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Courts Have Gone Overboard in Applying the Maritime Drug Law Enforcement Act

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COURTS HAVE GONE OVERBOARD IN APPLYING THE MARITIME DRUG LAW ENFORCEMENT ACT

*Elaina Aquila**

The Maritime Drug Law Enforcement Act (MDLEA), enacted through Congress's power to "define and punish . . . Felonies Committed on the high Seas," prosecutes individuals for drug trafficking "on board" vessels. Individuals often raise jurisdictional defenses in U.S. courts when prosecuted under MDLEA, and scholarship in the area argues about whether the Constitution permits MDLEA to reach drug traffickers who are on the high seas. Recently, courts have begun using MDLEA to prosecute foreign nationals located in a foreign nation who are not on board a vessel as conspirators. However, no court has fully examined Congress's authority to enact a statute with this reach or engaged in a comprehensive statutory interpretation of MDLEA's conspiracy provision.

This Note examines MDLEA from two perspectives. First, it examines whether Congress has constitutional authority to enact a law prosecuting drug trafficking by a foreign national on land in a foreign nation to determine the validity of such law. Because the Constitution grants Congress the power to punish crimes on the high seas, this inquiry depends on whether conspiracy can effectively extend an individual's conduct from land to the high seas. Second, this Note considers the statutory language of MDLEA to determine whether the law enables the prosecution of a foreign national located in a foreign nation as a conspirator.

This Note argues that the text of the statute limits the substantive offense by using the jurisdictional language of "on board a covered vessel," and so MDLEA remains a valid exercise of Congress's Article I authority under the Felonies Clause.

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INTRODUCTION

A Colombian drug trafficker at home in Colombia conspires to transport cocaine from Colombia to Australia. The boat sets sail for Australia but is stopped, and the drugs are seized. The drug trafficker, who was in Colombia the entire time, is now sitting in a New York federal prison. That individual would probably ask, “How did I wind up here?” It is not surprising that he is in prison but rather that he is in the United States. This is exactly what Daniel German Sanchez Alarcon must be wondering.

On July 5, 2017, the Southern District of New York denied Defendant Sanchez's motion to dismiss charges against him under the Maritime Drug Law Enforcement Act (MDLEA) for lack of jurisdiction.¹ MDLEA states that "[w]hile on board a covered vessel, an individual may not knowingly or intentionally . . . manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance."² Sanchez argued that MDLEA did not apply to him because he was not a U.S. citizen, was never on board the vessel or "on the high seas," let alone in the United States, and his conduct never targeted the United States.³ He further argued that, while MDLEA covers conspiracies, the relevant provision does not confer jurisdiction.⁴ The court held that interpreting MDLEA's conspiracy provision to reach only individuals on board a vessel would undermine the intent of Congress.⁵ The court also stated that, as long as an individual understood that his or her conduct could be prosecuted, it is irrelevant whether that individual was aware that he or she could be prosecuted in the United States.⁶

Applying MDLEA to reach a foreign national in a foreign country raises constitutional issues. Scholars argue about whether it is constitutional for MDLEA to reach individuals on the high seas,⁷ and one scholar has expressed the need for a limit on the Felonies Clause.⁸

A broad reading of MDLEA also raises budgetary concerns. The United States spends over \$8 million annually battling marine drug trafficking,⁹ and "[h]undreds if not thousands" of foreign nationals sit in United States federal prisons for violating MDLEA.¹⁰ The average cost of incarcerating one

1. United States v. Aragon, No. 15-292, 2017 WL 2889499 (S.D.N.Y. July 5, 2017).

2. 46 U.S.C. § 70503(a)(1) (2012).

3. Memorandum of Law in Support of Mr. Daniel German Sanchez Alarcon's Pre-Trial Motion to Dismiss the indictment for Lack of Jurisdiction and Other Relief at 1-3, *Aragon*, 2017 WL 2889499 (No. 15-292), ECF No. 167.

4. *Id.* at 21-22.

5. *Aragon*, 2017 WL 2889499, at *19 (citing United States v. Ballestas, 795 F.3d 138, 145 (D.C. Cir. 2015)).

6. *Id.* at *18-19 (asserting that in Sanchez's case there was no due process problem based on a lack of a connection to the United States).

7. See generally Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191 (2009) (arguing that "all or most" instances of establishing jurisdiction under MDLEA exceed Congress's Article I powers); Charles R. Fritch, Note, *Drug Smuggling on the High Seas: Using International Legal Principles to Establish Jurisdiction over the Illicit Narcotics Trade and the Ninth Circuit's Unnecessary Nexus Requirement*, 8 WASH. U. GLOBAL STUD. L. REV. 701 (2009) (arguing the United States has the authority to prosecute individuals under MDLEA regardless of a nexus to the United States).

8. See Stephanie M. Chaissan, Comment, "*Minimum Contacts*" Abroad: Using the International Shoe Test to Restrict the Extraterritorial Exercise of United States Jurisdiction Under the Maritime Drug Law Enforcement Act, 38 U. MIAMI INTER-AM. L. REV. 641, 650 (2007). Chaissan differentiates between the United States' authority to apply a law to foreign nationals generally and its ability to prosecute a foreign national, who violates law outside of the United States, does not have contact with the United States, and whose conduct does not sufficiently affect the United States. *Id.* at 648.

9. Fritch, *supra* note 7, at 701.

10. Kontorovich, *supra* note 7, at 1195.

individual in a federal prison is \$31,977.65 a year.¹¹ If courts continue to construe MDLEA broadly, the amount of tax revenue spent on housing foreign nationals in U.S. federal prisons will increase.

This Note argues that the text of the statute limits the substantive offense by using the jurisdictional language of “on board a covered vessel.” As a result, MDLEA remains a valid exercise of Congress’s Article I authority, which in this instance is limited to the high seas. Part I of this Note describes the jurisdictional authority of the U.S. government to prosecute a foreign national in a foreign country. This Part lays out the differences between adjudicative and prescriptive jurisdiction and draws on the Constitution, the substantive offense of MDLEA, and international law principles of criminal jurisdiction to help determine whether the United States can prosecute these individuals.

Part II then analyzes the current application of this issue in U.S. courts and identifies the shortcomings of the courts in interpreting MDLEA. Specifically, this Part discusses how courts have not engaged in a full statutory interpretation, and instead have inadequately relied on precedent and improperly generalized the intent of Congress.

Part III argues that prosecuting a foreign national located in a foreign country as a conspirator exceeds Congress’s Article I powers and raises due process concerns. Because courts have not fully addressed this issue, this Part seeks to lay out the inquiry courts should engage in to determine the constitutionality of this application. This Part shows that the Felonies Clause limits Congress’s power to enact laws that prosecute individuals on the high seas and that MDLEA contains jurisdictional language that limits the offense to individuals who are “on board” a vessel to avoid constitutional concerns.

Part IV addresses practical considerations and suggests that courts should stop applying MDLEA to reach foreign nationals located in foreign nations as conspirators. This Note also urges legislators to amend the statute to clarify that the conspiracy provision only applies to individuals “on board a covered vessel.”

I. TWO TYPES OF JURISDICTION DETERMINE WHETHER PROSECUTING A LAND-BASED CONSPIRATOR IS CONSTITUTIONAL

If a state does not have jurisdiction over an individual, the state cannot enforce its laws over that individual.¹² In assessing the constitutionality of MDLEA, two concerns arise: prescriptive jurisdiction, which is a state’s authority to enforce its laws against an individual,¹³ and adjudicative jurisdiction, which is a state’s authority to impose its legal process on an

11. Annual Determination of Average Cost of Incarceration, 81 Fed. Reg. 46,957, 46,957 (July 19, 2016).

12. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(b) (AM. LAW INST. 1987).

13. *Id.* § 521; Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT’L L.J. 121, 126 (2007).

individual.¹⁴ A prescriptive jurisdictional inquiry considers whether Congress exercised appropriate lawmaking authority and whether a court may exercise subject matter jurisdiction,¹⁵ whereas an adjudicative jurisdictional inquiry raises questions regarding personal jurisdiction and whether the substantive offense covers the behavior.¹⁶ Technically, adjudicative jurisdiction cannot exist without prescriptive jurisdiction; a law that does not confer prescriptive jurisdiction would be unconstitutional and thus unenforceable.¹⁷ A substantive law can be within prescriptive limits and be constitutional, however, a court can declare it unconstitutional as applied in a given situation.¹⁸

Simply put, this situation raises two similar, but distinct, questions. First, does Congress have the authority under Article I, Section 8, clause 10 of the U.S. Constitution¹⁹ (the “Define and Punish Clause”) to enact a law that allows the United States to prosecute a foreign national in a foreign nation for trafficking drugs on the high seas?²⁰ Second, does the substantive offense of MDLEA prohibit a foreign national not “on board” a vessel, but rather located in a foreign nation, from conspiring to traffic drugs?²¹

Part I.A lays out the scope of authority granted to Congress by the Constitution, which determines whether prescriptive jurisdiction exists. Part I.B.1 discusses the rights of foreign nationals to raise adjudicative jurisdiction defenses. Then, Part I.B.2 provides background on the substantive offense of MDLEA, which determines whether adjudicative jurisdiction exists. Finally, Part I.C expands the discussion by drawing on prevailing theories of criminal jurisdiction in international law to assess whether principles of international law can establish jurisdiction.

14. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(b); Colangelo, *supra* note 13, at 126.

15. Colangelo, *supra* note 13, at 126.

16. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(b); Colangelo, *supra* note 13, at 126.

17. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 627 (2000) (striking down a provision of the Violence Against Women Act because Congress did not have the authority to regulate noneconomic activity, which traditionally has been dealt with by the state, under the Commerce Clause).

18. *See generally* Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657 (2010) (differentiating between holding a statute facially unconstitutional and “overturn[ing] the application of [a] statute”).

19. *See* United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1248 (11th Cir. 2012) (analyzing the constitutionality of MDLEA as applied by interpreting Article I, Section 8, clause 10); Chaiisan, *supra* note 8, at 649 (“MDLEA seemingly stems from the Piracies and Felonies Clause of Article I of the United States Constitution . . .”).

20. *See* Howard M. Wasserman, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. ONLINE 289, 303 (2012) (describing prescriptive jurisdiction as whether Congress has the ability to enact a law).

21. *Id.* (describing adjudicative jurisdiction as whether a court can hear a case based on laws currently in place).

A. *Prescriptive Jurisdiction: The Limits on Congress's Authority to "Define and Punish . . . Felonies Committed on the High Seas"*

Understanding Congress's constitutional authority to enact MDLEA is crucial in analyzing whether prescriptive jurisdiction exists to prosecute a foreign national located in a foreign country as a conspirator under MDLEA.

In enacting MDLEA, Congress relied upon the Define and Punish Clause,²² which grants Congress the power "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."²³ There are two terms that must be defined to understand the Define and Punish Clause: "Piracies," which the U.S. Supreme Court defined as "robbery upon the sea,"²⁴ and "Offences against the Law of Nations," which another court limited by "customary international law."²⁵ Further, "[d]rug trafficking was not a violation of customary international law at the time of the Founding, and drug trafficking is not a violation of customary international law today."²⁶ Therefore, Congress used the power to "define and punish . . . Felonies committed on the high Seas"²⁷ (the "Felonies Clause") to enact MDLEA.

Understanding the scope of Congress's lawmaking authority helps determine whether prescriptive jurisdiction exists. The Eleventh Circuit has noted that "the Felonies Clause is textually limited to conduct on the high seas."²⁸ Two terms must be defined to properly interpret this Clause. The "high seas" means "[t]he ocean waters beyond the jurisdiction of any country,"²⁹ and a "felony" is a "serious crime" punishable by a prison sentence of longer than one year or by death.³⁰ Whether Congress interpreted and applied the Felonies Clause properly when it enacted MDLEA determines whether prescriptive jurisdiction exists.

The founders gave police power to the states, not the federal government.³¹ Therefore, Congress generally cannot create felonies.³² Understanding what motivated the founders to give Congress the authority to prosecute certain felonies under the Felonies Clause helps to explain the scope of Congress's power. At the time of the founding, pirates were a serious threat and seen as

22. *See supra* note 19.

23. U.S. CONST. art. I, § 8, cl. 10.

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

25. *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1249 (11th Cir. 2012).

26. *Id.* at 1253–54.

27. U.S. CONST. art. I, § 8, cl. 10.

28. *Bellaizac-Hurtado*, 700 F.3d at 1248–49 (analyzing how the Felonies Clause does not proscribe the ability to seize a boat located in another territory's waters); *see also* Kontorovich, *supra* note 7, at 1193–95 (explaining that there is probably less scholarship on the Define and Punish Clause than any other Article I power and asserting that the Felonies Clause is limited to the high seas).

29. *High Seas*, BLACK'S LAW DICTIONARY (10th ed. 2014).

30. *Felony*, BLACK'S LAW DICTIONARY (10th ed. 2014).

31. *United States v. Morrison*, 529 U.S. 616, 618 (2000). Police power is the ability to enact laws regarding "public security, order, health, morality, and justice." *Police Power*, BLACK'S LAW DICTIONARY (10th ed. 2014).

32. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821).

members of the worst class of criminals.³³ The ocean was considered shared property,³⁴ and because pirates targeted all nations, they were considered adversaries of all nations.³⁵ Therefore, the founders sought to establish the authority for Congress to enact legislation to prosecute them.

There are limits on Congress's authority under the Felonies Clause. First, at the time of the founding, there was an emphasis on the separation between state and federal governments.³⁶ The Honorable St. George Tucker, in a prominent legal text,³⁷ explained that crimes that occurred on soil are reserved to the states and did not implicate the Define and Punish Clause.³⁸ In modern times there has been a rise in federal criminal laws,³⁹ the majority of which are enacted through Congress's spending power.⁴⁰

Second, at the time of the founding, the United States was a "weak" country, susceptible to the will of stronger nations.⁴¹ Because of this, the founders were reserved in constructing foreign policy.⁴² To gain the respect of other countries, the United States had to respect and create diplomatic relationships.⁴³ In modern times, however, the United States is a superpower on the world stage.⁴⁴

33. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 171–72 (1926) ("Pirates have been regarded by all civilized nations as the enemies of the human race, and the most atrocious violators of the universal law of society. They are every where pursued and punished with death; and the severity with which the law has animadverted upon this crime, arises from its enormity and danger, and the cruelty that accompanies it." (footnote omitted)). See generally DANIEL DEFOE, A GENERAL HISTORY OF THE PYRATES (Manuel Schonhorn ed., 1724).

34. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 107 (2d ed. 1829) ("[T]he sea becomes the common property of all nations.").

35. *Id.* ("[T]he pirate is the enemy of all nations, and all nations are the enemy of the pirate"). All nations have the ability to prosecute pirates, felonies on the high seas, and offenses against the law of nations. See Nat'l Const. Ctr., *Article I: The Legislative Branch—The Enumerated Powers (Section 8)*, CONST. DAILY (Feb. 21, 2014), <https://constitutioncenter.org/blog/article-1-the-legislative-branch-the-enumerated-powers-sections-8> [<https://perma.cc/QWC9-VAUX>] (asserting that "[e]very sovereign nation possesses" powers analogous to those granted under Article I, Section 8, clause 10).

36. See *supra* notes 31–32 and accompanying text.

37. Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111, 1114 & n.16 (2006) (citing Charles F. Hobson, *St. George Tucker's Law Papers*, 47 WM. & MARY L. REV. 1245, 1247 (2006)).

38. See 1 WILLIAM BLACKSTONE, COMMENTARIES *415 (asserting that the power to prosecute "[a]ll felonies and offences committed upon land . . . [is] reserved to the states, respectively").

39. Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 6–7 (2003).

40. *Id.* at 6.

41. 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, 466 (2000); Matthew Spalding, *America's Founders and the Principles of Foreign Policy: Sovereign Independence, National Interests, and the Cause of Liberty in the World*, HERITAGE FOUND. 3 (Oct. 15, 2010), http://thf_media.s3.amazonaws.com/2010/pdf/fp0033.pdf [<https://perma.cc/YK59-Y7EP>].

42. Spalding, *supra* note 41, at 3–4.

43. *Id.* at 14.

44. Andreas Paulus, *Antinomies of Power and Law, in* COMPARATIVE LAW AS TRANSNATIONAL LAW: A DECADE OF THE GERMAN LAW JOURNAL 313, 313 (Russell A. Miller ed., 2012).

Understanding the scope of Congress's power under the Felonies Clause is vital. As James Madison explained, "[t]he powers delegated by the . . . Constitution to the federal government are few and defined."⁴⁵ And as the Supreme Court later held, "The Constitution's express conferral of some powers makes clear that it does not grant others. And the federal government 'can exercise only the powers granted to it.'"⁴⁶ Therefore, there must be an enumerated power authorizing Congress to enact a given law.⁴⁷

Article I, Section 8, clause 18 of the Constitution (the "Necessary and Proper Clause") broadens Congress's authority. This Clause allows Congress to "make all Laws [that] shall be necessary and proper for carrying into Execution" its enumerated powers.⁴⁸ It follows, therefore, that the goal of any law enacted under the Necessary and Proper Clause must still be within the range of Congress's enumerated powers.⁴⁹

Therefore, Congress has the authority to enact both laws that criminalize felonies committed on the high seas and laws that are necessary and proper for achieving this end.

B. Adjudicative Jurisdiction: The Substantive Offense of the Maritime Drug Law Enforcement Act

Knowing the extent to which MDLEA prohibits conduct helps to determine whether the United States has adjudicative jurisdiction to prosecute a foreign national, not on board a vessel, as a conspirator. Part I.B.1 lays out the rights of foreign nationals to raise a defense regarding adjudicative jurisdiction. Part I.B.2 discusses the scope of the substantive offense of MDLEA.

1. Rights of Foreign Nationals

Adjudicative jurisdiction considers whether the substantive offense covers the conduct as well as personal jurisdiction.⁵⁰ It remains unlikely that a criminal defendant who is a foreign national can successfully assert the defense of lack of personal jurisdiction.⁵¹ Rather, precedent suggests the need for a due process violation for a foreign national to claim this type of defense.⁵²

The Constitution differentiates between citizens and noncitizens in regard to certain rights.⁵³ Nevertheless, the protections of the Fifth and Fourteenth

45. THE FEDERALIST NO. 45, at 99 (James Madison) (Michael A. Genovese ed., 2009).

46. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)).

47. *See id.*

48. U.S. CONST. art. I, § 8, cl. 18.

49. *Nat'l Fed'n*, 132 S. Ct. at 2579 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

50. *Supra* note 16 and accompanying text.

51. *See, e.g., United States v. Alvarez-Machain*, 504 U.S. 655, 659–63 (1992).

52. *See United States v. Russell*, 411 U.S. 423, 431–32 (1973).

53. David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 370 (2003) (explaining that "the right not to be discriminatorily denied the vote and the right to run for federal elective office are expressly restricted to citizens" (citing U.S. CONST. art. I, §§ 2–3; *id.* art. II, § 1; *id.* amend. XV)).

Amendments apply to foreign nationals.⁵⁴ The principles of due process and equal protection are rights afforded “to all ‘persons.’”⁵⁵ When being prosecuted for a crime in the United States, an individual is “entitled to all of the rights that attach to the criminal process” even if he or she is a foreign national.⁵⁶

There is also an issue of whether an individual would have notice that MDLEA applies to his or her conduct. The Fifth Amendment provides that “no person shall . . . be deprived of life, liberty, or property, without due process of law.”⁵⁷ Due process requires that a statute “give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.”⁵⁸ This Clause allows a court to hold a statute unconstitutional when judicial construction “unforeseeably and retroactively expand[s]” the statute.⁵⁹

Disagreement exists as to the extent to which courts should be concerned with possible due process problems when applying a criminal statute extraterritorially.⁶⁰ While some propose that the Fifth Amendment should be applied to foreign nationals in the same way it is used domestically, others insist that conducting a rigid due process analysis for foreign nationals would reduce the United States’ impact on and power among nations.⁶¹

Thus, for a criminal defendant who is a foreign national to be afforded any protection based on a lack of adjudicative jurisdiction, the foreign national must assert a due process violation.⁶²

2. Tracking the Legislative History of MDLEA to Identify the Jurisdictional Scope of the Act

Whether MDLEA confers adjudicative jurisdiction and whether a reasonable person could foresee that his or her conduct is prohibited hinge on its provisions.

54. *Id.* at 369 (concluding that fewer “distinctions” exist between the rights afforded to citizens and noncitizens than are traditionally thought and that “foreign nationals are generally entitled to the equal protection of the laws . . . and to due process requirements of fair procedure where their lives, liberty, or property are at stake”).

55. *Id.* at 370 (explaining that due process and equal protection rights apply to noncitizens and that the Constitution does not make a distinction between citizens and noncitizens when establishing these rights); see Jennifer K. Elsea, *Substantive Due Process and U.S. Jurisdiction over Foreign Nationals*, 82 *FORDHAM L. REV.* 2077, 2080 (2014) (discussing the definition of “persons” under the Fifth Amendment as applied to aliens).

56. Cole, *supra* note 53, at 370–71 & n.16; Elsea, *supra* note 55, at 2089. See generally *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (considering a foreign national’s Fourth Amendment rights after a search by border patrol).

57. U.S. CONST. amend. V.

58. *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (quoting *United States v. Harris*, 347 U.S. 612, 617 (1954)).

59. *Id.* at 352.

60. See Elsea, *supra* note 55, at 2080–81 & n.19 (explaining that just because “all persons” have Fifth Amendment rights does not mean that in application these rights must be applied consistently without making distinctions based on citizenship and alienage).

61. Colangelo, *supra* note 13, at 124.

62. See *supra* notes 51–52 and accompanying text.

Section 70503 provides that “[w]hile on board a covered vessel, an individual may not knowingly or intentionally . . . manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance.”⁶³ The statute does two pertinent things. First, it prohibits attempts and conspiracies to violate § 70503.⁶⁴ Second, it calls for extraterritorial application.⁶⁵ This Note considers MDLEA and its history as a whole to understand the scope of the conspiracy provision when applied extraterritorially.

Congress enacted a predecessor to MDLEA in 1980 (the “1980 Act”) to fill a gap in U.S. laws regarding narcotics importation.⁶⁶ Those who were found on the high seas with drugs sometimes escaped liability where no proof of a conspiracy could be found.⁶⁷ In other cases, a seagoing vessel would insulate itself by loitering outside U.S. waters and off-load the drugs onto smaller, faster boats that are more difficult to catch.⁶⁸ It was necessary to implement this statute due to the difficulties in enforcing laws on the high seas.⁶⁹

The predecessor to MDLEA was discussed by legislators on the floor of the House of Representatives. Statements on the House floor suggest that the statute was intended to apply extraterritorially⁷⁰ and reach those drug traffickers who were “seaborne.”⁷¹ The bill was considered a necessary, “noncontroversial piece of legislation.”⁷²

Committee reports suggest that the scope of the bill was contemplated to reach individuals on the high seas. The Subcommittee on Merchant Marine and Fisheries report explained that the Departments of Justice and Transportation recommended language that “reflect[ed] the extent of U.S. ability under international law to prescribe rules of conduct for persons in vessels on the high seas.”⁷³ Further, the discussion of the conspiracy provision referenced persons on board a vessel but did not address land-based conspirators.⁷⁴

63. 46 U.S.C. § 70503(a)(1) (2012).

64. *Id.* § 70506(b).

65. *Id.* § 70503(b) (providing that “[s]ubsection (a) applies even though the act is committed outside the territorial jurisdiction of the United States”).

66. *See generally* Pub. L. No. 96-350, 94 Stat. 1159 (1980) (codified as amended at 21 U.S.C. § 955 (2012)); *see also* H.R. REP. NO. 96-323, at 4–6 (1979) (Conf. Rep.) (explaining that because of an “oversight” in 1970, a bill prohibiting the “use” of drugs on a U.S. vessel on the high seas was “inadvertently repealed by the Comprehensive Drug Abuse Prevention and Control Act” allowing the United States to prosecute only if “conspiracy to import” could be proved); Fritch, *supra* note 7, at 708–09.

67. 125 CONG. REC. 20,082–84 (1979) (statements of Rep. Biaggi and Rep. Murphy).

68. *Id.* at 20,084 (statement of Rep. LaFalce).

69. *Id.* at 20,083 (statement of Rep. McCloskey).

70. 126 CONG. REC. 20,737 (1980) (statement of Rep. Biaggi).

71. 125 CONG. REC. 20,084 (1979) (statement of Rep. Murphy) (asserting that “seaborne drug traffickers will no longer be able to escape prosecution”).

72. 126 CONG. REC. 20,737 (1980) (statement of Rep. Biaggi).

73. H.R. REP. NO. 96-323, at 9 (1979) (Conf. Rep.).

74. *Id.* at 13–14, 25 (discussing the conspiracy provision and providing as the only example: “a person aboard any vessel on the high seas who knowingly transfers a large amount of a controlled substance to a person aboard a vessel of the United States”).

In 1986, Congress enacted MDLEA, finding it “necessary to ‘facilitate enforcement by the Coast Guard of laws relating to the importation of illegal drugs.’”⁷⁵ MDLEA was crucial to stem a developing movement of defendants trying to “escape conviction” by using “international jurisdictional questions as legal technicalities.”⁷⁶ Congress enacted MDLEA as part of the Anti-Drug Abuse Act of 1986, a major piece of legislation,⁷⁷ which was “fast track[ed]” through the enactment process⁷⁸ and received bipartisan support to create a “drug-free America.”⁷⁹ The Act increased funding for the United States to prohibit drugs internationally, and it allocated funds to drug abuse education and treatment programs, which was seen as noteworthy.⁸⁰

The legislative history pertaining to MDLEA itself is brief. Discussion of MDLEA on the House and Senate floors centered around the increased budget allocated to the U.S. Coast Guard to interdict drugs.⁸¹ The ability to interdict drugs in the territorial waters of another nation, with the consent of that nation, was the only substantive change noted by the legislation.⁸² President Ronald Reagan’s signing statement did not even mention MDLEA but rather focused on changes to the Freedom of Information Act (FOIA).⁸³

The language in MDLEA mirrors the 1980 Act almost identically. The 1980 Act provided that

it is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.⁸⁴

75. Fritch, *supra* note 7, at 709 (quoting S. REP. NO. 96-855, at 1); *see also* Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections of the U.S.C.).

76. Fritch, *supra* note 7, at 709 n.47 (quoting S. REP. NO. 99-530, at 15 (1986)).

77. *See* Joel Brinkley, *Anti-Drug Law: Words, Deeds, Political Expediency*, N.Y. TIMES (Oct. 27, 1986), <http://www.nytimes.com/1986/10/27/us/anti-drug-law-words-deeds-political-expediency.html> [<https://perma.cc/6VXP-2V77>] (calling the Anti-Drug Abuse Act of 1986 “the most far-reaching drug law ever passed by Congress”).

78. 132 CONG. REC. 33,246 (1986) (statement of Sen. Chiles).

79. *Id.* at 33,248 (statement of Sen. Biden).

80. *Id.*

81. *See id.* at 22,651 (statement of Rep. Pepper) (discussing how the Anti-Drug Abuse Act provides increased funds for the Coast Guard to interdict drugs); *id.* at 26,474 (stating that the Act provides \$45,000,000 for purchasing radar systems for Coast Guard surveillance, \$153,000,000 for the Coast Guard, and mandates that 500 Coast Guard personnel be assigned to naval vessels to interdict drugs); *id.* at 26,730 (asserting that \$150,000,000 will be allocated to the Coast Guard for drug interdiction); *id.* at 27,174 (explaining that the Anti-Drug Abuse Act “increases Federal support for interdiction by the . . . Coast Guard”).

82. *See id.* at 26,475 (asserting that MDLEA “creates a new offense to make it unlawful under U.S. law to possess with intent to distribute a controlled substance aboard a vessel located within the territorial sea of another country where that country affirmatively consents to enforcement action by the U.S.”); *id.* at 26,719–20 (statement of Sen. Murkowski) (discussing that interdicting a flag vessel or a vessel in another territory’s waters requires permission by the foreign nation).

83. Presidential Statement on Signing the Anti-Drug Abuse Act of 1986, 2 PUB. PAPERS 1447 (Oct. 27, 1986).

84. *See generally* Pub. L. No. 96-350, 94 Stat. 1159 (1980) (codified as amended at 21 U.S.C. § 955a (2012)).

MDLEA provides, “While on board a covered vessel, an individual may not knowingly or intentionally . . . manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance.”⁸⁵ The only change is that, while the 1980 Act explained jurisdiction in the substantive offense itself, MDLEA discusses jurisdiction in the definition of “covered vessel.” MDLEA defines a covered vessel as “(1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or (2) any other vessel if the individual is a citizen of the United States or a resident alien of the United States.”⁸⁶ Consistent with the scope of the 1980 Act, this suggests that MDLEA applies to U.S. citizens and resident aliens regardless of the vessel they board.

In 1996, Congress amended MDLEA to add a provision regarding jurisdiction.⁸⁷ This provision makes clear that whether a vessel is subject to the jurisdiction of the United States is a question of subject matter jurisdiction.⁸⁸

It follows that MDLEA allows the United States to prosecute individuals for drug trafficking who are on board vessels subject to the jurisdiction of the United States.

C. Theories of Criminal Jurisdiction

As this application touches upon international law and foreign nations, some argue that theories of criminal jurisdiction could confer prescriptive jurisdiction.⁸⁹ The five theories of criminal jurisdiction—territorial, protective, nationality, universal, and passive personality⁹⁰—have become the prevailing outlook in regard to criminal jurisdiction in international law.⁹¹

85. 46 U.S.C. § 70503(a)(1) (2012).

86. *Id.* § 70503(e)(1)–(2).

87. *See id.* § 70504(a).

88. *United States v. Miranda*, 780 F.3d 1185, 1192 (D.C. Cir. 2015); *United States v. De La Garza*, 516 F.3d 1266, 1271 (11th Cir. 2008); *United States v. Tinoco*, 304 F.3d 1088, 1105 (11th Cir. 2002) (“By adding to the MDLEA the jurisdiction and venue provision, 46 U.S.C. app. § 1903(f), Congress, as we have pointed out, plainly indicated that whether a vessel is subject to the jurisdiction of the United States is not an element of the offense, but instead is solely an issue of subject matter jurisdiction that should be treated as a preliminary question of law for the court’s determination.”); *United States v. Bustos-Useche*, 273 F.3d 622, 626 (5th Cir. 2001). *But see* *United States v. Gonzalez*, 311 F.3d 440, 443 (1st Cir. 2002) (stating that the jurisdictional provision does not relate to a court’s subject matter jurisdiction but rather the “reach and application” of MDLEA). *See infra* note 175 for how the First Circuit’s holding supports that MDLEA does not reach conspirators not “on board.”

89. *See, e.g.*, *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1258 (11th Cir. 2012) (considering theories of international law when determining a question of jurisdiction).

90. *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. SUPPLEMENT 435, 439–40 (1935). Scholars refer to this authority as “Harvard Draft.”

91. THE HARVARD RESEARCH IN INTERNATIONAL LAW: CONTEMPORARY ANALYSIS AND APPRAISAL 21–22 (John P. Grant & J. Craig Barker eds., 2007) (discussing the impact and authority of the Harvard Draft and finding that the convention on “Jurisdiction with Respect to Crime” has been referenced in 263 law review articles); Christopher L. Blakesley, *United States Jurisdiction over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1110 & n.5 (1982) (describing the theories put forth in the Harvard Draft and stating that the Harvard Draft theories have been adopted by U.S. federal courts, state courts, most course books, and most treatises on international law); Dan Jerker B. Svantesson, *A New Jurisprudential*

When determining MDLEA cases, courts focus their analyses on the protective and universal theories of criminal jurisdiction.⁹² The protective theory grants jurisdiction over a criminal when her conduct affects or intends to affect a national interest of the forum state.⁹³ The effect must “pose a threat to national security, sovereignty, or some important governmental function,”⁹⁴ such as terrorism or espionage, to assert jurisdiction using the protective theory.⁹⁵ The universal theory grants jurisdiction to any forum when the offenses are particularly heinous,⁹⁶ such as “torture, genocide, crimes against humanity, and war crimes.”⁹⁷

Courts disagree, however, on how influential these theories are, or should be, in analyzing jurisdiction in a particular case.⁹⁸ Theories of international law may be able to confer jurisdiction in certain cases where there would not ordinarily be clear adjudicative or prescriptive jurisdiction.⁹⁹ Some may argue that international law principles could establish jurisdiction. However, courts do not agree on how persuasive these theories are in asserting jurisdiction over an individual.

II. NO COURT HAS FULLY ANALYZED THE QUESTION OF WHETHER MDLEA REQUIRES A CONSPIRATOR TO BE ON BOARD A VESSEL

Unfortunately, courts have only addressed these constitutional concerns in passing.¹⁰⁰ Part II.A outlines the analysis in *United States v. Carvajal*,¹⁰¹ the

Framework for Jurisdiction: Beyond the Harvard Draft, 109 AM. J. INT’L L. UNBOUND 69, 69 (2015) (asserting that the Harvard Draft structure “has represented public international law’s approach to jurisdiction” since 1935).

92. Fritch, *supra* note 7, at 713.

93. Blakesley, *supra* note 91, at 1111; Michael P. Scharf, *Jurisdiction with Respect to Crime: Universal Jurisdiction and the Harvard Research*, in THE HARVARD RESEARCH IN INTERNATIONAL LAW: CONTEMPORARY ANALYSIS AND APPRAISAL, *supra* note 91, at 275, 276 n.5.

94. Blakesley, *supra* note 91, at 1111.

95. Scharf, *supra* note 93, at 276 n.5.

96. *See id.* at 276; *see also* Blakesley, *supra* note 91, at 1111.

97. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring) (asserting that certain crimes and principles of international law limit universal jurisdiction).

98. Fritch, *supra* note 7, at 713 & n.76 (comparing *United States v. Perlaza*, 439 F.3d 1149 (9th Cir. 2006), which states that international law principles could be a “rough guide” to determining the appropriate due process “framework,” *id.* at 1162, with *United States v. Cardales*, 168 F.3d 548 (1st Cir. 1999), which states that principles of international law “determin[e] whether due process is satisfied,” *id.* at 553).

99. *See, e.g.*, *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1258 (11th Cir. 2012) (considering whether the theory of universal jurisdiction could confer jurisdiction when the vessel was seized in the territorial waters of another nation).

100. The court in *Carvajal* asserted that it was “aware of at least two other cases in which conspirators not on board a vessel were convicted of violating MDLEA.” *United States v. Carvajal*, 924 F. Supp. 2d 219, 244 (D.D.C. 2013). However, neither of these cases dealt with a foreign national located in a foreign nation, where it was clear that the defendants were not trafficking drugs into the United States. *See infra* notes 123–24 and accompanying text. The one case cited in *Carvajal* that dealt with a foreign national in a foreign nation did not employ statutory interpretation but ruled that “the object of the charged conspiracy . . . is expressly proscribed by the MDLEA.” *United States v. Salcedo-Ibarra*, No. 8:07-CR-49-T-27TGW, 2009 WL 1953399, at *1 (M.D. Fla. July 6, 2009).

101. 924 F. Supp. 2d 219 (D.D.C. 2013).

only case to have substantially discussed this issue. Part II.B describes the shortcomings in the court's analysis to illustrate the lack of consideration courts have given this issue.

A. *The Court's Analysis in Carvajal*

In *Carvajal*, the D.C. district court considered whether a conspirator must be "on board" to be prosecuted under MDLEA.¹⁰² The court's reasoning relied on three distinct factors: (1) a declaration that the conspiracy provision could not be read to reach only individuals on board, (2) two district court cases, and (3) an understanding that Congress intended to close such jurisdictional loopholes.¹⁰³ The court stated that reading the statute to only reach conspirators on board was "novel" and "clever."¹⁰⁴ After outlining the defendants' and government's arguments, the court held that "[a] conspiracy under 46 U.S.C. § 70506(b) . . . must naturally include activities other than those that occur directly on board the vessel. The statute cannot be read any other way."¹⁰⁵

The court relied on two cases to support its analysis. First, the court cited *United States v. Salcedo-Ibarra*¹⁰⁶ and noted that it rejected the argument that a conspirator needs to be "on board" a vessel.¹⁰⁷ Second, it cited to *United States v. Medjuck*,¹⁰⁸ which considered "primarily" due process concerns but "relied on the premise that MDLEA applies to conspirators not on board the vessel."¹⁰⁹

The *Carvajal* court asserted that reading the statute to exclude conspirators not on board would be "contrary to Congress's intent."¹¹⁰ The court quoted the Department of Justice's argument that Congress's concern was the "use of vessels to transport drugs," so conspiring to traffic drugs on "a vessel subject to the jurisdiction of the United States . . . brings [the conspirators] under the purview of . . . MDLEA's conspiracy provision."¹¹¹ The court acknowledged that other courts have recognized the wide scope of MDLEA.¹¹² The court also noted that the defendants were attempting to use

102. *Id.* at 243–45.

103. *Id.*

104. *Id.* at 243.

105. *Id.* at 244.

106. No. 8:07-CR-49-T-27TGW, 2009 WL 1953399 (M.D. Fla. July 6, 2009).

107. *Carvajal*, 924 F. Supp. 2d at 244 ("Just as one who possesses cocaine with the intent to distribute while 'on board' a vessel subject to the jurisdiction of the United States violates MDLEA, one who conspires with those 'on board' the vessel likewise violates the MDLEA." (quoting *Salcedo-Ibarra*, 2009 WL 1953399, at *1)).

108. 937 F. Supp. 1368 (N.D. Cal. 1996).

109. *Carvajal*, 924 F. Supp. 2d at 244 (citing *Medjuck*, 937 F. Supp. at 1369–70, 1375).

110. *Id.* at 245.

111. *Id.* (quoting Government's Response in Opposition to Defendants' Motion to Dismiss the Indictment at 8, *Carvajal*, 924 F. Supp. 2d 219 (No. 106-02)).

112. *Id.* ("MDLEA was passed 'to strengthen the United States' drug laws . . . specifically by removing geographical barriers [that] had impeded efforts to combat the drug trade.'" (alteration in original) (quoting *United States v. Ledesma-Cuesta*, 347 F.3d 527, 531 (3d Cir. 2003))).

a “loophole that defendants have unsuccessfully attempted to exploit regarding similar statutes for almost 200 years.”¹¹³

Lastly, the *Carvajal* court held that the Felonies Clause extends to conspiracies, asserted jurisdiction, and ruled that this was within Congress’s authority by applying U.S. conspiracy law.¹¹⁴

Because the conspiracy provision must naturally include individuals not on board, the court in *Carvajal* relied on two other cases that also prosecuted individuals not on board and on Congress’s intent to close jurisdictional loopholes to find that an individual does not need to be “on board” to be prosecuted under MDLEA.

B. *Carvajal Missed the Boat*

In *Carvajal*, the D.C. district court concluded that an individual does not need to be “on board” to be prosecuted as a conspirator,¹¹⁵ but its analysis was flawed for four reasons: (1) it relied on U.S. conspiracy law to establish jurisdiction, (2) it did not engage in statutory interpretation to understand the scope of MDLEA, (3) it relied on cases that are factually distinct from the application at issue that also did not engage in statutory interpretation, and (4) it overgeneralized Congress’s intent.

First, the court applied U.S. conspiracy law in its analysis to establish that this was within the scope of Congress’s authority under the Felonies Clause.¹¹⁶ This is problematic because there is a circuit split on whether it is appropriate to use conspiracy law to establish jurisdiction.¹¹⁷

Second, the court asserted that no support exists for a reading of the conspiracy provision to encompass only those on board a vessel.¹¹⁸ The court stated that the conspiracy clause “must naturally include activities other than those that occur directly on board the vessel.”¹¹⁹ This assertion ignores three important things. First, historically, the only way for the United States to prosecute drug trafficking on the high seas was to prove a conspiracy among those on board.¹²⁰ Second, a conference report to the 1980 Act considers how the conspiracy provision reaches someone on board a vessel and does not contemplate reaching a land-based conspirator.¹²¹ Third, a crew member on board a vessel can be prosecuted as a conspirator under MDLEA.¹²²

113. *Id.* (citing *United States v. Holmes*, 18 U.S. (5 Wheat.) 412, 417 (1820)).

114. *Id.* at 259–60.

115. *See id.*

116. *Id.*

117. *See* Jack Figura, *No Consensus on Conspiracy Theory of Personal Jurisdiction*, LAW360 (Jan. 31, 2018), <https://www.law360.com/articles/1007340> [<https://perma.cc/375C-EFZG>].

118. *Id.* at 244. (“A conspiracy under 46 U.S.C. § 70506(b) . . . must naturally include activities other than those that occur directly on board the vessel. The statute cannot be read any other way.”).

119. *Id.*

120. *See supra* note 67 and accompanying text.

121. *Supra* note 74 and accompanying text.

122. *United States v. Perlaza*, 439 F.3d 1149, 1157 (9th Cir. 2006) (prosecuting individuals who were aboard the vessel under the conspiracy provision); *United States v. Moreno-Morillo*, 334 F.3d 819, 822–23 (9th Cir. 2003) (charging individuals on board a vessel with possession

These three points make clear that the conspiracy provision can be read only to criminalize conduct occurring “on board” a vessel on the high seas.

Third, the analysis in *Carvajal* relied on cases factually distinguishable from reaching a foreign national in a foreign country that did not engage in statutory interpretation of MDLEA’s conspiracy provision. The court based part of its analysis on a finding in *Medjuck* that the conspirator provision applies to individuals not on board.¹²³ In *Medjuck*, however, the individuals who were prosecuted as conspirators while not on board the vessel were either U.S. citizens or currently located in the territory of the United States.¹²⁴ *Carvajal* also cited *Salcedo-Ibarra*, but that case rested on nexus and the fact that at least some of the cocaine on board was destined for the United States.¹²⁵ Additionally, neither the court in *Salcedo-Ibarra* nor *Medjuck* conducted statutory interpretation in analyzing the conspiracy provision,¹²⁶ which weakens the persuasive authority of the cases in holding that MDLEA prosecutes conspirators not on board.

Fourth, the *Carvajal* court did not cite any authority showing Congress intended for MDLEA to apply to foreign nationals in a foreign nation. While the “use of vessels” may be central to MDLEA, this does not mean that Congress intended the statute to reach an individual not on board. Further, just because MDLEA is expansive does not support an expansive interpretation of the statute. Lastly, a general concern about defendants using jurisdictional defenses does not indicate that Congress intended to reach all persons in all situations.

Carvajal did not adequately consider whether MDLEA reaches a foreign national as a conspirator in a foreign nation, nor did it consider whether this application of MDLEA is within Congress’s constitutional authority. The court did not engage in statutory interpretation. Instead, it relied on cases that did not engage in a complete analysis of this question and improperly generalized the intent of Congress. These shortcomings show the lack of consideration that courts have given to determining whether the conspiracy provision applies to individuals not “on board” the vessel.

III. THERE IS NO PRESCRIPTIVE OR ADJUDICATIVE JURISDICTION TO PROSECUTE INDIVIDUALS WHO ARE NOT ON THE HIGH SEAS

If the D.C. district court had done a proper analysis, it should have held that reaching a foreign national in a foreign nation as a conspirator to drug trafficking is unconstitutional. Part III of this Note lays out the analysis the

with intent to distribute and conspiracy); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1255–56 (9th Cir. 1998) (prosecuting Klimavicius and Lerma-Lerma, who were on board the vessel, as conspirators); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1053 (3d Cir. 1993) (charging Martinez with possession of cocaine with intent to distribute and conspiracy).

123. *See Carvajal*, 924 F. Supp. 2d at 244–45.

124. *See id.* (discussing that one conspirator was an American in Singapore and that the second was a Canadian who was in charge of receiving and distributing the drugs in the United States).

125. *United States v. Salcedo-Ibarra*, No. 8:07-CR-49-T-27TGW, 2009 WL 1953399, at *2 (M.D. Fla. July 6, 2009).

126. *Id.* at *1. *See generally* *United States v. Medjuck*, 937 F. Supp. 1368 (N.D. Cal. 1996).

court should have conducted by addressing all the concerns raised in the foregoing discussions.¹²⁷ First, Part III.A argues that Congress's power is limited to reaching crimes and individuals on the high seas under the Define and Punish Clause. With this foundation, Part III.B argues that all provisions of MDLEA should be read as limited by the jurisdictional language of "on board" a vessel. Part III.C then briefly considers but rejects the possibility that theories of international law could confer jurisdiction.

A. Congress Does Not Have the Authority Under the Felonies Clause to Enact a Statute That Prosecutes an Individual Who Is on Land and Not on the High Seas

Determining whether prescriptive jurisdiction exists in this context depends on whether Congress has the power under the Define and Punish Clause to enact a law that prosecutes a foreign national in a foreign nation not on the high seas. Here, the structure of the Constitution, history, and case law suggest that Congress's power under the Felonies Clause does not validly reach individuals in foreign nations not on the high seas.

Congress has the power to punish felonies on the high seas under the Define and Punish Clause.¹²⁸ MDLEA prohibits drug trafficking but only prosecutes individuals for this felony¹²⁹ when committed on a boat¹³⁰ on the high seas.¹³¹ Furthermore, no court has held MDLEA to be an abuse of congressional authority when there is a nexus to the United States.¹³² The Define and Punish Clause hinges on where the *crime* occurred, not on the location of the *individual*.¹³³ However, the Define and Punish Clause has always been interpreted to reserve the prosecution of crimes committed on land to the territory where such conduct occurred.¹³⁴ Here, the question is whether conspiracy can effectively extend an individual's conduct from land to the high seas.

Within MDLEA, jurisdiction is an initial inquiry "totally distinct from the crime itself," and jurisdiction must be established before U.S. complicity law can apply.¹³⁵ While a conspirator can be prosecuted under U.S. federal law

127. This Note considers both text- and intention-based arguments but does not address which is the correct approach to interpreting the Clause or the statute. This Note considers only the factual situation of a foreign national located in a foreign nation as a conspirator to drug trafficking on the high seas.

128. *See supra* Part I.A.

129. *See Federal Trafficking Penalties*, DRUG ENFORCEMENT AGENCY, <https://www.dea.gov/druginfo/ftp3.shtml> [<https://perma.cc/V446-HNWN>] (last visited Apr. 13, 2018).

130. *See supra* note 63 and accompanying text.

131. *See supra* Part I.A.

132. *See, e.g.*, *United States v. Perlaza*, 439 F.3d 1149, 1167 (9th Cir. 2006) (explaining that if the vessel is not stateless, the government must prove a sufficient nexus on remand); *United States v. Davis*, 905 F.2d 245, 248–49, 251 (9th Cir. 1990) (holding MDLEA constitutional as applied to Davis because there was a nexus to the United States).

133. *See supra* Part I.A.

134. *Supra* note 38 and accompanying text.

135. *Perlaza*, 439 F.3d at 1168–69 (asserting that the court had to establish jurisdiction before "apply[ing] United States aiding-and-abetting law" in an MDLEA case). Conspiracy,

in any venue where any coconspirator acts,¹³⁶ a court cannot use U.S. conspiracy law until it establishes jurisdiction.¹³⁷ Thus, under MDLEA, the individual's conspiracy cannot be extended to conduct occurring on the high seas until the court establishes jurisdiction, which would allow for U.S. federal criminal conspiracy law to apply. Therefore, an argument that the scope of Congress's authority allows for prescriptive jurisdiction over this individual would be circular.

Because the Felonies Clause does not implicate conduct occurring on land and is limited to conduct on the high seas, reaching a foreign national located in a foreign nation as a conspirator is outside the scope of the Felonies Clause.¹³⁸ Even if implemented using the Necessary and Proper Clause, this application of MDLEA would still not be within the scope of Congress's enumerated powers.¹³⁹ Prosecuting a land-based conspirator is not necessary to seizing drugs being transported on the high seas.¹⁴⁰

Therefore, using MDLEA to reach a foreign national located in a foreign country not on board a vessel on the high seas exceeds Congress's power under the Felonies Clause. Thus, prescriptive jurisdiction does not exist to prosecute a foreign national as a conspirator in a foreign nation when that individual is not on the high seas.

*B. The Maritime Drug Law Enforcement Act Does Not Cover
a Conspirator Who Is in a Foreign Nation*

To find adjudicative jurisdiction, the substantive offense of MDLEA must reach a foreign national in a foreign nation as a conspirator. Here, the text as well as the intent and purpose of MDLEA do not render such a reading. Further, in light of understanding the Felonies Clause of the Define and Punish Clause to not reach such individuals,¹⁴¹ the statute should be read within the bounds of Congress's authority to enact laws. Applying MDLEA to reach a foreign national not "on board" a vessel would be an unconstitutional reading of MDLEA due to the limits of Congress's

a subset of complicity law, is an agreement between two or more people to commit a crime and such agreement is a crime in itself. *Conspiracy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

136. Under U.S. federal criminal law, an individual is liable for all acts of coconspirators that are within the scope of agreement. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946). Jurisdiction is proper in any venue where a coconspirator acts to further the conspiracy according to U.S. federal law. *Krulewitch v. United States*, 336 U.S. 440, 452 (1949) (Jackson, J., concurring) ("An accused, under the Sixth Amendment, has the right to trial 'by an impartial jury of the State and district wherein the crime shall have been committed.' The leverage of a conspiracy charge lifts this limitation from the prosecution and reduces its protection to a phantom, for the crime is considered so vagrant as to have been committed in any district where any one of the conspirators did any one of the acts, however innocent, intended to accomplish its object.").

137. See *supra* note 135 and accompanying text.

138. See *supra* notes 28, 38 and accompanying text.

139. See *supra* notes 45–49 and accompanying text.

140. See *infra* notes 200–01 and accompanying text (describing how MDLEA is effective at seizing drugs on the high seas and explaining that these individuals would be prosecuted by the country of which they are nationals or residents).

141. See *supra* Part III.A.

prescriptive jurisdiction. In addition to there being no adjudicative jurisdiction to punish these individuals, this application also presents a due process notice problem as a consequence of judicial interpretations and applications of the statute. This Part analyzes MDLEA using various canons of statutory interpretation and demonstrates how each of them point to the same conclusion, namely, that MDLEA does not extend to foreign conspirators who are not physically on board a vessel on the high seas.

According to the theory of new textualism and the plain meaning rule, statutes should be read in accordance with their ordinary meaning when the text is clear.¹⁴² One may argue that because MDLEA prohibits conspiracy,¹⁴³ it must be read to reach any conspirator of drug trafficking conduct. However, the phrase “on board” a vessel limits the scope of MDLEA.¹⁴⁴ MDLEA does not prohibit an individual from “intentionally manufactur[ing] or distribut[ing], or possess[ing] with intent to manufacture or distribute, a controlled substance on board a covered vessel.” Rather, it prohibits individuals “while on board a covered vessel” from knowing or intending to manufacture or distribute drugs.¹⁴⁵ Therefore, according to the statute’s plain meaning, reaching someone not “on board” is not covered and, therefore, unreasonable.

An argument appealing to the meaningful variation canon of statutory interpretation¹⁴⁶ also fails. One may claim that, when writing the statute, legislators could have included the language of “while on board a covered vessel” in the provision regarding conspiracies and attempted crimes if legislators intended to reach only those conspiring on the high seas. However, under the *expressio unius est exclusio alterius* canon, words omitted may be just as significant as those words that are set forth.¹⁴⁷ Here, if the legislators intended the statute to reach conspirators on land, they could have provided text for this application. Further, there is evidence that legislators included such a qualifier in prior laws as seen when the First Congress enacted a law against piracy¹⁴⁸ and prohibited persons “either upon the land or the sea” from aiding and abetting such crimes.¹⁴⁹

Under the whole act canon, an appropriate means for understanding the text itself considers the act as a whole.¹⁵⁰ Here, the title, “Maritime Drug

142. *See generally* United States v. Marshall, 908 F.2d 1312 (7th Cir. 1990) (applying the plain meaning rule).

143. *See supra* note 64 and accompanying text.

144. 46 U.S.C. § 70503(a) (2012).

145. *Id.*

146. *See generally* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991) (discussing the canons against surplusage and redundancy).

147. *Expressio unius est exclusio alterius*, BLACK’S LAW DICTIONARY (10th ed. 2014).

148. Act of April 30, 1790, ch. 8, 1 Stat. 112, 113–14 (1790).

149. *See id.* ch. 9, at 114. This provision did not mandate extraterritorial application. *Id.* If applied to a foreign national in a foreign nation this provision would not create constitutional concerns because piracy is considered an offense against the law of nations and is therefore an appropriate application of universal jurisdiction. *See supra* notes 35, 96 and accompanying text.

150. *See generally* Yates v. United States, 135 S. Ct. 1074 (2015) (analyzing the title and structure of the act).

Law Enforcement Act,” specifically relates to the sea and conduct on the sea. The connection to the ocean is significant, especially because Congress’s powers under the Felonies Clause are limited to conduct on the high seas.¹⁵¹ Further, although the Act prohibits conspiracy,¹⁵² this provision should be read consistently with the rest of the statute and, therefore, should only reach conspirators “on board” a vessel.

According to the legal process theory, the purpose and spirit of the statute should be considered when understanding the text.¹⁵³ One of the major reasons MDLEA was seen as necessary was because of defendants making arguments regarding jurisdiction.¹⁵⁴ One could maintain that legislators expressly included conspiracy as a section of the statute to prevent defendants from raising such arguments. However, nothing suggests that jurisdictional questions regarding foreign nationals who were *not* on board concerned legislators. The 1980 Act was seen as necessary to close a loophole for individuals who were on board a vessel where the government could not prove a drug trafficking conspiracy or could not discover such vessels once they had entered U.S. territorial waters.¹⁵⁵ Further, even the discussion of the conspiracy provision of the 1980 Act only contemplated reaching a conspirator on the high seas.¹⁵⁶

Silence on this issue weighs in favor of this reach not being contemplated rather than it being conceded to. One may argue that, according to the “dog [that] did not bark” canon,¹⁵⁷ if there were concerns about this reach, legislators would have argued about them. Furthermore, one could also argue that, because MDLEA received support from both sides of the aisle¹⁵⁸ and was quickly enacted,¹⁵⁹ there were no concerns about the scope of the Act. However, legislatures do not “hide elephants in mouseholes.”¹⁶⁰ Reaching all foreign nationals in foreign countries is an elephant.¹⁶¹ Here, it is unlikely that legislators could have contemplated such a profound change of scope from the 1980 Act to MDLEA without anybody mentioning it.¹⁶²

151. *See supra* Part I.A.

152. *Supra* note 64.

153. *See generally* *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) (looking to the purpose of the statute).

154. *See supra* note 76 and accompanying text.

155. *See supra* notes 66–68 and accompanying text.

156. *See supra* note 74 and accompanying text.

157. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 589 (1982) (Stevens, J., dissenting).

158. *See supra* note 79 and accompanying text.

159. *See supra* note 78 and accompanying text.

160. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

161. *See United States v. Caicedo*, 47 F.3d 370, 372 (9th Cir. 1995) (“Punishing crimes committed on foreign soil . . . is an intrusion into the sovereign territory of another nation.”).

162. *See, e.g., Mont. Wilderness Ass’n v. U.S. Forest Serv.*, 655 F.2d 951, 955–57 (9th Cir. 1981) (analyzing the few times a broad change was mentioned or documented); *supra* note 74 and accompanying text (contemplating that the conspiracy provision of the 1980 Act reached a person on board a vessel on the high seas); *supra* notes 81–82 and accompanying text (describing how the discussions of MDLEA revolved around budget allocation); *supra* notes 84–86 and accompanying text (showing that the majority of language from the 1980 Act was used in MDLEA).

Within debates regarding the Anti-Drug Abuse Act, there is little discussion of MDLEA. Discussions emphasized the national context of drug abuse education¹⁶³ rather than MDLEA and its potential reach. The presidential signing statement does not even mention MDLEA.¹⁶⁴ Therefore, it is unlikely that MDLEA was the primary motivation behind the Anti-Drug Abuse Act.

Due to this narrow application,¹⁶⁵ only a weak argument for congressional acquiescence exists. One may claim that, because Congress has not amended the statute to make clear that “on board” limits the conspiracy provision, Congress has acquiesced to courts reading the statute in this way. But, as this is a rarely litigated, narrow issue¹⁶⁶ and because MDLEA is so highly litigated,¹⁶⁷ legislators may not even be aware of this application.

While not directly related to the issue of reaching a conspirator on land, the 1996 amendment weighs in favor of understanding “on board” a vessel as a limit to the substantive offense of MDLEA. The 1996 amendment has been understood by the Fifth, Eleventh, and D.C. Circuits to clarify that language of “on board a vessel subject to the jurisdiction of the United States” as “a congressionally imposed limit on courts’ subject matter jurisdiction.”¹⁶⁸

Policy arguments also support limiting MDLEA not to reach foreign nationals who are not on board a vessel but rather in a foreign nation. According to the rule of lenity, criminal statutes should be construed narrowly,¹⁶⁹ and any ambiguity should be read in favor of the defendant.¹⁷⁰ Although this Note argues that the statute only reaches individuals “on board” vessels, there is an ambiguity in the statute because some judges have interpreted the statute differently.¹⁷¹ Therefore, MDLEA should be read in favor of the defendant and should not be understood to reach a foreign national as a conspirator located in a foreign country.

Because this application would exceed Congress’s Article I powers under the Felonies Clause,¹⁷² it would be appropriate to construe the statute to avoid such a problem.¹⁷³ Reaching a foreign national located in a foreign nation as a conspirator would be outside the scope of Congress’s Article I powers, but limiting MDLEA to reach only conspirators “on board” the vessel would

163. *See supra* note 80 and accompanying text.

164. *See supra* note 83 and accompanying text.

165. *See United States v. Carvajal*, 924 F. Supp. 2d 219, 244 (D.D.C. 2013) (noting the court’s awareness of two other cases with this application).

166. *Id.* at 225.

167. *See supra* note 10 and accompanying text.

168. *See United States v. De La Garza*, 516 F.3d 1266, 1271 (11th Cir. 2008); *supra* note 88 and accompanying text.

169. *Muscarello v. United States*, 524 U.S. 125, 150 (1998) (Ginsburg, J., dissenting) (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971)).

170. *Id.* at 148 (asserting that the rule of lenity is the presumption when the text is ambiguous and that a defendant should prevail when the text is unclear).

171. *See generally Carvajal*, 924 F. Supp. 2d 219; *United States v. Medjuck*, 937 F. Supp. 1368 (N.D. Cal. 1996).

172. *See supra* Part III.A.

173. *See, e.g., Fair Hous. Council v. Roommates.com, LLC*, 666 F.3d 1216, 1222 (9th Cir. 2012).

avoid this constitutional issue. The Eleventh Circuit's interpretation of the statute is consistent with this reading.¹⁷⁴ Further, this interpretation remains consistent with other federal laws to read a jurisdictional requirement in a federal statute to avoid constitutional concern.¹⁷⁵

The conspiracy provision should not extend the subject matter jurisdiction beyond those "on board." In *United States v. Yakou*,¹⁷⁶ the court determined that a foreign national in a foreign nation could not aid and abet his son's violation of the Brokering Amendment, even where the statute applied extraterritorially.¹⁷⁷ The court explained that "the crime of aiding and abetting 'confer[s] extraterritorial jurisdiction to the same extent as the offense [] that underlie[s it].'"¹⁷⁸ Just as the Brokering Amendment applies extraterritorially when a "U.S. person" aids and abets a crime,¹⁷⁹ MDLEA's conspiracy provision should also apply extraterritorially when an individual is "on board a vessel subject to the jurisdiction of the United States."

Nexus to the United States does not resolve all requirements under the Constitution. Some could argue that a nexus to the United States fulfills due process to reach foreign vessels or other nations' waters¹⁸⁰ and would fulfill due process sufficiently for a foreign national in a foreign nation. However, reaching someone not "on board" appears unreasonable, and those individuals would not have notice of this application because prosecuting a foreign conspirator has occurred only rarely.¹⁸¹ Although there may be a nexus to the United States, there exist different constitutional concerns such as the substantive offense not covering such conduct and the statute being interpreted in a way that would not make individuals aware that MDLEA reaches their conduct.¹⁸²

The substantive offense does not prosecute a foreign national in a foreign nation as a conspirator. Adjudicative jurisdiction does not exist to prosecute

174. To have adjudicative jurisdiction over an individual, the government must prove that the defendant was "on board a vessel subject to the jurisdiction of the United States." *United States v. De La Garza*, 516 F.3d 1266, 1272 (11th Cir. 2008). This case did not consider the question of reaching a coconspirator not on board but rather an individual on a "go-fast" vessel. *Id.* at 1268. The Fifth and D.C. Circuits agree that "whether a vessel is subject to the jurisdiction of the United States" is a limit on the courts' subject matter jurisdiction. *See supra* note 88 and accompanying text.

175. *See, e.g., Schmuck v. United States*, 489 U.S. 705, 710–11 (1989) (discussing the mailing element in federal mail fraud); *United States v. Feola*, 420 U.S. 671, 676 & n.9 (1975) (discussing "federal officer" as a jurisdictional element that allows for federal jurisdiction). Further, the First Circuit's interpretation of MDLEA supports this interpretation. *See United States v. Gonzalez*, 311 F.3d 440, 443 (1st Cir. 2002) (explaining that "jurisdiction" in § 1903(f) refers to the substantive reach of the statute and that Congress's use of the term "authority to regulate" is analogous to its use of "affects interstate commerce" or "involved a federally insured bank").

176. 428 F.3d 241 (D.C. Cir. 2005).

177. *Id.* at 251–54.

178. *Id.* at 252 (alterations in original) (quoting *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002)).

179. *Id.* at 252–53.

180. *See United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1256–59 (9th Cir. 1998).

181. *See United States v. Carvajal*, 924 F. Supp. 2d 219, 243–45 (D.D.C. 2013) (noting just two other cases where a land-based conspirator was prosecuted).

182. *See supra* note 59 and accompanying text.

these individuals. Therefore, it is unconstitutional to use MDLEA in this way. In addition to there being no adjudicative jurisdiction, the way MDLEA has been interpreted and applied to reach individuals' conduct produces a due process notice problem for these individuals.

C. Theories Alone Cannot Establish Jurisdiction

One might argue that principles of international law could establish jurisdiction.¹⁸³ However, unless a federal statute expressly prohibits conduct, the federal judiciary does not have jurisdiction over the individual that engaged in that conduct.¹⁸⁴ Therefore, if MDLEA does not cover the conduct of a coconspirator not on board a vessel on the high seas, other theories should not be able to establish a basis for prosecuting the coconspirator. Even if these theories could establish jurisdiction, they fail to do so in this instance.

Both the protective principle and universal theories of jurisdiction have been rejected by courts as a basis for MDLEA.¹⁸⁵ While one may argue that the United States has a national interest in the effects of drug trafficking, such effects do not rise to the level of threatening national security or an important government function. Thus, using the protective principle to establish jurisdiction would be erroneous here.¹⁸⁶ Likewise, drug trafficking is neither heinous nor similar to the crimes of torture and genocide. Using universal jurisdiction in this instance would also be incorrect.¹⁸⁷ Therefore, neither of these theories could establish jurisdiction for the crime of drug trafficking.

According to the Charming Betsy doctrine, statutes should be read to comply with international law.¹⁸⁸ While every country prosecutes drug trafficking as "criminal behavior," drug trafficking is neither an "international crime" nor universally cognizable.¹⁸⁹ Therefore, theories of universal jurisdiction do not extend to drug crimes.¹⁹⁰ Further, Justice Breyer has cautioned reading the protective principle broadly to ensure that the government does not use this theory to prosecute any vital interest.¹⁹¹

It follows that principles of international law cannot establish U.S. jurisdiction over a foreign national in a foreign country for being a conspirator to drug trafficking on the high seas.

183. See Fritch, *supra* note 7, at 713–14. Fritch argues that the United States can establish jurisdiction, absent a nexus to the United States, using international legal theories and treaties. *Id.* at 721.

184. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812).

185. Fritch, *supra* note 7, at 715.

186. See *supra* notes 93–95 and accompanying text.

187. See *supra* notes 96–97 and accompanying text.

188. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

189. *Kontorovich*, *supra* note 7, at 1226. See generally *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* 1582 U.N.T.S. 95(1988).

190. See *Kontorovich*, *supra* note 7, at 1223–27 (asserting that universal jurisdiction cannot be an international law basis for MDLEA).

191. *United States v. Robinson*, 843 F.2d 1, 3 (1st Cir. 1988).

IV. UNDERSTANDING “ON BOARD” A VESSEL AS A CONSTITUTIONAL CHECK ON MDLEA

In addition to there being no prescriptive and adjudicative jurisdiction, policy arguments and practical implications also weigh in favor of declining to extend MDLEA to foreign nationals acting as conspirators located in a foreign nation. Part IV.A shows that the United States can refrain from establishing jurisdiction because other remedies exist. Next, Part IV.B recommends that courts stop prosecuting foreign nationals in foreign nations as conspirators and suggests that legislators amend the statute. Part IV.B adds that, in the event legislators want MDLEA to reach individuals who are foreign conspirators, and if the Supreme Court approves of this reach, Congress should amend the conspiracy provision to include “on land or on sea.”

A. *Walking the Plank: Practical Considerations Show Conspirators Will Be Prosecuted in the Absence of MDLEA*

While there may be arguments that foreign conspirators located in foreign nations should not be out of reach of the U.S. criminal law, real-world considerations show that these individuals will be prosecuted even if the United States declines to extend jurisdiction. Drug crimes are criminalized universally;¹⁹² therefore, other remedies exist besides MDLEA. The foreign nation wherein the conspirators are located, or the foreign nation of which they are citizens, should prosecute these individuals, and the United States could provide any assistance necessary in the investigation.¹⁹³ Therefore, it is unnecessary for the United States to pursue these prosecutions.

Policy considerations also weigh against the United States prosecuting foreign nationals not on board vessels on the high seas. Clear connections exist between the War on Drugs and mass incarceration.¹⁹⁴ Incarceration rates in the United States were consistent from 1925 until 1975; however, since then, incarceration rates have increased fourfold.¹⁹⁵ In 1980, “drug offenders” accounted for 25 percent “of the federal prison population”; by 1996, they accounted for 59 percent.¹⁹⁶ Mass incarceration is problematic

192. See *supra* note 189 and accompanying text.

193. See United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 189, at 170–81. The Convention mandates that each signatory “shall adopt such measures as may be necessary” to criminalize a variety of drug-related offenses. *Id.* at 175–76. This includes “tak[ing] such measures as may be necessary to establish jurisdiction.” *Id.* When “[an] offence has been committed” by the national of a signatory country or one present in its territory, the “[p]arties shall afford one another . . . the widest measure of mutual legal assistance in investigations, prosecutions, and judicial proceedings.” *Id.* at 181–82.

194. Benjamin Levin, Note, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2188 (2016).

195. David Cole, *Formalism, Realism, and the War on Drugs*, 35 SUFFOLK U. L. REV. 241, 250 (2001). The United States has the highest per capita rate of incarceration, which is five times higher than the next western European country. *Id.*

196. *Id.* (arguing that the War on Drugs been an influential factor in the “explosion in incarceration rates” in the United States).

because it is costly and, from a social welfare perspective, raises concerns about quality of life and reentry problems.¹⁹⁷

Additionally, incarceration does not solve the drug abuse problem.¹⁹⁸ That the War on Drugs targets minorities erodes the scheme's validity.¹⁹⁹ United States taxpayers should not pay to prosecute and imprison another nation's drug criminals when incarceration clearly does not solve the drug problem, and targeting minorities will only undermine the legitimacy of the War on Drugs.

MDLEA effectively curbs international drug trafficking without reaching a foreign national located in a foreign country as a conspirator. One may try to assert that, because MDLEA ineffectively targets drug trafficking if it cannot reach a conspirator not "on board" the vessel, such an application is necessary and proper to execute Congress's powers to punish felonies on the high seas. However, MDLEA still allows the Coast Guard to seize massive amounts of drugs headed to the United States.²⁰⁰ Further, the inability to reach a conspirator located in a foreign nation would not truncate Congress's authority to police the ocean for drugs headed to the United States. Lastly, because of international agreement that countries will prosecute drug trafficking, individuals located in foreign nations should be prosecuted for violating their own nations' drug laws.²⁰¹ Therefore, an argument that the conspirator will continue to conspire to traffic drugs remains unfounded because the individual will be imprisoned whether in the United States or in his or her own nation.²⁰²

It is important to keep in mind that "[h]ow we treat foreign nationals . . . ultimately tests our own humanity."²⁰³ Out of respect for other countries, U.S. courts should consider whether jurisdiction is appropriate over a noncitizen.²⁰⁴ Beyond that, it is in the United States' best interest to treat

197. For a discussion of the problems of mass incarceration, see generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010).

198. Cole, *supra* note 195, at 253 ("[W]e cannot 'incarcerate ourselves out of' the drug problem." (quoting Mireya Navarro, *Experimental Courts Are Using New Strategies to Blunt the Lure of Drugs*, N.Y. TIMES (Oct. 17, 1996), <https://www.nytimes.com/1996/10/17/us/experimental-courts-are-using-new-strategies-to-blunt-the-lure-of-drugs.html> [<https://perma.cc/M5E5-C5KH>])).

199. *Id.* at 252–53 ("Two features of the war on drugs in particular corrode legitimacy. The first is the reality and perception that the system is unfair to minorities, subjecting them to much harsher treatment than whites.").

200. *See, e.g.*, *United States v. Perlaza*, 439 F.3d 1149, 1152 (9th Cir. 2006) (seizing approximately 2000 kilograms of cocaine); *United States v. Aikins*, 946 F.2d 608, 611 (9th Cir. 1990) (seizing 21,000 pounds of marijuana); *United States v. Davis*, 905 F.2d 245, 247 (9th Cir. 1990) (seizing 7000 pounds of marijuana).

201. *See supra* note 193 and accompanying text.

202. *See supra* note 193.

203. Cole, *supra* note 53, at 388.

204. Chaiassan, *supra* note 8, at 655–56. Prosecuting a foreign national in a foreign nation as a conspirator for drug trafficking to a foreign nation is inconsistent with Restatement (Third) of Foreign Relations Law of the United States's understanding of when prosecuting an individual is reasonable. The Restatement asserts that jurisdiction is reasonable if the person is present in, domiciled in, a resident of, or a national of the state. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421(2) (AM. LAW INST. 1987). Jurisdiction is unreasonable if the person is only transitorily in the state. *See id.* Further, the Restatement

foreign nationals the way that the United States would hope foreign nations would treat U.S. citizens. Because nations possess analogous powers to those granted under the Define and Punish Clause,²⁰⁵ in this context, U.S. courts should consider the ability of a foreign nation to extradite a U.S. citizen and prosecute that individual pursuant to the foreign nation's laws. As this would make many wary, courts should consider limiting the U.S. government from doing this to other nation's citizens. If not, other nations may attempt to do the same to U.S. citizens.

B. All Aboard: Recommendation to Courts and Legislators That MDLEA Should Prosecute Only Individuals "on Board"

As discussed above, using MDLEA to reach a foreign national located in a foreign nation as a conspirator is unconstitutional, and the statute should be read to avoid this reach. Courts should read MDLEA to limit prosecution to only individuals on the high seas, U.S. citizens, or persons in U.S. territories.

The scope of the Felonies Clause and the text of the statute does not reach a foreign national in a foreign nation as a conspirator.²⁰⁶ An argument that this reach is within Congress's authority is circular and illogical.²⁰⁷ Policy and practical considerations weigh against reaching a foreign national located in a foreign nation as a conspirator to drug crimes aboard vessels on the high seas.²⁰⁸ For the foregoing reasons, the statute should be read with jurisdictional language that limits an application to individuals "on board" vessels on the high seas.

This Note recommends a remedy in two steps. First, courts should immediately stop applying the law to reach foreign nationals located in a foreign nation as conspirators. Courts should adopt the Eleventh Circuit's interpretation of MDLEA as requiring the government to show an individual was "on board a vessel subject to jurisdiction of the United States" to establish jurisdiction.²⁰⁹ Second, legislators should amend the statute to clarify that, while the Act covers conspirators, it does not cover conduct or individuals who are not "on board" a vessel. Legislators may want to include the language of "on board" a vessel in the conspiracy provision to make this expressly clear. Showing that legislators do not acquiesce to the *Carvajal* interpretation of MDLEA requires this amendment.

If this application does not stop, the constitutional issue should be certified to the Supreme Court to determine whether reaching a foreign national in a

considers jurisdiction reasonable when the person has consented to jurisdiction, conducts regular business in the state, or has engaged in activity outside the state that will have "substantial" effects within the state. *Id.* Thus, extending jurisdiction over a foreign national who has never been present in, domiciled in, a resident of, a national of, who has neither conducted activity in the state, nor engaged in conduct affecting the state (in the case where the drugs are not destined for the United States), is inconsistent with the Restatement's understanding of when conferring jurisdiction is reasonable. *See id.*

205. *See supra* note 35.

206. *See supra* Part III.

207. *Supra* Part I.A.

208. *Supra* Part IV.A.

209. *See supra* note 174 and accompanying text.

foreign nation exceeds the scope of Congress's powers under the Felonies Clause. Due to the Necessary and Proper Clause,²¹⁰ it is possible that the Supreme Court may determine that this application of MDLEA is necessary and proper for Congress to execute its power under the Felonies Clause. If the Supreme Court were to hold this way, due to the fact that the substantive offense does not reach this conduct, this Note recommends that legislators amend the statute to make this application clear. This Note suggests reincorporating language similar to that used by the First Congress and include whether "on land or on sea" to the conspiracy provision.

CONCLUSION

The Maritime Drug Law Enforcement Act prosecutes individuals for drug trafficking "on board" vessels. The text of MDLEA *does not* criminalize the conduct of an individual not on board, nor did legislators ever contemplate this reach. Courts should interpret all provisions of MDLEA as limited by the jurisdictional language of "on board a covered vessel" to avoid constitutional concerns. Legislators should amend the statute to make clear the conspiracy provision only applies to individuals who are "on board" vessels.

210. *See supra* note 48 and accompanying text.