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

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BEYOND THE ARTICLE I HORIZON: CONGRESS’S ENUMERATED POWERS AND UNIVERSAL JURISDICTION OVER DRUG CRIMES

Eugene Kontorovich*

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In March 2007, the United States Coast Guard sailors boarded a suspicious Panamanian vessel that had been spotted by an overhead surveillance plane.1 The boarding resulted in the largest maritime cocaine seizure ever—(a massive 42,000 pounds uncut. Eleven crewmembers were arrested, brought to Florida, and indicted.

Yet the seizure did not take place in U.S. territorial waters, or even the broader U.S. customs zone. It took place in Panamanian waters.2 Moreover, none of the crew—now facing decades or life in U.S. jails—were Americans. Finally, there was no evidence that the drugs, seized over a thousand miles from Miami, were destined to the U.S. Indeed, the DEA conceded the drugs were bound for a third country.

This case, while exceptional in the amount seized, is otherwise not unusual. It repeats itself dozens of times each year, as the U.S. begins to enforce its own drug laws in foreign territory. The wisdom or propriety of such action as a matter of drug policy, international relations, or even international law is not the subject of this Article. Rather, the question here is which of Congress’s enumerated powers authorize it to regulate such purely foreign conduct?

The international law doctrine of universal jurisdiction (UJ) holds that a nation can prosecute certain serious international offenses even though it has no connection to the conduct or participants.3 It has increasingly been used by European national courts and international tribunals to prosecute

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alleged human rights violations around the world. The U.S., however, has been hostile to universal criminal jurisdiction as an international legal development. Even the U.S. statute criminalizing genocide, the paradigmatic modern UJ crime, only applies to crimes that directly involve the U.S.⁴

However, under a little-known statute, America uses universal jurisdiction far more than any other nation, and perhaps even more than all other nations combined. For two decades, the United States has been punishing drug crimes (including possession) committed entirely by foreigners outside U.S. territory, with no demonstrable connection to the U.S. Under the Maritime Drug Law Enforcement Act (MDLEA),⁵ the U.S. Coast Guard apprehends vessels with drugs on the high seas, often thousands of miles from American waters; the crews of these vessels are prosecuted in U.S. courts for violating U.S. drug law, and are sentenced to terms in U.S. jails. In none of these cases is there any evidence the drugs were destined for the U.S. While European UJ prosecutions in war crimes and genocide cases attract a great deal of attention as they involve major wars and high government officials, the MDLEA cases have gone almost unnoticed -- no doubt because the defendants are various low-level members of the Latin American drug trade.

The MDLEA’s UJ provisions raise fundamental questions about the source and extent of Congress’s constitutional power to regulate purely foreign conduct. Courts have said the MDLEA fits under Congress’s power to “Define and Punish Piracies and Felonies on the High Seas.”⁶ Yet this only raises the question of whether that provision has any limits. Perhaps no Article I powers of Congress have received less attention than “Piracies and Felonies.”⁷ This Article is the second in a two-part project examining the limits of Congress’s power under the Define and Punish Clause and related issues – the first academic work examining the nature and scope of these powers.⁸ That companion Article shows that Clause 10 authorizes UJ over

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⁴ 18 U.S.C. § 1091(d) (requiring offense to be committed by U.S. national or in U.S. territory).
⁵ 46 U.S.C Appendix § 1903(a) (1994); id. at § 1903(c)(1)(A) and (C).
⁶ U.S. CONST., ART. I § 8, cl. 10.
at most – crimes that international law has established as universally
cognizable. This limit applies both to the “Felonies” power and the
“offenses against the law of nations.”

Thus the “Define and Punish” clause does not generally authorize
Congress to regulate foreign conduct with no demonstrable U.S.
connection. Congress cannot punish dog-fighting by Indonesians in Java
because Congress has not been authorized by the Constitution to make such
laws. While some UJ may be permissible, it is only in narrowly defined
circumstances. This Article contends that the most or all of the MDLEA’s
jurisdictional provisions go beyond Congress’s Art. I powers in several
ways.

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

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

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

The issue is of significant practical and theoretical importance. From a

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9 See id.
criminal law perspective, hundreds if not thousands are in jail under this statute, which lies at best at the horizon of Congress’s Art. I powers. Furthermore, exploring the potential Art. I basis for the MDLEA exposes several important and novel questions of constitutional and international law in addition to the issue of UJ under Clause 10 explored in the companion Article. Can the foreign commerce clause be used to regulate conduct with no U.S. nexus? Can a law be considered an exercise of Congress’s treaty power if passed a decade before the relevant treaty is ratified. That is, can a treaty retroactively validate a statute? Do Senate declarations made when ratifying count as part of the treaty for the purpose of Congress’s lawmaking powers? Can Congress “define” a crime as an offense against international law when international law does not seem to treat it as such? To what extent can Congress assert UJ over acts committed not just in international waters but in foreign territory? Thus the MDLEA offers a tour of Art. I’s foreign relations provisions.

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

I. BACKGROUND
A. Expanding Jurisdiction on the High Seas

The increasing flow of drugs from the Southern Hemisphere into the U.S. – first marijuana in the 70s and then the more profitable cocaine in the 80s – and the increasing sophistication of the smugglers lead Congress to gradually expand the scope of its extraterritorial law-making. Because of the difficulty of catching traffickers in the relatively short time they are in U.S. waters, the U.S. began projecting its enforcement increasingly far from its shores. Today the Coast Guard patrols the oceans thousands of miles away – and often just off the coast of other states – as part of U.S. anti-drug efforts. And to ensure the Coast Guard’s ability to catch those with drugs bound for the U.S., the Congress cast a net that pulls in – and makes subject to U.S. law – even those foreign vessels whose cargo is not demonstrably destined here.

1. Marijuana on the High Seas Act

The MDLEA built on and expanded the jurisdictional provisions of its predecessor, the Marijuana on the High Seas Act (MHSA), passed in 1980. Drug importation had significantly increased in the 1970s, and Coast Guard interdiction efforts became an important part of the War on Drugs. Smugglers adopted a “mothership” strategy, where a large drug-laden ship would hover on the high seas, just outside of U.S. customs waters, and bring the contraband to shore via many small and difficult to detect boats. When the motherships were seized on the high seas, successful prosecution proved elusive. The motherships themselves were generally foreign-flagged and foreign-crewed, and proving a conspiracy to import was apparently difficult.\(^\text{10}\) The House Report on the bill complained that the impunity of the foreign drug traffickers hurt Coast Guard morale.

The main relevant innovation of the MHSA was to extend U.S. jurisdiction on the high seas not just to “U.S. vessels,” but also to a new category, “vessels subject to the jurisdiction of the United States.” This latter category was defined as stateless vessels, meaning a vessel flying no flag, or bearing fraudulent or multiple registries.\(^\text{11}\) Earlier drafts of the legislation sought to extend jurisdiction to genuinely foreign vessels whenever the flag state consents. However, the Committee reported “various jurisdictional and constitutional” objections to using a state’s “prior consent as a basis for. . . domestic criminal jurisdiction.”\(^\text{12}\) The

\(^{10}\) See H.R. Rep. 96-323 at 5 (July, 10, 1979).

\(^{11}\) Id. at 24-25.

constitutional concerns were not made explicit, and the chief worry seemed to be about international law, which was understood to require a nexus for prosecution. The statute’s authors seemed to think that as a matter of international law, flag state consent would still be an inadequate basis given that drug trafficking “is not generally accepted as an international crime.” 13 However, under the MHSA, a “purported flag state” could reject a vessel’s claim of nationality. 14 Thus the Marijuana on the High Seas Act did sweep in cases involving foreigners on the high seas, on non-American vessels, without proof that the vessel or cargo was destined for America. Moreover, the alleged flag state’s ability to deny claims of registry at its discretion could function as an informal version of consent jurisdiction.

2. Adopting the MDLEA

The MHSA proved anachronistic almost as soon as it was adopted. The cocaine boom of the 1980s lead to a vast increase in drug smuggling, and a correlate demand for more aggressive action. The 1980 statute, designed for a marijuana era, now seemed weak. Thus in 1986, Congress expanded the jurisdictional provisions of its maritime drug laws once again.

The Senate report claimed the MHSA was troublesome to enforce. Extraterritorial jurisdiction over foreign vessels turned on defects in registry. However, evidence of a vessel’s nationality took several days to obtain from the defendant’s home state. It could be hard to prove whether a vessel was stateless. Obtaining such evidence that would be “sufficient to withstand evidentiary objections in a U.S. courtroom can take months.” 15 The MDLEA sought to avoid such problems by expanding jurisdiction far beyond stateless vessels.

First, jurisdiction was extended to any vessel with some U.S. connection. This includes anyone aboard vessels registered in the U.S, owned or formerly owned, in whole or part by U.S. nationals or corporations; 16 or U.S. nationals and resident aliens aboard any vessels; as well as any vessel in U.S. territorial or customs waters. 17 But the statute also applies U.S. drug laws (not just importation laws) to vessels that fall outside this broad description, and even to foreign-crewed vessels in foreign waters. The MDLEA expanded on the MHSA by extending U.S. jurisdiction to any foreign vessels on the high seas, or even in foreign territorial waters, so long as the relevant foreign nation consents. 18

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13 Id. at 20.
14 Committee Report at 23, analysis A.2(b).
16 §1803(b)(2)-(3).
17 § 1903(a).
18 § 1903(c)(1)(C).
This consent is broadly defined – it may be “oral” – and not subject to challenge in court: it “may be obtained by radio, telephone, or similar oral or electronic means.” Moreover, the definition of stateless vessels is expanded to those that do not produce evidence of their registry when requested by the Coast Guard – a request which, on the high seas or in foreign territorial waters, they may feel fully entitled to reject, as well as those whose registry is not “affirmatively and unequivocally” confirmed by the foreign state. Given that the Senate report makes clear that obtaining any kind of registry confirmation from foreign states is slow, difficult, and confusing, this provision would sweep in many genuinely foreign (not actually lacking a legitimate registry) vessels.

Because these are classified as “vessels subject to the jurisdiction of the United States,” no conspiracy to import need be proven; they are treated exactly as if they were U.S. ships, over which Congress’s power is plenary. Thus the statute clearly criminalizes mere “possession” on these foreign vessels in foreign or international waters. Moreover, the statute clearly instructed courts to construe these provisions as broadly as possible. It explicitly brushes aside any presumptions against extraterritoriality, and bars any jurisdictional or substantive defenses based on the U.S.’s “failure to comply with international law.” Indeed, a 1996 amendment sought to keep all questions of statelessness away from a jury by providing that “jurisdiction of the United States with respect to vessels subject to this chapter is not an element of any offense… [and] are preliminary questions of law to be determined solely by the trial judge.” With the cocaine epidemic raging, the “constitutional objections” that had dissuaded Congress from adopting a state-consent criterion of jurisdiction for the MHSA were absent from the discussion of the MDLEA.

Congress did not specify which head of Art. I authority it exercised when enacting the MDLEA or its predecessor. However, courts and commentators have consistently seen the law as pursuant to the Piracies and Felonies Clause because “that clause is the only specific grant of power to be found in the Constitution for the punishment of offenses outside the territorial limits of the United States.” A few courts have implied that the

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19 Id. at (c)(2)(C).
20 Id. at (c)(2)(B).
21 Id. at (c)(2)(C).
22 § 1903(a).
23 § 1903(h).
24 § 1903(d).
25 Subsec. (f). Pub. L. 104-324, § 1138(a)(5)
act must be an exercise of the *felonies* power in particular, though most have mistakenly spoke of “Piracies and Felonies” as if they are synonymous or interchangeable. Since this clause speaks directly to criminal legislation for the high seas, it seems to be the natural place to seek authority for the MDLEA.

**B. Enforcement**

Under standard rules of international law, the Coast Guard cannot stop or board foreign vessels on the high seas or in foreign waters. Thus the United States has negotiated “bilateral maritime agreements” with 26 Caribbean and Latin American states since the enactment of the MDLEA. The agreements have been negotiated country by country over the past 20 years. They set out frameworks for the U.S. to stop, search, and sometimes board the other state’s vessels if they are suspected of drug trafficking. The agreements coordinate numerous technical and tactical aspects of joint counter-narcotics enforcement, including the “ship rider” program, where a law enforcement officer from one country embarks on the other’s vessels, with the authority to board and make arrests in the name of his home state. The agreements generally follow a standard six-part form apparently drafted by U.S. officials. However, the particular arrangement with each country often varies somewhat from the basic template, depending on particular local concern.

The agreements primarily provide a framework for the U.S. to interdict

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

28 See United States Department of State, Bureau of International Narcotics and Law Enforcement Affairs, International Narcotics Control Strategy Report (March 2007), available at <http://www.state.gov/p/inl/rls/nrcrpt/2007/vol1/html/80853.htm>. Only a few nations in the area, such as Ecuador and Cuba, have not signed such an agreement.


and potentially seize foreign vessels, in coordination and with the approval of the flag state. They do not address prosecution of the crew in any detail. However, the typical agreement contains a clause that, while reserving primary jurisdiction over the vessel and crew to the flag state, notes it could waive it in favor of the U.S. Presumably the flag nation could authorize U.S. prosecution in the absence of an agreement saying that they might do so. If these clauses have any meaning, it is to make clear that no automatic or ex ante authorization to prosecute should be inferred from the boarding and seizure provisions of the agreements, which in many ways give the Coast Guard considerable authority over the other nation’s vessels. Some of the agreements make this point explicitly.

The MDLEA has quietly become the largest font of universal jurisdiction in U.S. courts, dwarfing the more high-profile Alien Tort Statute litigation. Indeed, the MDLEA appears to be the only statute under which the U.S. asserts universal criminal jurisdiction. The practical consequences are significant. Prosecutions under the MDLEA often involve a vessel’s entire crew. Given the large quantities of drugs on these vessels, these foreigners, captured on foreign vessels in international waters, can face decades in federal prison. And this despite potentially never having set foot in, or directed their activities towards, the U.S. The exact number of UJ prosecutions under the MDLEA is unclear, because the statute covers both U.S. vessels and nationals and foreign vessels and nationals, and applies in U.S. waters as well as the high seas. Separate statistics are not kept on how

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32 See id., Art. VII(1):
In all cases arising in the territorial sea or internal waters of the Republic of Honduras, or concerning Honduran flag vessels seaward of any State's territorial sea, the State of Honduras shall have the primary right to exercise jurisdiction over a detained vessel, cargo and/or persons on board (including seizure, forfeiture, arrest, and prosecution), provided, however, that the State of Honduras may . . . waive its primary right to exercise jurisdiction and authorize the enforcement of United States law against the vessel, cargo and/or persons on board.


many MDLEA prosecutions involve situations where there is no nexus with the U.S. A conservative guess would be 100 or more individuals a year. In one recent year, 199 people were arrested in Columbian vessels or waters alone. District court cases in the Westlaw databases show roughly 20 decisions annually in recent years, though each case usually involves multiple defendants. Of course, there are many more UJ prosecutions, since the defendants, like in other criminal cases, almost invariably plead guilty and waive appeals.

C. MDLEA in the Courts

The MDLEA has been subject to a wide variety of legal challenges—not surprisingly given the serious penalties under it. These have been almost invariably, and firmly, rebuffed by the courts. However, no published opinion deals squarely with the question of Congress’s Art I. power over purely foreign “Felonies.”

1. Due Process issues

Constitutional challenges to the MDLEA have focused on Due Process grounds. Defendants argue that the Fifth Amendment requires that defendants have some “nexus” or factual connection with the forum. If correct, this would rule out UJ. But the argument is framed in terms of individual rights rather than of the Article I limits on Congress. Most courts of appeals (including the 11th Circuit, which gets most MDLEA cases) have held that the Fifth Amendment requires no nexus. The Ninth Circuit, on the other hand, holds that due process requires that the defendant’s conduct have some nexus with U.S.

Due process is a personal right and thus can be waived—this points up an important difference in whether a nexus requirement is located in the

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36 The statute itself takes the U.S.’s “failure to comply with international law” off the table as a defense. See § 1903(d).
37 See, e.g., United States v. Tinoco, 304 F.3d 1088, 1109 (11th Cir. 2002) (holding that provisions of MDLEA requiring Court to decide whether statutory jurisdictional requirements have been met does not violate Apprendi, Due Process Clause or jury trial right).
38 See Tinoco, at 1110 n. 21 (noting that case does not bear on Congress’s “substantive authority under Article I”).
40 Perlaza, 439 F.3d at 1161.
Fifth Amendment, or in Art. I limits on Congress’s legislative power. Most courts of appeals hold that whatever right the defendant has to not be subject to UJ is really an international law right of his state. In other words, it is not that the defendant has a right to be free of UJ, but rather that his state has the sovereign power to deal with his crime. In this view, even if there was a nexus requirement from the Due Process clause, the consent of the defendant’s home state to prosecution waives this defense. And such consent is routinely given in MDLEA cases, making the Fifth Amendment nexus defense a non-starter except in the Ninth Circuit.

2. Article I issues

The question of whether the MDLEA exceeds Congress’s Art. I limits has not been fully resolved by any court. However, in the past few years some defendants have begun to point to a pair of early 19th-century Supreme Court cases involving piracy and murder on the high seas indicating limits on UJ under the Felonies power. These arguments have usually been raised in a cursory manner for the first time on appeal or otherwise waived, and thus faced an uphill battle under a plain error standard. The 11th Circuit has denied such appeals with almost no discussion, noting that other courts had found the MDLEA to be an exercise of the Piracies and Felonies power, though those cases simply cited the clause, and did not discuss the issue of its limits, or that since the old

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

42 United States v. Rodriguez-Duran, 507 U.S. F.3d, 749, 757 n.9 (1st. Cir. 2007) (describing the processes for obtaining foreign state consent, which usually takes about 10 hours).

43 Madera-Lopez, 190 Fed. Appx. at 835 (“There is no precedent from either the Supreme Court or this Court resolving the issue of whether the MDLEA’s enactment exceeded Congress’s authority under the “Piracies and Felonies Clause.”).

44 The author of this article was responsible for drafting the first of these defense motions. See Unites States v. Garcia, 182 Fed. Appx. 873 (11th Cir. 2006). Though unsuccessful below and on appeal, the argument was quickly echoed by many other defendants. The view of the clause’s limits taken here and in Define and Punish Clause is the product of much more extensive research, and is in some ways different from those positions advanced in litigation.

45 Compare United States v. Garcia, 182 Fed. Appx. 873, 876 (11th Cir. 2006) (“While there is little case law interpreting the scope of the High Seas Clause, other circuits have upheld the constitutionality of the MDLEA . . . without specifically discussing the High Seas Clause’s limits.”) (citations omitted); with Madera-Lopez, 190 Fed. Appx. at 836 n.1 (recognizing that cases cited in Garcia “did not discuss the limits of Congress’s authority under the Piracies and Felonies Clause”).
Supreme Court cases do not deal squarely with the statute at hand, they are not binding.

To the extent courts have considered such arguments, they misread *Palmer* and *Furlong* as purely statutory cases about the scope of 1790 Crimes Act, or based on international rather than constitutional law principles. Furthermore, litigants only began to mention the Piracies and Felonies clause after most courts had ruled that the Fifth Amendment does not require a nexus in MDLEA cases. Thus courts see the Felonies argument as simply a repleading of the oft-rejected nexus argument, and treat it as a matter of *stare decisis*. This conflates two totally different inquiries – the Fifth Amendment and the Define and Punish clause. One provision can do what the other does not. The fact that the Fifth Amendment does require a nexus says nothing about whether Congress has the power to legislate absent a nexus. Indeed, this kind of logic succumbs to what the Framers saw as the greatest danger in having a Bill of Rights: people might conclude that if something is not prohibited by the first eight amendments, it is permitted – without examining whether Congress’s enumerated powers include such an act.

As the next Part will show, there is good reason to believe that much of the MDLEA’s UJ application exceeds Congress’s Art. I limits. This was indeed recognized by the Marshall Court in *Palmer* and *Furlong*, as a close reading of those cases suggests. It is also corroborated by a wide range of other evidence not yet considered by any court an MDLEA case: strong statements made by Justices James Wilson and Joseph Story in their grand jury instructions, John Marshall’s famous House of Representatives speech

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Even less persuasively, *Suerte* took the astonishing step of refusing to follow *Furlong* based on a notion that it “may be at loggerheads, however, with more recent pronouncements by the Court.” Of the two “pronouncements” relied on by *Suerte*, one is a dissent, and the other a dictum that does not deal with the Define and Punish Clause at all.

46 United States v. Madera-Lopez, 190 Fed. Appx. 832, 836 (11th Cir. 2006) (holding that because *Furlong* did not specifically “hold that Congress exceeded its authority under the Pirates and Felonies Clause by seeking to regulate drug trafficking on the high seas,” on plain error review of objection not raised below, district court did not err by finding MDLEA unconstitutional).

47 See United States v. Suerte, 291 F.3d 366 (5th Cir. 2002).

48 United States v. Estupinan, 453 F.3d 1336, 1338 (11th Cir. 2006) (holding that district court did not err in failing to strike down MDLEA *sua sponte* as exceeding Congress’s Define and Punish power because the circuit has not previously “adorned the MDLEA with a nexus requirement”); United States v. Garcia, 182 Fed. Appx. 873, 876 (11th Cir. 2006) (“We have previously rejected the argument that the MDLEA is unconstitutional because the conduct at issue lacks a nexus to the United States.”) (citing Fifth Amendment cases).

49 See Suerte, 291 F.3d at 374-75 (“The opinions addressing the reach of the 1790 Act are of significance to our consideration of the MDLEA’s reach [under the Fifth Amendment]”).
in the Thomas Nash affair, and the views of Congress in not extending UJ to the slave trade. Nor have courts considered the lessons that might be learned from the drafting history and purposes of the clause.

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

II. “PIRACIES AND FELONIES” AND THE LIMITS ON UNIVERSAL JURISDICTION

Congress has only those powers given to it. The question raised by the MDLEA is whether the Define and Punish Clause, and in particular its provision for “Piracies and Felonies on the High Seas,” is an open-ended empowerment for Congress to punish any crimes on the high seas and any offenses against the law of nations regardless of whether they have a connection with the United States. In the companion article, The “Define and Punish” Clause and Universal Jurisdiction: Recovering the Lost Limits, it is shown that while “piracies” can be punished without regard to nexus, “Felonies” and “Offenses” require a direct connection to the U.S. Thus while assaults on ambassadors were paradigmatic violations of the law of nations, an attack on the Fijian ambassador to Vanuatu by a citizen of the latter would not fall within Congress’s power over “offenses.” Similarly, while rape is a felony, when committed among Vanuatans on one of their national vessels, it would not fall within Congress’s “Felonies” power.

The companion Article shows the limits of Clause 10 through a comprehensive examination of the clause’s origins, text, ratification, and purposes. It goes on to confirm this understanding of the clause against the views taken by the courts, the executive branch, and Congress during the Founding and early Republic – the last time the jurisdictional scope of the clause was an issue. Naturally, the full analysis cannot be repeated here. Rather, this Part summarizes the main lines of evidence for treating the grant of power over “Piracies” as jurisdictionally broader, but substantively narrower, than the power over felonies and offenses. Even if this

50 See Suerte, 291 F.3d at 374 (observing in MDLEA case that since piracy can be punished with no U.S. nexus, this “should apply with equal weight to felonies such as at issue here”).

51 See generally, Kontorovich, Define and Punish, supra n.8.

52 The companion Article explores these sources in greater detail, as well as considering potential objections, methodological questions, and the few pieces of inconsistent evidence. See id.
understanding does not persuade as an original matter, its adoption by these figures in a series of cases should, as a practical matter, make it hard for a court today to come to its own conclusions about the meaning of such an obscure and poorly-documented provision.

A final point bears stressing. The argument here is not that Congress cannot violate international law, because it is directly binding on Congress. Such a view has long been rejected. Rather, it is that Clause 10, by using various terms of art from customary international law, requires one to turn to that body of law to define those terms. Thus international law is partially incorporated, but only by explicit reference.

A. The Drafting of the Clause and the legal background

The Define and Punish Clause received little “serious” discussion at the Philadelphia Convention or during ratification. Yet on its face, the clause requires further analysis, as it contains a striking double redundancy. Piracy is a subspecies of felony on the high seas. Moreover, piracy is an offense against the law of nations. Constitutional construction disfavors readings that render certain provisions superfluous. Indeed, Justice Story insisted that other potentially overlapping words in Clause 10 should bear separate meanings. A double-redundancy begs the question whether anything distinguishes piracy both from other felonies and from other law of nations crimes. Such a difference would likely be the reason for the Constitution mentioning piracy separately.

Indeed, one major difference existed between piracy and the other powers listed in Clause 10. Piracy was the only universal jurisdiction offense know to the Framers, indeed the only one until recent decades.

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53 JOSEPH STORY, III COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1160 (1833) (hereafter “STORY, COMMENTARIES”).
54 See WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 107-08 (2d ed. 1829) (“Felony. . . when committed on the high seas, amounts to piracy.”).
55 See WILLIAM BLACKSTONE, IV COMMENTARIES ON THE LAWS OF ENGLAND 68, 71 (observing that piracy is both a felony under English law and an offense against the law of nations) (1769); FEDERALIST NO. 42 (Madison).
58 See Marshall in Robbins Case (emphasis added) (noting that “piracy under the law of nations which alone is punishable by all nations”); Smith, 18 U.S. at 162 (1820) (noting the “general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever”); Talbot v. Jansen, 3 U.S. (Dall.) 133, 165-66 (1795) (“All piracies and trespasses committed against the general
The definition of piracy in international law was narrow, specific, and undisputed: robbery on the high seas. Piracy and its notorious UJ status (referred to at the time as hostis humani generis, enemy of all mankind), were congruent, almost synonymous.

However, in addition to piracy under the law of nations, each nation could make diverse offenses “municipal” or “statutory piracies.” Such statutory piracy could only be punished within the particular state’s municipal jurisdiction. As Wheaton, the American diplomat, reporter of Supreme Court decisions, and author of the leading early 19th century American treatise on international law, put it: “piracy created by municipal statute could only be punished by that State within whose territorial jurisdiction” or “on board whose vessels the offence thus created was committed.”

The distinction between “municipal” and “international” or true piracy obviously tracks the constitutional distinction between felonies and piracies. It suggests that Congress can “punish” piracy consistent with its UJ status, but that should not spill over to “felonies.”

**B. Early interpretations**

With one exception, Congress did not use the Piracies and Felonies clause to legislate universally over anything but piracy itself until the MDLEA. The First Congress exercised the “Piracies and Felonies” power when it enacted the first criminal statute in 1790. It purported to criminalize “murder or robbery” when committed by “any person” on the high seas. See generally Kontorovich, *Piracy Analogy*, supra n.3, at 190-91.

59 HENRY WHEATON, *ENQUIRY INTO VALIDITY OF THE BRITISH CLAIM TO A RIGHT OF VISITATION AND SEARCH OF AMERICAN VESSELS SUSPECTED TO BE ENGAGED IN THE ATLANTIC SLAVE TRADE* 16 (Philadelphia 1842) (hereinafter *WHEATON, RIGHT OF VISIT*) (“All that is meant is, that the offence is visited with the pains and penalties of piracy.”).

60 Id.

61 Section 8 of the statute provided that:

> if any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted shall suffer death: and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he
Subsequent sections went on to say “any person” shall be punished for a variety of maritime misdeeds, such as “running away with a vessel,” revolt, assaulting commanders, and attempts and conspiracies to do those things. Robbery on the high seas was, of course, the international law crime of piracy, or “general” piracy. But the other offenses that the statute dubbed “piracy” and made punishable when committed by “any person,” without restriction. A literal reading would extend U.S. legislative power universally to a wide variety of major and minor crimes aboard any vessel on the high seas, and even to some ancillary offenses on land.

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

Similarly, John Marshall, while a congressman from Virginia, attacked the constitutionality of a statute during his famous speech on the House floor in the affair of Jonathan Robbins. First, he argued that the idea that Congress’s power to punish felonies on the high seas was unlimited lead to consequences too absurd to accept. Could the U.S. punish desertion by British seamen from a British to a French vessel, or pick-pocketing among British sailors? Such a general jurisdiction over high seas offenses had never been suggested, and certainly could never have been intended by the drafters or ratifiers. If the text does not expressly forbid it, Marshall argued, it is only because it was too silly for the Framers to have thought of.

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

[That] clause can never be construed to make to the government a grant of power, which the people making it do not

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63 Id. at 377 (observing the universal application of the murder provisions “could not be carried out by the courts”).
64 Id. at 863.
themselves possess. It has already been shown that the people of the United States have no jurisdiction over offences committed on board a foreign ship against a foreign nation. Of consequence, in framing a government for themselves, they cannot have passed this jurisdiction to that government. The law [the Crimes Act], therefore, cannot act upon the case. But this clause of the constitution cannot be considered, and need not be considered, as affecting acts which are piracy under the law of nations.65

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

C. Supreme Court Precedents

The Supreme Court did not confront the question until nearly two decades later, in United States v. Palmer.66 The case was a classic international law piracy – the armed robbery of a Spanish vessel by a foreign defendant. The Court held that while Congress could constitutionally extend UJ to genuine “piracies,” the 1790 Act had not done so. This conclusion was surprising given the statute’s capacious language of “any person” – the same language used in the MDLEA.67 Moreover, it went against what was generally perceived as Congress’s goal in passing to statute – to punish piracy to the same extent all other nations do, namely, universally. (Indeed, Congress promptly passed a new statute to provide clear authorization for piracy UJ.) Marshall’s reasoning followed the exact same lines he had laid down twenty years earlier in Robbins’ case. The statute must be interpreted non-literally even in the case of piracy, because if “any person” were read literally, it would be quite problematic to apply to all the non-piratical offenses listed in the statute. Marshall’s clear flouting of Congressional intent was clearly a narrowing construction to save the statute from constitutional difficulty.

Because of the narrowing construction, Marshall did not have to directly express the constitutional issue. But the arguments for reading the statute narrowly in Palmer were the same ones he used the House to explain why a broad reading would be unconstitutional. Moreover, both the U.S. Attorney, arguing for a broad scope for the law, conceded it could not constitutionally apply universally to non-piratical offenses, and Justice Johnson wrote separately to stress what was just below the surface in Marshall’s opinion.68

66 16 (3 Wheat.) U.S. 610 (1818).
67 46 App. U.S.C. § 1903(a)
68 Palmer, 16 U.S. at 641-42 (“Congress can inflict punishment on offences committed
Two years later a unanimous Court reaffirmed that Congress could not punish the murder of a foreigner by a foreigner on a foreign vessel.\(^6\) Such a case was one in which Congress “ha[s] no right to interfere.”\(^7\) This Court makes clear that that this limitation is not one found in international law, or due process, or the statute itself. Rather, it is found in the difference between “Piracy” and “Felony” in Clause 10. As the Court put it, UJ in such a case would go beyond the “the punishing powers of the body that enacted” the law.\(^7\) The Court went on to distinguish between piracies at international law, and other crimes. Murder, when it involves only foreigners abroad, is a matter in which Congress “has no right to interfere;” on the other hand, piracy under identical circumstances falls within the “acknowledged reach of the punishing powers of Congress.”

The Court’s distinction between piracy and murder precisely tracks the “Piracies and Felonies” distinction:

There exist well-known distinctions between the crimes of piracy and murder, both as to constituents and incidents. Robbery on the seas is considered as an offence within the criminal jurisdiction of all nations. . . . Not so with the crime of murder. It is an offence too abhorrent to the feelings of man, to have made it necessary that it also should have been brought within this universal jurisdiction. And hence, punishing it when committed within the jurisdiction, or, (what is the same thing,) in the vessel of another nation, has not been acknowledged as a right.\(^7\)

The “constituents” of the crimes are their elements – the substantive conduct. The “incidents” are the rules regarding their punishment. \textit{Furlong} makes two points: Congress does not have power to “define” the “constituents” of offenses without regard to the international law definition. And, more pertinently for present purposes, it cannot apply the “incidents” of piracy to something that does not have that status. Of course, the only “incident” of piracy that it did not share with murder was its UJ status.

The test of what Congress can make universally cognizable is the law of nations; Congress cannot expand its jurisdiction by calling crimes “piracies” when they do not have such a status in international law. Piracy and murder “are things so essentially different in their nature, that \textit{not even the}

\begin{itemize}
\item \textit{on board the vessels of the United States, or by citizens of the United States, anywhere; but Congress cannot make that piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts over such offences.}(emphasis added).}
\item \textit{See United States v. Furlong, 618 U.S. (5 Wheat.) 184 (1820).}
\item Id. at 198.
\item Id. at 196 (emphasis added).
\item Id. at 198.
\end{itemize}
omnipotence of legislative power can confound or identify them.” It would be harder to find clearer language expressing the view that this limit is inherent and nonderogable.

D. Congressional self-limitation.

In the early 1800s, the U.S. and Europe began taking measures to ban the transatlantic slave trade. A growing number of nations banned the trade and a series of international congresses decried it as an abomination. In 1820 Congress went further than any other nation had ever gone before by declaring the slave trade a form of “piracy” punishable by death. The statute applied to “any citizen of the United States, being of the crew or ship’s company of any foreign ship or vessel engaged in the slave trade, or any person whatever, being of the crew or ship’s company of any ship or vessel, owned in the whole or part, or navigated for, or in behalf of, any citizen or citizens of the United States.” In other words, Congress extended jurisdiction just short of UI, but no further. While the Act cast the jurisdictional net broadly, and dubbed the trade piratical, Congress chose to only punish the conduct to the extent it had a demonstrable U.S. nexus.

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

73 Id. at 199.
75 Statutes at Large, 16th Congress, Sess. I, Ch. 113, 1820, *An Act to continue in force an act to protect the commerce of the United States, and punish the crime of piracy,* and also to make further provisions for punishing the crime of piracy, §§ 4-5.
76 Many of the cases brought under the Act revolved around whether either the citizenship or ownership requirements were satisfied. See, e.g., United States v. Gordon, 25 F.Cas. 1364, (Cir. Ct. N.Y. 1861). Before passports, when much of the U.S. population were first or second generation immigrants, determining a defendant’s nationality was not easy, especially if he wished to obscure it. Similarly, slave traders resorted to a variety of measures, like fictitious sales and renaming to throw off their American connection. As an element of the offense, the jurisdictional requirements had to be proven by the U.S., and thus defendants relied heavily on this point.
77 The Antelope, 23 U.S. (10 Wheat.) 66 (1825); III JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 381 (1824) (reporting resolution questing President to negotiate with other nations to establish slave trade as jurisdictionally equivalent to piracy); HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW*, § 124, 200-201 (1836).
The report on the bill from the House Committee on the Slave Trade makes clear that Congress limited the reach of the Act because of concerns about the limits of its Piracies and Felonies powers. In explaining why the law only punished offenses with an American connection, the House report explained that “the Constitutional power of the Government has already been exercised . . . in defining the crime of piracy” as far is it can go given that the slave trade had yet to become universally cognizable:

Such is the unavoidable consequence of any exercise of the authority of Congress, to define and punish this crime. The definition and punishment can bind the United States alone.

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

III. THE MDLEA EXCEEDS CLAUSE 10’S LIMITS

Congress cannot attach the jurisdictional consequences of “piracies” to “felonies.” This raises the question of whether drug trafficking is a piracy or felony.” It takes little effort to show that it does not fit within the traditional definition of piracy as “robbery on the high seas,” or even the more modern definition of “acts of violence or detention, or any act of depredation, committed for private ends” aboard a vessel.

However, the Define and Punish clause’s limitation of U.S. to piracy can be understood in one of two ways. The more textual or originalist understanding would be that only piracy is the only offense which Congress can punish without a U.S. nexus. A broader view would reason that since piracy was the only U.S. offense at the time of the Founding, the Clause means to allow Congress to use U.S over whatever offenses are universally

78 See ANNALS OF CONGRESS, 16th Cong. 1st sess., 2209 (May 10?, 1820).
79 See ANNALS OF CONGRESS, 16th Cong. 1st sess., 2209 (May 10?, 1820).
80 See WHEATON, RIGHT OF VISITATION, supra n. 59, at 109-10 (emphasis added).
81 See United States v. Smith.
82 UNCLOS Art. 101(a). The violence or depredation must be “directed… against” people on the ship or on another ship on the high seas. Operating a pirate vessel or facilitating or encouraging piratical acts also counts as piracy. Id. at 101(b)-(c).
cognizable under the CIL of the time. Thus as new offenses become universally cognizable, the scope of “piracies” changes and expands. No position is taken here on the permissibility of “updating” to track evolving international law.

If the Constitutional text locks into the 1789 limits on UJ, the MDLEA obviously exceeds this limit. If “updating” is allowed, the analysis is somewhat more complex. Thus for the sake of argument, this section assumes “piracies” encompasses today’s UJ offenses, and the Clause 10 as a whole tracks changes in international law. Nonetheless, this Part shows even with “updating,” the MDLEA exceeds the Define and Punish Clause’s limits in two distinct ways: it treats “Felonies” as “Piracies,” and punishes them even beyond the “high seas.”

A. Congressional discretion to “Define”

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

The “Define and Punish” clause raises questions about how much flexibility Congress has in “defining.”83 Can courts look to the law of nations to determine whether Congress has defined a crime that is actually recognized by international law, or is whether something violates the law of nations itself a question left entirely to Congress through its power to “define”? The word “define” may suggest some latitude for Congress, that

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

The history of the provision suggests conflicting answers, and the courts have had few occasions to address the question. The clause, as it first appeared coming out of the Committee on Detail, gave Congress the power “to declare the law and punishment of piracies and felonies & c.” Ultimately “define” was substituted for “declare the law of,” though with little apparent change in meaning. The spirit of the provision seems to be that felonies and the law of nations refer to a broad body of law, external to the Constitution, whose precise details, elements and penalties vary. Congress could statutorily provide the requisite specificity to allow for certain and uniform punishment.

The convention rejected Gouverneur Morris’s suggestion replacing the “define” with “designate” because the former term “would be limited to its preexisting meaning.” Other members of the Convention argued that “define” would allow the “creation of new offenses” in the case of felonies, but not piracies. This implies that Congress cannot “designate” something that the law of nations had not already made a piracy. Rather, Congress can only specify the elements of an offense whose rough outlines emerged from international custom. On the other hand, if the Framers were concerned that the law of nations in its raw form was “too vague and deficient to provide a rule” to govern individual behavior, it could be difficult for courts to determine whether a given “definition” fits within the “vague” parameters. This would be especially true under today’s more fluid and expansive international law. Thus the scant evidence from the Framing does not seem to resolve the issue.

Few decisions address the question directly. However, the Court has from the time of the early Republic acted as if it can review Congress’s

84 2 FARRAND, supra note , at 129 n.1
85 Id. at 614-15.
Offences. . . against the law of nations, cannot. . . be said to be completely ascertained and defined in any public code recognised by the common consent of nations. In respect, therefore, as well to felonies on the high seas as to offences against the law of nations, there is a peculiar fitness in giving the power to define as well as to punish; and there is not the slightest reason to doubt that this consideration had very great weight in producing the phraseology in question.
87 FARRAND at 316.
88 See HARV. L. REV. 118 at 2392.
89 Perhaps most recently, in Ex Parte Quirin, the Court considered whether the charged offenses against the laws of war were in fact violations of the law of war. 317 U.S. 1, 18-19 (1942).
“definition” against the external standard of the law of nations. The Court in *Furlong*, much like Marshall in his 1799 House speech, strongly insisted that Congress cannot entirely arbitrarily classify something as a felony or piracy (i.e., universally cognizable). This must depend on its status in surrounding law:

Nor is it any objection to this opinion, that the law [the 1790 Crimes Act] declares murder to be piracy. These are things so essentially different in their nature, that not even the omnipotence of legislative power can confound or identify them. . . . If by calling murder piracy, it might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device?

Perhaps the most discussed case on the subject is *United States v. Arjona*, in which the Court upheld a law against counterfeiting foreign currency as an exercise of the Offenses power. The Court briefly considered whether the law legitimately falls within the “offenses” category. It did not entirely take Congress’ word for it at all, but rather looked to international law treatises. It found that the counterfeiting of currency itself by individuals was not a violation of international law; rather, international law imposed obligations on nations to prevent their citizens from counterfeiting. So the Court sustained the statute as “necessary and proper” for the U.S.’s compliance with international law.

Some have suggested that *Arjona*’s “quick look” at international law, and its sustaining of the statute despite finding a nexus rather than a tight fit between it and international law, provides precedent for a very deferential view of the Offenses power. However, *Arjona* is simply not that much of an Offenses precedent at all. The Court saw the primary source of congressional power as the Foreign Commerce clause aided by the Necessary and Proper clause. And the Court’s casual discussion of international law constantly refers back to great effect such counterfeiting can have on U.S. economic relations.

The purposes and precedent provide no support for the view that Congress can “invent” offenses, or that courts cannot measure exercises of

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90 See Smith, 18 U.S. at 160-61 (holding that statutory offense of “piracy as defined by the law of nations” is in fact a violation of clear international law and thus punishable).
91 *Furlong*, at 198 (emphasis added).
92 129 U.S. 479 (1887).
93 Id. at 484-85 (“The national government is . . . made responsible to foreign nations for all violations by the United States of their international obligations.”).
94 Id. at 483.
95 Id. at 486-67. Indeed, Congress did not cast the statute as an exercise of the Offenses power; that argument apparently only arose in litigation. See id. at 488.
the Offenses clause against the law of nations as they understand it. 96 The word “define” means an “express enumeration of all the particulars included in that term,” according to Justice Story. 97 This suggests that Congress can fill in interstitial questions, or resolve particular disputes and uncertainties about the elements of an offense, but it cannot punish primary conduct that is not an international crime.

Because the Clause refers to an external legal standard to limit Congress, it suggests a particularly strong role for judicial review. 98 If the law of nations cannot be used to establish judicially-reviewable limits on Congress’s action, it could use the Offenses power to legislate regarding anything. The obscure Clause 10 would overshadow all other regulatory powers, even the Commerce Clause. It would be odd that such a vast grant of authority over individuals, unchecked by any limiting principle, would exist in the Constitution, or that it would have gone unnoted at the convention and ratification debates. 99 Thus the most extensive examination of the question has found that courts have consistently looked for substantial state practice to establish the existence of a customary international law (CIL) norm. 100

At the same time, limiting Congress to a preexisting definition would nullify the power to “define,” a power which the Framers deliberately conferred. Thus some slack between Congress’s “offenses” and “the law of nations” must be tolerated. Yet the idea that Congress is owed substantial deference in determining whether something violates international law ultimately borders on a power to “invent.” This is especially true in an era when many loose claims are made on the basis of international law, and few

96 See Siegal, supra n.83, at 877.
97 See United States v. Smith. Accord, 11 Op. ATT’N GEN. 297, 299 (1865) (“To define is to give the limits or precise meaning of a word or thing in being; to make is to call into being. Congress has power to define, not to make, the laws of nations . . . .”).
98 See Siegal, supra n.83, at 940-42.
99 See Teachout, supra n. 83, at 1321-22 (arguing that the “unambitious” purposes of provision were to allow Congress to reach violations of international law for which the U.S. would be held accountable, and to serve this goal, there would be no need for Congress to criminalize conduct the rest of the world did not see as violating the law of nations).
100 See Siegal, supra n. 83, at 895 (“[F]or the first 100 years after the Constitution, in deciding the existence of customary international law, justices of the Supreme Court looked to the actual practice of states.”). There is, however, substantial doubt about how accurate such judicial investigations are, and the effort is likely to be even more difficult today, given the proliferation of relevant languages, sources, and nations whose practice counts towards the establishment of custom. See Michael Ramsey, International Law and the Denominator Problem; Jack L. Goldsmith and Eric A. Posner, A Theory of International Law, 66 U. Chi. L. REV. 1113 (1999) (arguing that Supreme Court mistakenly took routine self-interested behavior for CIL norm in famous Paquette Habana case).
areas of human life lie outside the scope of some purported IL norm, and advocates argue for a CIL that can emerge without overt state practice. If the Courts do not police the “law of nations” requirement, Congress can by citing some General Assembly resolutions and law review articles give itself authority over anything. This would be inconsistent with the idea of limited and enumerated powers, and would tend to frustrate the purposes of judicial review. Thus while some slack must be allowed to exist between an “objective” judicial view of the law of nations and Congress’s “definition,” this says little about how much. Perhaps a useful distinguishing principle would be elements of an offense versus the general form of the offense. Obviously these can collapse into each other at a high enough level of abstraction, but line-drawing problems are the life of the law.

B. Drug Smuggling Not Universally Cognizable

The two sources of international law are treaties and customary (unwritten) international law.\textsuperscript{101} The Constitution gives Congress different powers to implement each type of international law. Mainstream interpretations of the Treaty Power authorize Congress to implement treaties through domestic legislation even when the law would not otherwise fall within the enumerated powers.\textsuperscript{102} When a treaty is in the picture, the terms of the treaty itself govern the scope of Congress’s jurisdictional power.\textsuperscript{103} The “Offenses” power is implicated when there is no treaty basis for the law, and so one must look to see whether Congress’s offense roughly corresponds to customary international law. (Indeed, the “law of nations” is the 18\textsuperscript{th} century term for CIL.)

Drug trafficking is not recognized in customary international law as a universally cognizable offense. Indeed, it is not a crime at international law at all.\textsuperscript{104} While there is no firm agreement on the precise set of crimes

\textsuperscript{101} See Charter of the International Court of Justice, Art. 38.
\textsuperscript{102} See Missouri v. Holland, 252 U.S. 416 (1920).
\textsuperscript{103} See Part IV.A, infra. UJ laws were passed specifically to implement certain multilateral conventions. However, these statutes arguably go further than the treaties they are based on. The conventions only purport to confer jurisdictional over nationals of signatory states. While most countries have joined these treaties, the implementing statutes do not limit their application to nationals of signatory states.
\textsuperscript{104} See SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 412-418 (2006) (describing drug traffic as area of international criminal cooperation rather than international crime); ANTONIO CASSESE, INTERNATIONAL LAW 436 (2d. ed. 2005) (observing that illicit traffic in narcotic drugs not a crime in customary international law); Many scholars suggest that the international crimes for which an individual may be held criminally responsible are congruent with those which fall under universal jurisdiction; certainly the major IL crimes are also universally cognizable, as the factors that contribute to the former status are the same that lead to the latter. Id.
subject to universal jurisdiction, there is a general consensus that they are egregious, violent human rights abuses. Not a single universal jurisdiction offense, or indeed widely recognized international crime, is a so-called victimless offense. All U.S. courts to consider the issue have held that narcotics traffic falls outside of universal jurisdiction. Thus the most respected lists of UJ offenses do not mention drugs at all. Moreover, commentators uniformly agree that there is absolutely no state practice whatsoever for the universality of drug crimes (aside from the MLDEA, of course). No international convention criminalizes drug crimes, and no international tribunal punishes them.

The most comprehensive statement on the law of the sea is the comprehensive Third United Nations Convention on the Law of Sea (UNCLOS III). The United States has not ratified the treaty, but the U.S. (and almost all scholars) regard it as expressing the customary international law on the subject. UNCLOS expressly addresses drug smuggling and piracy in neighboring provisions. It makes clear the former is not an

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105 See United States v. Perlaza, 439 F.3d 1149, 1162-63 (9th Cir. 2006) (rejecting UJ as jurisdictional basis for MDLEA); United States v. Wright-Barker, 784 F.2d 161, 168 n. 5 (3rd Cir. 1986) (“[I]nternational agreements have yet to recognize drug smuggling as a threat to a nation’s ‘security as a state or the operation of its governmental functions,’ warranting protective jurisdiction, RESTATEMENT, supra n.3, at § 33, or as a heinous crime subject to universal jurisdiction.”); United States v. James-Robinson, 515 F. Supp. 1340, 1344 n. 6 (S.D. Fla. 1981) (“Drug trafficking is not recognized as being subject to universal jurisdiction.”). But see, United States v. Marino-Garcia, 679 F.2d 1373, 1382 n. 16 (11th Cir.1982) (finding “growing consensus” that drug trafficking should be UJ offenses and suggesting that “it may well be that the time has arrived” that Congress “should” pass UJ legislation to punish “all foreign vessels on the high seas that are engaged in drug trafficking”). Marino-Garcia’s brief dictum is particularly odd in that it suggests Congress can substantially punish anticipate IL developments, and act before an international consensus has emerged. Even the Eleventh Circuit has avoided repeating this view.


107 See Adelheid Puttler, Extraterritorial Application of Criminal Law: Jurisdiction to Prosecute Drug Traffic Conducted By Aliens Abroad, in EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE, KARL M. MEESSEN ED.103 (1996) (“Similar to slave trade [in the 19th century, when most nations condemned and banned it but refused to agree to UJ], existing state practice does not support the conclusion that illicit drug traffic is subject to universal jurisdiction as a matter of customary law.”).

108 Statement of President Ronald Reagan on United States Ocean Policy, 22 I.L.M. 461, 464 (1983) (“The convention . . . contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice.”)

international law crime like the latter is, and that drug smuggling is not regarded as being sufficiently heinous to warrant universal jurisdiction. Indeed, in the drafting of the convention, extending UJ to drug trafficking vessels was proposed and rejected.

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

The Senate Report on the MDLEA described drug smuggling as “universally recognized criminal behavior.” Some courts have taken this as a determination that it is an international crimes. But this finding does no such thing. There is a vast difference between conduct that all nations criminalize and international crimes. Uniform condensation and criminalization does not make something an international crime. Murder and rape, and indeed, most malum in se offenses, are also universally condemned, none all fall outside of international law. Presumably Congress cannot legislate the punishment of purely foreign rapes despite it being “universally recognized criminal behavior.” Indeed, the Senate report makes no findings that would be relevant to the offense’s being universally cognizable, such as the offense being extremely heinous, and beyond the bounds of civilized society. Indeed, national drug laws and attitudes vary far more than those for murder.

The status of drug trafficking as found in international custom does not raise fine question of whether state practice has become general enough to generate a binding norm, or whether the practice is accompanied by opinio juris. There simply is no state practice, and a palpable lack of support in relevant legal sources.

114 See Kontorovich, Piracy Analogy, supra n.3, at 206-07.
The understanding of the Define and Punish clause developed above suggests one of two positions regarding the scope of UJ under the clause today. The narrow view, one that would be supported by the text and some evidence of the original meaning, would limit permanently limit UJ to piracy, even if international law develop to include more offenses under that category. The broader view would read the clause as authorizing extraterritorial jurisdiction offenses over Felonies on the high seas and Offenses against the law of nations to the extent that such jurisdiction is allowed by contemporary international law. Both positions take the clause as incorporating international law by reference. The difference is whether such incorporation is static, locked into the 1789 content of international law, or dynamic, expanding (or hypothetically, contracting) to track international law.

The narrow view would obviously mean all UJ applications of the MDLEA are unconstitutional. Drug trafficking does not in any way resemble piracy (far from being robbery, it is sales) and thus it is a “felony” and not universally cognizable. The broader view of the clause obviously demands a more detailed inquiry into present-day international law. The broad view treats “Piracies” as meaning “whatever set of offenses the international law of the time treats as universally cognizable.” It has been shown above the drug-trafficking is not such an offense.

Today’s jurisdictional norms are more copious than those of the early Republic. Not only are there more UJ offenses, other flexible jurisdictional categories have emerged that allow broad extraterritorial, if not universal, jurisdiction. Thus in the dynamic view, if drug trafficking has become something the U.S. could exercise jurisdiction over without a nexus under international law, whether because of UJ or other international jurisdictional rules unknown to the Framers, it can be treated as a “piracy” for constitutional purposes. This subpart considers the two possible “non-UJ” justifications for MDLEA, the statelessness of the vessels, and the protective principle of jurisdiction.

Two caveats: first, all of this is only relevant if one thinks “Piracy,” like “Army and Navy” is supposed to track external legal changes. Second, the discussion of international law here is not based on a view that it directly binds Congress or the U.S. Rather, international law is only relevant because Clause 10 explicitly refers to it by using terms of art borrowed from the law of nations.

1. Statelessness
Recall that the Marshall court, in a series of piracy cases that rejected UJ over foreign vessels in cases of murder and even classic piracy. However, in other cases decided at the same time, the Court held that Congress can punish even murder, a non-UJ “felony” when committed on stateless vessels, even when there is no U.S. nexus. The vessels in these cases were stateless by virtue of “turning pirate.” Thus these cases could be understood as accommodating Congress’s desire to punish pirates, something potentially endangered by the Court’s holding in *Palmer*. The international law of the day did treat pirate ships as having lost their national character or protection.

These decisions may stand for nothing more than a sort of supplemental universal jurisdiction, allowing UJ over “felonies” when they are part of the same “case or controversy” or “common nucleolus of operative fact” as a “piracy.” At the same time, they could stand for a broader proposition, that “felonies” can be punished aboard stateless vessels, or even more broadly, that the Constitution allows UJ over felonies to be as broad as allowable under international law. So if international law allows UJ over stateless vessels as part of the law of the “high seas,” Clause 10 incorporates this power.

Several different provisions in the MDLEA allow for UJ. One of them, 117 allows for jurisdiction over stateless vessels, and UJ over stateless vessels is consistent with today’s CIL. However, the MDLEA’s definition of statelessness goes far beyond what is recognized by international custom or convention. The statute defines a “vessel without nationality” as one whose claim of registry is denied by their government, or that does not claim a nationality, for example, by not flying a flag. The MDLEA also includes vessels where the “nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.” In other words, a properly registered, non-piratical vessel can be treated as stateless if the flag state acquiesces, or simply does not reply. Under international law, a vessel without nationality is one that is not registered by any state, or whose registration involves some subterfuge, such as flying multiple flags, or flags of state with which the vessel has no

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115 See Kontorovich, Define and Punish, supra n.8.
116 Though piracy is still universally cognizable, it no longer results in statelessness. See UNCLOS Art. 104 (“A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft.”).
117 § 1903(c)(1)(1) (extending jurisdiction to “vessels without nationality”).
118 See Moreno-Morillo, 334 F.3d at 824-825.
119 Id. at (c)(2)(1) – (2). United States v. Tinoco, 304 F.3d 1088, 1116 (11th Cir.2002) (describing vessel on which defendants were arrested as flying no flag and bearing no registry or identifying markings).
connection. The MDLEA’s final “statelessness” provision sweeps further than this to include vessels that are properly authorized to fly a nation’s flag. This goes beyond what international law recognizes as stateless. Indeed, it is not a statelessness rule. It is a rule of flag state consent or waiver.

2. Protective Jurisdiction.

Several appeals courts have held that the MDLEA can be justified under through the “protective principle” of international jurisdiction, though others have resisted this approach. The protective principle is one of limited and highly uncertain scope. The courts have given little reason for treating the offenses as within protective jurisdiction apart from the fact that the preamble to the MDLEA sounds vaguely (but only vaguely) like the test for protective jurisdiction. But no treaty law or state practice supports such broad jurisdiction over drug offenses, and indeed the cases make little effort to show otherwise.

The principle allows a state to punish extraterritorially “a limited class of offenses . . . directed against the security of the state or other offenses threatening the integrity of governmental functions.” Unlike more traditional forms of jurisdiction, no actual harm to these interests need be shown. Even more than UJ, the bounds of this jurisdictional theory are unclear. All commentators stress that the category of protective jurisdiction offenses is quite small, and none suggest drug smuggling as one of them.

Indeed, the cases that see the MDLEA as an exercise of protective jurisdiction fundamentally misconceive the principle. It applies to conduct

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120 See UNCLOS Arts. 91-92; 1958 Geneva Convention on High Seas Arts. 5-6.
121 See Moreno-Morillo, 334 F.3d at 825.
122 United States v. Gonzalez, 311 F.3d 440, 446 (11th Cir. 2003) (holding that protective principle authorizes MDLEA, and the Congress invoked that principle in statute’s preamble); United States v. Cardalles, 168 F.3d 548, 552 (1st. Cir. 1999) (“Application of the MDLEA to the defendants is consistent with the protective principle of international law because Congress has determined that all drug trafficking aboard vessels threatens our nation’s security.”); United States v. Peterson, 812 F.2d 486, 494 (9th Cir. 1989) (“Drug trafficking presents the sort of threat to our nation’s ability to function that merits application of the protective principle of jurisdiction.”), reversed in relevant part by, Perlaza, at 439 F.3d at 1162 (dismissing Peterson as “dicta” and finding protective principle insufficient to establish jurisdiction over MDLEA defendants).
123 United States v. Robinson, 843 F.2d 1, 3 (1st Cir.1988) (Breyer, J.) (describing as “forceful” the argument that protective principle only applies to conduct that threatens U.S. specifically, and not the general drug trafficking of the MDLEA).
124 RESTATEMENT supra n.3, at § 402 cmt. f.
125 Id. at cmnt. D.
that in itself could potentially endanger the security of the United States. As the Restatement puts it, the conduct me be \textit{directed} against the security of the \textit{forum} state.\textsuperscript{126} Thus it would have to be shown that the particular conduct endangered the U.S. This could obviously not be shown, because by stipulation, there is no reason to believe the drugs were destined for, or could reach or affect, U.S. markets. The MDLEA courts, however, think the protective principle means jurisdiction over conduct \textit{of the general kind} that could endanger the U.S. If some drug trafficking endangers the U.S., the courts seem to think all drug trafficking can be reached.

Moreover, “the security of the state” refers to the safety and integrity of the state apparatus itself (its “government operations” or “state interests”), not its overall physical and moral well-being.\textsuperscript{127} This is demonstrated by the Restatement’s examples: “espionage, counterfeiting of the state's seal or currency, falsification of official documents, as well as perjury before consular officials, and conspiracy to violate the immigration or customs laws.” All these crimes are aimed at or particularly involve the government apparatus of the forum state. Needless to say, the protective principle would not authorize the U.S. to punish a Ghanan for violating Spanish immigration laws or bribing Spanish officials.

There is no support for the principle reaching moral or victimless crimes, and indeed, apparently only one other Western nation casts its jurisdiction over drug crimes so broadly.\textsuperscript{128} Indeed, treating drug crimes as within protective jurisdiction would eliminate any difference between it and universal jurisdiction. Indeed, it would sweep more broadly than even UJ by allowing states to punish relatively minor crimes.

\textit{D. “High Seas” vs. Foreign Waters}

The MDLEA, in some of its applications and provisions, may be an \textit{ultra vires} exercise of the Piracies and Felonies power for an entirely different reason – it punishes drug crimes even beyond the “high seas.” Moreover, the Court has repeatedly warned that jurisdiction over foreign vessels in foreign waters would exceed Congress’s legislative competence.

1. The meaning of high seas.

Clause 10 does not give Congress a general power over extraterritorial crimes. Rather, felonies can only be punished “on the High Seas.”\textsuperscript{129} Unlike

\textsuperscript{126} Id.
\textsuperscript{127} Puttler, \textit{supra} n.107, at 109.
\textsuperscript{128} Id. at 107.
\textsuperscript{129} U.N. Convention on the High Seas Art. 1 (1958) (“The term ‘high seas’ means all parts of the sea that are not included in the territorial sea or in the internal.”).
the difference between piracy and felony, this is an express textual limitation on the Define and Punish power. Without such a limitation, Congress would have a general police power. (The parallel provision, "Offenses against the law of nations," lacks such a limitation, but the class of offenses is much narrower than felonies, and the former often involve war, which can take place abroad).

The MDLEA, by its terms, applies to non-U.S. vessels neither on the high seas nor in U.S. territorial waters – namely, to “vessel[s] located in the territorial waters of another nation.”130 The unconstitutionality of § 1903(c)(1)(E) is not a major impediment to the MDLEA’s policy, as very few cases, if any, are brought under this part of the statute. But many applications of the MDLEA’s other sections could potentially be void if “high seas” in Clause 10 is read to mean what that term means in today’s international law. Recall that because Clause 10 uses many international law terms of art, it raises the question of whether their definition is locked into the law of 1789, or “updates” to track changes in the law of nations. Without updating, only piracy could be punished under UJ, and it would take little analysis to show that drug trafficking is not piracy. However, allowing updating could also cast doubt on much of the MDLEA.

In today’s customary international law, as articulated in the United Nations Convention on the Law the Sea, the “high seas” begin up to 200 miles out from shore.131 A great number of MDLEA cases – like the one in the example at the beginning of this Article – involve conduct in this 200 mile area that is neither the “territorial waters” of the foreign state, but also not “the high seas.” This Article takes no position on the merits of “updating,” which involves fundamental questions of interpretive philosophy. However, it does seem that whether one decides to update or not, the decision should be consistent at least within Clause 10: if UJ is not locked into its 1789 parameters of just “piracy,” it is hard to see why the “high seas” should not change with the times as well.

It would seem there is at least a strong policy case for “updating” here. In 1789, territorial waters ended three miles from shore. In territorial waters, Congress has plenary power over foreign vessels though the admiralty clause. It would be odd to not allow Congress, under its admiralty

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130 § 1903(c)(1)(E). While such jurisdiction can only be exercised with the foreign nation’s consent, this does not change the fact that U.S. drug law is made to apply beyond the “high seas” limit of Clause 10. Clause 10 simply does not say “the high seas, or foreign territory when the sovereign does not mind.”

131 Art. 86. Under the UNCLOS regime, waters are no longer territorial or “high.” Rather, the new regime recognizes a broad intermediate area, the “exclusive economic zone,” where the coastal state has many but not all sovereign rights. This area is explicitly no longer treated as part of the high seas regime. See Arts. 55-57.
powers, to expand its territorial admiralty power to keep up with the maximum allowed by international law. No such proposition has ever been suggested. Indeed, the MDLEA assumes total Congressional control over territorial waters as defined by today’s international law.

2. Precedents and the admiralty power.

No case has ever decided the precise question of Congress’s power over foreign vessels in foreign waters because prior to the MDLEA, largely because the question rarely arises. Indeed, the leading case is eight years old. There, the Court endorsed the view that the Define and Punish clause did not reach into foreign waters. United States v. Flores concerned a murder among the American crew of a U.S. vessel while in Belgian waters. The defendant argued that the plain text of the Define and Punish Clause kept it from reaching conduct in foreign waters. The Court accepted this point as self-evident. However, the Court though the prosecution could be justified under another congressional power, over the admiralty or maritime jurisdiction. An examination of the Framers’ intent and drafting history lead the Court to conclude that Constitution sought to give the federal government all powers within the area of admiralty. The Define and Punish power was thus a “supplement” rather than a “limitation” to broader admiralty power. The admiralty power could extend in certain circumstances even beyond the high seas, and Clause 10 should not be read precluding this for felonies or piracies.

The Court’s examination of admiralty law lead it to conclude that it allowed regulation “of vessels of the United States … while in foreign territorial waters.” The admiralty law follows the flag. Indeed, it seems crucial to the Court’s opinion that the case involved a U.S. ship, as the purpose of admiralty is to allow a nation to govern conduct on its vessels, a matter in which it has a great interest regardless of where they are. Thus Flores suggests Congress’s admiralty power could not encompass foreign vessels in foreign waters.

This conclusion is strengthened by the only other discussion of the issue

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132 289 U. S. 137 (1933).
133 The Court inferred from the grant of judicial authority over maritime and admiralty cases, see Art. III, § 2, cl. 3, a correlate power of Congress to create the substantive body of this law. Flores, 289 U.S. at 147-48.
134 Given the breadth of the admiralty power, it is hard to see how the Court’s reading would make Clause 10 redundant rather than supplemental. Perhaps its significance lies in allowing for common law punishment of high seas offenses, rather than confining such cases to the civil regime of admiralty.
135 Id. at 149-50 (emphasis added).
136 Id., see also id. at 158 (noting that the case of a foreign vessel would be a “different question”).
by the Supreme Court. Oddly, though Flores attempted to engage the original understanding of Constitution and the 1789 content of admiralty jurisdiction, it makes no mention of this case, even though the opinion was written by Justice Marshall, who had a much clearer view of the original meanings and the nuances of admiralty law. United States v. Witelberger involved a killing among an America crew of a vessel on a river 35 miles inside China. In the circuit court trial, the defendant’s counsel argued that applying U.S. law there would exceed Congress’s power over “felonies on the High Seas.” The U.S. Attorney conceded the Clause 10 issue. Instead, he located congressional authority in the admiralty and maritime power, anticipating Flores. But he did not argue that admiralty extended beyond the high seas into foreign waters. Rather, under standard, internationally-accepted admiralty principles, it applied to a U.S.-flagged vessel wherever it went. It would be “incredible” for such jurisdiction to not be authorized by the Constitution. Justice Washington, riding on circuit, thought the question difficult enough to certify to the Supreme Court, which decided it the following year.

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

Naturally this did not stop him from offering an extended dictum on the constitutional issue. In a lengthy footnote attached to the certificate in the case, Marshall suggested the constitutional limits of admiralty extended

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137 28 F. Cas. 727, No. 16,738 (C.C. Pa. 1819).
138 Id. All seemed to agree that the Constitution locks in some historic version of admiralty jurisdiction, but given slight difference in the understanding of this jurisdiction in different for a, it was unclear what was locked in. The U.S. Attorney argued that the Constitution referred to the general principles of admiralty “as generally understood and exercised amongst the nations of Europe; and not to the exercise of it at the period when the constitution was framed.” Justice Marshall would go on to suggest that it referred to the jurisdiction of the British Admiralty, but as the jurisdiction would be translated the America – in other words, unburdened by certain statutes limiting jurisdiction over inland waterways, which Marshall said were never intended to be applied to the Colonies.
139 Id. (“There is no civilized nation, with which we are acquainted, where jurisdiction over offences committed on board of its own vessels, in foreign ports, would not be exercised.”).
140 United States v. Wiltberger, 18 U.S. 76, 95-98.
But his discussion, based on British admiralty practice, strongly implied that foreign vessels on foreign waters would be excluded. Thus Marshall at most would be in accord with the view of the U.S. Attorney, who saw the constitutionality of U.S. jurisdiction as depending entirely on the vessel being American.\footnote{As late as 1823, a district court found it “not clear” whether Congress’s legislative authority extends to a murder on a U.S. vessel in Spanish waters. United States v. Gourlay, 25 F.Cas. 1382, 1397, No. 15,241 (C.C. N.Y. 1823).}

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

\section*{IV. OTHER SOURCES OF ART. I POWER}

While this Article argues that the MDLEA exceeds the Define and Punish power, a statute is constitutional if there is \textit{any} Art. I basis for it, even if it is not the authority that Congress or the courts thought was being exercised. This Part considers the most likely alternative sources for Congress’s authority.\footnote{See Bradley, \textit{Universal Jurisdiction, supra n.7 at 336 (suggesting that the foreign commerce clause and treaty power would likely allow Congress to regulate “even if there are some instances in which Article I of the Constitution would not [otherwise] supply Congress with authority to enact a statute exercising universal jurisdiction”).} (The “admiralty and maritime” power was considered and found wanting in Part III.C, as part of the “high seas” discussion.) Here the Article considers at some length the treaty power, a counterpart in some ways to the “Offenses” power. It also more briefly
discusses the relevance of the foreign commerce clause. The latter is easily dismissed. There may be a colorable treaty clause argument, but it would have to overcome considerable difficulties, especially since the relevant treaty was ratified years after the MDLEA.

A. Treaty Power

Under the doctrine of Missouri v. Holland, Congress can act outside of its otherwise enumerated powers when implementing a treaty. However, the extent to which a treaty can authorize action otherwise unconstitutional remains unclear. Certainly Congress cannot violate express guarantees of individual rights. Under current doctrine, treaties can trump implied constitutional constraints such as federalism, but not express ones. (This may be an odd result as the enumeration of powers in Art. I was supposed to be the major Constitutional protection of individual rights.) The MDLEA does not raise any questions of federalism or separation of powers, or violate express individual rights. Thus under Missouri it would be a valid

144 252 U.S. 416 (1920). Missouri was perhaps a weak case for establishing this principle. It involved a migratory bird conservation treaty. Justice Holmes assumed for the sake of argument, as lower courts had held, that the hunting of such birds could not be reached through Congress’s enumerated powers. But he did not demonstrate this crucial proposition, and it is not obvious even under the narrower Commerce doctrine of the time. Moreover, if the Foreign Commerce power is broader than the interstate power, it could have itself provided a Art. I basis for the statute.

Interestingly, Commerce Clause arguments played little role in the lower court litigation. Instead, the lower courts relied on an earlier Supreme Court decision holding that state animal export regulations do not violate the Dormant Commerce clause as meaning that wildlife falls wholly outside the scope of the Commerce Clause. Of course the scope of permissible state action under the dormant Commerce Clause is not coterminous with permissible Congressional regulation under the Commerce Clause. Congress can properly regulate many things which, in the absence of such legislation, states can affect through their policies.


147 Some have challenged the statute’s UJ provisions on due process grounds, see Part I.C.1, supra. Those challenges, which courts have almost entirely rejected, fall outside the
exercise of Congress’s authority if “necessary and proper” to some treaty. The question then is whether there is such a treaty. Certainly the legislative history of the act does not mention any treaty basis. Similarly, courts have never mentioned the treaty as a source for Congress’s Art. I authority, thought they have mentioned it to show that the MDLEA complies with international law and fairness. The courts and Congress were right to not invoke the treaty power. For while there arguably is a U.S. treaty implicated by the MDLEA – the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances – a close examination of its provisions and the circumstances of its enactment shows it cannot easily be taken as a basis for the MDLEA.

The provisions of the Convention that specifically contemplate MDLEA-type situations do not purport to confer additional jurisdictional powers. The Convention’s jurisdictional provision first requires parties to take jurisdiction of offenses committed within their respective territorial or flag jurisdiction. It goes on to encourage, but not require, states to enter into agreements with each other authorizing interdiction of drug trafficking by each other’s vessels – exactly the kind of arrangements under which most MDLEA cases arise.

1. Bilateral Maritime Agreements.

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

148 Bradley, *Universal Jurisdiction*, supra n.7, at 323.
149 United States v. Bravo, 489 F.3d 1, 8 (1st Cir. 2007).
150 Suerte at 377.
151 (1988); ratified by U.S. in 1990. The Convention has 183 state parties.
152 Art. 4(1)(a).
153 See id., Art. 17(4)(c).
154 See id., Art. 4(1)(b)(ii).
155 See MURPHY, supra, at 412-13 (describing convention as setting up framework for international cooperation but not as criminalizing any conduct).
Nor do the Maritime Agreements themselves – the bilateral arrangements contemplated by the Convention, and in whose shadow the MDLEA prosecutions occur – provide a “Treaty Power” basis for the statute. First, most of them are not treaties but rather mere executive agreements, entered into by State Department officials with no congressional input, let alone advice and consent. Even broad defenders of the “nationalist” view of *Missouri* think that unlike treaties, sole executive agreements cannot go be the basis for legislation beyond what Art. I would otherwise authorize – that is, executive agreements don’t do what treaties do under *Missouri*. Moreover, the Agreements do not confer any authority on the U.S. with respect to prosecution. Rather, they simply set up rules for cooperation in drug interdiction but they do not authorize, let alone require, the U.S. to prosecute.\footnote{But see Agreement Between the Government of the United States of America and the Government of the Republic of Colombia to Suppress Illicit Traffic by Sea, Feb. 20, 1997, T.I.A.S. No. 12835.}

The standard jurisdictional provision states that the flag state, while retaining “primary” jurisdiction, “may . . . waive its primary right to exercise jurisdiction and authorize the enforcement of United States law against the vessel and/or persons on board.” Some agreements go further and expressly disclaim giving any jurisdiction to the U.S.\footnote{The State Department uses a six-part “Model Maritime Agreement,” which covers enforcement issues like shippers, pursuit, overflights, and boarding. Most of the 26 nations with which the U.S. has such deals have agreed to less than all six parts.} Simply put, these agreements do not give the U.S. any jurisdiction it did not previously have. (Indeed, the purpose of the agreements is to facilitate enforcement, not prosecution.)

This waiver is done on a case by case basis, usually initiated by a State Department or Coast Guard request. Often the consent is provided by low-level functionaries. It may be provided orally, and in some cases, the source, form and content of the consent remains obscure.\footnote{See note 33, supra.} Such authorization certainly falls short of a formal treaty, or even of an executive agreement. Certainly such consent, especially when made in the framework of a bilateral agreement and in the shadow of the UN Convention, removes any potential international law problems with U.S. jurisdiction. But that does not answer the Art. I question. The notion that a mere waiver by another nation of its rights at international law can expand the legislative competence of Congress goes much further than even the broadest view of *Missouri v. Holland*.\footnote{See, e.g., United States v. Normandin, 378 F.Supp.2d 4, 8 (D. P.R. 2005).}
Indeed, the bilateral agreements highlight a danger of Holland’s rule that Congress can expand its legislative powers through treaty. Generally the consent of the foreign state is understood as some kind of check on abuses of the treaty power. Foreign states will presumably not enter deals just to allow Congress to aggrandize itself. But the U.S. has extraordinary bargaining power with respect to most of the nations it has signed bilateral maritime agreements with, such as St. Kitts and Nevis, or Dominica.

Many nations were reluctant to enter agreements which they saw as impinging on their sovereign territory or law enforcement functions. Washington, however, threatened these states with substantial aid reductions and other economic sanctions if they did not enter the agreements. Such ultimatums caused quite a bit of bad feeling in countries like Jamaica, but have proved ultimately effective. Yet it would have potentially troubling implications if such purchased treaties could give Congress power to do what Art. I had not allowed it.

2. Extradite or Punish provisions.

The strongest Treaty Clause basis for the MDLEA is a provision of the Convention contained in the subsequent section of the jurisdictional article, that permits but does not require states to punish or extradite offenders “present in its territory” but otherwise unconnected to the forum. Once MDLEA defendants are seized on the high seas by the Coast Guard for the purposes of prosecution, they are “present in its territory.” While it is not clear the Convention contemplated coerced presence, such factors clearly make no difference in U.S. law. Still, for purposes of the Treaty Power, it matters what the treaty allows. Certainly similar “extradite or punish” provisions in other treaties have been held to allow jurisdiction based on coerced presence. However, several factors suggest a different answer here.

decades who were seized on vessels of states with whom the U.S. did not have an agreement.


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


165 Art. 4(2)(b).

166 Yunis; Ker-Frisbee doctrine
The Convention contains particular jurisdictional and substantive clauses dealing with joint drug interdiction on the high seas – the provisions that prompted the creation of the Bilateral Maritime Treaties. Thus one might be hesitant to construe an entirely separate jurisdictional provision, 4(2)(b), as covering cases where the defendant “is present” in the forum state because of the operation of arrangements specifically addressed by those clauses. One can read 4(1)(b)(2) as being exclusive of (2)(b). In other words, the provisions that discuss jurisdiction over vessels solely govern maritime drug smuggling; thus the broader provision would not be available.

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

To put it differently, since UNCLOS reflects a deliberate judgment to not allow UJ in such cases, interpreting the Illicit Substances Convention as authorizing UJ would mean the two treaties conflict. This would be awkward for the close to 200 nations that are parties to both treaties. It would also have ungainly consequences for the MDLEA. While the U.S. is not currently a party to UNCLOS, despite having signed it, Congress could presumably act under the (arguably) broader jurisdictional provisions of the Illicit Traffic Convention. Yet if the Senate ratifies UNCLOS, as most observers expect it to do very shortly, the last-in-time rule with respect to treaties would mean that UNCLOS cuts off Congress’s treaty power to authorize the MDLEA. Given the number of nations party to both treaties, it seems safest to construe those provisions so as to not conflict.

3. Novel Problems with the Convention as a Constitutional basis.

Two additional factors, one quite unusual, cast doubt on the Illicit Trafficking Convention as a Treaty Power basis for the MDLEA. Firstly, the treaty was drafted and ratified several years after the statute was enacted. Thus it is no surprise Congress did not see the law as an exercise

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167 See Art. 17(1).
168 See UNCLOS, Art. 108(1).
169 The U.S. ratified the Convention in 1990. The MDLEA was adopted in 1986, but
of the treaty power. Thus at the very least, the Convention does nothing for constitutionality of the statute’s UJ provisions ab initio. It is a nice question whether an unconstitutional statutory provision can be saved by a subsequent treaty.\textsuperscript{170} Congress’s authority for legislation pursuant to treaties is a combination of the Treaty and Necessary and Proper Clause. Even though the latter has been given almost limitless scope, it would seem fundamentally odd to say that a statute was “necessary” to implement a treaty not yet in existence.

Even when the treaty is subsequently ratified, it is hard to see how an existing statute could retroactively become “necessary and proper” to it: Congress did not pass the law to implement the treaty. If the law is “necessary” to the treaty, that must be determined by a new Congress, one contemporaneous with the treaty. Furthermore, it would seem an invitation to mischief if Congress could pass a statute that, while unconstitutional at its inception, could be automatically resuscitated by subsequent developments, like a treaty, constitutional amendment, judicial reinterpretation. In any case, if the MDLEA exceeds Art. I powers, the subsequent ratification of the treaty could certainly not save convictions and sentences secured up until then.

A second problem with using the Convention to justify the MDLEA lies in limitations imposed by the Senate when it ratified the treaty. The U.S. entered a declaration that “nothing in this Treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States.” Such declarations are generally entered to limit the constraining effect of a treaty, to avoid international obligations. In this case, it could be read as preventing a potentially empowering effect of the treaty. If the Constitution can be said to “prohibit” universal jurisdiction over non-universal crimes, then the Convention cannot confer such a power. A question remains whether “prohibited” is meant simply to track the\textit{Missouri v. Holland} sense of “expressly ruled out,” or in the more common sense of not authorized by constitutional law. One might favor the latter reading because Senate has since the 1950s attached such declarations to treaties specifically because of their discomfort with the broad rule of\textit{Missouri}. With the Illicit Substances Convention, the primary concern behind the declaration seems to have been the extradition of U.S. citizens to

\textsuperscript{170} It is apparently a question of first impression, even in the academic literature. The question is not answered by\textit{Missouri v. Holland}, where Congress passed a second statute “pursuant” to the treaty after an earlier one had run afoul in the lower courts: in that case, the treaty still preceded the statute.
countries that would not afford them due process. This does not mean the Senators would not have thought the declaration applicable to otherwise unconstitutional expansions of Congress’s criminal powers. Most likely, the potential UJ issues raised by the Convention escaped their notice.

B. Foreign Commerce Clause

One might think the Foreign Commerce Clause could support the MDLEA. After all, the interstate commerce clause, assisted by the necessary and proper power, allows Congress to regulate much that is not itself interstate commerce. And perhaps the scope of the foreign commerce clause is even broader: since the regulation of foreign commerce is an exclusively federal power, it does not run up against federalism principles or reserved rights of states.

However, the MDLEA lies even beyond the foreign commerce power. However broad it is, the foreign commerce power does not authorizing legislation regarding conduct with no demonstrable and direct nexus with the United States. Exactly how much of a connection the conduct must have is a difficult question, but one that need not be answered in a UJ case. With the MDLEA UJ cases, there is no evidence of any connection to the U.S.

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

Rather than relying on Congress's direct authority under Art. I Section 8 to define and punish offenses against the law of nations, the government

172 The Attorney General’s description of the jurisdictional provisions to the Senate did not mention UJ at all, and indeed, his discussion of its extraterritorial affect implied it would not allow UJ. See Statement of Dick Thornborough, id. at S16619 (“Parties may establish jurisdiction over offenses committed by their nationals, committed on board vessels outside their territorial waters which are properly boarded and searched, and with respect to conspiratorial offenses committed outside their territory with a view to commission of a covered offense within their territory.”).
173 Cf. Bradley, Universal Jurisdiction, supra n.7, at 336 (“[A]t least some invocations of the universal jurisdiction concept by Congress are likely to involve situations in which there are effects on foreign commerce--for example, the disruption of shipping lanes or air traffic due to piracy.”).
174 See id.
contends that Congress has authority to regulate global air commerce under the commerce clause . . . Congress . . . is not empowered to regulate foreign commerce which has no connection to the United States. Unlike the states, foreign nations have never submitted to the sovereignty of the United States government nor ceded their regulatory powers to the United States. 175

Thus courts in MLDEA case have entirely disclaimed the commerce clause as a basis for the law.176

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

The text of the Foreign Commerce Clause along with what we know about the founders’ beliefs regarding state sovereignty and attendant rules of jurisdictional non-interference lead persuasively to the conclusion that for Congress to act extraterritorially under the Clause, the conduct it seeks to regulate must exhibit a direct connection to U.S. commerce.177

This is not the place to recapitulate Prof. Colangelo’s able exposition of the arguments. Briefly, the text of the clause suggests that the commerce must be “with” the U.S. The Constitution does not use the term “among” that it uses for “commerce among the states.”178 This shows that it is not enough for the commerce to be between some foreign states. Rather, the U.S. must be on one side of the transaction. Moreover, the Framers’ territorial concepts of jurisdiction make it highly improbable that they intended to give Congress plenary power to legislate over all global economic activity.179 Nothing in the purposes of the Commerce Clause suggest such a power. Consider the kinds of laws Congress can pass under its interstate commerce powers. Surely it would be odd to think the Constitution empowers Congress to legislate safety conditions for Yemeni shoe repairmen, or regulate backyard wheat production or prostitution in Pakistan.

To continue the reductio ad absurdum, if one thought the Foreign Commerce power to be as robust as the domestic one, it would imply the

175 Yunis, 681 F. Supp. at 907 n.24. See also, United States v. Georgescu, 723 F. Supp. 912, 918 (E.D. N.Y. 1989) (observing that Foreign Commerce clause gives Congress power "to criminalize activities affecting our foreign commerce").
176 See Moreno-Morillo, 334 F.3d at 825.
178 Id. at 148-49.
179 Id. at 149-51. Furthermore, to the extent the protections of the Bill of Rights, such as the Takings Clause, do not apply to foreigners abroad, Congress’s power to legislate for foreign countries could exceed its power to legislate domestically, a counterintuitive result.
existence of a Dormant Foreign Commerce clause – a power of federal courts or Congress to strike down foreign laws that burden international commerce. Such a power has never been suggested, because of the fundamentally different nature of domestic intrastate commerce from purely foreign commerce. This shows that one cannot simply export doctrine from the interstate commerce clause to the foreign one.

CONCLUSION

Congress has almost never used its Define and Punish power to punish conduct with no connection to the U.S. The first time it did so, in 1790, the Supreme Court narrowly interpreted the law to avoid constitutional difficulties. Soon after, Congress steered a statute clear of a much-desired UJ provision because of similar doubts. One hundred sixty years later, Congress ventured back into the poorly charted-waters of UJ with the MDLEA – and ran afoul of shoals.

In general, the Constitution does not empower Congress cannot legislate for foreigners in international waters or abroad. If Congress could do so, its powers would be unlimited. There is an exception to this for piracy, stateless vessels, and perhaps other areas where international law allows UJ. But Congress cannot by fiat make something a UJ offense when CIL does not treat it as such. To paraphrase Furlong, if by calling drugs smuggling piracy, Congress could assert jurisdiction over an offense committed by a foreigner in a foreign vessel, what offence might nor be brought within their power by the same device? Surely Congress could not regulate dueling on foreign vessels, as Justice Marshall put it.

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

There is a difficult argument to be made for the MDLEA as legislation pursuant to a treaty, if one takes a sufficiently broad view of what “necessary and proper” to a treat is. However, the use of the treaty power to sustain the statute would depend on several other difficult and untested propositions, such as Congress being able go beyond its Art. I powers in pursuance of non-mandatory (i.e., aspirational or permissive) treaties, and
of treaties not yet on the books when the law is enacted.

However, there may be sections of the MDLEA that have some basis in the traditional understanding of the Felonies power. In particular, the MDLEA’s application to stateless vessels (as defined in international law) may be consistent with the Felonies power as it has been applied in the only Supreme Court decisions dealing with such issues.