

FOREIGN TERRITORIAL SEA-ZURES: ARTICLE I SUPPORTS  
THE APPLICATION OF THE MARITIME DRUG LAW  
ENFORCEMENT ACT TO DRUG TRAFFICKING WITHIN  
FOREIGN TERRITORIAL SEAS

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Abstract

Maritime drug trafficking poses a serious threat to the security and societal well-being of the United States. As one of the largest consumers of foreign-cultivated illicit drugs, the United States serves as a lucrative market for international drug trafficking organizations. Exploiting this insatiable demand, drug traffickers often use maritime routes in the Eastern Pacific Ocean, the Caribbean Sea, and the Gulf of Mexico to convey bulk quantities of drugs ultimately bound for the United States. The United States Coast Guard, which is charged with stopping drug traffickers within this six million square mile maritime zone, faces a task akin to searching for a needle in a haystack. Seeking to enhance the Coast Guard's ability to suppress drug trafficking efforts as close to their origins as possible, the Maritime Drug Law Enforcement Act (MDLEA), which criminalizes extraterritorial maritime drug trafficking, includes a far-reaching provision providing for United States jurisdiction over drug trafficking vessels interdicted in the territorial seas of a foreign nation. While the MDLEA has generally withstood constitutional attack since the statute's enactment, the U.S. Court of Appeals for the Eleventh Circuit struck major blows to the constitutionality of this critical provision of the MDLEA in *United States v. Bellaizac-Hurtado* and *United States v. Davila-Mendoza*. In each case, the Eleventh Circuit held that Congress exceeded its authority under Article I, Section 8 of the U.S. Constitution in criminalizing the drug trafficking conduct of foreign persons aboard foreign vessels in foreign territorial seas.

The Eleventh Circuit's holdings seriously undermine the United States' ability to suppress maritime drug trafficking, signaling to drug traffickers that they may remain beyond the reach of the United States simply by shifting their trafficking routes to remain entirely within the territorial seas of Caribbean, Central American, and South American nations, where there is a markedly limited law enforcement presence.

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Contrary to the Eleventh Circuit’s holdings, however, this Note argues that Congress does have the power to criminalize the drug trafficking conduct of foreign persons aboard foreign vessels in foreign territorial seas under the Define and Punish Clause, the Foreign Commerce Clause, and the Necessary and Proper Clause. The Eleventh Circuit stands alone in holding that the MDLEA is unconstitutional as applied to foreign persons aboard foreign vessels in foreign territorial seas. Other circuits should not follow the Eleventh Circuit’s lead but should instead find that Article I, Section 8 supports such an application of the MDLEA.

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#### INTRODUCTION

On June 4, 2016, a United States maritime patrol aircraft spotted a stalled vessel in the territorial seas of Jamaica.<sup>1</sup> After receiving authorization from the Jamaican government, United States Coast Guard

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1. *United States v. Davila-Mendoza*, 972 F.3d 1264, 1267 (11th Cir. 2020).

personnel boarded and searched the vessel.<sup>2</sup> Upon embarking, the boarding team learned that the vessel's crewmembers were foreign nationals,<sup>3</sup> and that the vessel was registered in Costa Rica.<sup>4</sup> A search of the vessel revealed 164 bales of marijuana weighing 3,500 kilograms.<sup>5</sup> Following the discovery, the vessel's crew admitted that they had traveled from Costa Rica to Jamaica to retrieve the marijuana and were en route to Costa Rica with the cargo when their engines failed.<sup>6</sup> With Jamaica's consent to the enforcement of United States law,<sup>7</sup> the United States indicted the crewmembers for possession of, and conspiracy to possess with intent to distribute, more than one thousand kilograms of marijuana while on board a vessel subject to the United States' jurisdiction in violation of the Maritime Drug Law Enforcement Act<sup>8</sup> (MDLEA).<sup>9</sup>

The crewmembers moved to dismiss the indictment, arguing that as applied to them, the MDLEA was unconstitutional because Congress lacks the power to criminalize drug trafficking conduct in foreign territorial seas.<sup>10</sup> In response, the United States argued that under the Foreign Commerce Clause,<sup>11</sup> or alternatively, the Necessary and Proper Clause,<sup>12</sup> Congress does possess such power.<sup>13</sup> Denying the crewmembers' motion, the district court found that Congress had the power to proscribe the crewmembers' conduct under the Foreign Commerce Clause.<sup>14</sup> On appeal in *United States v. Davila-Mendoza*,<sup>15</sup> however, the Eleventh Circuit vacated the crewmembers' convictions, holding that, as applied to them, Congress exceeded its authority under both the Foreign Commerce Clause and the Necessary and Proper Clause in criminalizing drug trafficking by foreign persons aboard foreign vessels in foreign territorial seas.<sup>16</sup>

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2. *Id.*

3. See *United States v. Pineda*, No. 16-10032-CR, 2016 WL 7670052, at \*1 (S.D. Fla. Dec. 12, 2016), report and recommendation adopted, No. 16-10032-CR-Martinez/Snow, 2017 WL 105920 (S.D. Fla. Jan. 10, 2017), vacated sub nom. *Davila-Mendoza*, 972 F.3d 1264.

4. *Davila-Mendoza*, 972 F.3d at 1267.

5. *Pineda*, 2016 WL 7670052, at \*1.

6. Brief for the United States at 5, *Davila-Mendoza*, 972 F.3d 1264 (Nos. 17-12038-EE, 17-12039-EE, 17-12742-EE), 2018 WL 1242186, at \*5.

7. *Pineda*, 2016 WL 7670052, at \*1.

8. Pub. L. No. 96-350, 94 Stat. 1159 (codified as amended at 46 U.S.C. §§ 70501–70507).

9. *Davila-Mendoza*, 972 F.3d at 1267.

10. *Pineda*, 2016 WL 7670052, at \*1.

11. U.S. CONST. art. I, § 8, cl. 3.

12. *Id.* art. I, § 8, cl. 18.

13. *Davila-Mendoza*, 972 F.3d at 1268.

14. See *Pineda*, 2016 WL 7670052, at \*4–5.

15. 972 F.3d 1264 (11th Cir. 2020).

16. *Id.* at 1277–78.

Though the Eleventh Circuit narrowed its holding to the specific circumstances before it in *Davila-Mendoza*, the court's decision imposes a stark limitation on the MDLEA's reach, creating a jurisdictional gap wherein drug traffickers are virtually untouchable. In conjunction with the court's holding in *United States v. Bellaizac-Hurtado*<sup>17</sup> that the Define and Punish Clause<sup>18</sup> does not support the application of the MDLEA in foreign territorial seas,<sup>19</sup> the Eleventh Circuit has foreclosed any possibility of enforcing the MDLEA against foreign persons aboard foreign vessels in foreign territorial seas. At first glance, this result may seem benign, considering that the United States' ability to suppress drug trafficking within the six million square mile maritime zone spanning the Eastern Pacific Ocean, the Caribbean Sea, and the Gulf of Mexico<sup>20</sup> is curtailed only by the boundaries of foreign nations' territorial seas as defined in the United Nations Convention on the Law of the Sea (UNCLOS).<sup>21</sup> In reality, however, these decisions incentivize drug traffickers to shift their trafficking routes to remain entirely within foreign territorial seas, thereby using the coastal geography and limited maritime law enforcement capabilities of Caribbean, Central American, and South American nations to their advantage.<sup>22</sup> There, according to the Eleventh Circuit, drug traffickers are beyond the United States' reach, rendering them free to ferry bulk quantities of drugs ultimately bound for the United States.

Only the Eleventh Circuit has squarely addressed the constitutionality of the MDLEA as applied to foreign persons aboard foreign vessels in foreign territorial seas. Because the Eleventh Circuit stands alone in its conclusion that such an application exceeds Congress's authority under Article I, this Note argues that other circuits should not follow the Eleventh Circuit's lead. Instead, other circuits can and should find that Congress possesses the constitutional authority to criminalize such trafficking under the Define and Punish Clause, the Foreign Commerce Clause, and the Necessary and Proper Clause.

Determining whether Congress possesses such constitutional authority requires an understanding of the complex nature of extraterritorial maritime jurisdiction. Thus, Part I of this Note introduces

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17. 700 F.3d 1245 (11th Cir. 2012).

18. U.S. CONST. art. I, § 8, cl. 10.

19. *Bellaizac-Hurtado*, 700 F.3d at 1248–49.

20. See Joseph E. Kramek, Comment, *Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is This the World of the Future?*, 31 U. MIA. INTER-AM. L. REV. 121, 122 (2000).

21. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. UNCLOS recognizes the territorial sea as extending twelve nautical miles from shore. *Id.* art. 3.

22. See Aaron J. Casavant, *In Defense of the U.S. Maritime Drug Law Enforcement Act: A Justification for the Law's Extraterritorial Reach*, 8 HARV. NAT'L SEC. J. 113, 155 (2017).

the relevant provisions of the MDLEA and its legislative history. Part II provides an overview of domestic and international legal principles surrounding extraterritorial maritime jurisdiction. Part III briefly describes the factual situations before the Eleventh Circuit in *Bellaizac-Hurtado* and *Davila-Mendoza* and outlines the court's reasoning in holding that the Define and Punish Clause, Foreign Commerce Clause, and Necessary and Proper Clause do not support the application of the MDLEA to foreign persons aboard foreign vessels in foreign territorial seas. Part IV discusses those constitutional provisions by countering the Eleventh Circuit's reasoning, ultimately concluding that the MDLEA, as applied to foreign persons aboard foreign vessels in foreign territorial seas, does not exceed Congress's authority. Finally, this Note concludes by discussing the implications of the Eleventh Circuit's holdings, and underscores why other circuits should find that Congress does have the power to proscribe drug trafficking by foreign persons aboard foreign vessels in foreign territorial seas.

#### I. THE MARITIME DRUG LAW ENFORCEMENT ACT

The MDLEA is a criminal statute prohibiting an individual from knowingly or intentionally “manufactur[ing] or distribut[ing], or possess[ing] with intent to manufacture or distribute, a controlled substance” aboard a “covered vessel.”<sup>23</sup> This prohibition also includes attempts and conspiracies to violate the MDLEA.<sup>24</sup> The definition of “covered vessel” is comprehensive, including, inter alia, “vessel[s] subject to the jurisdiction of the United States,”<sup>25</sup> thereby extending the United States' jurisdiction as far as international law permits.<sup>26</sup> Such vessels include “vessel[s] without nationality,” vessels “assimilated to . . . [being] without nationality,” vessels “registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law,” and “vessel[s] in the territorial waters of a foreign nation if the nation consents to the enforcement of United States law.”<sup>27</sup> Finally, the MDLEA expressly prohibits acts of drug trafficking committed extraterritorially, thereby explicitly extending the MDLEA's reach beyond the territorial jurisdiction of the United States and into both international waters and foreign territorial seas.<sup>28</sup>

Congress enacted the MDLEA to address concerns posed by maritime drug trafficking, specifically finding that “trafficking in controlled substances aboard vessels is a serious international problem, is

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23. 46 U.S.C. § 70503(a)(1).

24. *See id.* § 70506(b).

25. *Id.* § 70503(e).

26. *See* S. REP. NO. 96-855, at 2 (1980).

27. 46 U.S.C. § 70502(c)(1).

28. *See id.* § 70503(b).

universally condemned, and presents a specific threat to the security and societal well-being of the United States.”<sup>29</sup> A substantial quantity of foreign-cultivated illicit drugs travel along maritime routes before entering the United States.<sup>30</sup> Although the vast majority of drug traffic crosses into the continental United States via land at the southwest border with Mexico,<sup>31</sup> most of the drug supply originates in other countries and travels via maritime routes before reaching the staging areas in Mexico.<sup>32</sup> Recognizing that drug traffickers convey large quantities of United-States-bound drugs via maritime means, Congress enacted the “Marijuana on the High Seas Act”<sup>33</sup> (MHSA) in 1980 with the express purpose of “facilitat[ing] increased enforcement by the Coast Guard of laws relating to the importation of controlled substances.”<sup>34</sup> The MHSA also closed a “statutory void”<sup>35</sup> inadvertently created by the Comprehensive Drug Abuse Prevention and Control Act of 1970<sup>36</sup> (CDAPCA), which repealed the Narcotic Drugs Import and Export Act.<sup>37</sup> Criminalizing the possession of illicit drugs only within the United States’ territorial seas, the CDAPCA permitted drug traffickers to “operate[] with impunity on the high seas”<sup>38</sup> because the United States could only prosecute drug traffickers interdicted on the high seas for attempts or conspiracies to import illicit drugs, which are difficult to prove.<sup>39</sup> Thus, the CDAPCA had little deterrent effect on drug trafficking organizations, which viewed the loss of drug shipments as “part of the cost of doing business.”<sup>40</sup> The MHSA removed this territorial obstacle by eliminating the need to prove an intent to import illicit drugs.<sup>41</sup>

Despite the MHSA’s improvements, foreign drug traffickers continued to escape prosecution because the statute’s terms only extended jurisdiction to United States vessels and vessels assimilated to

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29. *Id.* § 70501.

30. See JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.4, COUNTERDRUG OPERATIONS, at I-15 (2019).

31. See DRUG ENF’T ADMIN., U.S. DEP’T OF JUST., DEA-DCT-DIR-007-20, NATIONAL DRUG THREAT ASSESSMENT 77, 88, 104–05 (2019).

32. See *id.* at 77, 88, 105; U.N. OFF. ON DRUGS & CRIME, WORLD DRUG REPORT, at 29, U.N. Sales No. E.20.XI.6 (2020).

33. Pub. L. No. 96-350, 94 Stat. 1159 (1980), *repealed by* Maritime Drug Law Enforcement Act of 1986 (current version at 46 U.S.C. §§ 70501–70507).

34. H.R. REP. NO. 96-323, at 2 (1979).

35. *Id.* at 4–5.

36. Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. §§ 801–971).

37. Pub. L. No. 77-165, 55 Stat. 584 (1941) (repealed 1970).

38. H.R. REP. NO. 96-323, at 5.

39. *Id.*

40. S. REP. NO. 96-855, at 2 (1980).

41. See Joseph R. Brendel, Note, *The Marijuana on the High Seas Act and Jurisdiction over Stateless Vessels*, 25 WM. & MARY L. REV. 313, 315–17 (1983).

statelessness.<sup>42</sup> Congress responded accordingly in 1986 by enacting the MDLEA, which expanded the definition of vessels “subject to the jurisdiction of the United States” to include foreign-flagged vessels and vessels located in the territorial seas of another nation, when the flag state or coastal nation consented to the enforcement of United States law.<sup>43</sup> With this far-reaching criminal statute, Congress enhanced the Coast Guard’s ability to interdict drugs “close to their origins and as far from U.S. shores as possible where drug shipments are in their most concentrated bulk form.”<sup>44</sup> But for such a far-reaching criminal statute to be valid, it must satisfy both domestic and international legal principles.

## II. DOMESTIC AND INTERNATIONAL LEGAL PRINCIPLES OF JURISDICTION

Extraterritorial jurisdiction in the maritime realm rests upon the confluence of domestic and international legal principles. Underlying these principles are the concepts of jurisdiction to enforce,<sup>45</sup> prescribe,<sup>46</sup> and adjudicate,<sup>47</sup> which often blend together, because “a state may not exercise authority to enforce law that it has no jurisdiction to prescribe,”<sup>48</sup> nor may the state enforce such law via its courts if it lacks jurisdiction to adjudicate.<sup>49</sup> To elucidate these overlapping concepts, this Note further breaks jurisdiction into three distinct requirements that the United States must satisfy under both domestic and international law before it can assert jurisdiction over a vessel: jurisdiction as to the place, the person, and the act.<sup>50</sup>

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42. See S. REP. NO. 99-530, at 15 (1986).

43. See *id.* at 16.

44. See BUREAU FOR INT’L NARCOTICS & LAW ENF’T AFFS., U.S. DEP’T OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT: DRUG AND CHEMICAL CONTROL 40 (2019) [hereinafter INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT], <https://www.state.gov/wp-content/uploads/2019/04/INCSR-Vol-INCSR-Vol.-I-1.pdf> [<https://perma.cc/4QPX-TYC3>].

45. See RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 401(c) (AM. L. INST. 1987) (defining jurisdiction to enforce as the state’s authority “to induce or compel compliance or to punish noncompliance with its laws or regulations”).

46. See *id.* § 401(a) (defining jurisdiction to prescribe as the state’s authority “to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, . . . or by determination of a court”).

47. See *id.* § 401(b) (defining jurisdiction to adjudicate as the state’s authority “to subject persons or things to the process of its courts or administrative tribunals”).

48. *Id.* § 431 cmt. a.

49. See *id.* § 431(3)(c).

50. See generally CASES AND MATERIALS ON THE LAW OF COAST GUARD OPERATIONS (U.S. Coast Guard Acad. Dep’t of Humanities L. Section ed., 7th ed. 2011) [hereinafter CASES AND MATERIALS] (using the framework of jurisdiction as to the place, the person, and the act to explain concepts of maritime law enforcement jurisdiction).

### A. *Jurisdiction Under Domestic Legal Principles*

Under domestic legal principles, the United States must simultaneously possess jurisdiction as to the place, the person, and the act before it may assert jurisdiction.<sup>51</sup>

Jurisdiction as to the place concerns the specific locations where jurisdiction may be exercised, and it is defined by federal statutes.<sup>52</sup> 14 U.S.C. § 522(a) authorizes the United States Coast Guard to engage in maritime law enforcement in the United States' territorial seas, in international waters, and in foreign territorial seas.<sup>53</sup> Thus, the United States Coast Guard possesses the statutory authority necessary to enforce the MDLEA at sea, thereby satisfying domestic jurisdiction as to the place.

Jurisdiction as to the person concerns the class of persons over whom the United States may assert jurisdiction. Federal statutes define the persons falling within their jurisdiction by identifying the class of persons whose conduct the statute regulates. The MDLEA criminalizes the drug trafficking conduct of "an individual."<sup>54</sup> While "an individual" comprehends "every human being,"<sup>55</sup> there is a "legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application."<sup>56</sup> Thus, courts normally construe statutes to apply only to persons within the territorial jurisdiction of the United States.<sup>57</sup> But this presumption may be overcome by implication<sup>58</sup> or by Congress's clear expression of its intent for a statute to apply extraterritorially.<sup>59</sup> In the context of the MDLEA, Congress has textually expressed its intention to prohibit acts of drug trafficking committed beyond the territorial jurisdiction of the United States, thereby defeating the presumption against extraterritoriality.<sup>60</sup> Thus, any person who engages in drug trafficking "[w]hile on board a covered vessel"<sup>61</sup> falls within the United States' jurisdiction, even if that person is beyond the territorial jurisdiction of the United States.

Jurisdiction as to the act concerns the United States' authority to proscribe certain conduct. To satisfy domestic jurisdiction as to the act, a

51. *See id.* at 21–22.

52. *See, e.g.*, 14 U.S.C. § 522(a).

53. *See United States v. Conroy*, 589 F.2d 1258, 1266–67 (5th Cir. 1979).

54. *See* 46 U.S.C. § 70503(a).

55. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818).

56. *Small v. United States*, 544 U.S. 385, 388–89 (2005).

57. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that a statute banning trade with any French colony would not be construed to have extraterritorial application unless explicitly stated or clearly implied by Congress).

58. *See United States v. Bowman*, 260 U.S. 94, 98 (1922).

59. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989).

60. *See* 46 U.S.C. § 70503(b).

61. *Id.* § 70503(a).

federal statute must both criminalize the particular conduct and find support in a constitutional provision.<sup>62</sup> The MDLEA criminalizes the particular conduct of knowingly or intentionally “manufactur[ing] . . . distribut[ing], or possess[ing] with intent to manufacture or distribute, a controlled substance” aboard a “covered vessel,”<sup>63</sup> or attempting or conspiring to do so.<sup>64</sup> With regard to the second prong of jurisdiction as to the act, Congress must possess the authority to criminalize the conduct by virtue of any one of the provisions in Article I, Section 8.<sup>65</sup> Federal statutes that fail to find constitutional support exceed Congress’s authority to enact.<sup>66</sup> The Eleventh Circuit found that the MDLEA, as applied to foreign persons aboard foreign vessels in foreign territorial seas, exceeds Congress’s Article I authority.<sup>67</sup> The MDLEA, however, actually finds the necessary support in the Define and Punish Clause, the Foreign Commerce Clause, and the Necessary and Proper Clause, thereby satisfying the requirements of domestic jurisdiction as to the act.<sup>68</sup>

### B. *Jurisdiction Under International Legal Principles*

In addition to satisfying domestic jurisdictional requirements, the United States must also satisfy international jurisdictional requirements before it may assert extraterritorial jurisdiction.<sup>69</sup> International jurisdiction as to the place depends upon several factors espoused in UNCLOS: the location of the vessel;<sup>70</sup> the flag state of the vessel;<sup>71</sup> and the relationship between the vessel and the nation asserting jurisdiction.<sup>72</sup> UNCLOS divides the sea into zones wherein coastal nations may exercise certain authorities.<sup>73</sup> Subject to the right of innocent passage,<sup>74</sup> a coastal nation has complete sovereignty over its territorial sea, which is a “belt

62. *See, e.g.*, *United States v. Ballinger*, 395 F.3d 1218, 1230 (11th Cir. 2005).

63. 46 U.S.C. § 70503(a)(1).

64. *See id.* § 70506(b).

65. *See* CASES AND MATERIALS, *supra* note 50, at 99; *cf.* THE FEDERALIST NO. 45 (James Madison) (“The powers delegated by the . . . Constitution to the federal government are few and defined.”).

66. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 552, 559 (1995).

67. *See* discussion *infra* Part III.

68. *See* discussion *infra* Part IV.

69. *See* CASES AND MATERIALS, *supra* note 50, at 22.

70. *See* UNCLOS, *supra* note 21, arts. 3, 8, 33, 57, 86, 87.

71. *See id.* arts. 91–92.

72. *See id.* arts. 2, 94, 217.

73. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 511 cmt. a (AM. L. INST. 1987).

74. *See* UNCLOS, *supra* note 21, arts. 17, 24 (defining the right of innocent passage as the right of all vessels to transit unimpeded through the territorial sea of a coastal nation). A coastal nation may exercise jurisdiction aboard a foreign ship passing through its territorial seas to arrest a person or investigate a crime “if such measures are necessary for the suppression of illicit traffic in narcotic drugs.” *See id.* art. 27(1)(d).

of sea” that extends twelve nautical miles from the shoreline of the coastal nation.<sup>75</sup> In the contiguous zone, the zone extending seaward from the outer edge of the territorial sea to twenty-four nautical miles from the shoreline, the coastal nation may only prevent infringement of its customs, fiscal, immigration, and sanitary laws.<sup>76</sup> In the exclusive economic zone (EEZ), the zone extending seaward from the outer limits of the territorial sea to two hundred nautical miles from the coastal nation’s shoreline, the coastal nation only has sovereign rights over natural resources.<sup>77</sup> The coastal nation has no jurisdictional authority on the high seas, which UNCLOS defines as the waters beyond the EEZ,<sup>78</sup> because the high seas are not subject to any nation’s jurisdiction.<sup>79</sup>

To fill the gaps left by the decreasing levels of a coastal nation’s authority, UNCLOS provides for flag state jurisdiction, which does not depend on territorial limits. UNCLOS requires all vessels be registered and sail under the flag of a single state, known as the flag state.<sup>80</sup> Once registered, the vessel is at all times subject to the laws of that flag state,<sup>81</sup> and the master of the vessel cannot change its registration at their convenience.<sup>82</sup> This proviso is critical because on the high seas, the vessel is subject to the exclusive jurisdiction of the flag state.<sup>83</sup> With few exceptions,<sup>84</sup> therefore, third-party nations may not interfere with registered vessels on the high seas.<sup>85</sup> Unregistered vessels and vessels that purport to be registered in two or more states, however, are considered vessels without nationality, or stateless vessels,<sup>86</sup> and are subject to the jurisdiction of all nations.<sup>87</sup> Thus, a third-party nation may impede a vessel’s transit so as to determine the vessel’s registration status under certain circumstances.<sup>88</sup> In other maritime zones, such as foreign territorial seas, the flag state does not have *exclusive* jurisdiction over its vessels because the coastal nation may assert jurisdiction over those

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75. *See id.* arts. 2–3.

76. *See id.* art. 33.

77. *See id.* arts. 56–57.

78. *See id.* art. 87.

79. *Id.* art. 89. UNCLOS does not define the EEZ as being part of the high seas, but “the rights and freedoms of other states in the zone . . . are the same as on the high seas,” so from the perspective of the coastal nation, the high seas extend from the outer limits of its EEZ to the outer bounds of another nation’s territorial sea. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 514 cmt. b (AM. L. INST. 1987).

80. *See* UNCLOS, *supra* note 21, art. 92.

81. *See id.* art. 94.

82. *See id.* art. 92(1).

83. *See id.*

84. *See id.*

85. *See* Casavant, *supra* note 22, at 126.

86. *See* UNCLOS, *supra* note 21, art. 92(2).

87. *See, e.g.,* United States v. Marino-Garcia, 679 F.2d 1373, 1383 (11th Cir. 1982).

88. *See* UNCLOS, *supra* note 21, art. 110.

vessels that engage in activities prejudicial to the peace, good order, or security of the coastal nation—activities like drug trafficking.<sup>89</sup>

Because of these nuances of flag state jurisdiction, UNCLOS provides third-party nations with jurisdiction as to the place in certain circumstances.<sup>90</sup> Third-party nations can only assert jurisdiction over a vessel with the consent of the flag state<sup>91</sup> or, if the vessel is within the coastal nation's territorial seas and has violated its laws, with the consent of the coastal nation.<sup>92</sup> Such consent requires express authorization under an international agreement or other informal arrangement.<sup>93</sup> In lieu of such consent, a third-party nation can also assert jurisdiction over vessels engaging in universal crimes recognized under customary international law.<sup>94</sup> Because drug trafficking is not such a crime, third-party nations rely on treaties like the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988<sup>95</sup> (1988 Convention) and bilateral agreements to gain the necessary consent to assert jurisdiction as to the place over foreign vessels.<sup>96</sup>

Generally, if a nation satisfies the requirements of jurisdiction as to a vessel's place, the nation possesses jurisdiction as to the persons on board the vessel, regardless of their nationality.<sup>97</sup> In fact, there is no "principle of international law clearly specifying that the right of nations to subject . . . vessels on the high seas to their jurisdiction is exclusive of the right to exercise jurisdiction over the conduct of those aboard such vessels."<sup>98</sup> Thus, so long as there is jurisdiction as to the place, the requirements of jurisdiction as to the person are satisfied.<sup>99</sup>

International jurisdiction as to the act concerns "the propriety of the exercise[] of jurisdiction by a state, and the resolution of conflicts of

89. See RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 502 n.6 (AM. L. INST. 1987); UNCLOS, *supra* note 21, arts. 19(2)(g), 27(1)(d).

90. See CASES AND MATERIALS, *supra* note 50, at 34.

91. See UNCLOS, *supra* note 21, art. 110(1); RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 522(2) (AM. L. INST. 1987).

92. See RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 502 n.6 (AM. L. INST. 1987).

93. See *id.* § 522 nn.4, 8.

94. See *id.* § 522(2)(a).

95. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, *ratified* Feb. 20, 1990, 1582 U.N.T.S. 95 [hereinafter 1988 Convention].

96. See, e.g., Agreement Between the Government of the United States of America and the Government of Jamaica Concerning Cooperation in Suppressing Illicit Maritime Drug Trafficking art. 10(5), Jam.-U.S., Feb. 6, 2004, T.I.A.S. No. 98-310 [hereinafter Jamaica Bilateral Agreement].

97. *United States v. Alvarez-Mena*, 765 F.2d 1259, 1266–67 (5th Cir. 1985) (finding that the United States had jurisdiction over a defendant because he was on a stateless vessel).

98. *Id.* at 1267.

99. See RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 433 n.4 (AM. L. INST. 1987).

jurisdiction between states,”<sup>100</sup> thereby requiring a nation to have some nexus with the crime before asserting jurisdiction.<sup>101</sup> Thus, international jurisdiction as to the act limits the United States’ jurisdiction over extraterritorial conduct based upon principles of comity<sup>102</sup> and reasonableness.<sup>103</sup> The nexus requirement may be satisfied under any one of six extraterritorial jurisdictional principles: territorial; objective-territorial; nationality; protective; universality; and passive-personality.<sup>104</sup> Under the territorial principle, jurisdiction is “based on the location where the alleged crime was committed.”<sup>105</sup> The objective-territorial principle “allows countries to reach acts committed outside [their] territorial limits but intended to produce, and producing, detrimental effects within the nation.”<sup>106</sup> The nationality principle creates a nexus based upon the offender’s nationality.<sup>107</sup> The protective principle provides for jurisdiction over “offenses directed against the security of the state or . . . threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems.”<sup>108</sup> The universality principle provides jurisdiction when the nation has “obtain[ed] physical custody of the perpetrator of certain offenses considered particularly heinous and harmful to humanity.”<sup>109</sup> Finally, the passive-personality principle allows nations to assert jurisdiction when one of its citizens is the victim of the offender’s illegal conduct.<sup>110</sup>

In the context of stateless vessels and vessels assimilated to statelessness, there is no nexus requirement because the assertion of jurisdiction does not impinge on any other nation’s jurisdiction.<sup>111</sup> When the MDLEA is applied to foreign persons aboard foreign-registered vessels, however, courts rely on the territorial principle to establish jurisdiction if an international agreement bestows upon the United States

100. *See id.* § 401 cmt. b.

101. *See* United States v. Caicedo, 47 F.3d 370, 372 (9th Cir. 1995).

102. *See id.*

103. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 403(1) (AM. L. INST. 1987).

104. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 n.7 (D.C. Cir. 1984) (Edwards, J., concurring) (naming only five of the six principles of extraterritorial jurisdiction, while leaving out the territorial principle). The objective-territorial principle is often treated as a subset of the territorial principle of extraterritorial jurisdiction, but it differs from the territorial principle because it includes conduct actually occurring outside of a country’s territorial boundaries. *See* United States v. Layton, 509 F. Supp. 212, 215 (N.D. Cal. 1981).

105. *Layton*, 509 F. Supp. at 215.

106. *Id.*

107. *See id.*

108. RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 402 cmt. f (AM. L. INST. 1987).

109. United States v. Yunis, 681 F. Supp. 896, 899–900 (D.D.C. 1988).

110. *See Layton*, 509 F. Supp. at 215.

111. *See, e.g.,* United States v. Caicedo, 47 F.3d 370, 373 (9th Cir. 1995).

the authority to enforce its laws within another nation's territory.<sup>112</sup> On occasion, courts have relied on the universality principle.<sup>113</sup> But much more frequently, courts turn to the protective principle because drug trafficking aboard vessels threatens the security of the United States.<sup>114</sup> Courts have also looked to the objective-territorial principle to establish jurisdiction as to the act,<sup>115</sup> but finding a nexus under this theory largely depends on the specific facts of the case.<sup>116</sup> Regardless, so long as some nexus exists between the vessel and the United States under one of the six principles, the requirements of international jurisdiction as to the act are satisfied.

### III. THE ELEVENTH CIRCUIT'S HOLDINGS IN *BELLAIZAC-HURTADO* AND *DAVILA-MENDOZA*

In *Bellaizac-Hurtado* and *Davila-Mendoza*, the Eleventh Circuit found that the MDLEA, as applied to foreign persons aboard foreign vessels in foreign territorial seas, exceeds Congress's Article I authority.<sup>117</sup> The two case illustrations below illuminate the Eleventh Circuit's arguments in support of that conclusion.

#### A. *United States v. Bellaizac-Hurtado and the Define and Punish Clause*

In *Bellaizac-Hurtado*, the United States Coast Guard spotted a fishing vessel operating at night, without lights or a flag, in the territorial seas of Panama, and reported the vessel's position to the Panamanian Navy.<sup>118</sup> After interdicting the vessel, the Panamanian Navy discovered and seized 760 kilograms of cocaine.<sup>119</sup> With Panama's consent, the United States charged the vessel's crew with violations of the MDLEA.<sup>120</sup> Notably, the fishing vessel traveled from Colombia into Panamanian territorial seas without entering international waters,<sup>121</sup> and there was no evidence that the cocaine cargo was destined for the United States.<sup>122</sup> Moving to dismiss their indictment, the defendants argued that the MDLEA was

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112. See RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 402 cmt. h (AM. L. INST. 1987); *United States v. Robinson*, 843 F.2d 1, 3–4 (1st Cir. 1988).

113. See, e.g., *United States v. Estupinan*, 453 F.3d 1336, 1339 (11th Cir. 2006) (per curiam).

114. See, e.g., *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999).

115. See, e.g., *United States v. Peterson*, 812 F.2d 486, 493 (9th Cir. 1987).

116. See, e.g., *United States v. Loalza-Vasquez*, 735 F.2d 153, 156 (5th Cir. 1984).

117. See *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1258 (11th Cir. 2012); *United States v. Davila-Mendoza*, 972 F.3d 1264, 1277–78 (11th Cir. 2020).

118. See *Bellaizac-Hurtado*, 700 F.3d at 1247; *United States v. Bellaizac-Hurtado*, 779 F. Supp. 2d 1344, 1350 (S.D. Fla. 2011), *rev'd*, 700 F.3d 1245.

119. See *Bellaizac-Hurtado*, 700 F.3d at 1247–48.

120. See *id.* at 1248; *Bellaizac-Hurtado*, 779 F. Supp. 2d at 1350.

121. See *Bellaizac-Hurtado*, 779 F. Supp. 2d at 1352.

122. See *id.* at 1351.

unconstitutional as applied to them because Congress lacked the authority to criminalize drug trafficking in foreign territorial seas under Congress's power "[t]o define and punish . . . Felonies committed on the high Seas"<sup>123</sup> (Felonies Clause).<sup>124</sup> Denying the defendants' motion, the district court held that Congress could criminalize such conduct under its power "[t]o define and punish . . . Offences against the Law of Nations"<sup>125</sup> (Offences Clause).<sup>126</sup> On appeal, however, the Eleventh Circuit vacated the defendants' convictions, holding that Congress does not have the power to criminalize drug trafficking in foreign territorial seas under the Define and Punish Clause.<sup>127</sup>

The Eleventh Circuit began by noting that Congress could not proscribe maritime drug trafficking under its power "[t]o define and punish Piracies . . . committed on the high Seas"<sup>128</sup> (Piracies Clause) because drug trafficking is not piracy.<sup>129</sup> The court also quickly disposed of the applicability of the Felonies Clause, noting that the Clause is "textually limited to conduct on the high seas."<sup>130</sup> As for the Offences Clause, the Eleventh Circuit determined that Congress's power to "define" is limited to "codify[ing] and explain[ing] offenses that had already been understood as offenses against the law of nations," and does not include the power to "create or declare" them.<sup>131</sup> Accordingly, the court determined that international law defines the scope of Congress's power under the Offences Clause.<sup>132</sup>

Next, the Eleventh Circuit concluded that the term "law of nations" is synonymous with customary international law, citing as support the U.S. Supreme Court's understanding of the term as it was used in a statute enacted by the First Congress.<sup>133</sup> Defining customary international law as the "general and consistent practice of states followed by them from a sense of legal obligation,"<sup>134</sup> the Eleventh Circuit determined that drug trafficking is not a violation of customary international law.<sup>135</sup> The court observed that at the time of the Founding, drug trafficking was not "a

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123. U.S. CONST. art. I, § 8, cl. 10.

124. *See Bellaizac-Hurtado*, 779 F. Supp. 2d at 1346.

125. U.S. CONST. art. I, § 8, cl. 10.

126. *See Bellaizac-Hurtado*, 700 F.3d at 1248–49; *Bellaizac-Hurtado*, 779 F. Supp. 2d at 1346, 1349.

127. *See Bellaizac-Hurtado*, 700 F.3d at 1258.

128. U.S. CONST. art. I, § 8, cl. 10.

129. *See Bellaizac-Hurtado*, 700 F.3d at 1248.

130. *Id.*

131. *Id.* at 1249–50.

132. *See id.* at 1251.

133. *See id.*

134. *Id.* at 1251–52 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 102(2) (AM. L. INST. 1987)).

135. *See id.* at 1253–58.

matter of international concern” because national governments had engaged in international drug trafficking.<sup>136</sup> Regarding customary international law as it is understood today, the court noted that even though the majority of nations have ratified the 1988 Convention, the lack of strict enforcement of the treaty’s terms by nations that are specially affected by the illicit drug trade indicates that the eradication of drug trafficking is viewed only as an aspirational goal.<sup>137</sup> Because the international community does not view the curtailment of drug trafficking as a legal obligation, the court found that drug trafficking is not a violation of customary international law and therefore is not an offense against the law of nations.<sup>138</sup> Thus, the Eleventh Circuit concluded that Congress exceeded its authority under the Offences Clause by criminalizing drug trafficking in foreign territorial seas.<sup>139</sup>

B. *United States v. Davila-Mendoza and the Foreign Commerce and Necessary and Proper Clauses*

In *Davila-Mendoza*, the Eleventh Circuit considered the constitutionality of the MDLEA as applied to foreign persons aboard a Costa Rican vessel interdicted in Jamaican territorial seas while en route to Costa Rica with 3,500 kilograms of marijuana.<sup>140</sup> The court held that Congress exceeded its authority under the Foreign Commerce Clause and the Necessary and Proper Clause by proscribing drug trafficking involving foreign persons aboard a foreign vessel in foreign territorial seas.<sup>141</sup> Analyzing the applicability of the Foreign Commerce Clause, the Eleventh Circuit noted that because the Supreme Court has not yet “articulated the bounds of the positive foreign commerce power,” it would assume that the Foreign Commerce Clause and the Interstate Commerce Clause<sup>142</sup> have the same scope.<sup>143</sup> Thus, using the Supreme Court’s Interstate Commerce Clause jurisprudence, the Eleventh Circuit limited its analysis to determining whether the MDLEA validly regulated an activity “that ha[s] a ‘substantial effect’ on commerce between the United States and foreign nations.”<sup>144</sup>

The court first observed that the MDLEA does not contain congressional findings concerning the effect of drug trafficking on the

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136. *See id.* at 1254.

137. *See id.* at 1255.

138. *Id.*

139. *See id.* at 1258.

140. *See supra* text accompanying notes 1–16.

141. *United States v. Davila-Mendoza*, 972 F.3d 1264, 1277–78 (11th Cir. 2020).

142. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . .”).

143. *Davila-Mendoza*, 972 F.3d at 1270–71.

144. *Id.* at 1271.

United States' commerce with foreign nations.<sup>145</sup> This distinguished the MDLEA from a statute that the Eleventh Circuit analyzed in a separate case, in which the court relied solely on Congress's findings to determine that Congress had a rational basis in concluding that the statute regulated an activity that had a substantial effect on commerce between the United States and foreign nations.<sup>146</sup> The court also noted that the MDLEA does not contain a textual element which would require the drug trafficking conduct to affect foreign commerce.<sup>147</sup> Furthermore, the MDLEA does not include a jurisdictional hook that would "preclude[] purely foreign activity with no nexus to the United States from being criminalized."<sup>148</sup> The Eleventh Circuit also observed that the United States failed to allege "even a peripheral" connection between the defendants' conduct and the United States.<sup>149</sup> Critically, the court remarked that Congress's power under the Foreign Commerce Clause is limited to the regulation of commerce "with foreign nations," and not among them.<sup>150</sup> Thus, even if foreign drug trafficking that has no nexus with the United States impacts the international drug trade, and in the aggregate could substantially affect the United States' commerce with foreign nations, the chain of inferences necessary to make such a conclusion would allow Congress to intrude on the sovereignty of other nations by policing drug trafficking conduct around the world.<sup>151</sup> Accordingly, the Eleventh Circuit found that the Foreign Commerce Clause did not support the application of the MDLEA in this case.<sup>152</sup>

The Eleventh Circuit then turned to the alternative argument concerning the Necessary and Proper Clause, but found that it was also inapposite.<sup>153</sup> The court determined that although Congress has the power under the Necessary and Proper Clause to enact legislation implementing treaties made pursuant to Article II, Section 2,<sup>154</sup> Congress enacted the MDLEA before both the 1988 Convention and the United States' counterdrug bilateral agreement with Jamaica<sup>155</sup> (Jamaica Bilateral Agreement).<sup>156</sup> Thus, the court found that the MDLEA was not enacted

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145. *See id.* at 1274.

146. *See id.*

147. *See id.* at 1275.

148. *Id.*

149. *See id.* at 1275–76.

150. *Id.* at 1276–77.

151. *See id.*

152. *See id.* at 1277.

153. *See id.*

154. *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . .").

155. Jamaica Bilateral Agreement, *supra* note 96.

156. *See Davila-Mendoza*, 972 F.3d at 1277.

“to effectuate those international agreements.”<sup>157</sup> Furthermore, the Eleventh Circuit observed that the United States failed to bring to the court’s attention any case that upheld legislation “as necessary and proper for carrying into execution a treaty which did not yet exist at the time the legislation was enacted.”<sup>158</sup> Finally, the court noted that neither the MDLEA’s legislative history nor any case concerning the MDLEA mentions or cites to a “treaty obligation as the source of Congress’s Article I authority.”<sup>159</sup> Thus, the court declined to hold that the Necessary and Proper Clause supported the MDLEA’s application to the defendants.<sup>160</sup>

#### IV. THE CONSTITUTIONAL PROVISIONS UNDER WHICH CONGRESS MAY PROSCRIBE DRUG TRAFFICKING IN FOREIGN TERRITORIAL SEAS

The constitutionality prong of domestic jurisdiction as to the act requires Congress to have validly enacted the MDLEA in accordance with one of the powers enumerated in Article I, Section 8 before the law will apply to the conduct of foreign persons aboard foreign vessels in foreign territorial seas.<sup>161</sup> Despite the Eleventh Circuit’s arguments to the contrary,<sup>162</sup> Congress should have the authority to criminalize such drug trafficking conduct under the Define and Punish Clause, the Foreign Commerce Clause, and the Necessary and Proper Clause.

##### A. *The Define and Punish Clause*

Article I, Section 8, Clause 10 authorizes Congress “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”<sup>163</sup> This Clause provides Congress with three separate sources of power: the Piracies Clause, the Felonies Clause, and the Offences Clause.<sup>164</sup> The Piracies Clause does not provide a basis for Congress to enact the MDLEA because drug trafficking does not fall within the definition of piracy.<sup>165</sup> Thus, under Article I, Section 8, Clause 10, the MDLEA is valid only as an exercise of the Felonies Clause or the Offences Clause.

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157. *Id.*

158. *Id.*

159. *Id.* (quoting *United States v. Cardales-Luna*, 632 F.3d 731, 749 (1st Cir. 2011) (Torruella, J., dissenting)).

160. *See id.* at 1277–78.

161. *See* discussion *supra* Section II.A.

162. *See* discussion *supra* Part III.

163. U.S. CONST. art. I, § 8, cl. 10.

164. *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1248 (11th Cir. 2012).

165. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161–62 (1820).

## 1. The Felonies Clause

As applied to foreign persons aboard foreign vessels in foreign territorial seas, the MDLEA is a valid exercise of Congress's power under the Felonies Clause. In *Bellaizac-Hurtado*, the Eleventh Circuit disposed of the Felonies Clause on the grounds that it is textually limited to the high seas,<sup>166</sup> thereby implying that the "high seas" exclude a nation's territorial seas. While this comports with contemporary understandings of the "high seas,"<sup>167</sup> Commander Aaron Casavant of the United States Coast Guard has recently argued that this understanding fails to recognize that at the time of the Founding, the "high seas" actually referred to waters that "overlap[ped] . . . the territorial waters of other nations."<sup>168</sup> Notably, the Supreme Court's definition of the "high seas" has been inconsistent in the centuries following the Constitution's ratification.<sup>169</sup> However, as Commander Casavant argues, the Supreme Court's understanding of the "high seas" as the term was used in congressional enactments immediately following the Constitution's ratification supports an interpretation of the "high seas" as including foreign territorial seas.<sup>170</sup> This interpretation is further supported by the fact that lower courts reached similar conclusions when deciphering the meaning of the term as Congress used it in other statutes enacted through the mid-twentieth century.<sup>171</sup> Thus, according to an originalist interpretation, the "high seas" include waters up to the coastline, rendering the MDLEA a valid exercise of the Felonies Clause as applied to drug trafficking

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166. See *Bellaizac-Hurtado*, 700 F.3d at 1248.

167. See, e.g., *United States v. Shi*, 525 F.3d 709, 721 (9th Cir. 2008).

168. Casavant, *supra* note 22, at 148.

169. See *In re Air Crash off Long Island, N.Y.*, on July 17, 1996, 209 F.3d 200, 206 (2d Cir. 2000).

170. See, e.g., *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 94 (1820) (discussing the appropriate definition and boundaries of the "high seas" as being "confined to the ocean which washes a coast"); *United States v. Rodgers*, 150 U.S. 249, 253–54, 263 (1893) (defining the "high seas" as "the portion of the sea which washes the open coast," or those waters "not within the body of a county," and finding that the high seas, as referred to in the statute at issue, included the waters extending beyond the boundary line at the center of the Great Lakes up "to the Canadian shore"); *The Manila Prize Cases*, 188 U.S. 254, 271 (1903) (concluding that "the high seas include coast waters without the boundaries of low water mark").

171. See, e.g., *United States v. Ross*, 27 F. Cas. 899, 900 (C.C.D.R.I. 1813); *United States v. Grush*, 26 F. Cas. 48, 50–51 (C.C.D. Mass. 1829); *United States v. Davis*, 25 F. Cas. 786, 787 (C.C.D. Mass. 1837); cf. *Roberts v. United States*, 498 F.2d 520, 524 n.7 (9th Cir. 1974) (opining that in a statute enacted in 1920, Congress may "have considered all waters beyond one marine league from [United States] shores to be 'high seas' for purposes of [the Death on the High Seas Act] . . . even though within the territorial waters of a foreign state"); *United States v. Ross*, 439 F.2d 1355, 1357 (9th Cir. 1971) (finding that a vessel "was on the 'high seas'" when it was anchored in a foreign harbor); RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 512 n.1 (AM. L. INST. 1987) ("Early in the 20th century, the status of the territorial sea was still debated, some seeing it as part of the high seas . . .").

conduct in foreign territorial seas. Alternatively, the Eleventh Circuit's understanding of the "high seas" overlooks the fact that the breadth of a nation's territorial sea has changed over time, which means that the term, as used in the Felonies Clause, may yet encompass portions of the territorial sea as it is recognized today.<sup>172</sup> Accordingly, even if the Founders understood the "high seas" as exclusive of foreign territorial seas, an originalist interpretation of the Felonies Clause indicates that the "high seas" encompass those waters beyond the breadth of the territorial sea as it was recognized in 1787.<sup>173</sup> Thus, the Felonies Clause would support the application of the MDLEA to a drug trafficking vessel interdicted beyond three nautical miles from shore.

Several scholars have also argued that because the Felonies Clause requires a nexus between the drug trafficking conduct and the United States, it does not support the application of the MDLEA to foreign persons aboard foreign vessels in foreign territorial seas in cases where the vessel's drug cargo has no connection with the United States.<sup>174</sup> But the Eleventh, Ninth, Fifth, and Third Circuits have all "refused to read a jurisdictional nexus requirement into the [Define and Punish C]ause"<sup>175</sup> when applying the MDLEA to drug trafficking conduct in international waters.<sup>176</sup> In these circuits, therefore, even though the drug trafficking conduct may occur in the territorial seas of another nation (as opposed to international waters), the outcome should remain unchanged. But even in circuits that do require a nexus, the protective and territorial principles of jurisdiction permit the criminalization of drug trafficking in the absence of overt evidence indicating such a nexus.

The protective principle allows a nation to assert jurisdiction as to the act when offenses that take place outside of its territorial jurisdiction are

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172. Compare THOMAS WEMYSS FULTON, *THE SOVEREIGNTY OF THE SEA: AN HISTORICAL ACCOUNT OF THE CLAIMS OF ENGLAND TO THE DOMINION OF THE BRITISH SEAS, AND OF THE EVOLUTION OF THE TERRITORIAL WATERS, WITH SPECIAL REFERENCE TO THE RIGHTS OF FISHING AND THE NAVAL SALUTE* 563–64, 572, 574 (1911), <https://www.gutenberg.org/files/54977/54977-h/54977-h.htm> [<https://perma.cc/Z9YA-7N4V>] (noting that in the late eighteenth century, the breadth of the territorial sea was the range of a cannon shot, or three miles), with UNCLOS, *supra* note 21, art. 3 (recognizing the territorial sea as extending twelve nautical miles from the coastline).

173. See *United States v. Alarcon Sanchez*, 972 F.3d 156, 170 (2d Cir. 2020); *cf.* Proclamation No. 5928, 54 Fed. Reg. 777, 777 (Dec. 27, 1988) (stating that the Proclamation recognizing the territorial sea as extending twelve nautical miles from shore does not "extend[] or otherwise alter[] existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom").

174. See, e.g., Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1210–12 (2009).

175. *United States v. Saac*, 632 F.3d 1203, 1210 (11th Cir. 2011).

176. See, e.g., *United States v. Estupinan*, 453 F.3d 1336, 1338 (11th Cir. 2006); *United States v. Moreno-Morillo*, 334 F.3d 819, 824 (9th Cir. 2003); *United States v. Suerte*, 291 F.3d 366, 375 (5th Cir. 2002); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993).

“directed against the security of the state” or “threaten[] the integrity of governmental functions” and “are generally recognized as crimes by developed legal systems.”<sup>177</sup> Commander Casavant has posited that maritime drug trafficking is an offense that falls within the protective principle, even if the conduct does not have an overt nexus to the United States.<sup>178</sup> First, drug trafficking specifically threatens the integrity of the United States’ borders and bypasses customs laws.<sup>179</sup> Drug trafficking has also influenced an epidemic of drug overdoses<sup>180</sup> and motivated drug trafficking organizations to orchestrate violent attacks against U.S. officials and citizens, thereby impacting the societal well-being of the United States.<sup>181</sup> Furthermore, drug trafficking has destabilized regional governments,<sup>182</sup> ultimately threatening the United States’ security.<sup>183</sup> And if that were not a sufficient nexus, the United States is one of the largest consumers of illicit drugs, making it highly likely that bulk shipments of drugs traveling between Caribbean, Central American, and South American nations will ultimately end up in the United States, even if there are intermediate stops.<sup>184</sup> Finally, a majority of the world recognizes drug trafficking as a crime.<sup>185</sup> Because drug trafficking falls squarely within the protective principle’s ambit, the protective principle supports Congress’s criminalization of maritime drug trafficking, even when a particular instance of such conduct includes no overt nexus with the United States.

The territorial principle also supports Congress’s criminalization of drug trafficking by foreign persons aboard foreign vessels in foreign territorial seas in the absence of an overt nexus with the United States.

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177. RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 402 cmt. f (AM. L. INST. 1987).

178. See Casavant, *supra* note 22, at 145.

179. See *id.* at 145–46 (discussing drug trafficking organizations’ efforts to undermine border security by corrupting Customs and Border Protection agents).

180. See JUNE S. BEITTEL, CONG. RSCH. SERV., R41576, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS 4 n.15 (2020).

181. See *id.* at 4.

182. See *id.* at 1–2.

183. See JOINT CHIEFS OF STAFF, *supra* note 30, at I-1; Casavant, *supra* note 22, at 124.

184. See, e.g., *United States v. Alvarez-Mena*, 765 F.2d 1259, 1267 n.11 (5th Cir. 1985); *United States v. Cabrera*, 734 F. Supp. 2d 66, 72–73 (D.D.C. 2010), *aff’d sub nom.* *United States v. Vega*, 826 F.3d 514 (D.C. Cir. 2016); *United States v. Carvajal*, 924 F. Supp. 2d 219, 242 (D.D.C. 2013), *aff’d on other grounds sub nom.* *United States v. Miranda*, 780 F.3d 1185 (D.C. Cir. 2015); *United States v. Normandin*, 378 F. Supp. 2d 4, 9 n.4 (D.P.R. 2005); *Bureau of Int’l Narcotics & Law Enf’t Affs.: Costa Rica Summary*, U.S. DEP’T STATE, <https://www.state.gov/bureau-of-international-narcotics-and-law-enforcement-affairs-work-by-country/costa-rica-summary/> [https://perma.cc/T75K-B5ZE]; INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, *supra* note 44, at 195; U.N. OFF. ON DRUGS & CRIME, *supra* note 32, at 29, 72.

185. See, e.g., *United States v. Estupinan*, 453 F.3d 1336, 1339 (11th Cir. 2006).

Under the territorial principle, a “state has jurisdiction to prescribe and enforce a rule of law in the territory of another state to the extent provided by international agreement.”<sup>186</sup> A coastal nation has the authority to proscribe drug trafficking in its territorial seas and enforce its laws against offending foreign flagged vessels.<sup>187</sup> And because the coastal nation can do so consistently with international law, the coastal nation can, by treaty or informal agreement,<sup>188</sup> consent to the enforcement of United States law over such a vessel in accordance with the territorial principle,<sup>189</sup> regardless of whether the vessel has an overt nexus with the United States.<sup>190</sup> Opponents to this theory argue that even though such an application of the territorial principle would satisfy international law, it would be unreasonable and therefore fail to comport with the Fifth Amendment’s Due Process Clause.<sup>191</sup> But “[t]hose embarking on voyages with holds laden with illicit narcotics, conduct which is contrary to laws of all reasonably developed legal systems, do so with the awareness of the risk that their government may consent to enforcement of the United States’ laws against the vessel.”<sup>192</sup> Thus, the territorial principle supports Congress’s criminalization of drug trafficking in foreign territorial seas, even in the absence of an overt nexus with the United States. Because the Founders understood the “high seas” as overlapping foreign territorial seas, and because there is a sufficient nexus between foreign drug trafficking and the United States under either the protective or territorial principles, the MDLEA is a valid exercise of Congress’s power under the Felonies Clause when applied to foreign persons aboard foreign vessels in foreign territorial seas.

## 2. The Offences Clause

The Offences Clause, which is not textually limited to conduct on the high seas, also supports Congress’s criminalization of drug trafficking by foreign persons aboard foreign vessels in foreign territorial seas. Under the Eleventh Circuit’s understanding of the scope of the Offences Clause, Congress’s power is limited to defining and punishing only those offenses recognized by the “law of nations,” which is synonymous with customary

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186. *United States v. Robinson*, 843 F.2d 1, 4 (1st Cir. 1988) (quoting RESTATEMENT (SECOND) OF THE FOREIGN RELS. L. OF THE U.S. § 25 (AM. L. INST. 1965)).

187. *See United States v. Rodgers*, 150 U.S. 249, 260 (1893) (holding that a country can exert authority over a foreign vessel if the vessel affects the peace, dignity, or tranquility of the country).

188. *See, e.g., Robinson*, 843 F.2d at 4.

189. *See id.*

190. *See id.* at 3–4.

191. *See United States v. Angulo-Hernandez*, 576 F.3d 59, 61–62 (1st Cir. 2009) (Torruella, J., dissenting from the denial of en banc review).

192. *United States v. Gonzalez*, 776 F.2d 931, 941 (11th Cir. 1985).

international law.<sup>193</sup> Therefore, according to the Eleventh Circuit, because drug trafficking is not an offense recognized under customary international law, the Offences Clause does not bestow upon Congress the authority to criminalize drug trafficking in foreign territorial seas.<sup>194</sup> However, this understanding of the “law of nations” fails to recognize that customary international law was not the only source of the “law of nations” as the Framers understood the term. In fact, scholars have argued that the Framers understood the “law of nations” as embracing not only customary international law but also conventional international law, which is the body of international law expressed in treaties.<sup>195</sup>

While the Supreme Court has not explicitly stated whether the “law of nations” includes treaties,<sup>196</sup> numerous Supreme Court opinions in the years following the Founding indicate that it does.<sup>197</sup> At least two circuits have also concluded that the “law of nations,” as the Framers used the term, includes treaties.<sup>198</sup> Thus, while there may be merit to the Eleventh Circuit’s argument that “[t]reaties may [only] constitute evidence of *customary international law*,”<sup>199</sup> the “law of nations,” as the Framers used the term in the Offences Clause, includes treaties.<sup>200</sup> Accordingly, because the United States is a signatory of international treaties that require signatory nations to cooperate to the fullest extent possible to suppress drug trafficking,<sup>201</sup> Congress could validly criminalize maritime

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193. See *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1251 (11th Cir. 2012).

194. *Id.* at 1258.

195. See Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 *YALE L.J.* 2202, 2212–17 (2015); Casavant, *supra* note 22, at 150–53.

196. See *Bellaizac-Hurtado*, 700 F.3d at 1251. The Eleventh Circuit found that the Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), equated the “law of nations” to customary international law based on the Court’s interpretation of the Alien Tort Statute, which was enacted in 1789 and used the same term. See *Bellaizac-Hurtado*, 700 F.3d at 1251. Thus, the Eleventh Circuit declared, “the Framers understood the term ‘the law of nations’ in the Offences Clause and the Alien Tort Statute to mean the same thing.” *Id.* The *Sosa* Court’s argument, however, focused on the Alien Tort Statute’s separate reference to the law of nations *and* treaties. See 28 U.S.C. § 1350. But the statute’s separation of the terms is explained by the fact that it was common to do so “when people referred to treaties expressly and needed a catch-all phrase to refer to the other categories of the law of nations,” which included “the ‘customary’ and the ‘voluntary’ law of nations.” Cleveland & Dodge, *supra* note 195, at 2216.

197. See, e.g., *Ware ex rel. Jones v. Hylton*, 3 U.S. (3 Dall.) 199, 227 (1796) (opinion of Chase, J.); *The Venus*, 12 U.S. (8 Cranch) 253, 283 (1814); *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815); *The Commercen*, 14 U.S. (1 Wheat.) 382, 389 n.i (1816); *The Estrella*, 17 U.S. (4 Wheat.) 298, 307–08 (1819).

198. See *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 36 n.23 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App’x 7 (D.C. Cir. 2013); *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 398–400 (4th Cir. 2011).

199. *Bellaizac-Hurtado*, 700 F.3d at 1255 (emphasis added) (citing *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 256 (2d Cir. 2003)).

200. See *United States v. Clark*, 266 F. Supp. 3d 573, 586 (D.P.R. 2017).

201. See 1988 Convention, *supra* note 95, art. 17(1).

drug trafficking by foreign persons aboard foreign vessels in foreign territorial seas under the Offences Clause.<sup>202</sup>

### B. *The Foreign Commerce Clause*

Congress can also criminalize drug trafficking by foreign persons aboard foreign vessels in foreign territorial seas under the Foreign Commerce Clause. The Foreign Commerce Clause empowers Congress “[t]o regulate Commerce with foreign Nations.”<sup>203</sup> Because the Supreme Court has not clearly defined the scope of the Foreign Commerce Clause,<sup>204</sup> it is necessary to draw parallels between the Interstate Commerce Clause and the Foreign Commerce Clause.<sup>205</sup> Accordingly, like the Eleventh Circuit,<sup>206</sup> this Note applies the Supreme Court’s Interstate Commerce Clause jurisprudence in the foreign commerce context.

The Supreme Court has held that there are “three broad categories of activity that Congress may regulate under its commerce power”: (1) the channels of commerce; (2) the instrumentalities of commerce, or the persons or things in commerce; and (3) activities that substantially affect commerce.<sup>207</sup> In determining whether an activity has a substantial effect on commerce, courts must determine not whether the activity at issue, “taken in the aggregate, substantially affect[s] . . . commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”<sup>208</sup> Additionally, the Supreme Court has noted that in order for a statute to be sustained under the commerce power, the statute must seek to regulate an economic activity.<sup>209</sup> But Congress may, under the commerce power, regulate an activity that is not itself economic in nature if it is an “essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the . . . activity were regulated.”<sup>210</sup> Furthermore, the statute should possess a jurisdictional element, which ensures that the activity that it seeks to regulate is in or affects commerce.<sup>211</sup> Finally, in

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202. See *United States v. Arjona*, 120 U.S. 479, 483 (1887) (citing U.S. CONST. art. I, § 8, cl. 10) (holding that Congress can punish offenses against the law of nations to fulfill the international obligations of the United States).

203. U.S. CONST. art. I, § 8, cl. 3.

204. See *Baston v. United States*, 137 S. Ct. 850, 851 (Thomas, J., dissenting from the denial of certiorari); Naomi Harlan Goodno, *When the Commerce Clause Goes International: A Proposed Legal Framework for the Foreign Commerce Clause*, 65 FLA. L. REV. 1139, 1148–49 (2013).

205. See *United States v. Bollinger*, 798 F.3d 201, 215 (4th Cir. 2015).

206. See *United States v. Davila-Mendoza*, 972 F.3d 1264, 1271 (11th Cir. 2020).

207. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

208. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

209. See *Lopez*, 514 U.S. at 560–61; *United States v. Morrison*, 529 U.S. 598, 613 (2000).

210. *Raich*, 545 U.S. at 24–26 (quoting *Lopez*, 514 U.S. at 561).

211. *Lopez*, 514 U.S. at 561–62.

determining whether Congress had a rational basis for concluding that a regulated activity will have a substantial effect on commerce, a court can consider legislative findings concerning an activity's effect on commerce,<sup>212</sup> but “the absence of particularized findings does not call into question Congress[’s] authority to legislate.”<sup>213</sup>

The Eleventh Circuit found that as applied to the factual situation in *Davila-Mendoza*, the MDLEA was an unconstitutional exercise of the Foreign Commerce Clause,<sup>214</sup> but the court unnecessarily restricted its analysis to determining if the MDLEA’s prohibition of international drug trafficking regulates an activity that substantially affects the United States’ commerce with foreign nations.<sup>215</sup> Rather, the MDLEA regulates the things in foreign commerce: controlled substances. In fact, Congress has already validly regulated the importation of controlled substances from foreign countries<sup>216</sup> using the Foreign Commerce Clause.<sup>217</sup>

But even limiting the scope of the analysis to determining whether the MDLEA regulates an activity that substantially effects the United States’ commerce with foreign nations, the MDLEA clearly does so by regulating maritime drug trafficking.<sup>218</sup> The Eleventh Circuit declined to find that Congress had a rational basis for concluding that foreign drug trafficking conduct is “part of an economic “class of activities” that have a substantial effect on . . . commerce’ between the United States and other countries,”<sup>219</sup> noting that the MDLEA “does not include any findings on the existence or extent of an economic impact, aggregate or otherwise, of the international drug trade on United States commerce with foreign nations.”<sup>220</sup> Though a court *can* consider Congress’s findings in determining whether Congress had a rational basis for concluding that the regulated activity will have a substantial effect on commerce, the absence of such findings is not fatal to the enactment.<sup>221</sup> And even though the Eleventh Circuit acknowledged that congressional findings were unrequired,<sup>222</sup> it refused to even attempt to justify whether Congress had a rational basis in concluding that foreign drug trafficking could have a

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212. *See id.* at 562–63.

213. *Raich*, 545 U.S. at 21.

214. *United States v. Davila-Mendoza*, 972 F.3d 1264, 1277 (11th Cir. 2020).

215. *See id.* at 1271.

216. *See* Controlled Substances Import and Export Act, Pub. L. No. 91-513, § 1002, 84 Stat. 1285, 1285 (1970) (codified as amended at 21 U.S.C. §§ 951–966, 970–971).

217. *See* *Brolan v. United States*, 236 U.S. 216, 218–19 (1915); *United States v. LaFroscia*, 354 F. Supp. 1338, 1340 (S.D.N.Y. 1973).

218. *See* *United States v. Feliciano*, 223 F.3d 102, 118 (2d Cir. 2000).

219. *Davila-Mendoza*, 972 F.3d at 1274 (quoting *United States v. Baston*, 818 F.3d 651, 668 (11th Cir. 2016)).

220. *Id.*

221. *See* *Gonzales v. Raich*, 545 U.S. 1, 21 (2005).

222. *Davila-Mendoza*, 972 F.3d at 1274.

substantial effect on commerce between the United States and foreign nations. But the court would not have had to make a significant logical leap to determine that “trafficking in controlled substances aboard vessels,”<sup>223</sup> which involves both the instrumentalities in foreign commerce (vessels) and things in foreign commerce (controlled substances), could have a substantial effect on commerce between the United States and foreign nations.

The Eleventh Circuit’s finding that the MDLEA lacks an element within the text of the statute that would require the drug trafficking conduct to be in or affect foreign commerce<sup>224</sup> is trivial. While the MDLEA does not contain such an explicit jurisdictional element, it is unnecessary because it may be implied from the type of conduct that the MDLEA regulates. “Commerce, undoubtedly, is *traffic* . . . .”<sup>225</sup> International drug *trafficking* itself is in or affects commerce<sup>226</sup> between the United States and foreign nations.<sup>227</sup> Furthermore, the MDLEA is a necessary part of the CDAPCA, which is a larger regulatory scheme that regulates the trade of controlled substances between the United States and foreign nations.<sup>228</sup> The MDLEA was enacted to close loopholes in the CDAPCA that allowed drug traffickers to avoid prosecution for trafficking controlled substances into the United States outside of the regulated channels of foreign commerce.<sup>229</sup> Accordingly, Congress could have rationally concluded that the absence of the MDLEA’s regulation of maritime drug trafficking would undercut the CDAPCA’s regulation of the importation of controlled substances from foreign nations.<sup>230</sup> And like the cultivation and personal use of marijuana for medicinal purposes, which the Court in *Gonzales v. Raich*<sup>231</sup> held, in the aggregate, could substantially affect the interstate trade of illicit drugs that the Controlled

223. 46 U.S.C. § 70501.

224. See *Davila-Mendoza*, 972 F.3d at 1275.

225. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824) (emphasis added).

226. See *Kontorovich*, *supra* note 174, at 1218.

227. See Matthew S. Jenner, Note, *International Drug Trafficking: A Global Problem with a Domestic Solution*, 18 *IND. J. GLOB. LEGAL STUD.* 901, 905 (2011) (estimating that up to “\$24 billion of . . . cash crosses the [Southwest] border . . . every year as a result of [drug] trafficking”).

228. See Controlled Substances Import and Export Act, Pub. L. No. 91-513, 84 Stat. 1285 (1970) (codified as amended at 21 U.S.C. §§ 951–966, 970–971) (falling under Title III of the CDAPCA).

229. See S. REP. NO. 96-855, at 1–2 (1980); H.R. REP. NO. 96-323, at 4 (1979).

230. Cf. *United States v. Bollinger*, 798 F.3d 201, 219 (4th Cir. 2015) (finding that a statute criminalizing noncommercial sexual conduct with a minor in a foreign country was “part of a larger regulatory scheme designed to close loopholes that facilitated the abuse of children abroad by sex tourists,” so Congress had a rational basis in determining that the statute’s absence would harm Congress’s ability to regulate the child prostitution industry).

231. 545 U.S. 1 (2005).

Substances Act<sup>232</sup> sought to regulate,<sup>233</sup> the maritime trafficking of bulk quantities of illicit drugs between foreign nations could substantially affect the trade of controlled substances between the United States and foreign nations that the CDAPCA sought to regulate.<sup>234</sup>

But the critical issue raised by the Eleventh Circuit is the necessity of finding a nexus between the United States and the drug trafficking such that it would satisfy the requirement that Congress regulate commerce *with* a foreign nation and not among foreign nations.<sup>235</sup> While this is certainly a sticking point as it relates to cases in which there is no overt evidence of a nexus between the vessel and the United States, even then it is impossible to ignore the high likelihood that bulk shipments of drugs traveling between Caribbean, Central American, and South American nations will ultimately end up in the United States via unregulated channels,<sup>236</sup> which the CDAPCA sought to avoid.<sup>237</sup> And while the chain of inferences required for such an assertion could conceivably bring within Congress's ambit the power to criminalize any foreign conduct with some remote connection to foreign commerce with the United States,<sup>238</sup> this concern is limited by the fact that drug trafficking in bulk quantities, especially between Caribbean, Central American, and South American nations, has a *significant* connection to foreign commerce with the United States.<sup>239</sup> Furthermore, in the context of foreign commerce, federalism concerns limiting the scope of the Interstate Commerce Clause are absent, which would permit a broader scope of congressional authority under the Foreign Commerce Clause.<sup>240</sup> While there is a concern that expanding the scope of the Foreign Commerce Clause beyond that of the Interstate Commerce Clause would allow Congress to intrude into the sovereignty of other nations,<sup>241</sup> Congress addressed this concern by requiring the consent of the coastal nation before the United States could assert jurisdiction over a vessel within the coastal nation's territorial seas.<sup>242</sup> Accordingly, because the MDLEA regulates illicit maritime trafficking in controlled substances, which is an economic activity that has a substantial effect on the United States' regulation of commerce in controlled substances with foreign nations, it is a valid

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232. Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. §§ 801–904).

233. See *Raich*, 545 U.S. at 18–19.

234. See *United States v. Feliciano*, 223 F.3d 102, 118 (2d Cir. 2000).

235. See *United States v. Davila-Mendoza*, 972 F.3d 1264, 1276 (11th Cir. 2020).

236. See sources cited *supra* note 184.

237. See 21 U.S.C. § 955.

238. See *Davila-Mendoza*, 972 F.3d at 1276–77.

239. See, e.g., *In re Sealed Case*, 936 F.3d 582, 592 (D.C. Cir. 2019).

240. See *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979).

241. See *United States v. Al-Maliki*, 787 F.3d 784, 793 (6th Cir. 2015).

242. 46 U.S.C. § 70502(e)(1)(E).

exercise of the Foreign Commerce Clause even when there is no overt nexus between the drug trafficking conduct and the United States.

### C. *The Necessary and Proper Clause*

The Necessary and Proper Clause also serves as a source of power from which Congress may draw its authority to proscribe drug trafficking by foreign persons aboard foreign vessels in foreign territorial seas. The Necessary and Proper Clause empowers Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>243</sup> According to the Supreme Court, “the Necessary and Proper Clause makes clear that the Constitution’s grants of specific federal legislative authority are accompanied by broad power to enact laws that are ‘convenient, or useful’ or ‘conducive’ to the authority’s ‘beneficial exercise.’”<sup>244</sup> Thus, a statute enacted pursuant to the Necessary and Proper Clause must only “constitute[] a means that is rationally related to the implementation of a constitutionally enumerated power.”<sup>245</sup> Accordingly, the Necessary and Proper Clause empowers Congress to proscribe drug trafficking by foreign persons aboard foreign vessels in foreign territorial seas incident to the United States’ authority to enter into treaties, or, alternatively, incident to Congress’s power under the Felonies Clause.

Article II, Section 2, Clause 2 vests in the President the “[p]ower, by and with the Advice and Consent of the Senate, to make Treaties.”<sup>246</sup> Thus, incident to the President’s treaty power, Congress may enact legislation that is necessary and proper for effectuating the United States’ treaty commitments.<sup>247</sup> This holds true even if Congress lacks the necessary authority under one of the enumerated powers in Article I, Section 8, because Congress can act beyond those powers when legislating pursuant to a valid treaty under the Necessary and Proper Clause.<sup>248</sup> Congress therefore is restrained in enacting legislation that is necessary and proper for carrying out a treaty only on the grounds that such legislation cannot be expressly prohibited by the Constitution.<sup>249</sup> Accordingly, Congress could enact the MDLEA pursuant to the

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243. U.S. CONST. art. I, § 8, cl. 18.

244. *United States v. Comstock*, 560 U.S. 126, 133–34 (2010) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413, 418 (1819)).

245. *Id.* at 134.

246. U.S. CONST. art. II, § 2, cl. 2.

247. *See United States v. Carvajal*, 924 F. Supp. 2d 219, 250 (D.D.C. 2013), *aff’d on other grounds sub nom. United States v. Miranda*, 780 F.3d 1185 (D.C. Cir. 2015).

248. *See Missouri v. Holland*, 252 U.S. 416, 431–32 (1920).

249. *See Boos v. Barry*, 485 U.S. 312, 324 (1988).

Necessary and Proper Clause if the President entered into a valid treaty, the statute is necessary and proper for effectuating the United States' commitments under the treaty, and the Constitution does not expressly prohibit the statute.

The MDLEA is a valid exercise of Congress's power under the Necessary and Proper Clause because it effectuates the United States' treaty obligations. The United States is a party to treaties that seek to control problems associated with illicit drugs, including the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol<sup>250</sup> (Single Convention), the Convention on Psychotropic Substances of 1971<sup>251</sup> (1971 Convention), and the 1988 Convention. Both the Single and 1971 Conventions specifically require signatory nations to "[m]ake arrangements at the national level for co-ordination of preventive and repressive action against the illicit traffic" in narcotic drugs and psychotropic substances, "[a]ssist each other in the campaign against the illicit traffic," and "[c]o-operate closely with each other . . . with a view to maintaining a coordinated campaign against the illicit traffic."<sup>252</sup> Furthermore, both treaties require signatory nations to criminalize illicit trafficking.<sup>253</sup> The 1988 Convention was drafted specifically to "consider[] the various aspects of the problem [of illicit trafficking] as a whole, in particular those aspects not envisaged in [the Single and 1971 Conventions]," including the "improve[ment of] international co-operation in the suppression of illicit traffic by sea."<sup>254</sup> Thus, in contrast to the Single and 1971 Conventions, the 1988 Convention focuses entirely on drug trafficking and includes provisions specifically addressing maritime drug trafficking.<sup>255</sup>

The 1988 Convention states that a signatory nation

[m]ay take such measures as may be necessary to establish its jurisdiction over the offences it has established . . . when . . . the offence is committed on board a vessel concerning which that Party has been authorized to take appropriate action . . . provided that such jurisdiction shall be exercised only on the basis of agreements or arrangements.<sup>256</sup>

Article 17 of the 1988 Convention further allows signatory nations to

250. Single Convention on Narcotic Drugs of 1961, *amended by 1972 Protocol, ratified* Nov. 1, 1972, 976 U.N.T.S. 105 [hereinafter *Single Convention*].

251. Convention on Psychotropic Substances of 1971, *ratified* Apr. 16, 1980, 1019 U.N.T.S. 175 [hereinafter *1971 Convention*].

252. Single Convention, *supra* note 250, art. 35; 1971 Convention, *supra* note 251, art. 21.

253. Single Convention, *supra* note 250, art. 36; 1971 Convention, *supra* note 251, art. 22.

254. 1988 Convention, *supra* note 95, at 166–67.

255. *See id.* art. 17.

256. *Id.* art. 4(1)(b)(ii).

enter into bilateral or regional agreements that authorize a requesting nation to board, search, and take appropriate action aboard a vessel registered to the other nation if evidence of illicit trafficking is discovered aboard the vessel.<sup>257</sup> Pursuant to Article 17 of the 1988 Convention, the United States has entered into over forty bilateral agreements with partner nations to suppress maritime drug trafficking,<sup>258</sup> with some of those agreements containing provisions that allow the United States to exercise jurisdiction over drug trafficking within the partner nation's territorial seas.<sup>259</sup> Together, therefore, the Single, 1971, and 1988 Conventions obligate the United States to cooperate with other nations "to the fullest extent possible"<sup>260</sup> in suppressing illicit drug trafficking, including maritime drug trafficking.<sup>261</sup> While the scope of the United States' obligations are ill-defined and exceptionally broad, the Supreme Court has granted deference to "congressional judgment in [the] delicate area" of enacting "statute[s] necessary to comply with [the United States'] international obligations."<sup>262</sup> Accordingly, under the deferential rational relationship standard,<sup>263</sup> the MDLEA is necessary and proper for the United States to carry out its treaty obligations because it extends the United States' ability to suppress maritime drug trafficking in cooperation with other nations to drug trafficking by foreign persons aboard foreign vessels in foreign territorial seas.<sup>264</sup> Finally, the MDLEA is not prohibited by the Constitution because it does not violate express prohibitions, nor does it violate individual rights or implicate federalism issues.<sup>265</sup>

In *Davila-Mendoza*, the Eleventh Circuit dismissed the argument that the MDLEA was necessary and proper for effectuating the United States' treaty obligations because Congress enacted the MDLEA prior to the 1988 Convention and subsequent Jamaica Bilateral Agreement.<sup>266</sup> However, this ignores the fact that the United States is a party to the Single and 1971 Conventions, which the Senate ratified prior to enacting

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257. See *id.* art. 17(3)–(4), (9).

258. See INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, *supra* note 44, at 40.

259. See, e.g., Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, Pan.-U.S., art. XI, Feb. 5, 2002, T.I.A.S. No. 02-205.1.

260. 1988 Convention, *supra* note 95, art. 17(1).

261. See Cleveland & Dodge, *supra* note 195, at 2274.

262. *Boos v. Barry*, 485 U.S. 312, 329 (1988).

263. See *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998) (applying the rational relationship standard to congressional enactments made pursuant to the Necessary and Proper Clause).

264. See 46 U.S.C. § 70502(c)(1)(E).

265. See *Kontorovich*, *supra* note 174, at 1238–39.

266. See *United States v. Davila-Mendoza*, 972 F.3d 1264, 1277 (11th Cir. 2020).

the MDLEA's predecessor.<sup>267</sup> These treaties required the United States to criminalize illicit drug trafficking and coordinate with other nations to stop such illicit trafficking.<sup>268</sup> While these treaties do not explicitly mention maritime drug trafficking, the broad language of these treaties indicates that maritime drug trafficking was included within the ambit of the term "illicit traffic" because each of the treaties exempt drugs carried in first aid kits aboard ships engaged in international traffic from the treaties' prohibitions.<sup>269</sup> This is further evidenced by the fact that one of the driving purposes behind the 1988 Convention was to "improve international co-operation in the suppression of illicit traffic by sea," which was "not envisaged in [the Single and 1971 Conventions]."<sup>270</sup> Thus, the MDLEA is necessary and proper for effectuating the United States' obligations under the Single and 1971 Conventions, even if those treaties did not include specific provisions concerning maritime drug trafficking. But even if the Single and 1971 Conventions do not support the enactment of the MDLEA under the Necessary and Proper Clause, the 1988 Convention's incorporation of provisions concerning maritime drug trafficking does support the MDLEA's enactment.

The MDLEA is necessary and proper for effectuating the 1988 Convention even though Congress enacted the MDLEA before the Senate ratified the treaty.<sup>271</sup> First, legislation that preexisted a treaty may still apply as is necessary and proper to execute the terms of that treaty.<sup>272</sup> Second, despite the fact that the 1988 Convention came later than the enactment of the MDLEA in 1986, Congress's subsequent recodification of the MDLEA and amendment of the statute renders the MDLEA necessary and proper for implementing the new requirements explicitly imposed by the 1988 Convention and bilateral agreements made pursuant to it. Congress recodified the MDLEA in 2006,<sup>273</sup> and continued to expand upon the MDLEA via the Drug Trafficking Vessel Interdiction

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267. See *supra* notes 250–51 and accompanying text. Congress enacted the MHS Act five months after the Senate ratified the 1971 Convention. See Pub. L. No. 96-350, 94 Stat. 1159 (1980), *repealed by* Maritime Drug Law Enforcement Act of 1986 (current version at 46 U.S.C. §§ 70501–70507).

268. See *supra* text accompanying notes 252–53.

269. See Single Convention, *supra* note 250, art. 32; 1971 Convention, *supra* note 251, art. 14.

270. 1988 Convention, *supra* note 95, at 166–67 (emphasis added).

271. Cf. *Missouri v. Holland*, 252 U.S. 416, 432–33 (1920) (dismissing the argument that "what an act of Congress could not do unaided . . . a treaty cannot do," which stemmed from the trial courts finding unconstitutional a previous version of the statute at issue because no enumerated Article I power supported it, and the pertinent supporting treaty did not then exist).

272. Cf. *Ex parte Crow Dog*, 109 U.S. 556, 566–70 (1883) (holding that the United States can apply preexisting law to Indian nations by treaty in the absence of further congressional action).

273. See Pub. L. No. 109-304, § 10, 120 Stat. 1485, 1685–89 (2006).

Act of 2008.<sup>274</sup> Thus, it can be reasonably inferred that Congress viewed the MDLEA as necessary and proper for carrying out the United States' treaty obligations under the 1988 Convention and subsequent bilateral agreements.<sup>275</sup>

The Eleventh Circuit also ignored the fact that the United States played a major role in drafting the 1988 Convention.<sup>276</sup> First, a representative of the United States served in the capacity of one of the Vice Presidents of the 1988 Convention.<sup>277</sup> Additionally, the MDLEA provision authorizing the United States to exercise jurisdiction over drug trafficking conduct in foreign territorial seas “tracks the [relevant] provisions of the [1988 Convention] in all material respects”<sup>278</sup> because it provides such jurisdiction only upon the coastal nation’s consent.<sup>279</sup> This suggests that Article 17 of the 1988 Convention is partially influenced by the MDLEA. Moreover, the Eleventh Circuit overlooked the fact that the Single and 1971 Conventions did not expressly discuss the complexities of maritime drug trafficking, so as early as December 14, 1984, the United Nations began efforts to draft the 1988 Convention to address such issues.<sup>280</sup> Thus, Congress enacted the MDLEA concurrently with, and in anticipation of the drafting of the 1988 Convention, making the MDLEA necessary and proper for implementing the obligations the 1988 Convention imposed.

The Eleventh Circuit also dismissed the applicability of the Necessary and Proper Clause based on the absence of any mention of treaty obligations in the MDLEA’s text or legislative history, and the lack of judicial opinions citing treaty obligations as the source of Congress’s

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274. Pub. L. No. 110-407, 122 Stat. 4296 (2008) (codified at 18 U.S.C. § 2285 and 46 U.S.C. § 70508).

275. See Kontorovich, *supra* note 174, at 1247 (arguing that a Congress that convened after the United States adopted the 1988 Convention endorsed the MDLEA by expanding upon its provisions).

276. H.R. REP. NO. 101-1019, at 160 (1991).

277. See U.N. Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *Final Act of the United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, ¶ 14, U.N. Doc. E/CONF.82/14 (Dec. 19, 1988) [hereinafter U.N. Conference for the Adoption of the 1988 Convention].

278. Cf. *United States v. Belfast*, 611 F.3d 783, 806 (11th Cir. 2010) (finding that a statute was a valid exercise of congressional power under the Necessary and Proper Clause because it “tracks the relevant provisions of the [treaty] in all material respects”).

279. Compare 46 U.S.C. § 70502(c)(1)(E) (including vessels located in the territorial waters of foreign nations that consent to the “enforcement of United States law” within the definition of a vessel subject to United States jurisdiction), and *id.* § 70502(c)(2) (explaining the ways in which the United States may obtain a foreign nation’s consent to the exercise of United States jurisdiction over a foreign vessel), with 1988 Convention, *supra* note 95, arts. 17(4), (9), (11) (explaining the ways in which a foreign nation may authorize another nation, such as the United States, to exercise jurisdiction over a foreign vessel).

280. See U.N. Conference for the Adoption of the 1988 Convention, *supra* note 277, ¶ 1.

power in enacting the MDLEA.<sup>281</sup> The fact that Congress did not explicitly state that it enacted the MDLEA pursuant to treaty obligations is of little consequence.<sup>282</sup> Furthermore, even though the MDLEA's legislative history does not expressly state that it is in compliance with treaty obligations, the MDLEA's predecessor, the MHSA, was enacted to complement the CDAPCA,<sup>283</sup> and the CDAPCA expressly states that it complies with the United States' obligations under the Single Convention.<sup>284</sup> Furthermore, the legislative history of the MHSA includes numerous references to the CDAPCA,<sup>285</sup> as well as the Single and 1971 Conventions.<sup>286</sup> In fact, the MDLEA itself incorporates the CDAPCA by reference in several sections of the statute.<sup>287</sup> Moreover, Public Law 99-570, under which Congress enacted the MDLEA to update the MHSA, referenced the Single Convention and 1971 Convention, and called for more effective implementation of those existing treaties<sup>288</sup> while also urging the United Nations to complete the draft of the 1988 Convention as quickly as possible.<sup>289</sup> Thus, even though the MDLEA does not make express reference to an international treaty, the MDLEA's legislative history shows that Congress enacted the MDLEA in compliance with treaty obligations.

Finally, even though "[n]o court decision dealing with [the] MDLEA refers to any treaty obligation as the source of Congress's Article I authority,"<sup>290</sup> it does not necessarily mean that Congress could not have acted pursuant to the Necessary and Proper Clause in enacting the statute. In fact, at least one court has posited that treaty obligations and the Necessary and Proper Clause may be a source of power under which Congress could have enacted the MDLEA.<sup>291</sup> Accordingly, because the Single, 1971, and 1988 Conventions impose obligations on the United States to cooperate to the fullest extent with other nations to suppress illicit drug trafficking, the Necessary and Proper Clause serves as a source

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281. See *United States v. Davila-Mendoza*, 972 F.3d 1264, 1277 (11th Cir. 2020).

282. Cf. *United States v. Arjona*, 120 U.S. 479, 488 (1887) (noting that it is unnecessary for a statute's text to "declare that it was enacted to carry into execution any . . . particular power").

283. See S. REP. NO. 96-855, at 1-2 (1980); H.R. REP. NO. 96-323, at 4 (1979).

284. See 21 U.S.C. § 801(7).

285. See S. REP. NO. 96-855, at 1-4; H.R. REP. NO. 96-323, at 4, 8-10, 12-14.

286. See H.R. REP. NO. 96-323, at 8.

287. See, e.g., 46 U.S.C. §§ 70502(a), 70503(a)(2), 70506(a), 70507(a).

288. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 2020, 100 Stat. 3207, 3207-69.

289. See *id.* § 2023, 100 Stat. at 3207-70.

290. *United States v. Davila-Mendoza*, 972 F.3d 1264, 1277 (11th Cir. 2020) (quoting *United States v. Cardales-Luna*, 632 F.3d 731, 749 (1st Cir. 2011) (Torruella, J., dissenting)).

291. See *United States v. Carvajal*, 924 F. Supp. 2d 219, 250 (D.D.C. 2013), *aff'd on other grounds sub nom.* *United States v. Miranda*, 780 F.3d 1185 (D.C. Cir. 2015).

of power from which Congress could draw to proscribe drug trafficking by foreign persons aboard foreign vessels in foreign territorial seas.

Assuming *arguendo* that the Felonies Clause limits Congress to criminalizing conduct occurring beyond foreign territorial seas, the Eleventh Circuit and others have held that the MDLEA is a valid exercise of the Felonies Clause when applied to drug trafficking conduct in international waters, even when there is no overt nexus between the drug trafficking conduct and the United States.<sup>292</sup> Thus, the Necessary and Proper Clause, incident to Congress's power under the Felonies Clause, also supports Congress's criminalization of attempts to violate the MDLEA, thereby extending the reach of the MDLEA to drug trafficking committed by foreign persons aboard foreign vessels in foreign territorial seas. Under federal law, a defendant is guilty of an attempt when the defendant intended to commit the substantive crime, and "engaged in conduct amounting to a 'substantial step' towards the commission of the crime."<sup>293</sup> In order to "have taken a 'substantial step,' [the defendant] must have engaged in more than 'mere preparation,' but may have stopped short of 'the last act necessary' for the actual commission of the substantive crime."<sup>294</sup> The MDLEA prohibits a person on board a vessel subject to the jurisdiction of the United States from "possess[ing] with intent to manufacture or distribute, a controlled substance,"<sup>295</sup> and includes a provision criminalizing attempts to violate the MDLEA.<sup>296</sup> Thus, the possession of drugs on board a vessel in foreign territorial seas with the intent to travel aboard that vessel on the high seas so as to distribute the drugs elsewhere is an attempt to violate the MDLEA. A defendant in such a situation not only has the intent to distribute drugs in violation of the MDLEA but also to do so by operating the vessel on the high seas where the vessel would be subject to United States jurisdiction. This would constitute a substantial step toward the commission of the substantive crime because the defendant has actually departed the shore with a cargo of drugs.<sup>297</sup> Furthermore, such actions go beyond "mere preparation"<sup>298</sup> because the only remaining step that the defendant would have to undertake is actually crossing into international waters. There, the

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292. *See, e.g.*, *United States v. Estupinan*, 453 F.3d 1336, 1338 (11th Cir. 2006); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993) (applying the law without regard for any nexus between a defendant's criminal conduct and the United States).

293. *United States v. Yousef*, 327 F.3d 56, 134 (2d Cir. 2003) (quoting *United States v. Rosa*, 11 F.3d 315, 337 (2d Cir. 1993)).

294. *Id.*

295. 46 U.S.C. § 70503(a)(1).

296. *Id.* § 70506(b).

297. *Cf. United States v. Ledesma-Cuesta*, 347 F.3d 527, 531–32 (3d Cir. 2003) (holding that bringing drugs aboard a vessel bound for the United States is an attempt to violate the MDLEA).

298. *See Yousef*, 327 F.3d at 134.

vessel is subject to United States jurisdiction if the vessel's flag state consents,<sup>299</sup> rendering the crime complete.

The Necessary and Proper Clause supports the criminalization of an attempt to violate the MDLEA, even when the vessel has not yet left foreign territorial seas, because it is rationally related to the legitimate end of proscribing drug trafficking on the high seas. Two circuits have extended the MDLEA's proscription of drug trafficking under the MDLEA's conspiracy provision to foreign persons who never left the foreign country or set foot on board a vessel subject to United States jurisdiction.<sup>300</sup> The courts rested their holdings on the fact that Congress could criminalize drug trafficking conduct committed on the high seas and that the acts of the defendants' coconspirators, who had been interdicted with drugs in international waters, were directly attributable to them.<sup>301</sup> The Second Circuit, in particular, found that the Necessary and Proper Clause supported such prosecutions.<sup>302</sup> The court held that Congress had "not exceeded its authority under the Necessary and Proper Clause in extending the MDLEA to cover the conduct of land-based conspirators" because it was "rationally related to the legitimate end of prosecuting MDLEA conspirators who are on the high seas."<sup>303</sup> Elaborating on its reasoning, the court added: "In order reasonably to address . . . drug trafficking on the high seas, it is, therefore, necessary and proper for Congress to confer federal jurisdiction over all conspirators, [including] . . . those who remain on land."<sup>304</sup>

The Second Circuit's holding not only expands the reach of the MDLEA into foreign lands under the authority of the Necessary and Proper Clause but also extends the MDLEA to persons who never even set foot on a vessel. If the Necessary and Proper Clause allows the United States to prosecute such persons for conspiracy to violate the MDLEA, it is inconceivable that Congress could not take the less substantial step of extending the MDLEA's attempt provision to persons who intend to traffic drugs via international waters and have taken the substantial step of getting underway from shore with the drugs simply because the vessel had not yet crossed into international waters. Accordingly, the Necessary and Proper Clause, incident to the Felonies Clause, supports the MDLEA's attempt provision, thereby allowing Congress to criminalize drug trafficking by foreign persons aboard foreign vessels in foreign

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299. See 46 U.S.C. § 70502(c)(1)(C).

300. See *United States v. Alarcon Sanchez*, 972 F.3d 156, 167–68 (2d Cir. 2020); *United States v. Ballestas*, 795 F.3d 138, 143–47 (D.C. Cir. 2015).

301. See *Alarcon Sanchez*, 972 F.3d at 167–68; *Ballestas*, 795 F.3d at 146–47.

302. See *Alarcon Sanchez*, 972 F.3d at 167–68.

303. *Id.* at 167.

304. *Id.*

territorial seas, at least when there is evidence that such persons intended to travel on the high seas.

### CONCLUSION

The Eleventh Circuit's interpretation of the Define and Punish Clause, the Foreign Commerce Clause, and the Necessary and Proper Clause needlessly restricts the United States' ability to prevent foreign drugs from reaching the United States. While there have been relatively few MDLEA cases involving the interdiction and prosecution of foreign persons aboard foreign vessels in foreign territorial seas,<sup>305</sup> the Eleventh Circuit's holdings in *Bellaizac-Hurtado* and *Davila-Mendoza* create serious policy implications. First, these holdings signal that drug traffickers can avoid prosecution under the MDLEA by limiting their maritime trafficking routes to foreign territorial seas, thereby reducing the MDLEA's deterrent effect. Given the coastal geography of the Caribbean, Central America, and South America, it is possible for traffickers to remain within foreign territorial seas for most, if not all, of their transit.<sup>306</sup> There, according to the Eleventh Circuit, drug traffickers remain beyond the United States' reach. In theory, coastal nations along the trafficking routes could interdict and prosecute the drug traffickers for violating their laws, but such efforts have been ineffective in stemming the tide of illicit drugs flowing into the United States because of the limited maritime law enforcement capabilities of Caribbean, Central American, and South American nations.<sup>307</sup> Additionally, drug traffickers have been afforded the opportunity to prevent United States officials from establishing an overt nexus between the drug traffickers and the United States by simply claiming that they are delivering their illicit cargo to a different nation. But this ignores the fact that drug traffickers are known to use maritime routes to deliver drug loads to other countries such as Mexico before those drugs travel via land across the southwest border into the United States. And while the Eleventh Circuit's holdings rest upon Article I grounds, the court's interpretation of the Define and Punish Clause, the Foreign Commerce Clause, and the Necessary and Proper Clause is unwarranted.

Because of the significant counterdrug policy concerns that *Bellaizac-Hurtado* and *Davila-Mendoza* create, other circuits should not find that the MDLEA exceeds Congress's authority when applied to foreign persons aboard foreign vessels in foreign territorial seas. Rather, other circuits can and should find that the Define and Punish Clause, the Foreign Commerce Clause, and the Necessary and Proper Clause

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305. See Kontorovich, *supra* note 174, at 1232.

306. See Kramek, *supra* note 20, at 132.

307. See, e.g., *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1057 (3d Cir. 1993).

empower Congress to criminalize such maritime drug trafficking. The Define and Punish Clause offers Congress two sources of power that support Congress's authority to proscribe drug trafficking in foreign territorial seas. First, the Felonies Clause can be interpreted to reach conduct that occurs within foreign territorial seas because the Framers understood the high seas as including such waters, and the protective and territorial principles of international jurisdiction provide the necessary nexus for Congress to proscribe drug trafficking even in the absence of an overt connection with the United States. Second, the Offences Clause provides Congress with the power to define and punish offenses against the law of nations, which includes violations of conventional international law memorialized in treaties. The Foreign Commerce Clause allows Congress to criminalize drug trafficking in foreign territorial seas because illicit drug trafficking is an economic activity that, in the aggregate, has a substantial effect on the United States' regulation of commerce in controlled substances with foreign nations. Finally, the Necessary and Proper Clause provides Congress with the power to proscribe drug trafficking in foreign territorial seas because the MDLEA implements the United States' treaty obligations to cooperate with other nations to the fullest extent possible to suppress illicit drug trafficking. Alternatively, the Necessary and Proper Clause, incident to Congress's power under the Felonies Clause, allows Congress to criminalize attempts to violate the MDLEA, which includes instances of drug trafficking that take place within foreign territorial seas. Based upon these understandings of Congress's Article I, Section 8 powers, other circuits should find that the MDLEA validly extends to drug trafficking by foreign persons aboard foreign vessels in foreign territorial seas.