95–96.

154. *Palmer*, 16 U.S. (3 Wheat.) at 618.

rately to stress what was just below the surface in Marshall's opinion.<sup>155</sup>

Two years later a unanimous Court reaffirmed that Congress could not punish the murder of a foreigner by a foreigner on a foreign vessel in *United States v. Furlong*.<sup>156</sup> Such a case was one in which Congress "ha[s] no right to interfere."<sup>157</sup> The *Furlong* Court made clear that that this limitation was not one found in international law, or due process, or the statute itself.<sup>158</sup> Rather, it was found in the difference between "Piracies" and "Felonies" in the Define and Punish Clause.<sup>159</sup> As the Court put it, UJ in such a case would go beyond the "the punishing powers of the body that enacted" the law.<sup>160</sup> The Court went on to distinguish between piracies at international law and other crimes.<sup>161</sup> Murder, when it involves only foreigners abroad, is a matter in which Congress "ha[s] no right to interfere";<sup>162</sup> on the other hand, piracy under identical circumstances falls within the "acknowledged reach of the punishing power of Congress."<sup>163</sup>

The Court's distinction between piracy and murder precisely tracks the "Piracies and Felonies" distinction:

[T]here exist well-known distinctions between the crimes of piracy and murder, *both as to constituents and incidents*. Robbery on the seas is considered as an offence within the criminal jurisdiction of all nations. . . . Not so with the crime of murder. It is an offence too abhorrent to the feelings of man, to have made it necessary that it also should have been brought within this universal jurisdiction. And hence, punishing it when committed within the jurisdiction, or, (what is the same thing,) in the vessel of another nation, has not been acknowledged as a right . . .<sup>164</sup>

The "constituents" of the crimes are their elements—the substantive conduct. The "incidents" are the rules regarding their punishment. *Furlong* makes two points. First, Congress

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155. *Id.* at 641–42 (Johnson, J., dissenting) ("Congress can inflict punishment on offences committed on board the vessels of the United States, or by citizens of the United States, any where; but *congress cannot make that piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts over such offences.*" (emphasis added)).

156. 18 U.S. (5 Wheat.) 184, 197 (1820).

157. *Id.* at 198.

158. *Id.* at 194–95.

159. *Id.* at 195–96.

160. *Id.* at 196 (emphasis added).

161. *Id.* at 196–97.

162. *Id.* at 198.

163. *Id.* at 197.

164. *Id.* at 196–97 (emphasis added).

does not have power to define the “constituents” of offenses without regard to the definition under international law.<sup>165</sup> And, more pertinently for present purposes, it cannot apply the “incidents” of piracy to something that does not have that status.<sup>166</sup> Of course, the only “incident” of piracy that it did not share with murder was its UJ status.<sup>167</sup>

The test of what Congress can make universally cognizable is the law of nations; Congress cannot expand its jurisdiction by calling crimes piracies when they do not have such a status in international law.<sup>168</sup> Piracy and murder “are things so essentially different in their nature, that *not even the omnipotence of legislative power* can confound or identify them.”<sup>169</sup> It would be hard to find clearer language expressing the view that this limit is inherent and nonderogable.<sup>170</sup>

### C. CONGRESSIONAL RESTRAINT

In the early 1800s, the United States and Europe began taking measures to ban the transatlantic slave trade.<sup>171</sup> A growing number of nations banned the trade and a series of international congresses decried it as an abomination.<sup>172</sup> In 1820 Congress went further than any other nation had ever gone before by declaring the slave trade a form of piracy punishable by

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165. *Id.* at 197.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 198 (emphasis added).

170. A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379, 420 (1997) (stating that the Court believes Congress cannot punish crimes that are not under UJ in international law).

171. *The Antelope*, 23 U.S. (10 Wheat.) 66, 76 (1825).

172. See, e.g., Treaty of Ghent, U.S.-G.B., art. X, Dec. 24, 1814, 3 Stat. 218, 223 (“Whereas the traffic in slaves is irreconcilable with the principles of humanity and justice, and whereas both his Majesty and the United States are desirous of continuing their efforts to promote its entire abolition, it is hereby agreed that both the contracting parties shall use their best endeavors to accomplish so desirable an object.”); Congress at Vienna, Declaration of the Powers on the Abolition of the *Slave Trade*, Feb. 18, 1815, reprinted in 1 HERTSLET’S COMMERCIAL TREATIES 11 (Lewis Hertslet ed., 1840) (declaring the slave trade to be “repugnant to the principles of humanity and universal morality”); Declaration of the Congress of Verona, Relative to the Abolition of the Slave Trade, Nov. 28, 1822, reprinted in 3 HERTSLET’S COMMERCIAL TREATIES 2–3 (Lewis Hertslet ed., 1841) (announcing the powers’ commitment to wiping out slave trade); see also WHEATON, *supra* note 120, §§ 125–126, at 165–69; *The Antelope*, 23 U.S. (10 Wheat.) app. at 27 (1825) (describing European measures against slave trade).

death.<sup>173</sup> The statute applied to

any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship or vessel, owned in the whole or part, or navigated for, or in behalf of, any citizen or citizens of the United States.<sup>174</sup>

In other words, Congress extended jurisdiction just short of UJ, but no further. While the Act cast the jurisdictional net broadly, and dubbed the trade piratical, Congress chose to only punish the conduct to the extent it had a demonstrable U.S. nexus.<sup>175</sup>

The legislative history makes clear that Congress would have liked to punish the trade without any regard to a U.S. nexus. Congress wanted to eliminate the trade itself, not just U.S. involvement, which had already been criminalized by earlier laws.<sup>176</sup> But slave trading was at the time clearly not a violation of international law and not recognized as universally cognizable.<sup>177</sup>

The report on the bill from the House Committee on the Slave Trade makes clear that Congress limited the reach of the Act because of concerns about the limits of its Piracies and Felonies power.<sup>178</sup> In explaining why the law only punished offenses with an American connection, the House Report explained that "the *Constitutional power* of the Government has

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173. An Act to continue in force "An act to protect the commerce of the United States, and punish the crime of piracy," and also to make further provisions for punishing the crime of piracy, ch. 113, §§ 4–5, 3 Stat. 600, 600–01 (1820).

174. *Id.*

175. Many of the cases brought under the Act revolved around whether either the citizenship or ownership requirements were satisfied. *See, e.g.*, *United States v. Gordon*, 25 F. Cas. 1364, 1365 (S.D.N.Y. 1861) (No. 15,231). Before passports, when much of the U.S. population were first or second generation immigrants, determining a defendant's nationality was not easy, especially if he wished to obscure it. *See id.* at 1365 (relying on scant evidence and witnesses to determine defendant's citizenship). Similarly, slave traders resorted to a variety of measures, like fictitious sales and renaming, to throw off their American connection. *Id.* at 1366. As an element of the offense, the United States had to prove the jurisdictional requirements, and thus defendants relied heavily on this point. *Id.* at 1365.

176. James Monroe, Message to the Senate, May 21, 1824, in 3 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE 381 (1828) (stating that through prior laws Congress demonstrated that it wanted other nations to seek the abolition of the slave trade).

177. *The Antelope*, 23 U.S. (10 Wheat.) at 90; Monroe, *supra* note 176, at 381; WHEATON, *supra* note 120, § 125, at 165–67.

178. 36 ANNALS OF CONG. 2210 (1820).

already been exercised . . . in defining the crime of piracy” as far as it can go given that the slave trade had yet to become universally cognizable: “Such is the unavoidable consequence of any exercise of the authority of Congress, to define and punish this crime. The definition and punishment can bind the United States alone.”<sup>179</sup>

Thus in the Act of 1820, the United States acted “only “in relation to themselves,” understanding that “they were bound by the injunction of their constitution to execute it, so far as respects the punishment of their own citizens . . . .”<sup>180</sup> Congress’s view of its power over non-UJ felonies as jurisdictionally limited strongly corroborates the understanding suggested by the separate mention of piracies and felonies, views expressed by the Framers, influential interpreters such as Marshall and Story, and by Supreme Court dicta. Indeed, as a statement against interest—limiting its own power—Congress’s inaction in 1820 may carry additional interpretive weight.

### III. THE MDLEA EXCEEDS THE DEFINE AND PUNISH CLAUSE’S LIMITS

Congress cannot attach the jurisdictional consequences of piracies to felonies.<sup>181</sup> This raises the question of whether drug trafficking is a piracy or felony. It obviously does not fit within the traditional definition of piracy as “robbery, when committed upon the sea,”<sup>182</sup> or even the more modern definition of “acts of violence or detention, or any act of depredation, committed for private ends” aboard a vessel.<sup>183</sup>

However, the Define and Punish Clause’s limitation of UJ to piracy can be understood in one of two ways. The textual or originalist understanding would be that piracy is the one and only offense which Congress can ever punish without a U.S.

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179. *Id.* (emphasis added).

180. HENRY WHEATON, ENQUIRY INTO THE RIGHT OF VISITATION & SEARCH OF AMERICAN VESSELS 109–10 (1842) (emphasis added).

181. *See* United States v. Furlong, 18 U.S. (5 Wheat.) 184, 196–97 (1820) (stating that universal criminal jurisdiction over piracy does not extend to murder).

182. United States v. Smith, 18 U.S. (5 Wheat.) 153, 162 (1820).

183. United Nations Convention on the Laws of the Sea, art. 101(a), Dec. 10, 1982, 1833 U.N.T.S. 436. The violence or depredation must be “directed . . . against” people on the ship or on another ship on the high seas. Operating a pirate vessel or facilitating or encouraging piratical acts also counts as piracy. *Id.* art. 101(b)–(c).

nexus.<sup>184</sup> A broader view would reason that since piracy happened to be the only UJ offense at the time of the Founding, the Clause means to allow Congress to exert UJ over all offenses that the contemporary international law treats as universally cognizable.<sup>185</sup> In the latter view, just as constitutional references to “Army” and “Navy”<sup>186</sup> are interpreted as tracking external changes in military structure and technology by allowing for an independent “Air Force,”<sup>187</sup> “piracy” should be understood as tracking external legal changes.

Both positions understand the clause to incorporate international law by reference.<sup>188</sup> The difference is whether such incorporation is static, locked into the 1789 content of customary international law (CIL), or dynamic, expanding and contracting to keep up with external changes in international law. This Article takes no position on the “updating” question,<sup>189</sup> and will consider the implications of both approaches.

If the constitutional text locks in the 1789 limits on UJ, the MDLEA obviously exceeds them. Drug trafficking does not in any way resemble piracy. Far from being forcible robbery, it is voluntary commerce. It is a “Felony” and thus not universally cognizable.<sup>190</sup> On the other hand, if the text allows for updating, the analysis becomes more complex. For the sake of argument, this Part assumes the Clause as a whole tracks changes in international law, and thus “Piracies” encompasses today’s UJ offenses. Nonetheless, this Part shows even with updating, the MDLEA exceeds the Define and Punish Clause’s limits because drug trafficking is not a universally recognizable offense. This also means that Congress cannot reach the conduct through the related power to punish “Offences against the Law of Nations.” This part also considers other modern jurisdictional concepts that might authorize some MDLEA prosecutions—

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184. RUBIN, *supra* note 124, at 85.

185. *Id.*

186. U.S. CONST., art. I, § 8, cls. 12–14.

187. *Cf.* Fisher v. United States, 402 F.3d 1167, 1176 n.8 (Fed. Cir. 2005) (“The reference in the Constitution to the Army and Navy is understood to include the Air Force and other units of the military services.”); Lawrence Lesig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1203 (1993) (“[S]ince there was no such thing as an air force in 1789, it is absurd to read the gap [in the constitutional text] as a proscription.”); Michael Rappaport, *Is an Independent Air Force Constitutional?*, Jan. 30, 2007, [http://rightcoast.typepad.com/rightcoast/2007/01/is\\_an\\_independe.html](http://rightcoast.typepad.com/rightcoast/2007/01/is_an_independe.html).

188. RUBIN, *supra* note 124, at 92–93.

189. Kontorovich, *supra* note 17, at 199–202.

190. *See supra* Part II.C.

protective jurisdiction and statelessness. The latter may be sufficient to save a subset of MDLEA cases, if one proceeds on the somewhat untested theory that “piracy” means any high seas crime that would be within a state’s jurisdictional reach under the international law of the day.

#### A. CONGRESSIONAL DISCRETION TO “DEFINE”

Some might view the grant to Congress of a power to “define . . . Piracies and . . . Offences”<sup>191</sup> as giving it the final say on what is a non-UJ felony and what is not. Thus before considering whether modern CIL provides some basis for the MDLEA, this section shows that Congress does not get the first and last word on the content of CIL.

The Define and Punish Clause raises questions about how much flexibility Congress has in “defining.”<sup>192</sup> Can courts look to the law of nations to determine whether Congress has defined a crime that is actually recognized by international law? Conversely, is whether something violates the law of nations itself a question left entirely to Congress through its power to “define”? The word “define” may suggest some latitude for Congress that it is not entirely bound by some external, objectively determinable body of international law.

The history of the provision suggests conflicting answers, and the courts have had few occasions to address the question. The clause, as it first appeared coming out of the Committee of

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191. U.S. CONST. art. 1, § 8, cl. 10.

192. Zephyr Rain Teachout, Note, *Defining and Punishing Abroad: Constitutional Limits on the Extraterritorial Reach of the Offenses Clause*, 48 DUKE L.J. 1305, 1305 (1999). The few academic discussions arrive at markedly different answers. Compare Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses Against the Law of Nations,”* 42 WM. & MARY L. REV. 447, 545 (2000) (stating that “in deciding what falls within the reach of the Clause, Congress’s decisions are entitled to significant deference from the judiciary”), and Note, *The Offenses Clause After Sosa v. Alvarez-Machain*, 118 HARV. L. REV. 2378, 2394 (2005) (arguing that the “fluid, self-reinforcing character of modern customary international law and the role Congress has in shaping international law” requires that in a post-*Erie* world Congress not be confined to defining offenses clearly or certainly established as violations of international law), with Charles D. Siegal, *Deference and Its Dangers: Congress’ Power To “Define . . . Offenses Against the Law of Nations,”* 21 VAND. J. TRANSNAT’L L. 865, 879 (1988) (arguing that it would “extend the clause too far to permit Congress to use it to define offenses without a clear international law basis”), and Teachout, *supra*, at 1321 (arguing that the purpose of the provision was “to enable Congress to clarify unclear international law” rather than “to grant Congress the power to create its own version of international law”).

Detail, gave Congress the power “to declare the Law and Punishment of Piracies and Felonies committed on the high Seas . . . .”<sup>193</sup> Ultimately “define” was substituted for “declare the law”<sup>194</sup> though with little apparent change in meaning.<sup>195</sup> The spirit of the provision seems to be that felonies and the law of nations refer to a broad body of law, external to the Constitution, whose precise details, elements, and penalties vary.<sup>196</sup> Congress could statutorily provide the requisite specificity to allow for certain and uniform punishment.<sup>197</sup> The scant evidence from the Framing does not seem to resolve the issue.<sup>198</sup>

Few decisions address the question directly.<sup>199</sup> However, the Court has, from the time of the early Republic, acted as if it can review Congress’s definition against the external standard of the “Law of Nations.”<sup>200</sup> In a similar vein to Marshall’s 1800 House speech,<sup>201</sup> the Court in *Furlong*, strongly insisted that Congress cannot arbitrarily classify something as a felony or piracy (i.e., universally cognizable).<sup>202</sup> This must depend on its status in surrounding law:

Nor is it any objection to this opinion, that the law [the 1790 Crimes Act] declares murder to be *piracy*. These are things so essentially different in their nature, that not even the omnipotence of legislative power can confound or identify them. . . . If by calling murder *piracy*,

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193. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 168 (Max Farrand ed., 1911) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

194. *Id.* at 316.

195. *Cf. id.* (showing that changes in the language did not alter the meaning of the provision).

196. *See id.* (stating that the “common law is vague” on this question).

197. *See* United States v. Smith, 18 U.S. (5 Wheat.) 153, 159 (1820) (“Offences . . . against the law of nations, cannot . . . be said to be completely ascertained and defined in any public code recognised by the common consent of nations. In respect, therefore, as well to felonies on the high seas as to offences against the law of nations, there is a peculiar fitness in giving the power to define as well as to punish; and there is not the slightest reason to doubt that this consideration had very great weight in producing the phraseology in question.”); THE FEDERALIST NO. 42, at 234 (James Madison) (Clinton Rossiter ed., 1961).

198. *Cf.* RECORDS OF THE FEDERAL CONVENTION, *supra* note 193, at 316 (showing that there was relatively little debate on this issue).

199. Perhaps most recently, in *Ex parte Quirin*, the Court considered whether the charged offenses against the laws of war were in fact violations of the law of war. 317 U.S. 1, 18–19 (1942).

200. *See* *Smith*, 18 U.S. (5 Wheat.) at 163 (holding that the statutory offense was piracy, “as defined by the law of nations, so as to be punishable under the act of Congress of the 3d of March, 1819”).

201. Marshall, *supra* note 137, at 95–96.

202. United States v. Furlong, 18 U.S. (5 Wheat.) 184, 198 (1820).

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it might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device?<sup>203</sup>

Perhaps the most discussed case on the subject is *United States v. Arjona*,<sup>204</sup> in which the Court upheld a law against counterfeiting foreign currency as an exercise of the Offenses Clause of the United States Constitution.<sup>205</sup> The Court considered whether the law legitimately fell within the Offenses Clause.<sup>206</sup> It did not entirely take Congress's word for it, but rather looked to international law treatises.<sup>207</sup> It found that the counterfeiting of currency by individuals was not a violation of international law but rather that international law imposed obligations on nations to prevent their citizens from counterfeiting.<sup>208</sup> Therefore, the Court sustained the statute as "necessary and proper" for the United States' compliance with international law.<sup>209</sup>

Some have suggested that *Arjona's* "quick look" at international law, and its sustaining of the statute despite finding a nexus rather than a tight fit between it and international law, provides precedent for a very deferential view of the Offenses Clause.<sup>210</sup> However, *Arjona* does not provide groundbreaking precedent for the Offenses Clause as the Court saw the primary source of congressional power as the Foreign Commerce Clause aided by the Necessary and Proper Clause.<sup>211</sup> And the Court's casual discussion of international law constantly refers back to the great effect such counterfeiting can have on U.S. economic relations.<sup>212</sup>

The purposes of the Offenses Clause and precedents interpreting it provide no support for the view that Congress can entirely invent offenses, or that courts cannot measure exercises of the Offenses Clause against the "Law of Nations" as they understand it.<sup>213</sup> According to Justice Story, the word "define"

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203. *Id.* at 198.

204. 120 U.S. 479, 488 (1887).

205. *Id.* at 483 (citing U.S. CONST. art. I, § 8, cl. 10).

206. *Id.* at 488.

207. *Id.* at 484–87.

208. *Id.* at 483 ("The national government is . . . made responsible to foreign nations for all violations by the United States of their international obligations . . .").

209. *Id.* at 487.

210. *See, e.g.*, Siegal, *supra* note 192, at 885–86.

211. *United States v. Arjona*, 120 U.S. 479, 487 (1887).

212. *Id.* at 486–87.

213. Siegal, *supra* note 192, at 877.

means an “express enumeration of all the particulars included in that term.”<sup>214</sup> This suggests that Congress can fill in interstitial questions or resolve particular disputes and uncertainties about the elements of an offense, but it cannot punish primary conduct that is not an international crime.

Because the Offenses Clause refers to an external legal standard to limit Congress, it suggests a particularly strong role for judicial review.<sup>215</sup> If the law of nations cannot be used to establish judicially reviewable limits on Congress’s action, Congress could use the Offenses power to legislate regarding anything. The obscure Offenses Clause would overshadow all other regulatory powers, even the Commerce Clause.<sup>216</sup> It would be odd that such a vast grant of authority over individuals, unchecked by any limiting principle, would exist in the Constitution, or that it would have gone unnoted at the convention and ratification debates.<sup>217</sup> Thus, the most extensive examination of the question has found that courts have consistently looked for substantial state practice to establish the existence of a CIL norm.<sup>218</sup>

At the same time, limiting Congress to a preexisting definition would nullify the power to define, a power which the Framers deliberately conferred.<sup>219</sup> Thus some slack between Congress’s “Offences” and “the “Law of Nations” must be tolerated. Yet the idea that Congress is owed substantial deference in de-

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214. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153,159 (1820); see also 11 Op. Att’y Gen. 297, 299 (1865) (“To *define* is to give the limits or precise meaning of a word or thing in being; to make is to call into being. Congress has power to *define*, not to make, the laws of nations . . .”).

215. See Siegal, *supra* note 192, at 940–42.

216. U.S. CONST. art. I, § 8, cl. 3.

217. See Teachout, *supra* note 192, at 1321–22 (arguing that the “unambitious” provision was meant to allow Congress to prosecute violations of international law for which the United States would be held accountable and, therefore, Congress would not need to criminalize conduct the rest of the world did not see as violating the “Law of Nations”).

218. See Siegal, *supra* note 192, at 895 (“[F]or the first 100 years after the Constitution, in deciding the existence of customary international law, justices of the Supreme Court looked to the actual practice of states.”). There is, however, substantial doubt about the accuracy of such judicial investigations, and the effort is even more difficult today due to the proliferation of relevant languages, sources, and nations that serve to establish relevant customs. See Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1113 (1999) (arguing that the Supreme Court mistakenly took routine self-interested behavior for a CIL norm in the famous *Paquette Habana* case. 175 U.S. 677 (1900)).

219. See RECORDS OF THE FEDERAL CONVENTION, *supra* note 193, at 316.

termining whether something violates international law ultimately borders on a power to invent. This is especially true in an era when many loose claims are made on the basis of international law, few areas of human life lie outside the scope of some purported CIL norm, and some argue that CIL can emerge without overt state practice.<sup>220</sup> If courts do not police the “Law of Nations” requirement, Congress can, by citing some United Nations General Assembly resolutions and law review articles, give itself authority over anything. This would be inconsistent with the idea of limited and enumerated powers, and would tend to frustrate the purposes of judicial review. Thus while some slack must be allowed to exist between an objective judicial view of the law of nations and Congress’s definition, this says little about how much.

Perhaps a useful distinguishing principle would be the elements of an offense as opposed to the general type of the offense. For example, murder everywhere involves unjustified killing; premeditation may or may not be an element. Piracy against the “Law of Nations,” generally, is robbery on the high seas. Some particular elements of the offense may include *animus furandi*, use of force, or other factors defined by municipal law, but these are not essential to the form of the offense.<sup>221</sup> Obviously these can collapse into each other at a high enough level of abstraction, but line-drawing problems are the life of the law.

#### B. DRUG SMUGGLING NOT UNIVERSALLY COGNIZABLE

Because UJ is only available for a subset of international crimes, the question of whether drug smuggling has become modern piracy merges with the question of whether it falls under the “Offences against the Law of Nations” that Congress can punish under the Define and Punish Clause. These two issues will be discussed together here.<sup>222</sup> The major sources of international law are treaties and customary (unwritten) inter-

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220. See, e.g., Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 115, 149–50 (2005) (describing and supporting efforts to weaken the requirement for active state practice and have the principal inquiry be existence of *opinion juris*, whether or not it is manifest in deeds); cf. Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. 859, 913–14 (2006) (criticizing the move towards elevating “soft law” to the level of state practice).

221. WHEATON, *supra* note 120, § 124.

222. See *infra* Part IV for a specific focus on other possible sources of constitutional authority for the MDLEA aside from the “piracies” power.

national law.<sup>223</sup> When a treaty is in the picture, the terms of the treaty itself govern the scope of Congress's jurisdictional power.<sup>224</sup> The Offenses Clause is implicated when there is no treaty basis for the law, and so one must determine whether Congress's offense roughly corresponds to CIL.<sup>225</sup>

Drug trafficking is not recognized in CIL as a universally cognizable offense.<sup>226</sup> While there is no firm agreement on the precise set of crimes subject to UJ, there is a general consensus that they are egregious, violent human rights abuses.<sup>227</sup> Not a single UJ offense, or indeed widely recognized international crime, is a so-called victimless offense.<sup>228</sup> All U.S. courts that have considered the issue have held that narcotics traffic falls outside UJ.<sup>229</sup> The most respected lists of UJ offenses do not

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223. See Statute of the International Court of Justice art. 38, 59 Stat. 1055, 1060 (1945).

224. See *infra* Part IV.A. UJ laws were passed specifically to implement certain multilateral conventions. See BOLESŁAW A. BOCZEK, INTERNATIONAL LAW 82–85 (2005). These statutes, however, arguably go further than the treaties on which they are based. The conventions only purport to confer jurisdiction over nationals of signatory states. See, e.g., Rome Statute of the International Criminal Court art. 12, July 17, 1998, 2187 U.N.T.S. 91 [hereinafter Rome Statute]. While most countries have joined these treaties, the implementing statutes do not limit their application to nationals of signatory states. Cf. *id.* (showing that the United States is not a party to the treaty but still could be subject to the treaty's jurisdictional reach).

225. The "Law of Nations" is generally understood as being the eighteenth- and nineteenth-century term for CIL. See *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 237 n.2 ("[W]e have consistently used the term 'customary international law' as a synonym for the term the 'law of nations.'").

226. See ANTONIO CASSESE, INTERNATIONAL LAW 436 (2d ed. 2005) (observing that illicit traffic in narcotic drugs is not a crime in CIL); SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 412–13 (2006) (describing drug traffic as an area of law where there is substantial international cooperation). Many scholars suggest that the international crimes for which an individual may be held criminally responsible are congruent with those which fall under universal jurisdiction; certainly the major IL crimes are also universally cognizable, as the factors that contribute to the former status are the same that lead to the latter. See CASSESE, *supra*, at 436.

227. Kontorovich, *supra* note 10, at 204–07.

228. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987) (providing a list of UJ offenses); UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 178–79 (Stephen Macedo ed., 2004) (explaining that in order for a crime to qualify as a UJ offense it must be "contrary to a peremptory norm of international law" and "be so serious and on such a scale that they can justly be regarded as an attack on the international legal order").

229. See *United States v. Perlaza*, 439 F.3d 1149, 1162–63 (9th Cir. 2006) (rejecting UJ as a jurisdictional basis for the MDLEA); *United States v. Wright-Barker*, 784 F.2d 161, 168 n.5 (3d Cir. 1986), *superseded by statute*, 46 U.S.C. app. § 1903(d) (2000) (current version at 46 U.S.C.A. § 70505 (2007)

mention drugs at all.<sup>230</sup> There appears to be no state practice establishing UJ over drug trafficking (aside from the MLDEA, of course).<sup>231</sup>

The most comprehensive statement on the law of the sea was generated by the Third United Nations Conference on the Law of Sea.<sup>232</sup> The United States has not ratified the treaty, but regards it as expressing the customary international law on the subject.<sup>233</sup> UNCLOS expressly addresses drug smuggling and piracy in neighboring provisions.<sup>234</sup> For piracy (and the

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(“[I]nternational agreements have yet to recognize drug smuggling as a threat to a nation’s ‘security as a state or the operation of its governmental functions,’ warranting protective jurisdiction or as a heinous crime subject to universal jurisdiction.” (citation omitted)); *United States v. James-Robinson*, 515 F. Supp. 1340, 1344 n.6 (S.D. Fla. 1981) (“Drug trafficking is not recognized as being subject to universal jurisdiction.”). *But see* *United States v. Marino-Garcia*, 679 F.2d 1373, 1382 n.16 (11th Cir. 1982) (finding a “growing consensus” that drug trafficking should be a UJ offense and suggesting that “[i]t may well be that the time has arrived” that Congress “should” pass UJ legislation to punish “all foreign vessels on the high seas that are engaged in drug trafficking”). The court’s dictum in *Marino-Garcia* is particularly odd in that it suggests Congress can substantially punish anticipated IL developments and act before an international consensus has emerged. Even the Eleventh Circuit has avoided repeating this view.

230. *See* Rome Statute, *supra* note 224, art. 5(1) (listing genocide, crimes against humanity, war crimes, and crimes of aggression as crimes within jurisdiction of the court); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987); THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 29 (Stephen Macedo ed., 2001).

231. *See, e.g.*, Erik Franckx, *Pacta Tertii and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea*, 8 TUL. J. INT’L & COMP. L. 49, 68 (2000) (“In 1992, Italy’s highest court rejected the idea that a customary rule of international law had emerged which allowed high seas intervention with respect to foreign vessels suspected of drug trafficking.”); *see also* Adelheid Puttler, *Extraterritorial Application of Criminal Law: Jurisdiction to Prosecute Drug Traffic Conducted by Aliens Abroad*, in EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE, 103, 115 (Karl E. Meessen ed., 1996) (“Universal jurisdiction to prosecute offenses concerning ‘soft’ drugs does not exist in customary international law.”).

232. *See* ARND BERNAERTS, 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 7–9 (1988) (providing an overview of the Third United Nations Conference on the Law of the Sea).

233. Statement on United States Ocean Policy, 1 PUB. PAPERS 378 (Mar. 10, 1983) (“[T]he convention . . . contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice . . .”).

234. *Compare* UNCLOS, *supra* note 71, arts. 100–101, 105 (dealing with piracy), *with* UNCLOS, *supra* note 71, art. 108 (dealing with illicit drug trafficking).

slave trade), it explicitly provides universal jurisdiction.<sup>235</sup> Not so for drug trafficking, which it makes clear is not an *international law* crime.<sup>236</sup>

The common denominator of UJ offenses is their extraordinary heinousness. An offense must be regarded as so inhumane, so shocking to the conscience, that it makes all jurisdictional limitations moot.<sup>237</sup> Indeed, the Second Circuit has recently held that *terrorism* has not attained the status of a universal jurisdiction offense, and thus U.S. courts cannot put it on the same jurisdictional footing as piracy.<sup>238</sup>

The Senate Report on the MDLEA described drug smuggling as “universally recognized criminal behavior.”<sup>239</sup> Yet there is a vast difference between conduct that all nations criminalize and international crimes.<sup>240</sup> Uniform condemnation and criminalization does not make something an *international* crime.<sup>241</sup> Murder and rape, and indeed, most *malum in se* offenses, are also universally condemned, and all fall outside of international law.<sup>242</sup> Presumably Congress cannot legislate the punishment of purely foreign rapes despite it being “universally recognized criminal behavior.”<sup>243</sup> Indeed, the Senate Report makes no findings that would be relevant to the offense’s being universally cognizable, such as the offense being extremely heinous.<sup>244</sup> Indeed, different nations’ drug laws and attitudes vary far more than those for murder.<sup>245</sup> There simply is no state practice, and

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235. See *id.* arts. 100–101, 105.

236. See *id.* art. 108.

237. See *United States v. James-Robinson*, 515 F. Supp. 1340, 1344 n.6 (S.D. Fla. 1981); see also Kontorovich, *supra* note 10, at 204–05, 205 nn.125–27.

238. See *United States v. Yousef*, 327 F.3d 56, 107–08 (2d Cir. 2003).

239. See S. REP. NO. 99-530, at 16 (1986), as reprinted in 1986 U.S.C.C.A.N. 5986, 6001.

240. *United States v. Medjuck*, 937 F. Supp. 1368, 1394–95 (N.D. Cal. 1996) (recognizing that drug trafficking may be universally condemned and criminalized but not a UJ offense like piracy).

241. See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 152 (2001) (distinguishing “universality of condemnation” from “universal reach of national jurisdiction”).

242. See Kontorovich, *supra* note 10, at 206–07.

243. *Id.*

244. See S. REP. NO. 99-530, at 16.

245. See *Medjuck*, 937 F. Supp. at 1394–95 (recognizing that there is no jurisdiction in which drug trafficking is legal). *But cf.* Associated Press, *U.S. Reacts to Mexico’s Drug Legalization*, FOXNEWS.COM, Apr. 30, 2006, <http://www.foxnews.com/story/0,2933,193702,00.html> (demonstrating that national

a palpable lack of support in relevant legal sources, for treating drug trafficking as a universally cognizable crime.

### C. OTHER INTERNATIONAL LAW BASES FOR JURISDICTION

The understanding of the Define and Punish Clause developed above suggests a narrow and a broad approach to piracies—the former locked into the 1789 definition of piracy, and the latter understanding the term to mean whatever offenses happen to be treated as universally cognizable. The narrow view would mean all UJ applications of the MDLEA are unconstitutional. The broader view of the clause obviously demands a more detailed inquiry into present-day international law. As shown above, drug trafficking is not universally cognizable. However, the inquiry under the broad view might not end there.

Today's jurisdictional norms are more relaxed than those of the early Republic. Not only are there more UJ offenses, but other flexible jurisdictional categories have emerged that allow broad extraterritorial, if not universal, jurisdiction.<sup>246</sup> Thus in the most open-ended (and hardest to justify) version of the dynamic view, if drug trafficking has become something the United States could exercise jurisdiction over without a nexus under international law, whether because of UJ or other international jurisdictional rules unknown to the Framers, it can be treated as a piracy for constitutional purposes. To explore the implications of this approach for the MDLEA, this subpart considers two possible non-UJ international law justifications for MDLEA: statelessness and the protective principle of jurisdiction.

#### 1. Statelessness

Recall that the Marshall Court, in a series of piracy cases, rejected UJ over *foreign* vessels in cases of murder and even classic piracy.<sup>247</sup> However, in other cases decided at the same time, the Court held that Congress can punish murder, a non-UJ felony, when committed on *stateless* vessels, even absent a

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attitudes toward drug manufacturing and consumption vary widely).

246. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. a, Reporters' Notes 1, 3 (1987) (expanding universal jurisdiction to situations where it is reasonable); *id.* § 402(3) (giving protective jurisdiction and passive personality jurisdiction to states over persons outside its jurisdiction).

247. See *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 641–42 (1818).

U.S. nexus.<sup>248</sup> The vessels in these cases were stateless by virtue of “turning pirate.”<sup>249</sup> Thus these cases could be understood as accommodating Congress’s desire to punish pirates, something potentially endangered by the Court’s holding in *Palmer*.<sup>250</sup> The international law of the day did treat pirate ships as having lost their national character or protection.<sup>251</sup>

These decisions may stand for nothing more than a sort of supplemental universal jurisdiction, allowing UJ over felonies when they are part of the same “case or controversy” or “common nucleus of operative fact” as a piracy. But they could stand for a broader proposition, that felonies can be punished aboard stateless vessels, or even more broadly, that the Constitution allows UJ over felonies to be as broad as allowable under international law. So if international law allows UJ over stateless vessels as part of the law of the high seas, the Define and Punish Clause incorporates this power.

Several different provisions in the MDLEA allow for UJ. One of them allows for jurisdiction over stateless vessels,<sup>252</sup> and UJ over stateless vessels is consistent with today’s CIL.<sup>253</sup> However, the MDLEA’s definition of statelessness goes far beyond what is recognized by international custom or convention.<sup>254</sup> The statute defines a “vessel without nationality” as one whose claim of registry is denied by their government, or that does not claim a nationality, for example, by not flying a flag.<sup>255</sup> The MDLEA also includes cases in which the “nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.”<sup>256</sup> In other words, a properly registered, non-piratical vessel can be treated as stateless if the flag state acquiesces, or simply does not reply. Under international law, a

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248. See *United States v. Holmes*, 18 U.S. (5 Wheat.) 412, 417–18 (1820); *United States v. Klinton*, 18 U.S. (5 Wheat.) 144, 150 (1820).

249. See *Holmes*, 18 U.S. (5 Wheat.) at 417.

250. See *Kontorovich*, *supra* note 17, at 188–92.

251. Though piracy is still universally cognizable, it no longer results in statelessness. See UNCLOS, *supra* note 71, art. 104 (“A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft.”).

252. 46 U.S.C.A. § 70502(c)(1)(A) (2007) (extending jurisdiction to “vessels without nationality”).

253. See *United States v. Moreno-Morillo*, 334 F.3d 819, 824–25 (9th Cir. 2003).

254. 46 U.S.C.A. § 70502(c)(2)(A)–(B).

255. *Id.*; *United States v. Tinoco*, 304 F.3d 1088, 1116 (11th Cir. 2002) (describing the vessel on which defendants were arrested as flying no flag and bearing no registry or identifying markings).

256. 46 U.S.C.A. § 70502(c)(2).

vessel without nationality is one that is not registered by any state, or whose registration involves some subterfuge, such as flying multiple flags, or flags of state with which the vessel has no connection.<sup>257</sup> The MDLEA's final "statelessness" provision sweeps further than this to include vessels that are properly authorized to fly a nation's flag.<sup>258</sup> This goes beyond what international law recognizes as statelessness.<sup>259</sup> Indeed, it is not a statelessness rule. It is a rule of flag state consent or waiver.

## 2. Protective Jurisdiction

Several appeals courts have held that the MDLEA can be justified under the "protective principle" of international jurisdiction.<sup>260</sup> The protective principle is one of limited and uncertain scope. The courts have given little reason for treating MDLEA offenses as within protective jurisdiction apart from the fact that the statutes preamble sounds vaguely like the test for protective jurisdiction.<sup>261</sup> But no treaty, law, or state practice supports such broad jurisdiction over drug offenses, and the cases make little effort to show otherwise.

The principle allows a state to punish extraterritorially "a limited class of offenses . . . directed against the security of the state or other offenses threatening the integrity of governmental functions."<sup>262</sup> The legislative findings of the MDLEA con-

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257. See UNCLOS, *supra* note 71, arts. 91–92; Convention on the High Seas arts. 5–6, Apr. 29, 1958, 13 U.S.T. 2312, 2315.

258. 46 U.S.C.A. § 70502(c)(2).

259. See *United States v. Moreno-Morillo*, 334 F.3d 819, 826 (9th Cir. 2003).

260. See, e.g., *United States v. Gonzalez*, 311 F.3d 440, 446 (1st Cir. 2002) (holding that the protective principle authorized Congress to enact the MDLEA); *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999) ("[A]pplication of the MDLEA to the defendants is consistent with the protective principle of international law because Congress has determined that all drug trafficking aboard vessels threatens our nation's security."); *United States v. Peterson*, 812 F.2d 486, 494 (9th Cir. 1987) ("Drug trafficking presents the sort of threat to our nation's ability to function that merits application of the protective principle of jurisdiction."), *overruled by* *United States v. Perlaza*, 439 F.3d 1149, 1162 (9th Cir. 2006) (dismissing *Peterson* as "dicta" and finding the protective principle insufficient to establish jurisdiction over MDLEA defendants). *But see* *United States v. Robinson*, 843 F.2d 1, 3 (1st Cir. 1988) (describing as "forceful" the argument that the protective principle only applies to conduct that threatens the United States specifically, and not the general drug trafficking of the MDLEA).

261. See, e.g., *Cardales*, 168 F.3d at 553 (relying on a theory of territorial jurisdiction rather than protective jurisdiction to uphold its conviction of the defendant under the MDLEA).

262. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. f

clude that trafficking “presents a specific threat to the security and societal well-being of the United States.”<sup>263</sup> Unlike more traditional forms of jurisdiction, no actual harm to these interests need be shown. Even more than UJ, the bounds of this jurisdictional theory are unclear.<sup>264</sup> Commentators stress that the category of protective jurisdiction offenses is quite small, and none suggest drug smuggling as one of them.<sup>265</sup>

Indeed, the cases that see the MDLEA as an exercise of protective jurisdiction fundamentally misconceive the principle. Protective jurisdiction applies to conduct that *in itself* could potentially endanger the security of the United States. As the Restatement puts it, the conduct must be “*directed* against the security of *the* [forum] state . . . .”<sup>266</sup> Thus it would have to be shown that the particular conduct endangered the United States. This could obviously not be shown, because by stipulation, there is no reason to believe the drugs were destined for U.S. markets. Most courts, however, think the protective principle means jurisdiction over conduct of *the general kind* that could endanger the United States.<sup>267</sup> If some drug trafficking endangers the United States, the courts seem to think all drug trafficking can be reached.<sup>268</sup>

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(1987).

263. 46 U.S.C.A. § 70501.

264. Cf. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. d (1987) (discussing the controversy surrounding the question of whether “a state may exercise jurisdiction based on effects in the state, when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable under § 403”).

265. See, e.g., Edmund S. McAlister, *The Hydraulic Pressure of Vengeance: United States v. Alvarez-Machain and the Case for a Justifiable Abduction*, 43 DEPAUL L. REV. 449, 458–59 (1994) (“Most nations, for example, view counterfeiting currency as falling within the aegis of protective jurisdiction. Other crimes that logically have an adverse impact on a state’s national interest include espionage, falsification of official documents, and perjury before consular officials.”).

266. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(3) (emphasis added).

267. See, e.g., *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999) (describing how Congress has concluded that all drug trafficking aboard vessels threatens the United States’ security) (citing *United States v. Martinez-Hildago*, 993 F.2d 1052, 1056 (3d Cir. 1993)); *United States v. Mosquera*, 192 F. Supp. 2d 1334, 1339–40 (M.D. Fla. 2002) (“The Eleventh Circuit has found that there does not need to be proof of a nexus between a stateless vessel and the country seeking jurisdiction.” (citing *United States v. Marino-Garcia*, 679 F.2d 1373, 1383 (11th Cir. 1982))).

268. See *United States v. Gonzalez*, 776 F.2d 931, 939 (11th Cir. 1985). (“The protective principle does not require that there be proof of an actual or intended effect inside the United States. The conduct may be forbidden if it

Moreover, “the security of the state” refers to the safety and integrity of the state apparatus itself (its “government functions” or “state interests”), not its overall physical and moral well-being.<sup>269</sup> The Restatement’s examples demonstrate this: “espionage, counterfeiting of the state’s seal or currency, falsification of official documents, as well as perjury before consular officials, and conspiracy to violate the immigration or customs laws.”<sup>270</sup> All these crimes are aimed at or particularly involve the government apparatus of the forum state. Needless to say, the protective principle would not authorize the United States to punish a Ghanaian for violating Spanish immigration laws or bribing Spanish officials.

There is no support for the principle reaching moral or victimless crimes, and indeed, only one other Western nation casts its jurisdiction over drug crimes so broadly.<sup>271</sup> Treating drug crimes within protective jurisdiction would eliminate any difference between protective jurisdiction and universal jurisdiction. Indeed, protective jurisdiction would sweep more broadly than even UJ by allowing states to punish relatively minor crimes.

#### D. “HIGH SEAS” VS. FOREIGN WATERS

The MDLEA, in some of its applications and provisions, may be an *ultra vires* exercise of the Piracies and Felonies power for an entirely different reason—it punishes drug crimes even beyond the “high Seas.”<sup>272</sup> Moreover, the Court has repeatedly warned that jurisdiction over foreign vessels in foreign waters would exceed Congress’s legislative competence.

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has a potentially adverse effect and is generally recognized as a crime by nations that have reasonably developed legal systems.”). The court cited *Restatement (Second) of Foreign Relations Law* as support for this proposition, though the Restatement does not explicitly say anything of the sort. *See id.* at 939 n.11. *Restatement (Third) of Foreign Relations Law* seems even clearer in its insistence that the conduct actually have effects in the forum state. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. f (“The protective principle may be seen as a special application of the effects principle . . .”).

269. *See* Puttler, *supra* note 231, at 109–10.

270. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. f.

271. *Cf.* Puttler, *supra* note 231, at 103–04 (describing German cases where prosecutors sought jurisdiction to prosecute foreign national trading in cannabis abroad).

272. U.S. CONST. art. I, § 8, cl. 10.

### 1. The Meaning of “High Seas”

The Define and Punish Clause does not give Congress a general power over extraterritorial crimes.<sup>273</sup> Rather, felonies can only be punished “on the high Seas.”<sup>274</sup> Unlike the difference between piracy and felony, this is an express textual limitation on the Define and Punish power. Without such a limitation, Congress would have a general police power. The parallel provision, “Offences against the Law of Nations,” lacks such a limitation, but the class of offenses is much narrower than felonies.<sup>275</sup>

The MDLEA, by its terms, applies to non-U.S. vessels neither on the high seas nor in U.S. territorial waters—namely, to “vessel[s] in the territorial waters of a foreign nation . . . .”<sup>276</sup> The unconstitutionality of section 70502(c)(1)(E) is not a major impediment to the MDLEA’s policy, as apparently few if any cases are brought under this section.<sup>277</sup> But many applications of the MDLEA’s other sections could potentially be void if “high Seas” in the Define and Punish Clause is read to mean what that term means in today’s international law. Recall that because the Define and Punish Clause uses many international law terms of art, it raises the question of whether their definitions are locked into the law of 1789, or track changes in the law of nations over time. Without updating, only piracy could

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273. *Id.* (“The Congress shall have the Power . . . [t]o define and punish Piracies and Felonies committed on the high Seas . . .”).

274. *See id.*; *see also* United Nations Convention on the High Seas art. 1, Apr. 29, 1958, 450 U.N.T.S. 82 (“The term ‘high seas’ means all parts of the sea that are not included in the territorial sea or in the internal waters of a State.”).

275. *See* U.S. CONST. art I, § 8, cl. 10.

276. 46 U.S.C.A. § 70502(c)(1)(E) (2007). While such jurisdiction can only be exercised with the foreign nation’s consent, this does not change the fact that U.S. drug law is made to apply beyond the “high Seas” limit of Clause 10. *See* U.S. CONST. art. I, § 8, cl. 10. Clause 10 simply does not say “the high seas, or foreign territory when the sovereign does not mind.” *Cf. id.*

277. Only three cases in the Westlaw database obviously implicate this section of the MDLEA. *See* United States v. McPhee, 336 F.3d 1269, 1272–73 (11th Cir. 2003) (rejecting the defendant’s claim that his vessel was seized in Bahamian waters without the Bahamas’ consent); *see also* United States v. Aguilar, 286 F. App’x 716, 719 n.3 (11th Cir. 2008) (rejecting the defendant’s argument that the U.S. needed Honduras’s consent to subject the defendant’s vessel to U.S. jurisdiction in Honduran waters). The court held that the U.S. government did not prove its assertion that consent had been given. *Id.* at 723; *see also* United States v. Greer, 258 F.3d 158, 174–75 (2d Cir. 2000) (holding that consent given even after prosecution is initiated by the United States may satisfy jurisdiction under § 1903(c)(1)(E)).

be punished under UJ, and it would take little analysis to show that drug trafficking is not piracy. However, allowing updating could also cast doubt on much of the MDLEA.

In today's customary international law, as articulated in the United Nations Convention on the Law of the Sea, the high seas can begin up to two hundred miles out from shore.<sup>278</sup> A great number of MDLEA cases—like the one in the example at the beginning of this Article—involve conduct in this two hundred mile area that is neither the territorial waters of the foreign state, nor the high seas. This Article takes no position on the merits of updating. However, whether one decides to update or not, the decision should be consistent at least within the Define and Punish Clause: if UJ is not locked into its 1789 parameters of including only piracy, it is hard to see why the definition of the high seas should not change with the times as well.

It would seem there is at least a strong policy case for updating. In 1789, territorial waters ended three miles from shore.<sup>279</sup> In territorial waters, Congress has plenary power over foreign vessels though the Admiralty Clause.<sup>280</sup> It would be odd to not allow Congress to expand its territorial admiralty power to keep up with the maximum allowed by international law. No such proposition has ever been suggested. Indeed, the MDLEA assumes total congressional control over territorial waters as defined by today's international law.<sup>281</sup>

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278. United Nations Convention on the High Seas, *supra* note 274, art. 57. Under the UNCLOS regime, waters are no longer territorial or "high." *See id.* art. 86. Rather, the new regime recognizes a broad intermediate area, the "exclusive economic zone," where the coastal state has many but not all sovereign rights. *See id.* arts. 55–57. This area is explicitly no longer treated as part of the high seas regime. *See id.*

279. *See* 2 F. GALIANI, DE' DOVERI DE' PRINCIPI NEUTRALI VERSO I PRINCIP GUERREGGIANTI, E DI QUESTI I VERSO NEUTRALI 432 (1782); *see also* PHILIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 5–6 (1927).

280. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 614 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833) (describing how the Admiralty Clause extends jurisdiction to all "acts[] or injuries done upon the coast of the sea[] or, at farthest, acts and injuries done with the ebb and flow of the tide").

281. *See* 46 U.S.C.A. § 70502(c)(D) & (c)(F) (2007) (providing for jurisdiction over vessels in the customs waters and the contiguous zones of the United States).

## 2. Precedents and the Admiralty Power

No case has ever decided the precise scope of Congress's power over foreign vessels in foreign waters largely because, prior to the MDLEA, the question rarely arose. Indeed, the leading case, *United States v. Flores*, is eighty years old.<sup>282</sup> There, the Court endorsed the view that the Define and Punish Clause did not reach into foreign waters.<sup>283</sup> *Flores* concerned a murder among the American crew of a U.S. vessel while in Belgian waters.<sup>284</sup> The defendant argued that the plain text of the Define and Punish Clause kept it from reaching conduct in foreign waters.<sup>285</sup> The Court accepted this point as self-evident.<sup>286</sup> However, the Court thought the prosecution could be justified under Congress's power over the admiralty or maritime jurisdiction.<sup>287</sup> An examination of the Framers' intent and drafting history led the Court to conclude that the Constitution sought to give the federal government *all* powers within the area of admiralty.<sup>288</sup> The Define and Punish power was thus a supplement rather than a limitation to broader admiralty power.<sup>289</sup> The admiralty power could extend in certain circumstances even beyond the high seas, and the Define and Punish Clause should not be read to preclude this for felonies or piracies.<sup>290</sup>

The Court's examination of admiralty law lead it to conclude that the law allowed regulation "of vessels of the United States False . . . while in foreign territorial waters."<sup>291</sup> Admiralty law follows the flag.<sup>292</sup> Indeed, it seems crucial to the Court's opinion that the case involved a U.S. ship, as the purpose of admiralty is to allow a nation to govern conduct on its vessels, a matter in which it has a great interest regardless of where they

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282. 289 U.S. 137, 137 (1933).

283. *See id.* at 150–56.

284. *Id.* at 144–45.

285. *Id.* at 146–47.

286. *See id.*

287. *See id.* at 147–48. The Court inferred from the grant of judicial authority over maritime and admiralty cases a correlate power of Congress to create the substantive body of this law. *See id.* (citing U.S. CONST. art. III, § 2, cl. 3).

288. *See id.* at 149–50.

289. *See id.*

290. *See id.*

291. *Id.* at 149–50 (emphasis added).

292. *Cf. id.* at 159 ("It is the duty of the courts of the United States to apply to offenses committed by its citizens on vessels flying its flag, its own statutes, interpreted in the light of recognized principles of international law.").

are.<sup>293</sup> Thus, *Flores* suggests Congress's admiralty power could not encompass foreign vessels in foreign waters.

This conclusion is strengthened by the only other discussion of the issue by the Supreme Court, *United States v. Wiltberger*.<sup>294</sup> Oddly, though *Flores* attempted to engage the original understanding of the Constitution and the 1789 content of admiralty jurisdiction, it makes no mention of *Wiltberger*, even though the opinion was written by Justice Marshall, who had a much clearer view of the original meanings and the nuances of admiralty law.<sup>295</sup> *Wiltberger* involved a killing among an American crew of a vessel on a river thirty-five miles inside China.<sup>296</sup> In the circuit court trial, the defendant's counsel argued that applying U.S. law on China's waterways would exceed Congress's Felonies power.<sup>297</sup> The U.S. Attorney conceded the Define and Punish Clause issue.<sup>298</sup> Instead, he located congressional authority in the admiralty and maritime power, anticipating *Flores*.<sup>299</sup> But he did not argue that admiralty extended beyond the high seas into foreign waters.<sup>300</sup> Rather, under standard, internationally accepted admiralty principles, it applied to a U.S.-flagged vessel wherever it went.<sup>301</sup> It would be

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293. *Cf. id.* at 149–50 (“[W]e come to the question principally argued, whether the jurisdiction over admiralty and maritime cases . . . extends to the punishment of crimes committed on vessels of the United States while in foreign waters.”); *id.* at 157 (noting that the case of a foreign vessel would be a “different question”).

294. 18 U.S. (5 Wheat.) 76, 93–94 (1820).

295. *See also* *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820). *See generally* *United States v. Flores*, 289 U.S. 137 (1933).

296. *Wiltberger*, 18 U.S. (5 Wheat.) at 77.

297. *United States v. Wiltberger*, 28 F. Cas. 727, 728 (E.D. Pa. 1819) (No. 16,738), *certified question answered by Wiltberger*, 18 U.S. (5 Wheat.) 76.

298. *See id.*

299. *See id.* The parties and justices involved in the *Wiltberger* cases seemed to agree that the Constitution locks in some historic version of admiralty jurisdiction, but given the slight differences in their understanding of this jurisdiction, it is unclear what is locked in. The U.S. Attorney argued below that the Constitution referred to the general principles of admiralty “as generally understood and exercised amongst the nations of Europe; and not to the exercise of it at the period when the [C]onstitution was framed.” *See id.* at 728. At the Supreme Court, Justice Marshall went on to suggest that admiralty jurisdiction referred to the jurisdiction of the British Admiralty, but only as it would have been implemented in America. *See Wiltberger*, 18 U.S. at 106 n.w. For example, the power would be unburdened by certain statutes limiting jurisdiction over inland waterways, which Marshall said were never intended to be applied to the Colonies. *See id.* at 113.

300. *See Wiltberger*, 28 F. Cas. at 728–29.

301. *See id.* (describing how the Constitution refers to the jurisdiction un-

“incredible” for such jurisdiction to not be authorized by the Constitution.<sup>302</sup> Justice Washington, riding circuit, thought the question difficult enough to certify to the Supreme Court, which decided it the following year.<sup>303</sup>

A unanimous Court ruled against jurisdiction, but on the narrowest grounds.<sup>304</sup> Through an elaborate reading of the entirety of the Crimes Act of 1789, Justice Marshall concluded that Congress’s punishment of manslaughter “upon the high seas” was intended to have a more circumscribed scope than the maximum outer limits of the admiralty jurisdiction.<sup>305</sup> Thus, Marshall did not reach the constitutional question, which had occupied almost all the argument in the court below. The statutory construction is in his own admission somewhat strained, and seems clearly designed to avoid a real constitutional difficulty.<sup>306</sup>

Naturally this did not stop Justice Marshall from offering an extended dictum on the constitutional issue. In a lengthy footnote attached to the certificate in the case, Marshall suggested that the constitutional limits of admiralty extended beyond what would strictly be called the high seas.<sup>307</sup> But his discussion, based on British admiralty practice, strongly implied that foreign vessels on foreign waters would be excluded.<sup>308</sup> Thus, Marshall at most would be in accord with the view of the U.S. Attorney, who saw the constitutionality of U.S. jurisdiction as depending entirely on the vessel being American.<sup>309</sup>

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derstood by the nations of Europe, which does not include subjecting a vessel to the authority of foreign governments, regardless of its location).

302. *Id.* (“There is no civilized nation, with which we are acquainted, where jurisdiction over offences committed on board of its own vessels, in foreign ports, would not be exercised[.]”).

303. *See id.* at 731; *Wiltberger*, 18 U.S. (5 Wheat.) at 76.

304. *Wiltberger*, 18 U.S. (5 Wheat.) at 105.

305. *Id.* at 94–105.

306. *See id.* at 105.

307. *Id.* at 106 n.w. The principal difference is that constitutional admiralty jurisdiction reaches inland rivers, bays and coastal areas beyond the open seas. *See id.* at 115. The jurisdiction given by the Constitution was that of the “admiralty jurisdiction of England, from which ours was derived,” though this seems to have referred not to the actual jurisdiction of the Court of Admiralty in 1789, but to some previous, perhaps purer or teleological form. *See id.* at 106–09. Yet the note clearly implies that this jurisdiction, like that of Britain, extended only to waters in U.S. territory. *Id.* at 113–15.

308. *Cf. id.* at 113–15.

309. *See id.* at 82–84. *But see* *United States v. Gourlay*, 25 F. Cas. 1382, 1397 (S.D.N.Y. 1823) (No. 15,241) (showing that as late as 1823, a district

The Court has long held that the Define and Punish Clause has no application in foreign waters.<sup>310</sup> Thus in these areas, whatever their boundaries are today, the MDLEA must depend on the admiralty power. But there is no support in history, precedent or current practice for the view that foreign vessels within foreign waters are within the jurisdiction of another state's admiralty. Indeed, two centuries of Supreme Court dicta indicate otherwise.<sup>311</sup> The scope of U.S. admiralty jurisdiction is generally defined by that of the British Admiralty before the Revolution, and that did not extend to foreign vessels in foreign waters.<sup>312</sup> Thus, at least some applications of the MDLEA exceed Congress's powers regardless of what one thinks of the piracies vs. felonies issue. But the fact that Congress, in exercising a power over the high seas, included foreign waters might itself suggest that the statute was drafted without much thought about Article I limitations.

#### IV. OTHER SOURCES OF ARTICLE I POWER

The MDLEA has been understood as an exercise of the Define and Punish power, which this Article argues it exceeds. However, a statute is constitutional if there is *any* Article I basis for it, even if it is not the authority that Congress or the courts thought was being exercised. This Part considers possible alternative sources for Congress's authority.<sup>313</sup> Here the Article considers at some length the Treaty Power and the Foreign Commerce Clause.<sup>314</sup> While the latter is easily dismissed,

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court found it "not clear" whether Congress's legislative authority extends to a murder on a U.S. vessel in Spanish waters).

310. See *United States v. Palmer*, 16 U.S. 610, 630–635 (1818).

311. See *supra* notes 143–169 and accompanying text.

312. See *Molony v. Dows*, 8 Abb. Pr. 316, 329–30 (N.Y.C.P. 1859) (stating that English courts have jurisdiction over actions between foreigners for injuries to person or property that occurred within British dominions, but "no case will be found in the whole course of English jurisprudence in which an action for an injury to the person, inflicted by one foreigner upon another in a foreign country, was ever held to be maintainable in an English court"); *The Jerusalem*, 13 F. Cas. 559, 561–563 (D. Mass. 1814) (No. 7293); ALFRED CONKLING, *THE ADMIRALTY JURISDICTION, LAW AND PRACTICE OF THE COURTS OF THE UNITED STATES* 33–37 (1848); cf. Eugene Kontorovich, *Originalism and the Difficulties of History in Foreign Affairs*, 53 *ST. LOUIS L.J.* 39, 47–51 (2008) (describing civil UJ of admiralty in the early republic).

313. The inadequacy of two other potential powers was discussed earlier in this Article—the power to punish "offenses against the law of nations" in Part III.B, and the "admiralty and maritime" power in Part III.D, as part of the "high seas" discussion.

314. See *Bradley*, *supra* note 16, at 336 (suggesting that the Foreign Com-

there may be a colorable treaty clause argument, but it would have to overcome numerous serious difficulties and uncertainties, especially since the relevant treaty was ratified years after the MDLEA.

#### A. TREATY POWER

Under the doctrine of *Missouri v. Holland*, Congress can act outside of its otherwise enumerated powers when implementing a treaty.<sup>315</sup> However, the extent to which a treaty can permit congressional action that would otherwise be unconstitutional remains unclear.<sup>316</sup> Under current doctrine, legislation

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merce Clause and Treaty Power would likely allow Congress to regulate “[e]ven if there are some instances in which Article I of the Constitution would not [otherwise] supply Congress with authority to enact a statute exercising universal jurisdiction”).

315. 252 U.S. 416, 433 (1920). *Missouri* was perhaps a weak case for establishing this principle. It involved a migratory bird conservation treaty. *Id.* at 430–31. Justice Holmes assumed for the sake of argument, as lower courts had held, that the hunting of such birds could not be reached through Congress’s enumerated powers. *Id.* at 431–32. But he did not demonstrate this crucial proposition, and it is not obvious even under the narrower commerce doctrine of the time. Moreover, if the Foreign Commerce Power is broader than the interstate power, it could have itself provided an Article I basis for the statute.

Commerce Clause arguments played little role in the lower court litigation. Instead, the lower courts relied on an earlier Supreme Court decision, holding that state animal export regulations do not violate the Dormant Commerce Clause, as meaning that wildlife falls wholly outside the scope of the Commerce Clause. *See, e.g.,* *United States v. Samples*, 258 F. 479, 481 (W.D. Mo. 1919), *aff’d sub. nom. Missouri v. Holland*, 252 U.S. 416 (1920) (citing *United States v. Shauver*, 214 F. 154, 157–58 (E.D. Ark. 1914)). Of course the scope of permissible state action under the Dormant Commerce Clause is not coterminous with permissible congressional regulation under the Commerce Clause. Congress can properly regulate many things which, in the absence of such legislation, states can affect through their policies.

316. The debate goes back to the founding era. *Compare* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) (arguing that the treaty power should not be construed so as to negate federalism), Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1 (2006) (arguing that the Treaty Clause simply authorizes an additional method for carrying out powers already granted, and thus could not support treaties that go beyond existing federal powers), and Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005) (arguing that *Missouri v. Holland* was wrongly decided), with David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000) (arguing that a broad understanding of the treaty power is consistent with constitutional history), and David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1975–88 (2003) (arguing that judicially enforced limitations on the treaty power are unnecessary because the required two-thirds majority Senate confirmation protects federalism).

pursuant to treaties can trump structural constitutional constraints such as federalism, but not express limitations on congressional power, such as the individual rights guarantees in the Bill of Rights.<sup>317</sup> The MDLEA does not raise any questions of federalism or separation of powers, or violate express individual rights.<sup>318</sup> Thus under *Missouri* it would be a valid exercise of Congress's authority if "necessary and proper" to some treaty.<sup>319</sup>

The question, however, is whether there is such a treaty. The legislative history of the act does not mention any treaty. Similarly, courts do not refer to a treaty as a source for Congress's Article I authority, though they have mentioned treaties to show that the MDLEA complies with international law<sup>320</sup> and fairness.<sup>321</sup> The courts and Congress were right to not invoke the Treaty Power. As discussed above, the Law of the Sea Convention does not authorize UJ over drug trafficking, and seems to prohibit it by *expressio unius*.<sup>322</sup> There is another treaty implicated by the MDLEA—the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which builds on UNCLOS provisions urging cooperation against drug-trafficking.<sup>323</sup> However, a close examination

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317. See *Boos v. Barry*, 485 U.S. 312, 324–29 (1988); *Reid v. Covert*, 354 U.S. 1, 16–19 (1957); Bradley, *supra* note 316, at 424–26; Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1194 (2000).

318. Some have challenged the statute's UJ provisions on due process grounds. See *supra* Part I.C.1. Those challenges, which courts have almost entirely rejected, fall outside the scope of this argument. For purposes of argument, the Article here assumes the MDLEA does not violate the Fifth Amendment, and thus could fairly be an exercise of treaty power.

319. See Bradley, *supra* note 16, at 336–41.

320. *United States v. Bravo*, 489 F.3d 1, 7–8 (1st Cir. 2007).

321. *United States v. Suerte*, 291 F.3d 366, 377 (5th Cir. 2002).

322. See Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT'L L.J. 131, 179, 203–04 (2005) (noting that, unlike UNCLOS, the U.N. Narcotics Convention does not explicitly provide for universal jurisdiction); Sandra L. Hodgkinson et al., *Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap*, 22 AM. U. INT'L L. REV. 583, 650 (2007) ("Although UNCLOS provides for universal jurisdiction on the high seas for certain crimes, counter-narcotics operations are not among the general exceptions that confer jurisdiction.").

323. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *adopted* Dec. 19, 1988, S. TREATY DOC. NO. 101-4 (1989), 1582 U.N.T.S. 165 [hereinafter U.N. Narcotics Convention]. The Convention has more than 170 state parties. Juliana Gonzalez-Pinto, *Interdic-*

of the Convention shows it cannot easily be taken as a basis for the MDLEA.

The provisions of the Convention that specifically contemplate MDLEA-type situations do not create universal jurisdiction.<sup>324</sup> The Convention's jurisdictional provision first requires parties to take jurisdiction of offenses committed within their respective territorial or flag jurisdiction.<sup>325</sup> It goes on to encourage but not require states to enter into agreements with each other authorizing interdiction of drug trafficking by each other's vessels<sup>326</sup>—exactly the kind of arrangements under which most MDLEA cases arise.<sup>327</sup>

### 1. Bilateral Maritime Agreements

Under these bilateral agreements, if both the interdicting and the flag-state agree, the former may exercise adjudicative jurisdiction over the latter's nationals arrested in the course of the interdiction efforts.<sup>328</sup> The Convention does not require any state to exercise such extraterritorial jurisdiction.<sup>329</sup> Nor does it authorize it—ultimately, it is the home state's consent that makes prosecution possible, and the home state's consent would have had exactly the same legal effect in the absence of the UN Convention.<sup>330</sup> The Convention merely speaks of the possibility of such arrangements.<sup>331</sup> Thus this provision of the Convention creates no new rights or obligations, so it is hard to see how it could be a source of additional legislative power for Congress.

Nor do the Maritime Agreements themselves—the bilateral arrangements contemplated by the Convention, and in whose

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*tion of Narcotics in International Waters*, 15 U. MIAMI INT'L & COMP. L. REV. 443, 448 (2008).

324. See Natalie Klein, *The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 35 DENV. J. INT'L L. & POL'Y 287, 303–04 (2007).

325. U.N. Narcotics Convention, *supra* note 323, art. 4(1)(a).

326. See *id.* art. 17(4)(c).

327. See, e.g., *United States v. Cardales*, 168 F.3d 548, 522 (1st Cir. 1999); *United States v. Khan*, 35 F.3d 426, 428 (9th Cir. 1994).

328. See U.N. Narcotics Convention, *supra* note 323, art. 4(1)(b)(ii).

329. See *id.* art. 4(1)(b).

330. See *id.* art. 4(1) (indicating that states automatically have jurisdiction over their vessels and territorial waters); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 522 cmt. e (1987).

331. See U.N. Narcotics Convention, *supra* note 323, art. 4(1); MURPHY, *supra* note 226, at 412–13 (describing the Convention as setting up the framework for international cooperation but not as criminalizing any conduct).

shadow the MDLEA prosecutions occur—provide a Treaty Power basis for the statute. First, most of them are not treaties but rather mere executive agreements, entered into by State Department officials with no congressional input, let alone advice and consent.<sup>332</sup> Even defenders of the broad “nationalist” view of *Missouri* do not think executive agreements can be substitute for treaties.<sup>333</sup> Moreover, the Agreements do not confer any authority on the United States with respect to prosecution. Rather, they simply set up rules for cooperation in drug interdiction; they do not authorize, let alone require, the United States to prosecute.<sup>334</sup>

The standard jurisdictional clause provides that the flag state, while retaining “primary” jurisdiction, “may . . . waive its primary right to exercise jurisdiction and authorize the enforcement of United States law against the vessel and/or persons on board.”<sup>335</sup> Some agreements go further and expressly disclaim giving any jurisdiction to the United States.<sup>336</sup> Simply put, these agreements do not give the United States any jurisdiction it did not previously have. Indeed, the purpose of the agreements is to facilitate enforcement, not prosecution.<sup>337</sup>

This waiver is done on a case by case basis, usually initiated by a State Department or Coast Guard request.<sup>338</sup> Often the consent is provided by low-level functionaries.<sup>339</sup> It may be provided orally, and in some cases, the source, form, and con-

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332. See Becker, *supra* note 322, at 179; Joseph E. Kramek, Comment, *Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is This the World of the Future?*, 31 U. MIAMI INTER-AM. L. REV. 121, 135–37 (2000). *But see* Agreement to Suppress Illicit Traffic by Sea, U.S.-Colom., Feb. 20, 1997, T.I.A.S. No. 12,835.

333. See Golove, *supra* note 316, at 1306–09.

334. See Kramek, *supra* note 332, at 123–24. The State Department uses a six-part “Model Maritime Agreement,” which covers enforcement issues like shipriders, pursuit, overflights, and boarding. See *id.* at 133–35, app. at 152–60. Most of the nations with which the United States has such deals have agreed to less than all six parts. *Id.* app. at 150.

335. *Id.* app. at 157–58.

336. See, e.g., U.S.-Jam. Agreement, *supra* note 81, art. 3(5); U.S.-Barb. Agreement, *supra* note 81, art. 15(2).

337. See Kramek, *supra* note 332, app. at 152–53.

338. See, e.g., *United States v. Leuro-Rosas*, 952 F.2d 616, 619–20 (1st Cir. 1991) (discussing variety of informal circumstances in which such requests can arise); Gary W. Palmer, *Guarding the Coast: Alien Migrant Interdiction Operations at Sea*, 29 CONN. L. REV. 1565, 1568–69 (1997); Kramek, *supra* note 332, at 133 n.72.

339. Kramek, *supra* note 332, at 133 n.72.

tent of the consent remains obscure.<sup>340</sup> Such authorization certainly falls short of a formal treaty, or even of an executive agreement. Certainly such consent, especially when made in the framework of a bilateral agreement and in the shadow of the UN Convention, removes any potential *international law* problems with U.S. jurisdiction. But that does not answer the Article I question. The notion that a mere waiver by another nation of its rights at international law can expand the legislative competence of Congress goes much further than even the broadest view of *Missouri v. Holland*.<sup>341</sup>

Indeed, the bilateral agreements highlight a danger of *Holland's* rule that Congress can expand its legislative powers through treaty. Generally the consent of the foreign state is understood as some kind of check on abuses of the Treaty Power. Foreign states will presumably not enter deals just to allow Congress to aggrandize itself. But the United States has extraordinary bargaining power with respect to most of the nations it has signed bilateral maritime agreements with, such as St. Kitts and Nevis, or Dominica.<sup>342</sup>

Many nations were reluctant to enter agreements which they saw as impinging on their sovereign territory or law enforcement functions.<sup>343</sup> Washington, however, threatened these states with substantial aid reductions and other economic sanctions if they did not enter the agreements.<sup>344</sup> Such ultimatums caused quite a bit of bad feeling in countries like Jamaica, but have proven ultimately effective.<sup>345</sup> Yet it would have potential-

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340. See, e.g., *United States v. Normandin*, 378 F. Supp. 2d 4, 8 (D.P.R. 2005); Christina E. Sorensen, Comment, *Drug Trafficking on the High Seas: A Move Toward Universal Jurisdiction Under International Law*, 4 EMORY INT'L L. REV. 207, 223-24 (1990) (describing informal and oral consent deemed adequate in MDLEA cases).

341. 252 U.S. 416 (1920). Even if the maritime agreements were to provide a Treaty Clause hook for the MDLEA, they would still leave open the question of those people convicted in the past two decades who were seized on vessels of states with whom the United States did not have an agreement.

342. Cf. Lloyd Williams, *The Shiprider Agreement: No Smooth Sailing*, JAMAICA GLEANER, Feb. 8, 2004, available at <http://www.jamaica-gleaner.com/gleaner/20040208/cleisure/cleisure2.html>.

343. See Statement of Admiral Riutta, *supra* note 76; Williams, *supra* note 342.

344. See Williams, *supra* note 342 ("The dominant view throughout Latin America, the Caribbean and, of course, Jamaica, . . . was that Uncle Sam was being his big, bad bullying self, threatening that these nations sign a standard agreement, or be de-certified [from a list of nations that fight drugs, and thus lose U.S. funding].").

345. Kramek, *supra* note 332, at 146 ("[S]ome countries feel compelled into

ly troubling implications if such purchased treaties could give Congress power to do what Article I does not allow.<sup>346</sup>

## 2. Extradite or Punish Provisions

The strongest Treaty Clause basis for the MDLEA is a provision of the U.N. Narcotics Convention contained in the adjacent section of the jurisdictional article, that permits but does not require states to punish or extradite offenders “present in its territory” but otherwise unconnected to the forum.<sup>347</sup> Once MDLEA defendants are seized on the high seas by the Coast Guard for the purposes of prosecution, they are “present” in U.S. territory. Nonetheless, a combination of factors makes it doubtful whether the Convention authorizes UJ in cases where offenders are seized on the high seas.

The Narcotics Convention contains particular jurisdictional and substantive clauses dealing with joint drug interdiction on the high seas—the provisions that prompted the creation of the bilateral maritime treaties.<sup>348</sup> These provisions provide for the arrest of foreign drug traffickers under certain circumstances. Thus one might be hesitant to construe an entirely separate jurisdictional provision, 4(2)(b),<sup>349</sup> as covering cases where the defendant is “present” in the forum state because of the operation of arrangements specifically addressed by those cooperation clauses.<sup>350</sup> One can read 4(1)(b)(2) as being exclusive of (2)(b).<sup>351</sup> In other words, the provisions that discuss jurisdiction over vessels solely govern maritime drug smuggling; thus the broader provision would not be available. Indeed, in the drafting of the Convention, extending UJ to drug trafficking vessels was mentioned and rejected.<sup>352</sup>

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signing bilateral maritime agreements with the United States.”).

346. *Cf.* *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (discussing limits on Congress’s Article I spending power).

347. U.N. Narcotics Convention, *supra* note 323, art. 4(2)(b).

348. *See id.* art. 17.

349. *Id.* art. 4(2)(b).

350. *See id.* art. 17(4) (referring to “treaties in force between [Parties]” and “agreement[s] or arrangement[s] otherwise reached between those Parties” in explaining when States are authorized to take certain actions with respect to vessels).

351. *See id.* art. 4(1)(b)(ii) (conditioning jurisdiction over offences committed on board vessels on authorization under article 17); *id.* art. (4)(2)(b) (referring to other bases for establishing jurisdiction over offenses).

352. *See Klein*, *supra* note 324, at 304 (discussing rejection of a Canadian proposal to put drug trafficking on the same footing as piracy by allowing boarding of vessels without flag states’ consent).

This conclusion is strengthened when one reads the U.N. Narcotics Convention alongside UNCLOS, to which the Narcotics Convention explicitly refers.<sup>353</sup> As discussed above, UNCLOS only authorizes UJ over piracy and slave trading; for maritime drug trafficking it merely calls for “cooperat[ion].”<sup>354</sup> Because UNCLOS provides a comprehensive set of regulations for maritime matters, the Narcotics Convention should not be easily read as expanding UJ over conduct committed on the high seas beyond what UNCLOS allows. Indeed, those provisions of the Narcotics Convention that deal with maritime vessels simply elaborate the content of cooperation.<sup>355</sup> Thus the broader “extradite or punish” provisions should not be read as conferring a separate authority over persons apprehended on the high seas.<sup>356</sup>

UNCLOS establishes a general rule of freedom of the seas and does not make an exception for drug trafficking, but rather reflects a deliberate judgment to not allow UJ in such cases.<sup>357</sup> Interpreting the Illicit Substances Convention as authorizing UJ would mean putting the two treaties in conflict as to the permissible scope of jurisdiction. This would be awkward for the over 150 nations that are parties to both treaties.<sup>358</sup> It would also have ungainly consequences for the MDLEA. While the United States is not currently a party to UNCLOS, despite having signed it,<sup>359</sup> Congress could presumably act under the arguably broader jurisdictional provisions of the Illicit Traffic Convention. Yet if the Senate ratifies UNCLOS, as most ob-

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353. See U.N. Narcotics Convention, *supra* note 323, art. 17(1) (referring to the “international law of the sea”).

354. See UNCLOS, *supra* note 71, art. 108(1).

355. See U.N. Narcotics Convention, *supra* note 323, art. 17.

356. Other commentators seem to agree that the Convention does not create UJ where UNCLOS did not. See, e.g., Becker, *supra* note 322, at 179, 203; Hodgkinson et al., *supra* note 322, at 650; Klein, *supra* note 324, at 303–04.

357. See UNCLOS, *supra* note 71, art. 108.

358. See UNITED NATIONS DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, TABLE RECAPITULATING THE STATUS OF THE CONVENTION, AND OF THE RELATED AGREEMENTS, AS OF 19 DECEMBER 2008 (2008), [http://www.un.org/Depts/los/reference\\_files/status2008.pdf](http://www.un.org/Depts/los/reference_files/status2008.pdf) [hereinafter UNCLOS TABLE] (listing parties to the UNCLOS); Europa Treaties Office Database, Summary of Treaty: United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=526> (last visited Mar. 3, 2009) (listing parties to the U.N. Narcotics Convention).

359. See UNCLOS TABLE, *supra* note 358, at 8.

servers expect it to do in the near future, the last-in-time rule with respect to treaties would mean that UNCLOS cuts off Congress's Treaty Power to authorize the MDLEA.<sup>360</sup> Given the number of nations party to both treaties, it seems safest to construe their provisions so as to not conflict.

Finally, it is not clear that the Convention contemplated coerced presence in its authorization of jurisdiction over "present" defendants. U.S. courts have concluded that such factors clearly make no difference under U.S. law. And similar "extradite or punish" provisions in other treaties have been held to allow jurisdiction based on coerced presence.<sup>361</sup> Still, for purposes of the Treaty Power, it matters what the treaty itself permits.<sup>362</sup> Since the only basis for Congress's power is the terms of the treaty, it would be bootstrapping to read U.S. doctrines like the *Ker-Frisbie* rule back into the treaty.<sup>363</sup> While the Convention does not directly address the question, the passive tone of "present" suggests there was no particular intention of ruling out forced presence.<sup>364</sup>

### 3. Novel Problems with the Convention as a Constitutional Basis

Some additional—and exotic—issues cast doubt on the U.N. Narcotics Convention as a Treaty Power basis for the MDLEA.<sup>365</sup> First, the Convention was drafted and ratified

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360. See, e.g., *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("[I]f there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control.").

361. See *United States v. Shi*, 525 F.3d 709, 721 (9th Cir. 2008) (upholding jurisdiction over an alien who committed an offense on the high seas on a foreign vessel under a statute implementing mandatory "extradite or punish" provisions of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 672 [hereinafter *Maritime Safety Convention*]); *United States v. Yousef*, 327 F.3d 56, 95–96 (2d Cir. 2003) (discussing a similar provision in the Convention to Discourage Acts of Violence Against Civil Aviation art. 7, Sept. 23, 1971, 10 I.L.M. 1151 [hereinafter *Montreal Convention*], which permits but does not require exercise of jurisdiction).

362. See *United States v. Alvarez-Machain*, 504 U.S. 655, 662–63 (1992) (suggesting that the *Ker-Frisbie* doctrine could be trumped by a countervailing treaty prohibition on forcibly bringing people into the United States, but finding that the extradition treaty with Mexico contained no such limitation).

363. *Frisbie v. Collins*, 342 U.S. 519, 522 (1952) (holding that U.S. courts have jurisdiction over defendants even if their presence was not secured in accord with extradition treaties); *Ker v. Illinois*, 119 U.S. 436, 444 (1886) (same).

364. See U.N. Narcotics Convention, *supra* note 323, art. 4(2)(a).

365. It appears to be an open question whether legislation "necessary and proper" to a treaty is limited to treaty obligations or whether it can implement

several years after the MDLEA was enacted.<sup>366</sup> (This explains why Congress did not see the law as an exercise of the Treaty Power.) At the very least, the Convention does nothing for constitutionality of the statute's UJ provisions *ab initio*. Whether an unconstitutional statutory provision can be saved by a subsequent treaty is a nice question.<sup>367</sup> Congress's authority for legislation pursuant to treaties is a combination of the Article II Treaty Power and the Necessary and Proper Clause. Even though the latter has been given almost limitless scope,<sup>368</sup> it would seem fundamentally odd to say that a statute was "necessary" to implement a treaty not yet in existence.

Even when the treaty was subsequently ratified, Congress had not enacted the law to implement the treaty. If the law is "necessary" to the treaty, that should be determined by a new Congress. It would be an invitation to mischief if a statute that is constitutionally dead on arrival could be resuscitated by a subsequent treaty or judicial reinterpretation, without any additional action by Congress.<sup>369</sup> One could never know with fi-

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permissive or hortatory provisions. The U.N. Narcotics Convention's "extradite or punish" provisions are not mandatory ("may" rather than "shall"). *See id.* art. 6. This has not been an obstacle to courts finding jurisdiction under permissive extradite or punish in other treaties. *See United States v. Yousef*, 327 F.3d 56, 95–96 (2d Cir. 2003) (discussing the extradite or punish clause of the Montreal Convention, *supra* note 361); *United States v. Rezaq*, 134 F.3d 1121, 1128–32 (D.C. Cir. 1998) (discussing the extradite or punish clause of the Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1621, 1973 U.N.T.S. 106, and upholding jurisdiction over the defendant). The Ninth Circuit, in upholding jurisdiction under the Maritime Safety Convention, noted that the enabling legislation *as a whole* "was necessary" to "satisfy th[e] obligation" of the treaty, which requires signatories to punish or extradite offenders. *Shi*, 525 F.3d at 721 (discussing the Maritime Safety Convention, *supra* note 361, art. 7, and related legislation). It would certainly be extraordinary for a court to find a law unconstitutional for failing to be "necessary and proper" to some legitimate power.

366. The United States ratified the Convention in 1990, four years after the MDLEA was enacted. *See* U.N. Narcotics Convention, *supra* note 323. Some of that statute's UJ aspects had been on the books from the Marijuana on the High Seas Act of 1980. *See* Pub. L. No. 96-350, 94 Stat. 1159 (1980) (codified as amended at 46 U.S.C.A. §§ 70501–70507 (2007)).

367. There is little discussion of this question in cases or literature. It is not answered by *Missouri v. Holland*, where Congress passed a second statute "pursuant" to the treaty after an earlier one had run afoul in the lower courts: in that case, the treaty still preceded the statute. *See* 252 U.S. 416, 431–32 (1919).

368. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419–20 (1819) (interpreting the Necessary and Proper Clause broadly and laying the groundwork for its further expansion).

369. Perhaps the closest analog to the present question is the effect of constitutional amendments on previously void treaties. Many who supported the

nality which statutes were “dead” and which merely in a state of suspended animation.

The question turns on broader question about the meaning and content of congressional intent. The MDLEA has been amended in various ways in recent years,<sup>370</sup> and an entirely new section of the statute enacted in 2008 creates a completely novel UJ offense—operating a submersible vessel.<sup>371</sup> The changes have not narrowed the statute’s jurisdictional scope; if anything, they have expanded some of its provisions.<sup>372</sup> Thus one might take this as an expression of congressional endorsement of the rest of the statute.<sup>373</sup> In any case, if the MDLEA exceeds Article I powers, the subsequent ratification of the treaty could certainly not save convictions and sentences secured up until then.

A second problem with using the Convention to justify the MDLEA lies in limitations imposed by the Senate when it ratified the treaty. The United States entered a declaration that “nothing in [the U.N. Narcotics Convention] requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States.”<sup>374</sup> If the

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Civil Rights Act of 1866’s policy thought the Act was unconstitutional. This motivated the passage of the Fourteenth Amendment. While key supporters of the Amendment thought it would effect a “retroactive constitutionalization” of the 1866 Act, Congress significantly chose to explicitly reenact the law after the Amendment was passed. See David S. Bogen, *Slaughter-House 5: Five Views of the Case*, 55 HASTINGS L.J. 333, 360 n.158 (2003).

370. See 46 U.S.C.A. §§ 70502, 70505, Historical and Statutory Notes (2007).

371. See Drug Trafficking Interdiction Act of 2008, Pub. L. No. 110-407, 122 Stat. 4296 (to be codified in scattered sections of 18 U.S.C. and 46 U.S.C.).

372. The Drug Trafficking Vessel Interdiction Act of 2008, provides a criminal and civil penalty for people operating certain stateless submersible vessels “with the intent to evade detection,” on the high seas and even in the territorial waters of another country. See 18 U.S.C.A. § 2285(a) (West 2008) (criminal); 46 U.S.C.A. § 70508(a), (d) (West 2008) (civil). This targets yet another drug-smuggling tactic, but certainly not one that has even been suggested to be universally cognizable. Indeed, the legislative findings note that the practice is a “serious international problem,” but not “universally condemned” as drug trafficking is. 46 U.S.C.A. § 70501 (2007). The statute also notes that it “facilitates transnational crime, including drug trafficking, and terrorism, and presents a specific threat to the safety of maritime navigation and the security of the United States,” providing a potential basis for protective rather than universal jurisdiction. See Drug Trafficking Vessel Interdiction Act § 101.

373. Cf. WILLIAM S. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, 243–45 (discussing whether congressional acquiescence in judicial interpretation of statutes can be inferred from the amendment of a relevant statute).

374. See Reservations and Declarations Made Upon Ratification or Acces-

Constitution can be said to “prohibit” universal jurisdiction over non-universal crimes, then the Convention cannot confer such a power. A question remains whether “prohibited” is meant simply to track the *Missouri v. Holland* sense of “expressly ruled out,” or in the more common sense of not authorized by constitutional law. One might favor the latter reading because the Senate has since the 1950s attached such declarations to treaties specifically because of their discomfort with the broad rule of *Missouri*.<sup>375</sup> With the U.N. Narcotics Convention, the primary concern behind the declaration seems to have been the extradition of U.S. citizens to countries that would not afford them due process.<sup>376</sup> This does not mean the senators would not have thought the declaration applicable to otherwise unconstitutional expansions of Congress’s criminal powers. Most likely, the potential UJ issues raised by the Convention escaped their notice.<sup>377</sup>

#### B. FOREIGN COMMERCE CLAUSE

One might think the Foreign Commerce Clause<sup>378</sup> could support the MDLEA.<sup>379</sup> After all, the Interstate Commerce Clause,<sup>380</sup> assisted by the Necessary and Proper power, allows Congress to regulate much that is not itself interstate commerce.<sup>381</sup> And perhaps the scope of the Foreign Commerce

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sion of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Feb. 20, 1990, 1582 U.N.T.S. 404.

375. See, e.g., S. REP. NO. 412, at 8 (1953) (discussing the constitutional amendment proposed by S.J. Res. 1, 83rd Cong. (1953)); 136 CONG. REC. 36192–99 (1990) (debating the reservations, declarations, and understandings to be attached to the Senate’s advice and consent to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

376. See 135 CONG. REC. 31384–88 (1989) (statement of Sen. Helms).

377. The Attorney General’s description of the jurisdictional provisions to the Senate did not mention UJ at all, and indeed, his discussion of its extra-territorial affect implied it would not allow UJ. See *id.* at 31387 (statement of Dick Thornburgh) (“Parties may establish jurisdiction over offenses committed by their nationals, committed on board vessels outside their territorial waters which are properly boarded and searched, and with respect to conspiratorial offenses committed outside their territory with a view to commission of a covered offense within their territory.”).

378. See U.S. CONST. art. I, § 7, cl. 3.

379. See Bradley, *supra* note 16, at 336 (“[A]t least some invocations of the universal jurisdiction concept by Congress are likely to involve situations in which there are effects on foreign commerce—for example, the disruption of shipping lanes or air traffic due to piracy.”).

380. See U.S. CONST. art. I, § 7, cl. 3.

381. See, e.g., *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (discussing Congress’s power to regulate not only interstate commerce, but also activi-

Clause is even broader:<sup>382</sup> since the regulation of foreign commerce is an exclusively federal power, it does not run up against federalism principles or reserved rights of states.<sup>383</sup>

However, the MDLEA lies even beyond the Foreign Commerce power. However broad it is, the power does not authorize legislation regarding conduct with no demonstrable and direct nexus with the United States.<sup>384</sup> Exactly how much of a connection the conduct must have is a difficult question, but one that need not be answered in a UJ case. With the MDLEA UJ cases, there is no evidence of any connection to the United States.

Not surprisingly, there is little precedent or commentary on this issue.<sup>385</sup> When Congress legislates extraterritorially, as it does with increasing frequency, it is almost always *because* of the foreign conduct's effect on U.S. commerce, not despite it. However, what authority there is clearly recognizes a limit to the Foreign Commerce power, one that UJ legislation would exceed. One of the earliest and most significant discussions of UJ flatly rejected using the Foreign Commerce power as a substitute for the Define and Punish power:

Rather than relying on Congress's direct authority under Article I Section 8 to define and punish offenses against the law of nations, the government contends that Congress has authority to regulate global air commerce under the commerce clause. . . . But [Congress] is not empowered to regulate foreign commerce which has no connection to the United States. Unlike the states, foreign nations have never submitted to the sovereignty of the United States government nor ceded their regulatory powers to the United States.<sup>386</sup>

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ties that substantially affect interstate commerce); *Wickard v. Filburn*, 317 U.S. 111, 116–17, 133 (1942) (upholding Congress's power to pass a law regulating a farmer's individual production and consumption of wheat).

382. See *Japan Line, Ltd. v. Los Angeles*, 441 U.S. 434, 448 (1979) (“[T]here is evidence that the Founders intended the scope of the foreign commerce power to be the greater. Cases of this Court . . . echo this distinction.”) (citations omitted).

383. See *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring) (explicating how allowing Congress to regulate broadly under the Interstate Commerce Clause can intrude into states' rights).

384. See *Bradley*, *supra* note 16, at 329 (discussing situations covered in the MDLEA that include no express requirement of a nexus with the United States).

385. See *id.* at 336 (“The precise limits of [the foreign commerce] power are unclear.”).

386. *United States v. Yunis*, 681 F. Supp. 896, 907 n.24 (D.D.C. 1988); see also *United States v. Georgescu*, 723 F. Supp. 912, 918 (E.D.N.Y. 1989) (observing that the Foreign Commerce Clause gives Congress power “to criminalize activities affecting *our* foreign commerce” (emphasis added)).

Thus courts in MLDEA cases have entirely disclaimed the Foreign Commerce Clause as a basis for the law.<sup>387</sup>

The question of UJ and the Foreign Commerce Clause was recently discussed at some length by Prof. Colangelo. He concludes:

The text of the Foreign Commerce Clause along with what we know about the founders' beliefs regarding state sovereignty and attendant rules of jurisdictional non-interference lead persuasively to the conclusion that for Congress to act extraterritorially under the Clause, the conduct it seeks to regulate must exhibit a direct connection to U.S. commerce.<sup>388</sup>

This is not the place to recapitulate Prof. Colangelo's able exposition of the arguments. Briefly, the text of the clause suggests that the commerce must be "with" the United States. The Constitution does not use the term "among" that it uses for "commerce among the states."<sup>389</sup> This shows that it is not enough for the commerce to be between some foreign states. Rather, the United States must be on one side of the transaction. Moreover, the Framers' territorial concepts of jurisdiction make it highly improbable that they intended to give Congress plenary power to legislate over all global economic activity.<sup>390</sup> Nothing in the underlying purposes of the Foreign Commerce Clause suggests such a power. Consider the kinds of laws Congress can pass under its interstate commerce powers. Surely it would be odd to think the Constitution empowers Congress to legislate safety conditions for Yemeni shoe repairmen, or regulate backyard wheat production or prostitution in Pakistan.<sup>391</sup>

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387. See *United States v. Moreno-Morillo*, 334 F.3d 819, 824 (9th Cir. 2003).

388. Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 147 (2007).

389. See *id.* at 148–49 (analyzing the language in U.S. CONST. art. I, § 8, cl. 3).

390. See *id.* at 149–51. Furthermore, to the extent the protections of the Bill of Rights, such as the Takings Clause, do not apply to foreigners abroad, Congress's power to legislate for foreign countries could exceed its power to legislate domestically, a counterintuitive result.

391. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (“[Congress] can make laws . . . fixing wages and working conditions in certain fields of our economy.”); *Wickard v. Filburn*, 317 U.S. 111, 116–17, 133 (1942) (upholding a law regulating private production of wheat under the Interstate Commerce Clause); *Caminetti v. United States*, 242 U.S. 470, 492 (1917) (upholding a law prohibiting interstate transportation of women for prostitution or other immoral purposes).

To continue the *reductio ad absurdum*, if one thought the Foreign Commerce power to be as robust as the domestic one, it would imply the existence of a Dormant Foreign Commerce Clause—a power of federal courts or Congress to strike down foreign laws that burden international commerce.<sup>392</sup> Such a power has never been suggested because of the fundamentally different nature of domestic intrastate commerce from purely foreign commerce. This shows that one cannot simply export doctrine from the Interstate Commerce Clause to the Foreign one.

Therefore, many applications of the MDLEA, especially to non-stateless vessels, exceed Congress's powers under the Define and Punish Clause, and other constitutional sources of congressional authority do not provide an alternative basis. Going forward, it would not be difficult for Congress to provide a Treaty Clause basis if it wanted to, by transforming the bilateral maritime agreements into treaties, which would explicitly authorize, or provide a framework for authorizing (rather than merely noting the possibility, as the current agreements do) prosecution of foreign nationals in the United States.

#### CONCLUSION

Congress has almost never used its Define and Punish power to punish conduct other than piracy with no connection to the United States. The first time it did so, in 1790, the Supreme Court narrowly interpreted the law to avoid constitutional difficulties. Soon after, Congress abandoned a much-desired UJ provision for the slave trade because of similar doubts. One hundred sixty years later, Congress ventured back into the poorly chartered-waters of UJ with the MDLEA—and ran afoul of shoals.

In general, the Constitution does not empower Congress to legislate over foreigners in international waters or abroad. If Congress could do so, its powers would be unlimited. There is an exception to this for piracy, stateless vessels, and perhaps other crimes over which international law allows UJ. But Congress cannot by fiat make something a UJ offense when CIL does not treat it as such. To paraphrase *Furlong*, if by calling

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392. Along with empowering Congress to regulate interstate commerce, the Commerce Clause limits states' power to discriminate against interstate commerce. *See, e.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) (explaining the Dormant Commerce Clause doctrine and applying it to invalidate a state law).

drug smuggling piracy, Congress could assert jurisdiction over an offense committed by a foreigner in a foreign vessel, what offense might not be brought within their power by the same device? Surely Congress could not regulate dueling on foreign vessels, as Justice Marshall put it.

Most applications of the MDLEA that do not involve a U.S. nexus exceed Congress's Define and Punish power. That clause only authorizes Congress to regulate conduct that either has some direct relation to the United States, or in a broader interpretation, is universally cognizable in international law. In a narrower and quite plausible view of the clause, piracy is the only offense to which UJ can attach. Drug trafficking is not a UJ offense; nor does it fall under the similarly far-reaching protective principle of jurisdiction. Moreover, the MDLEA extends to vessels in foreign countries' exclusive economic zones, and even in their territorial waters. This violates the clause's explicit limitation to crimes on the "high Seas."

Congress can exercise jurisdiction over stateless vessels, under international law, and the statelessness provisions of the MDLEA are perhaps the easiest to defend. Some of them go beyond the international law definition of stateless, but the difference may be within the margin of Congress's power to "define." There is a difficult argument to be made for the MDLEA as legislation pursuant to a treaty, if one takes a sufficiently broad view of what "necessary and proper" to a treaty is. However, the use of the Treaty Power to sustain the statute would depend on several other difficult and untested propositions, such as Congress being able go beyond its Article I powers in pursuance of non-mandatory (i.e., aspirational or permissive) treaties, and of treaties not yet on the books when the law is enacted.

However, this does not doom U.S. drug interdiction efforts. The MDLEA could be saved through treaties permitting such jurisdiction with the various nations whose vessels are seized. The U.S. could also work towards and await the establishment of a customary international norm universalizing jurisdiction over drug trafficking.