Jurisdiction from Coast to Coast: Justifying Land-Based Conspiratorial Liability Under the Felonies Clause

The Maritime Drug Law Enforcement Act (MDLEA) has served as an effective tool for stemming the tide of the international drug trade, but has garnered criticism from the academy and a handful of circuit court opinions for its broad reach beyond American shores. The judges are skeptical of how far Congress's constitutional authority to "define and punish . . . felonies committed on the high seas" extends toward foreign territories. On the other hand, courts in the past decade have been willing to uphold the statute's application to members of narcotics conspiracies who remain in foreign countries. This is in tension with normal principles of conspiracy law, under which the substantive offense has no bearing on conspiratorial liability.

This Note explains the interaction between jurisdiction, Article I of the Constitution, and conspiracy law, ultimately arguing for the MDLEA's application to land-based conspirators. It sets the stage by analyzing the circuit split in understanding Congress's attempt to allocate determination of jurisdiction to the court rather than the trier of fact. Then, it suggests that that jurisdictional circuit split influences the three ways the circuits conceptualize conspiratorial liability under the MDLEA. Finally, it argues that each understanding is consistent with early understandings of Article I power generally, and the Felonies Clause specifically, as applied to conspiratorial liability. This conclusion creates a work-around of some limiting constructions in the literature and the circuit decisions.

INTRODUCTION

In 2016, the United States Coast Guard observed Andres Davila-Mendoza and several other crew on a stalled boat in Jamaican waters.[1] After obtaining permission from the Jamaican government, the Coast Guard boarded and searched the vessel, finding 3,500

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

kilograms of marijuana.[2] One of Davila-Mendoza's conspirators told the officials that they were planning to take the vessel and narcotics to Costa Rica, but were stalled because the ship was overloaded with marijuana.[3] With Jamaica's consent, the United States brought Davila-Mendoza and his conspirators to the Southern District of Florida.[4] They were charged with violating the Maritime Drug Law Enforcement Act (MDLEA) which criminalizes, inter alia, "an individual" "[w]hile on board a covered vessel" "knowingly or intentionally" "manufactur[ing] or distribut[ing], or possess[ing] with intent to manufacture or distribute, a controlled substance,"[5] as well as attempting or conspiring to do so.[6] The statute establishes that a "covered vessel" includes "a vessel subject to the jurisdiction of the United States."[7] Jamaican consent provided one of the ways that a ship could become "subject to the jurisdiction of the United States,"[8] with other options including the vessel being "without nationality" or obtaining the consent of the vessel's flag nation.[9] Defendants pled guilty to all charges, but they preserved their challenge to the statute's constitutionality.[10]

On appeal, defendants argued that the MDLEA as applied to them was unconstitutional because it exceeded the Felonies Clause's grant of power.[11] The Constitution's Felonies Clause (also called the Define and Punish Clause) enables Congress "[t]o define and punish

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2. *Id.*

3. *Id.*

4. *Id.* at 1264, 1267.

5. *Id.* at 1267 (citing 46 U.S.C. §§ 70503, 70506). Unless otherwise noted, all cited sections refer to those in Title 46 of the United States Code.

6. § 70506(b).

7. § 70503(e)(1). The definition also reaches "a vessel of the United States," *id.*, and "any other vessel if the individual [referenced in § 70503(a)] is a citizen of the United States or a resident alien." § 70503(e)(2).

8. § 70502(c)(1)(E); *Davila-Mendoza*, 972 F.3d at 1267.

9. § 70502(c)(1)(A), (c)(1)(C).

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

11. *Id.* While other powers might be able to support the MDLEA, no courts have supported it on other grounds. *See id.* at 1268–77 (discussing the applicability of the Foreign Commerce Clause and the Necessary and Proper Clause in conjunction with the Treaty Power); *see also* Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1237–51 (2009) (same); United States v. Dávila-Reyes, 23 F.4th 153, 169 (1st Cir. 2022) ("It is undisputed that the 'vessel without nationality' provisions of the MDLEA were enacted solely pursuant to Congress's authority to 'define and punish . . . Felonies committed on the high Seas' ('the Felonies Clause')."), *reh'g en banc granted, opinion withdrawn*, 38 F.4th 288 (1st Cir. 2022) (mem.).

Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[12] It provides "three distinct grants of power: the power to define and punish piracies, the power to define and punish felonies committed on the high seas, and the power to define and punish offenses against the law of nations."[13] Relying on circuit precedent, the Eleventh Circuit concluded that this application of the MDLEA to Davila-Mendoza was unconstitutional under the Felonies Clause because the conspirators never entered the high seas, but were captured while stalled in Jamaican waters.[14] The court then considered two other sources of constitutional power beyond the scope of this paper, but decided neither could support the MDLEA as applied.[15]

But consider another Eleventh Circuit case. Jorge Cifuentes-Cuero organized a drug smuggling operation while in Colombia and Ecuador.[16] Never leaving land, he coordinated at least two drug smuggling ships which the United States Coast Guard intercepted well into the Pacific Ocean.[17] He pled guilty to conspiracy to violate the MDLEA, exactly the same as the conspiracy claim applied to Davila-Mendoza.[18] In this case though, the court found that the Constitution—and specifically the Felonies Clause—*does* support Congress's criminalization of conspiracy to violate the MDLEA even for conspirators like Cifuentes-Cuero who never got on the boat and remained entirely on foreign soil.[19]

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12. U.S. CONST. art. I, § 8, cl. 10. On the naming distinctions, see, for example, *Dávila-Reyes*, 23 F.4th at 169 n.29.

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

14. *Davila-Mendoza*, 972 F.3d at 1268–69 (citing *Bellaizac-Hurtado*, 700 F.3d at 1249–57).

15. *Davila-Mendoza*, 972 F.3d at 1268–78 (considering the Foreign Commerce Clause and Necessary and Proper Clause in conjunction to a treaty with Jamaica); *accord* Kontorovich, *supra* note 11, at 1237–58; *see also Bellaizac-Hurtado*, 700 F.3d at 1249–58 (rejecting the Law of Nations Clause as a means of criminalizing land-based activity under the MDLEA). These powers revolve around a different sort of constitutional inquiry. The Law of Nations Clause carries baggage from the Alien Tort Statute. *See generally* Nestle USA, Inc. v. Doe, 141 S. Ct. 1931 (2021). The Foreign Commerce Clause is influenced by the Interstate Commerce Clause—a separate doctrinal field; and the Treaty Power is not an Article I, Section 8 power and so is not similar to Congress's Felonies Power. *See* U.S. CONST. art. II, § 2.

16. United States v. Cifuentes-Cuero, 808 F. App'x 771, 773 (11th Cir. 2020) (per curiam).

17. *Id.* at 774.

18. *Id.*; *Davila-Mendoza*, 972 F.3d at 1267–68.

19. *Cifuentes-Cuero*, 808 F. App'x at 776. There is some uncertainty surrounding whether the criminalization applies only to the boat when and where it is apprehended or whether the MDLEA applies based on some fulfilment of the § 70502(c) criteria at some time

The only distinction between Cifuentes-Cuero's case and that of Davila-Mendoza was that in the former's, the *other* conspirators *did* go on the high seas, violating the MDLEA, whereas, in the latter's, the conspiratorial attempt remained unfulfilled.[20] This distinction is, however, deeply puzzling. Every first-year law student knows that conspiracy prosecutions may (or may not) turn on overt acts, but rarely require that the underlying offense is fulfilled.[21] The "essence [of conspiracy] is an agreement to commit an unlawful act," and it is inchoate in the sense that its punishment does not hinge on the actual commission of the planned crime.[22]

For this Note, inchoate will not necessarily mean that there was no actus reus at all, but rather that there was no substantive § 70503(a) MDLEA violation because there was no possession of narcotics on the high seas. So an "inchoate" MDLEA conspiracy would include a scheme in which a drug cartel planned to ship cocaine out of Guatemala, knew which ships it would be using, but never actually used the vessels to transfer the narcotics (perhaps they changed to using a plane, or did not enter on the high seas).[23] Broken down into the most basic terms: The MDLEA criminalizes conspiracy to "possess with intent to manufacture or distribute[] a controlled substance" "while on board a covered vessel."[24] Assuming, as most courts have, that the MDLEA was "enacted under Congress's authority provided by the Felonies

not necessarily linked to apprehension. The large majority of cases support the proposition that § 70502(c)'s fulfilment is not necessarily linked to the specific apprehension. *See infra* Section I.C.3.

20. *Compare Cifuentes-Cuero*, 808 F. App'x at 776, *with Davila-Mendoza*, 972 F.3d at 1267–68, *and Bellaizac-Hurtado*, 700 F.3d at 1247–48. High seas is a legal term of art that excludes territorial waters. Convention on the High Seas art. I, Apr. 29, 1958, 450 U.N.T.S. 11.

21. *See e.g.*, Whitfield v. United States, 543 U.S. 209, 213–14 (2005) (proof of an overt act not required for money laundering conspiracy); United States v. Shabani, 513 U.S. 10, 11–16 (1994) (same for conspiracy to distribute cocaine in violation of 21 U.S.C. § 846); Nash v. United States, 229 U.S. 373, 378 (1913) (federal conspiracy law is based on common law which "does not make the doing of any act other than the act of conspiring a condition of liability.").

22. Iannelli v. United States, 420 U.S. 770, 777–78 (1975).

23. *E.g.*, United States v. Alarcon Sanchez, 972 F.3d 156, 159–61 (2d Cir. 2020).

24. § 70506(b); § 70503(a), (a)(1).

Clause,"[25] the statute's reach is "textually limited to conduct on the high seas."[26]

Therefore, the Eleventh Circuit's cases pose a puzzle. In both, the defendant in question never entered the high seas.[27] In *Davila-Mendoza*, the court held that this placed Davila-Mendoza beyond the MDLEA's constitutional reach.[28] In *Cifuentes-Cuero*, however, the court held that Cifuentes-Cuero could be successfully prosecuted under the Felonies Clause and the MDLEA for the same conspiracy provision as Davila-Mendoza *even though* he never entered the high seas.[29] The distinction, aggravated by circuit unanimity on land-based conspiratorial liability under the MDLEA when there is a substantive violation,[30] presents the following questions: Are MDLEA conspiracies not properly inchoate crimes? Do conspiracy prosecutions under the statute require an attendant substantive prosecution? In other words, why should the MDLEA conspiracy be different?

This Note suggests that this anomaly arises from diverging understandings of how the MDLEA's jurisdictional clauses interact with both the statute's impositions of liability and the constitutional limitations of the Felonies Clause of Article I, Section 8. I argue that under either prevalent understanding of statutory interplay—that is, whether the jurisdictional inquiry surrounds legislative or subject-matter jurisdiction—truly inchoate conspiracies that never left dry land can be covered by both the statute and the Constitution. However, the courts that interpret the jurisdiction stripping provision, § 70504, as concerning legislative jurisdiction will be more naturally open to applying the MDLEA to land-based conspirators based on the Necessary and Proper Clause. I also advance that affirming inchoate, land-based conspiracies under the MDLEA accords with our broader conceptions of

25. United States v. Cruikshank, 837 F.3d 1182, 1187 (11th Cir. 2016); *see* United States v. Dávila-Reyes, 23 F.4th 153, 177 (1st Cir. 2022) ("[I]t is undisputed in this case that the MDLEA was enacted pursuant to Congress's authority under the Felonies Clause."), *reh'g en banc granted, opinion withdrawn*, 38 F.4th 288 (1st Cir. 2022) (mem.).

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

27. United States v. Davila-Mendoza, 972 F.3d 1264, 1267 (11th Cir. 2020); United States v. Cifuentes-Cuero, 808 F. App'x 771, 776 (11th Cir. 2020) (per curiam) ("Cifuentes-Cuero['s] . . . actions occurred entirely on foreign land—and thus were not 'committed on the high seas.'").

28. *Davila-Mendoza*, 972 F.3d at 1268 ("Because the crimes here were not committed on the high seas, the Piracies and Felonies Clauses do not apply.").

29. *Cifuentes-Cuero*, 808 F. App'x at 775–76.

30. United States v. Ballestas, 795 F.3d 138, 146–47 (D.C. Cir. 2015); United States v. Mosquera-Murillo, 902 F.3d 285, 289–91 (D.C. Cir. 2018); United States v. Alarcon Sanchez, 972 F.3d 156, 164–68 (2d Cir. 2020); *Cifuentes-Cuero*, 808 F. App'x at 776.

conspiratorial liability and is not at odds with the limited history of conspiracy laws under the Felonies Clause.

Part I briefly sketches the historical development of the MDLEA and the challenges Congress has sought to overcome by amending it. It then explains the statute's complex structure, establishes several key doctrines implicated by the cases at hand, and notes the divergent interpretations currently advanced in the circuit courts. Finally, it highlights the practical importance of MDLEA questions in general, and the land-based conspirator question in particular. The policy issues of comity, creeping American jurisdiction, and the relationship between international law and the constitutionality of statutes strongly color potential interpretations of the MDLEA.

Part II examines how three circuit courts have recently applied the MDLEA to land-based conspirators. The arguments the courts advance hint that there is a difference between the cases in which co-conspirators committed the substantive MDLEA offense and those in which the entire conspiracy remains inchoate. Part II concludes by expanding on the irony of this interpretation and recalls that, in at least some cases, courts have determined that the MDLEA's conspiracy provision does not apply in inchoate conditions.

In Part III, I argue that the circuit split on interpreting the interaction between the MDLEA's substantive section (§ 70503) and the section that attempts to remove jurisdiction as an element (§ 70504) controls the range of possibilities for analyzing the role of jurisdiction in the statute's conspiracy section (§ 70506). I advance three possible approaches, focusing on the *Pinkerton* doctrine, the Necessary and Proper Clause, and the inclusion of accessorial liability in Article I power generally. Courts that read the jurisdictional clause as referring to legislative jurisdiction will be more compatible with properly inchoate conspiracy charges because they more naturally rely on the Necessary and Proper approach to cover "hypothetical" vessels subject to the jurisdiction of the United States. These courts have been more concerned about the interaction between Article I and the MDLEA, so their interpretations of the conspiracy could be narrower reflecting a more restricted understanding of the Felonies Clause.[31] On the other hand, courts like the D.C. Circuit that read the jurisdictional clause as a limit on subject-matter jurisdiction tend to replicate that restriction in the conspiracy provision, requiring an actual vessel subject to the jurisdiction of the United States, even though that extension is not strictly necessary.[32] The D.C. Circuit has stuck with the *Pinkerton*

31. *See infra* Section III.B.

32. *See infra* Section III.C.

approach but has questioned the viability of a broader incidental-accessorial power theory. Without taking a position on which approach is correct, I argue that all three approaches are tenable for covering land-based co-conspirators, but the practical implications and overlap with Commerce Clause jurisprudence of the legislative jurisdiction courts' approach make the application of inchoate conspiratorial liability more palatable. Finally, historical precedent shows that any of the possible approaches for criminalizing land-based conspirators is not at odds with past treatment of the Felonies Clause.[33]

I. THE MDLEA AND THE TENSIONS OF THE FELONIES CLAUSE'S EXTRATERRITORIAL REACH

This Part sets out the history of the MDLEA and Congress's attempt to use the Felonies Clause to address narcotics trafficking on the high seas.[34] Lawmakers have sought to expand American extraterritoriality after court attempts to cabin legislative or judicial reach.[35] Section I.B then lays out the MDLEA's complex statutory framework and the way claims under it are prosecuted.[36] Last, Section I.C clarifies some of the doctrines the courts address in connection to land-based conspiracies.[37]

A. Congress Has Continually Amended its Drug Statutes to Ensure Effective Convictions

In order to stem the flow of drugs into the United States, Congress enacted a legislative scheme permitting the Coast Guard and other law enforcement agencies to stop and seize ships suspected of carrying narcotics.[38] Through the Marijuana on the High Seas Act (MHSA), Congress could target vessels in United States customs waters as well as those that bore the American flag.[39] These jurisdictional provisions proved too restrictive to adequately address drug

33. *See infra* Section III.D.

34. *See* Kontorovich, *supra* note 11, at 1196–207 (detailing the history of the MDLEA).

35. *See infra* Section I.A.

36. *See infra* Section I.B.

37. *See infra* Section I.C.

38. Kontorovich, *supra* note 11, at 1197–98 (citing Pub. L. No. 96-350, 94 Stat. 1159 (1980)).

39. *Id.* at 1197–98.

importation.[40] Organizations would use a foreign "mother ship" outside U.S. waters and deliver the drugs via smaller, faster ships evading Coast Guard arrest.[41] Congress sought to address this issue by expanding the law's coverage, applying the MHSA to "vessels subject to the jurisdiction of the United States."[42] This category "was defined as stateless vessels, meaning a vessel flying no flag, or bearing fraudulent or multiple registries."[43] Another term for this sort of statelessness could be a "vessel without nationality," upon which any nation has jurisdiction under international law.[44] The MHSA's then-current scheme (1980–86) could reach further to capture drug importation on the high seas; however, the statute faced another hurdle in that prosecutors were required to prove with admissible evidence the jurisdictional basis for their claim over a given vessel.[45] This provision also allowed for a version of jurisdiction based on the consent of the supposed flag state since that state could refute the vessel's registry, rendering it stateless.[46]

Determined to adequately address this problem, Congress revamped its jurisdictional and evidentiary program in the MHSA's successor, the Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70501–08.[47] The MDLEA contained two innovations that shifted the way evidentiary rules interacted with jurisdiction. First, it allowed oral consent by a foreign nation to serve as a basis for jurisdiction over a vessel.[48] This would allow a state to affirm that the ship was under its jurisdiction, but permit the United States to execute its laws over the vessel anyway.[49] Second, it defined a vessel as stateless if upon request the vessel's master failed to claim nationality, or if the nation did not "affirmatively and unequivocally" confirm the vessel's purported statehood.[50] With both state consent and a capacious statelessness provision, the MDLEA was now equipped to cover a large range of narcotics-trafficking ships. This broad reach represented a

40. *Id.*

41. *Id.*

42. *Id.* at 198.

43. *Id.*

44. United States v. Aybar-Ulloa, 987 F.3d 1, 4–7 (1st Cir. 2021) (en banc).

45. Kontorovich, *supra* note 11, at 1199.

46. *Id.* at 1198.

47. *Id.* at 1199–1200; *see* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570 § 2, 100 Stat. 3207, 3207-1 (Title III, Subtitle C).

48. Kontorovich, *supra* note 11, at 1200.

49. *Id.*

50. *Id.* at 1200–01.

bipartisan effort to restrict the flow of drugs into the United States and ultimately to create "a 'drug-free America.'"[51] In 1996, Congress amended the MDLEA to clarify that "jurisdiction of the United States with respect to vessels subject to this chapter is not an element of any offense. All jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge."[52] Finally, in 2006, Congress amended the law to deny accused violators standing to assert the affirmative defense that the United States did not comply with international law.[53] This history helps to explain the complicated statutory structure of the current MDLEA.

B. The MDLEA's Complex Structure

The MDLEA's serpentine structure potentially contributes to the challenges courts face when applying it, as well as the need for Congress to continually re-amend the statute. An extended discussion of its independent provisions is warranted. The core of the law is § 70503, describing "Prohibited acts" under the title. It is preceded by §§ 70501 and 70502, which detail findings and definitions, and supplemented by §§ 70506 and 70507, which provide for ancillary enforcement mechanisms such as forfeiture, attempt, and conspiracy. Litigation under this title is cabined by the two provisions (§§ 70504–05) disclaiming jurisdiction as an element and prohibiting a violation of international law affirmative defense. Facially, these disclaimers were intended to avoid arguments that the United States had not adequately proven the vessel was stateless or the United States lacked the requisite nexus with the ship under international law.[54]

Congress defines the central substantive prohibition as: "While on board a covered vessel, an individual may not knowingly or

51. Elaina Aquila, Note, *Courts Have Gone Overboard in Applying the Maritime Drug Law Enforcement Act*, 86 FORDHAM L. REV. 2965, 2974–75 (2018) (quoting 132 CONG. REC. 33,246–48 (1986) (statements of Sens. Chiles and Biden)).

52. Coast Guard Authorization Act of 1996, Pub. L. No. 104-324 § 1138(a)(5), 110 Stat. 3901, 3988 (codified at § 70504(a)). This avoided the previous status quo under which the circuits held that the jurisdictional requirements were an element of the crime to be reviewed by the jury. United States v. Moreno-Morillo, 334 F.3d 819, 828 (9th Cir. 2003) (citing United States v. Medjuck, 48 F.3d 1107, 1110 (9th Cir. 1995) (collecting cases)).

53. An Act to Complete the Codification of Title 46, Pub. L. No. 109-304 § 10, 120 Stat. 1485, 1688 (2006) (codified at § 70505).

54. *See* Kontorovich, *supra* note 11, at 1198–1201.

intentionally—Manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance."[55]

Later in the same section, Congress defines "covered vessel" as: "(1) a vessel of the United States or a vessel subject to the jurisdiction of the United States."[56] These terms are in turn defined in detail in the definitions section. Relevant to our discussion, Congress defines vessels subject to the jurisdiction of the United States as including:

> a vessel without nationality; . . .
>
> (C) a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States; . . . [and]
>
> (E) a vessel in the territorial waters of a foreign nation if that nation consents to the enforcement of United States law by the United States . . . .[57]

The definition section continues to describe what constitutes a "vessel without nationality" as well as the standards for proving statelessness or foreign nation consent.[58] While the exact burdens of proof are subject to some question among the circuits,[59] the relatively low standards avoid some of the evidentiary difficulties prosecutors faced under the MHSA.[60]

In a typical substantive MDLEA prosecution, the Coast Guard will observe a prima facie drug carrying vessel on the high seas.[61] Law enforcement will then stop the vessel, board it, and seek a claim of

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55. § 70503(a)–(a)(1). The statute additionally prohibits destruction of property subject to forfeiture under the Comprehensive Drug Abuse Prevention and Control Act as well as "conceal[ment], or attempt or conspir[acy] to conceal, more than $100,000 in currency" under certain conditions. § 70503(a)(2)–(3).

56. § 70503(e)(1). Section 70503(e)(2) includes "any other vessel if the individual is a citizen of the United States or a resident alien of the United States."

57. § 70502(c)(1)(a), (c)(1)(c), (c)(1)(e).

58. § 70502(c)(2), (d).

59. *Compare* United States v. Nunez, 1 F.4th 976, 986–88 (11th Cir. 2021) (finding a vessel without nationality when those on the boat failed to identify a master or make a claim of nationality when requested), *with* United States v. Prado, 933 F.3d 121, 130–32 (2d Cir. 2019) (declining to find a vessel without nationality when the Coast Guard did not adequately question those on the boat), *and* United States v. Dávila-Reyes, 23 F.4th 153, 183–86, 192–95 (1st Cir. 2022) (rejecting the affirmative and unequivocal standard), *reh'g en banc granted, opinion withdrawn*, 38 F.4th 288 (1st Cir. 2022) (mem.).

60. Kontorovich, *supra* note 11, at 1199–1201.

61. *E.g.*, United States v. Aybar-Ulloa, 987 F.3d 1, 3 (1st Cir. 2021) (en banc).

nationality.[62] Those in charge may refuse to give a nationality,[63] provide one which is refuted by the claimed home nation,[64] or provide one which the home nation confirms but nevertheless consents to enforcement of American laws.[65] Once one of these options is satisfied, the only other element is possession.[66] However, given this structure, each of these sections offers room for state interaction—in confirming or denying nationality or the application of American law—a variable that forms the background of many MDLEA claims.[67]

C. Land-Based Conspiratorial Liability Rests on the Interaction Between Several Complex Doctrines

In the background of the nascent circuit split[68] about how the MDLEA properly applies to land-based conspirators lie a group of doctrines that are not always fully fleshed out in court opinions, but color the judges' logics. They are in three categories: first, the distinction between subject-matter jurisdiction and legislative jurisdiction and accompanying doctrines; second, the relationship between Article I grants of power and conspiratorial liability in general; and third, the way jurisdiction interacts with the actual encounter between law enforcement and defendants.

1. Subject-Matter Jurisdiction and Legislative Jurisdiction

Subject-matter jurisdiction is central to MDLEA prosecutions because the court cannot convict if it does not have authorization to do so from the Constitution and Congress. The Supreme Court has dealt with several cases concerning "the distinction between two sometimes

62. *Id.*

63. *E.g.*, *Nunez*, 1 F.4th at 986.

64. *E.g.*, *Aybar-Ulloa*, 987 F.3d at 3–4.

65. *E.g.*, United States v. Robinson, 843 F.2d 1, 4 (1st Cir. 1988). Theoretically, the flag jurisdiction could *disallow* for the application of American law. *See* United States v. Mosquera-Murillo, 902 F.3d 285, 291 (D.C. Cir. 2018).

66. *E.g.*, *Aybar-Ulloa*, 987 F.3d at 4.

67. *E.g.*, *Mosquera-Murillo*, 902 F.3d at 289–92 (questioning the extent of Colombia's consent); United States v. Van Der End, 943 F.3d 98, 102–04 (2d Cir. 2019) (calling into doubt the thoroughness of Coast Guard evidence for statelessness).

68. The split, advanced upon in Parts II–III, is nascent in the sense that the courts that have squarely faced the issue of extraterritorial conspiracy have all agreed on the substantive answer, but for different reasons. These different reasonings could produce divergent results, as I suggest has already happened within the Eleventh Circuit.

confused or conflated concepts: federal court 'subject-matter' jurisdiction over a controversy and the essential ingredients of a federal claim for relief."[69] Part of the confusion arises from the Court's observation that "jurisdiction . . . is a word of many, too many, meanings."[70] Subject-matter jurisdiction centers around the district court's power to hear a given case under the constitutional framework of the judicial power set out in Article III, Section 2.[71] Since this jurisdiction is a limitation on the court rather than on a party, it may not be waived and in many cases, is considered sua sponte.[72] In the criminal context, a "case" results from a "criminal investigation conducted by the Executive,"[73] and is ordinarily grounded in 18 U.S.C. § 3231, which gives the district courts "original jurisdiction . . . of all offenses against the laws of the United States." It is, however, still possible for Congress to limit that general grant of jurisdiction for specific statutes.[74] Given the extreme nature of stripping a court of subject-matter jurisdiction, the Supreme Court requires that a statute must clearly state that "a threshold limitation" is jurisdictional in order to deny subject-matter jurisdiction because of the failure to meet that threshold.[75]

Legislative jurisdiction, on the other hand, reflects Congress's constitutional authority to regulate certain conduct.[76] Since Congress "cannot punish felonies generally," its criminalization of certain actions must derive from an Article I grant of authority.[77] Legislative jurisdiction in the constitutional sense is also related to legislative jurisdiction in the international law doctrine that limits "the authority of a state to make its laws applicable to persons or activities" beyond its

69. Arbaugh v. Y & H Corp., 546 U.S. 500, 503 (2006).

70. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998) (quoting United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

71. "The judicial Power shall extend to all Cases . . . arising under . . . the Laws of the United States." U.S. CONST. art. III, § 2; *see also, e.g.*, Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152–53 (1908).

72. *Arbaugh*, 546 U.S. at 514; *see also Steel Co.*, 523 U.S. at 98–101 (defending sua sponte investigation).

73. *Steel Co.*, 523 U.S. at 102.

74. *See* United States v. Prado, 933 F.3d 121, 159 (2d Cir. 2019) (Pooler, J., concurring); *see also* Musacchio v. United States, 577 U.S. 237, 246–48 (2016).

75. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161–64 (2010) (quoting *Arbaugh*, 546 U.S. at 515–16); *see also* Henderson v. Shinseki, 562 U.S. 428, 441 (2011).

76. *See* United States v. Morrison, 529 U.S. 598, 606–07 (2000).

77. Cohens v. Virginia, 19 U.S. 264, 426–28 (1821); *accord Morrison*, 529 U.S. at 617–19.

territory.[78] This international law rule does not limit Congress's legislative reach, but is reflected in a presumption that Congress did not intend for its laws to apply outside the United States.[79] This presumption can be overcome by an affirmative indication from the statute that Congress intended it to apply to activities beyond American shores.[80] A separate doctrine from international law also colors the presumptions with which a court reads a statute. The "*Charming Betsy*" doctrine holds that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[81] In cases concerning extraterritoriality, it will reflect "those customary international-law limits on jurisdiction to prescribe."[82] Just like the presumption against extraterritoriality, the *Charming Betsy* presumption can be overcome by clear congressional intent.[83, 84]

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78. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (Scalia, J., dissenting in part).

79. Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 255 (2010). At times the terms have a significant overlap, but should be kept separate. *See*, *e.g.*, Fed. Trade Comm'n v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1316–18 (D.C. Cir. 1980); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 929–31 (D.C. Cir. 1984) (discussing the distinction).

80. *Nat'l Australia Bank*, 561 U.S. at 265.

81. *Hartford Fire*, 509 U.S. at 814–15 (citing Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)).

82. *Id.*

83. *See* United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) ("there is, of course, no doubt the Congress may override international law . . . [the predecessor to § 70505] expresses the necessary congressional intent to override international law to the extent that international law might" not condone MDLEA prosecutions); United States v. Hernandez, 864 F.3d 1292, 1301–02 (11th Cir. 2017) ("Congress has instructed that these defendants may not litigate those complaints [asserting violations of international law] in an MDLEA prosecution;"); *see also* GARY BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 588 (Rachel E. Barkow et al. eds., 6th ed. 2018) ("If Congress enacts legislation in violation of international law, it is well settled that U.S. courts must disregard international law and apply the domestic statute."); United States v. Yousef, 327 F.3d 56, 109 & n.44 (2d Cir. 2003) (collecting cases). *But see* Andreas Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880, 881–84 (1989) (arguing international law limitations on criminal jurisdiction are constitutionally required).

84. A recent First Circuit case has held, however, that the Felonies Clause constitutionalizes international law limits. United States v. Dávila-Reyes, 23 F.4th 153, 179–80, 183 (1st Cir. 2022) (asserting there is "no doubt that the Constitution's drafters intended that Congress's authority under the Define and Punish Clause, including the Felonies portion of it, be constrained by currently applicable international law whenever Congress invokes that clause to assert its authority over foreign nationals and their vessels on the high seas."), *reh'g en banc granted, opinion withdrawn*, 38 F.4th 288 (1st Cir. 2022) (mem.). It found that the MDLEA's

Importantly to our cases, a criminal prosecution must show both subject-matter jurisdiction and legislative jurisdiction to succeed. If the court lacks subject-matter jurisdiction, it must dismiss the case and consequently may not convict (or acquit for that matter), and jurisdiction cannot be consented to or waived.[85] Legislative jurisdiction is, on the other hand, a merits question.[86] If it is not challenged it may be waived, and under most circumstances is an element of the offense.[87] Further, under recent Supreme Court precedent it is doubtful whether the legislative basis of jurisdiction could ever avoid being an element of the crime.[88] For all the courts, then, the MDLEA and its conspiratorial provision must relate to an Article I grant of jurisdiction, detailed below.

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conditions for finding statelessness—and then subjection to American jurisdiction—were out of sorts with international law limits, and so that provision of the MDLEA was a facially unconstitutional use of the Felonies Clause. *Dávila-Reyes*, 23 F.4th at 179–80, 183 (asserting there is "no doubt that the Constitution's drafters intended that Congress's authority under the Define and Punish Clause, including the Felonies portion of it, be constrained by currently applicable international law whenever Congress invokes that clause to assert its authority over foreign nationals and their vessels on the high seas."). The First Circuit's conclusion is novel and striking, as I laid out in the *Columbia Journal of Transnational Law Bulletin*, and the Circuit subsequently withdrew the panel's opinion and granted a rehearing en banc, decision pending. *See* Michael Anfang, *First Circuit Constitutionalizes International Law Limits*, COLUM. J. TRANSNAT'L L. BULL. (Mar. 9, 2022), https://www.jtl.columbia.edu/bulletin-blog/first-circuit-constitutionalizes-international-law-limits [https://perma.cc/J9SL-YJDJ].

85. *E.g.*, United States v. Miranda, 780 F.3d 1185, 1192–93 (D.C. Cir. 2015).

86. *See id.* at 1191 (citing Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 253–54 (2010)).

87. United States v. Prado, 933 F.3d 121, 139 & n.9 (2d Cir. 2019). The bounds of this waiver are somewhat murkier when applied to the scope of Congress's constitutional powers. *Compare Dávila-Reyes*, 23 F.4th at 163–64 (citing Class v. United States, 138 S. Ct. 798, 803 (2018) (for the proposition "that 'a guilty plea by itself' does not bar 'a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal'. . . [appellants] argue that Congress exceeded constitutional limits with the enactment of the applicable provision."), *and* United States v. Ríos-Rivera, 913 F.3d 38, 42–43 (1st Cir. 2019), *with, e.g.*, Oliver v. United States, 951 F.3d 841, 846–47 (7th Cir. 2020) (limiting the holding of *Class* to the interpretation of guilty pleas). *See also In re* Sealed Case, 936 F.3d 582, 587–88, 593 & n.6 (D.C. Cir. 2019) (discussing *Class* objections and jurisdictional elements).

88. *Prado,* 933 F.3d at 139 & n.9; PAUL BREST ET AL., PROCESS OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 680–82 n.8 (7th ed. 2018); *see, e.g.*, United States v. Hill, 927 F.3d 188, 197–209 (4th Cir. 2019) (discussing the extent of the Commerce Clause). *But see* United States v. Wall, 92 F.3d 1444, 1450 (6th Cir. 1996) ("The prosecutor need not prove and the jury need not find that the accused or his instrumentalities crossed any state lines or affected interstate commerce.").

2. Article I Jurisdiction and Conspiracy

Maintaining common law tradition, Congress punishes conspiracy to commit a crime in addition to the substantive offence.[89] However, as noted above, Congress does not have a general police power and so its punishment of an offense must have a certain connection to an Article I grant of jurisdiction.[90] Under most litigation there are two ways to justify targeting inchoate conspiracies: as sufficiently threatening the federal interest, and as incorporated by the Necessary and Proper Clause. To take the Commerce Clause for example, the first approach considers a conspiracy to disrupt interstate commerce enough of a sufficient threat to draw it within congressional reach,[91] while the latter considers the prosecution of conspiracy as part of a broader scheme to stem the substantive threat to interstate commerce.[92]

The Supreme Court laid out the bounds of the first conception in *United States v. Feola*.[93] That case considered a conviction for conspiracy to assault an on-duty, but undercover, federal officer.[94] The question was that since the requirement of a federal officer for the substantive offense (assault on a federal officer) was jurisdictional rather than requiring scienter, did the repetition of that element in the conspiracy charge also lack a scienter requirement.[95] The Court concluded that the general federal conspiracy provision requires no more mens rea on each element than the substantive offense.[96] However, it also entertained a related question of whether "conspiracy to assault" and "conspiracy to assault a federal officer" were substantively different conspiracy offenses, and thus the defendant's knowledge of the fact that the victim is a federal officer becomes important again as part of the *aim* of the conspiracy.[97] In the specific case concerning assault on a federal officer, the Court held that there was no additional 'bad

89. United States v. Carvajal, 942 F. Supp. 2d 219, 259–60 (D.D.C. 2013) (citing State v. Buchanan, 5 H. & J. 317, 334–36 (Md. 1821), for its discussion of English conspiracy law).

90. *See supra* note 77 and accompanying text.

91. *E.g.*, United States v. Davila, 461 F.3d 298, 306–07 (2d Cir. 2006); United States v. Jannotti, 673 F.2d 578, 592 (3d Cir. 1982).

92. *E.g.*, United States v. Marco, 252 F. App'x 70, 76 (6th Cir. 2007) (citing United States v. Genao, 79 F.3d 1333, 1336 (2d Cir. 1996)); *see* United States v. Drachenberg, 623 F.3d 122, 124 (2d Cir. 2010) (tax power); c*f.* Gonzales v. Raich, 545 U.S. 1, 33–38 (2005) (Scalia, J., concurring).

93. 420 U.S. 671 (1975).

94. *Id.* at 672–75.

95. *Id.* at 676–77.

96. *Id.* at 684, 692.

97. *Id.* at 693.

content' supplied by the intended victim being a federal officer rather than a civilian, so there was no revamped knowledge requirement for the conspiracy charge.[98]

The Court kept open the possibility that the knowledge of the jurisdictional element could be relevant for conspiracy. For inchoate conspiracies,

> it must be established whether the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction. . . . Where the object of the intended attack is not identified with sufficient specificity so as to give rise to the conclusion that had the attack been carried out the victim would have been a federal officer, it is impossible to assert that the mere act of agreement to assault poses a sufficient threat to federal personnel and functions so as to give rise to federal jurisdiction.[99]

Inchoate conspiracies continue to be prosecuted under various Article I grants of power because the conspiracy itself poses a specific enough threat to that congressional interest.[100] A second common understanding of the basis for conspiratorial liability uses the Necessary and Proper Clause to extend Article I jurisdiction. This argument is fairly straightforward. Congress legitimately seeks to protect a certain Article I concern; it is better able to address that evil if it can punish conspirators as well as substantive offenders so that charge is within the Necessary and Proper Clause's reach.[101] Consistent with this understanding, Congress regularly uses the Necessary and Proper Clause to criminalize inchoate or extraterritorial conspiracies whose criminal object is subject of Article I concern.[102]

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98. *Id.* at 695.

99. *Id.* at 695–96.

100. *E.g.*, United States v. Amato, 31 F. App'x 21, 26 (2d Cir. 2002) (summary order); United States v. Cox, 705 F. App'x 573, 576 (9th Cir. 2017) (mem.).

101. *See, e.g.*, United States v. Comstock, 560 U.S. 126, 133–36 (2010) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 408–12 (1819), and Sabri v. United States, 541 U.S. 600, 605 (2004)).

102. *E.g.*, United States v. Bahel, 662 F.3d 610, 630 (2d Cir. 2011) (collecting Spending Power cases); United States v. Ferreira, 275 F.3d 1020, 1027–28 (11th Cir. 2001) ("the Commerce Clause, the Law of Nations Clause, or from [Congress's] broad power to regulate immigration and naturalization"); United States v. Orange, 49 F. App'x 815, 817–18 (10th Cir. 2002) (Taxing Power); Hamdan v. Rumsfeld, 548 U.S. 557, 591–92 & n.21 (2006) (Declare War, Law of Nations, and Regulation of Armed Forces Powers); *see also* Al Bahlul v. United States, 767 F.3d 1, 72–73 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring in part and

3. Is Stopping the Boat Necessary?

During the normal course of an MDLEA enforcement action, the United States Coast Guard will encounter and arrest defendants while they are onboard a vessel amenable to the statute.[103] If the ship is stateless, international law allows any state to "interdict and exercise physical control" over it.[104] Jurisdiction over the ship transfers to jurisdiction over those aboard under both early Supreme Court precedent and current international law.[105] The theory is that a stateless ship is not protected by any nation and so any state may treat it as one of its own vessels, that is like its own territory, and may subject those aboard to domestic laws just as if they were committed within that nation's territory.[106]

The First Circuit in an en banc decision raised an interesting dilemma of whether this principle of jurisdiction requires some actual contact between law enforcement and defendants on the high seas, or whether jurisdiction inheres in defendants' very presence on a stateless vessel on the high seas.[107] In his concurrence, Judge Barron argued that both the Constitution and the MDLEA clearly authorized prosecution even without Coast Guard contact with defendants on the high seas.[108] He cited to an early Supreme Court case, *United States v. Holmes*, upholding a conviction for a murder on board a Spanish ship turned pirate.[109] The Supreme Court held that once this ship was piratical, Congress had jurisdiction to punish this crime,[110] and that the

dissenting in part); United States v. Lawrence, 727 F.3d 386, 396–97 (5th Cir. 2013) (Treaty Power).

103. United States v. Aybar-Ulloa, 987 F.3d 1, 1–14 (1st Cir. 2021) (en banc); Kontorovich, *supra* note 11, at 1193.

104. *Aybar-Ulloa*, 987 F.3d at 6.

105. *Id.* at 7–14.

106. *Id.* at 9.

107. *Compare id.* at 14:

> we opt not to decide one way or the other whether the United States may prosecute a foreign citizen engaged in drug trafficking on a stateless vessel where the United States never boarded and seized the vessel. Nor do we reach the question of whether the MDLEA by its own terms reaches such a situation.

With id. at 18 (Barron, J., concurring) (disagreeing with such a distinction).

108. Other courts have suggested similar results. United States v. Carvajal, 924 F. Supp. 2d 219, 258 (D.D.C. 2013) ("Ultimately, the place of seizure is irrelevant to the Court's jurisdiction once the Defendants were brought to this country inasmuch as the Court finds that the vessel in question traveled on the high seas."), *aff'd sub nom.* United States v. Miranda, 780 F.3d 1185 (D.C. Cir. 2015).

109. United States v. Holmes, 18 U.S. (5 Wheat.) 412, 412–14 (1820).

110. *Id.* at 418–19.

nationality of those involved was irrelevant.[111] In the First Circuit case (*Aybar-Ulloa*), Judge Barron argued that since Holmes was only charged for murder once he returned to America and was not arrested by authorities while on the ship, on point Supreme Court precedent holds that the *Aybar-Ulloa* extension of jurisdiction comports with the Felonies clause.[112] According to this view, the territorial argument about stateless vessels being subject to the territorial jurisdiction of the United States is taken literally. Just as Massachusetts could punish a murder that occurred within its borders even if it did not accost the defendant there, so too can the United States punish a murder that occurred within a stateless ship even if it did not arrest the defendant on that ship.[113] Judge Barron also noted an even more extreme view of the Felonies clause advanced by Justice Story and noted in dicta in the *Holmes* decision, under which a defendant might be prosecuted for a domestic felony even if he was not on any ship but floating in the high seas.[114]

The majority opinion did not disagree with Judge Barron's argument about the "being on the high seas" logic in *Holmes*.[115] Rather, it held that—without deciding whether the Felonies clause *requires* compliance with contemporary international law[116]—the arrest of Aybar-Ulloa in this case did not violate international norms of jurisdiction.[117] Judge Kayatta found that international law permits any nation

111. *Id.* at 417.

112. *Aybar-Ulloa*, 987 F.3d at 22–26 (Barron, J., concurring).

113. *Id.* at 23 ("*Holmes* appears to state, then, that a foreign national is subject to the domestic criminal jurisdiction of the United States if he commits a felony while on a vessel on the high seas that is 'not lawfully sailing under the flag of any foreign nation.'") (citation omitted).

114. *Id.* at 26 n.13:

> Justice Story explained that the defendants could even be prosecuted if they had committed the murder while aboard no ship:
>
> > The statute refers as to locality to "the high seas" only, and it would be far to narrow a construction, to limit its operation to crimes committed on board of ships or vessels. . . . A man may in the sea murder another who is in the sea swimming, or on a plank or raft; and it is obvious, that when the death is by drowning, the murder is committed literally on the high seas, wherever the murderer may at the time be. . . . Every nation has concurrent jurisdiction with every other nation on the high seas; and when a crime is committed on the high seas, not on board any ship or vessel.
>
> In *Holmes* itself, moreover, the Supreme Court agreed that it makes no difference whether the offence was committed on board a vessel, or in the sea.

115. *Id.* at 8 (Kayatta, J., majority opinion).

116. The First Circuit later held that the Felonies Clause does require compliance with contemporary international law. United States v. Dávila-Reyes, 23 F.4th 153, 183 (1st Cir. 2022), *reh'g en banc granted, opinion withdrawn*, 38 F.4th 288 (1st Cir. 2022) (mem.).

117. *Aybar-Ulloa*, 987 F.3d at 4–5.

to "stop and board a stateless vessel on the high seas."[118] Once international law permits the authority to "interdict and exercise physical control over a stateless vessel," it also "renders stateless vessels susceptible to the jurisdiction of any State."[119] The final step holds that when a stateless vessel "becomes" subject to the territorial jurisdiction of a state, so too do those individuals on board.[120]

At first, the distinction between Judge Kayatta's understanding and that of Judge Barron seems narrowly about whether contemporary or nineteenth-century guidelines determine the Felonies clause analysis.[121] In reality, the conceptual distinction is much larger. The majority believes that the jurisdictional grant arrives in two steps. First, the United States exercises jurisdiction to stop and seize a foreign ship.[122] Second, since the United States has seized the vessel, the vessel becomes subject to American territory and therefore subject to normal criminal jurisdiction.[123] American jurisdiction over MDLEA defendants inheres only when American personnel actually seize a vessel because that is the only time when international law considers that vessel subject to the jurisdiction of the United States. This is in stark contrast to Judge Barron's view, under which American jurisdiction to stop and seize the ship *reflects* (rather than creates) general jurisdiction over those aboard stateless vessels.[124] Of course, Judge Kayatta is not

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118. *Id.* at 6 (citing United Nations Convention on the Law of the Sea art. 110(1)(d), Dec. 10, 1982, 1833 U.N.T.S. 397, and RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 522(2)(b) (AM. L. INST. 1987)).

119. *Id.* (internal quotations omitted).

120. *Id.* at 7–9. Judge Kayatta continued to determine that the theory extended to narcotics trafficking as opposed to being limited to certain "universal jurisdiction" crimes. *Id.* at 10–12. Judge Barron, however, found that this conclusion was not obvious under current international law. *Id.* at 16–17 (Barron, J., concurring).

121. *Compare id.* at 8 (Kayatta, J., majority opinion) ("the sometimes challenging syntax in *Holmes*, *Furlong*, and *Klintock*, plus the possibility that international law itself now differs materially from international law as understood 200 years ago, counsel against resting our conclusion solely on those cases if we do not need to do so. And we do not."), *with id.* at 26 (Barron, J., concurring):

> I am convinced that *Holmes* requires that we conclude that the Define and Punish Clause is best understood not to contain an implicit limit that would prevent the United States from prosecuting foreign nationals for their felonious conduct on stateless vessels in international waters . . . as between the uncertain or even skeptical views of more contemporary commentators on the law of nations and the seemingly unqualified statements of the Supreme Court in *Holmes*, I am persuaded that the latter must control our judgment as a lower court in this case.

122. *Id.* at 16–18 (Barron, J., concurring) (describing the majority position).

123. *Id.* at 17 (questioning whether this proposition truly obtains under current international law).

124. *Id.* at 20, 25–26.

bound to apply solely the logic advanced above—he explicitly declined "to decide one way or another whether the United States may prosecute a foreign citizen engaged in drug trafficking on a stateless vessel where the United States never boarded and seized the vessel."[125]

While this "tag" theory remains dicta and subject to some doubt,[126] there is a certain logic to it, at least in terms of fairness. Normally, the flag state would have jurisdiction over a given ship.[127] While on the high seas, those on that ship would only comply with the laws of the flag state. When the ship sails without a flag, those on it are amenable to the jurisdiction of any state, but they should only be amenable to the jurisdiction of a single state at any given time, so the argument for fairness goes. To hold otherwise could have unfair consequences like double jeopardy prosecutions in dozens of countries, even though such results are patently legal under the current regime.[128] On the other hand, a seaman would not know ex ante which nation's ships will accost him and so would be unable to anticipate which national law to comply with even under the "tag" theory. Further, this would accord with Professor Kontorovich's theory that the Felonies Clause requires a nexus with the United States,[129] although the large majority of courts has rejected this assertion.[130]

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125. *Id.* at 14 (Kayatta, J., majority opinion).

126. *Id.* at 18 (Barron, J., concurring):

> I see no clear support in either case law or commentary for the comparatively modest proposition that persons on stateless vessels that a foreign country's officials have seized and boarded pursuant to their recognized right to visit it are subject to that country's territorial jurisdiction under international law. Instead, I find no judicial precedent supporting that particular proposition, and much debate within the relevant commentary about its soundness.

127. *Id.* at 5 (Kayatta, J., majority opinion); United Nations Convention on the Law of the Sea, *supra* note 118, art. 217.

128. Gamble v. United States, 139 S. Ct. 1960, 1967 (2019) (successive prosecution by federal and state governments does not ordinarily violate the Double Jeopardy Clause, much in the same way that successive prosecution by different national governments would not violate the Clause). This situation is possible under international law. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 407 Reporter's Note 3 (AM. L. INST. 2017).

129. Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149, 167–68 (2009) (summarizing his theory).

130. *E.g.*, United States v. Van Der End, 943 F.3d 98, 105 (2d Cir. 2019) ("We have previously held that the MDLEA's predecessor statute did not, as a statutory matter require a nexus. . . . [D]ue process does not require that there be a nexus . . . ."); *Aybar-Ulloa*, 987 F.3d at 8–9 (collecting cases); United States v. Davila-Mendoza, 972 F.3d 1264, 1275 n.6 (11th Cir. 2020) (the requirement of nexus in the Foreign Commerce Clause "does not in any way undercut our holdings that no nexus is necessary where the MDLEA is an exercise of Congress's express authority to define and punish conduct occurring on the high seas pursuant to the Felonies Clause."). The only circuit that has found a nexus requirement originates it in

With these background conditions set—the debate of how the jurisdictional provision works and the question of whether the MDLEA requires "tag" jurisdiction—we can productively analyze the MDLEA's application to land-based conspirators. But first, the practical policy importance of such questions must be clarified.

D. International Comity Concerns Abound in MDLEA Litigation

Since the earliest days of the Republic, commentators have worried about the increasing scope of extraterritorial jurisdiction under the Felonies Clause.[131] First, there is consistent concern over policies through which Congress exceeds its Article I power.[132] Second, MDLEA prosecutions subject over 500 foreigners per year to American jurisdiction, raising significant questions of criminal justice and the just reach of American extraterritoriality.[133] Third, the split in the framework of jurisdiction of the MDLEA raises significant federalism questions, as it may improperly remove determinations from the court and the jury and grant them to the executive.[134] These constitutional questions of how far beyond the United States' borders prosecutors may enforce its criminal provisions are pressing enough to warrant investigation.

Further, the prosecution not just of foreigners captured by the Coast Guard on the high seas but also those who never left their home

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Fifth Amendment Due Process rather than the Felonies Clause. United States v. Perlaza, 439 F.3d 1149, 1160, 1163 (9th Cir. 2006), *overruled on other grounds by* Alleyne v. United States, 570 U.S. 99 (2013).

131. Reply Brief for Petitioner at 4, Vargas v. United States, *cert. denied*, 140 S. Ct. 895 (2020) (No. 19-6039).

132. *Id.* at 12 (citing Bond v. United States, 572 U.S. 844, 853–54 (2014), and Gonzales v. Raich, 545 U.S. 1, 9 (2005)); *see also* United States v. Dávila-Reyes, 23 F.4th 153, 194 (1st Cir. 2022) ("What the United States cannot do consistently with the Constitution, however, is arrest and prosecute foreigners on foreign vessels by relying on a concept of statelessness that conflicts with international law."), *reh'g en banc granted, opinion withdrawn*, 38 F.4th 288 (1st Cir. 2022) (mem.).

133. Reply Brief for Petitioner at 14, *Vargas*; *see also* Aquila, *supra* note 51 at 2988–89; *accord* Kontorovich, *supra* note 11, at 1195

134. *See* Petitioner Brief for Certiorari at 15–19, Mejia v. United States, *cert. denied*, 139 S. Ct. 593 (2018) (No. 18-5702); Petitioner Brief for Certiorari at 18–22, Carrasquilla-Lombada v. United States, *cert. denied*, 139 S. Ct. 480 (2018) (No. 18-5534) (discussing the interaction between § 70504 and Crawford v. Washington, 541 U.S. 36 (2004)); United States v. Prado, 933 F.3d 121, 156–57 (2d Cir. 2019) (Pooler, J., concurring) (discussing the interaction between § 70504 and Torres v. Lynch, 578 U.S. 452 (2016)). *But see* United States v. Rojas, 53 F.3d 1212, 1214–15 (11th Cir. 1995) (§ 70502 does not violate separation of powers); United States v. Cabezas-Montano, 949 F.3d 567, 588 n.11 (11th Cir. 2020).

countries raises acute concerns that the United States could offend other nations by intruding on their territorial sovereignty. Both sides of the § 70504(a) split theorize that Congress removed jurisdiction as an element of an MDLEA offense to give more weight to international comity. Judge Srinivasan argued that Congress framed the jurisdictional aspect as a subject-matter one to ensure that the defense of extraterritoriality could be raised at any point in litigation, allowing every chance for foreigners to avoid conviction.[135] On the other hand, Judge Leval was convinced that the prescriptive jurisdictional limit reflected a congressional concern of overreach beyond the bounds of international law.[136] In either case, the courts have recognized the significant impact MDLEA prosecutions can have on American foreign relations. Further, some commentators worry about whether the foreign nations implicated, primarily Central and South American states, truly consent to MDLEA prosecutions or are coerced by promises of U.S. aid.[137] Yet others emphasize that the MDLEA's extraterritorial application is central for a consistent and enforceable anti-smuggling regime that enjoys broad international support.[138]

Congress's attempt to criminalize maritime drug trafficking has led to significant legal questioning around three major areas: the distinction between subject-matter and legislative jurisdiction; the interaction between Article I jurisdiction and conspiracy law; and the potential requirement of "tag" jurisdiction under the felonies clause. Congress's expansive reach raises serious policy questions, which warrant exploration of how circuit courts think about applying the MDLEA to land-based conspirators.

II. NEW PROBLEMS ARISE WHEN EXTENDING THE § 70504(A) SPLIT TO CONSPIRACY

Under a classic substantive MDLEA prosecution, the conspiracy provision in § 70506 is used as a sentencing add-on for violators of § 70503.[139] Recently the United States has used § 70506's

135. United States v. Miranda, 780 F.3d 1185, 1194–96 (D.C. Cir. 2015); *accord Prado*, 933 F.3d at 158–59 (Pooler, J., concurring).

136. *Prado*, 933 F.3d at 136–37, 146–47.

137. Kontorovich, *supra* note 11, at 1242–43.

138. Aaron Casavant, *In Defense of the U.S. Maritime Drug Law Enforcement Act: A Justification for the Law's Extraterritorial Reach*, 8 HARV. NAT'L SEC. J. 191, 201–217, 232–33 (2017).

139. *Cf.* United States v. Ballestas, 795 F.3d 138, 146 (D.C. Cir. 2015) (criticizing the idea that only those on board should be amenable to § 70506); United States v. Alarcon Sanchez, 972 F.3d 156, 165 (2d Cir. 2020) (noting that the attempt-and-conspiracy provision

conspiracy provisions to prosecute land-based conspirators totally innocent of a § 70503 violation.[140] The theoretical difficulty is that if there is some sort of geographical limitation of the MDLEA to the high seas—whether statutory or constitutional—why should land-based acts be criminalized? Three circuits have addressed this issue head-on, and all have concluded that the MDLEA does extend to land-based conspirators. In each case, law enforcement agents have intercepted a vessel properly subject to American jurisdiction and prosecuted land-based conspirators as part of the broader action.[141] The D.C. Circuit first justified jurisdiction over land-based conspirators based on *Pinkerton* liability.[142] Judge Srinivasan argued that, since American conspiracy law considers the acts of any partner in furtherance of a conspiracy to be attributable to each and every conspirator, there is jurisdiction insofar as the act of possession on board a stateless vessel satisfies jurisdiction.[143] He phrased this theory clearly in a later case: "land-based co-conspirators . . . too would effectively be considered to have committed a prohibited act on board."[144] A per curiam opinion of the Eleventh Circuit has positively cited the D.C. Circuit's theory without emendation.[145] Judge Pooler for the Second Circuit considered the *Pinkerton* theory, but added that the prosecution of conspirators could be maintained under the Necessary and Proper Clause for otherwise enforcing the MDLEA under the Felonies Clause.[146]

The courts that have so far considered the issue of land-based conspirator liability have rejected some commentators' calls for

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may reach onshore conspirators); Marshall B. Lloyd & Robert L. Summers, *Pirates on the High Seas: An Institutional Response to Expanding U.S. Jurisdiction in Troubled Waters*, 38 B.U. INT'L L.J. 75, 95–100 (2020) (discussing substantive and conspiracy prosecutions under the Drug Trafficking Vessel Interdiction Act Pub. L. 110-407, 112 Stat. 4296 (2008) (codified at 18 U.S.C. § 2285 and 46 U.S.C. § 70508)).

140. *E.g.*, *Ballestas*, 794 F.3d at 138–46; *Alarcon Sanchez*, 972 F.3d at 165.

141. *Ballestas*, 795 F.3d at 146–47; United States v. Mosquera-Murillo, 902 F.3d 285, 289–91 (D.C. Cir. 2018); *Alarcon Sanchez*, 972 F.3d at 164–68; United States v. Cardona-Cardona, 500 F. Supp. 3d 123, 132–33 (S.D.N.Y. 2020); United States v. Cifuentes-Cuero, 808 F. App'x 771, 776 (11th Cir. 2020) (per curiam).

142. *Ballestas*, 795 F.3d at 146; *see infra* notes 223, 253–273 and accompanying text. *See generally* Pinkerton v. United States, 328 U.S. 640 (1946); Kassie Miller et al., *Federal Criminal Conspiracy*, 59 AM. CRIM. L. REV. 823, 847–48 (2022).

143. *Ballestas*, 795 F.3d at 146–47.

144. *Mosquera-Murillo*, 902 F.3d at 291.

145. *Cifuentes-Cuero*, 808 F. App'x at 776.

146. *Alarcon Sanchez*, 972 F.3d at 167–68; *see also Cardona-Cardona*, 500 F. Supp. 3d at 134 (characterizing *Alarcon Sanchez*'s holding as resting on the Necessary and Proper Clause theory).

limiting the extraterritorial application of the MDLEA.[147] Their theories of conspiratorial liability reflect a more capacious understanding of the issues the MDLEA faces on both constitutional and statutory grounds than the commentators suggest,[148] as has been borne out through the judicial interpretation of the interaction between §§ 70503 and 70504. I will argue that the divergent theories of that interaction—namely the circuit split on whether the "while on board a covered vessel" clause limits subject-matter or legislative jurisdiction—influences the explanation of conspiratorial jurisdiction under § 70506. This analysis will ultimately suggest a potential differentiation between the courts on conspiracies without a substantive MDLEA violation, with courts that find the "while on board" clause as reflecting legislative jurisdiction allowing for a broader application of inchoate conspiracy prosecutions. However, the additional evidentiary concerns present in the legislative jurisdiction courts may limit excessive prosecutions.

III. THE ALIGNMENT OF §§ 70503, 70504, AND 70506 ADDRESSES LAND-BASED AND INCHOATE CONSPIRACIES

A. The Subject-Matter Jurisdiction Versus Legislative Jurisdiction Circuit Split

This Section explains the circuit split about how to understand the interaction between § 70504's allocation of jurisdictional determination to the judge and § 70503's requirement for the substantive offense to be committed "while on board a covered vessel." It also describes the arguments that motivate each approach, which shed light on the courts' different visions of the MDLEA in general.

1. Motivating the Subject-Matter Jurisdiction Argument

Congress uses the Felonies Clause to prohibit knowing or intentional manufacture or possession with intent to distribute controlled substances while on board a vessel subject to the jurisdiction of the United States.[149] The simplest reading here is that Congress created a normal drug possession statute with the additional legislative element of being on board a ship subject to the jurisdiction of the United States

147. Aquila, *supra* note 51, at 2981–87 (discussing the lack of jurisdiction for onshore prosecutions).

148. *See id.*; *see also* Kontorovich, *supra* note 11, *passim*.

149. § 70503(a).

to tie the statute to the Felonies Clause.[150] This is parallel to the Commerce Clause hooks that feature in many other federal crimes.[151] As Judge Boudin put it,

> Congress asserted its own authority to regulate drug trafficking on some ships but not all ships and, in this context, used the word "jurisdiction" loosely to describe its own assertion of authority to regulate; it does the same thing whenever it fixes an "affects interstate commerce" or "involved a federally insured bank" as a condition of the crime.[152]

While elements of state crimes center predominantly on the substantive "evil" the state intends to regulate,[153] federal crimes also contain a "jurisdictional element [that] connects the law to one of Congress's enumerated powers, thus establishing legislative authority."[154] As noted above, it is likely jurisdictional elements still require a jury finding beyond a reasonable doubt, but are distinct from substantive elements in other contexts such as the presumption of mens rea and other matters of statutory interpretation.[155] So far, so good. Except, the MDLEA allocates determination of the jurisdictional element to the judge before trial and establishes a different standard of proof for its satisfaction.[156] It also declares that the finding of jurisdiction is not an element of the crime.[157] However, since the Supreme Court has held that Congress may not reallocate the constitutional right to a jury trial and burden of proof standards by reorganizing a statute, this arrangement casts serious doubt on the MDLEA's constitutionality as applied.[158]

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150. United States v. Prado, 933 F.3d 121, 138–39 (2d Cir. 2019).

151. Torres v. Lynch, 578 U.S. 452, 457, 464 (2016) (describing the interstate commerce element in 18 U.S.C. § 844).

152. United States v. González, 311 F.3d 440, 443 (1st Cir. 2002).

153. *Torres*, 578 U.S. at 457, 464, 467.

154. *Id.* at 467*; see also supra* Section I.C.1.

155. *Torres*, 578 U.S. at 468–69. Some lower courts have doubted whether the Supreme Court has definitively ruled on the required level of proof for jurisdictional elements but have nonetheless assumed the force of such a holding. *Prado*, 933 F.3d at 139 n.9.

156. §§ 70502(d)–(e), 70504(a).

157. § 70504(a).

158. *Prado*, 933 F.3d at 157 (Pooler, J., concurring) (citing United States v. Gaudin, 515 U.S. 506, 510 (1995) ("We have held that [the Fifth and Sixth Amendments] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.")). Judge Pooler did not consider *Gaudin*'s dictum about certain legal questions being allocated to the judge not

These constitutional problems are avoided if the jurisdictional element does not relate to the crime but instead controls federal courts' ability to rule on these charges.[159] Before the introduction of § 70504, several circuit courts had held that the jurisdictional element may have also been a substantive element of the crime, and that under either reading, it should be proven beyond a reasonable doubt at trial.[160] Congress sought to adjust this scheme and "overrule" circuit interpretation of the MDLEA so that it "unambiguously mandates that the jurisdictional requirement be treated only as a question of subject-matter jurisdiction for the court to decide."[161] Granting Congress its normal leeway to define the elements of a federal offense, courts recognized Congress as accomplishing its legislative goal by converting the jurisdictional element to subject-matter jurisdiction.[162]

As noted above, given the harshness of a jurisdiction-stripping rule, the Supreme Court has created a "bright line rule" requiring a "clear indication that congress wanted the rule to be jurisdictional."[163] The clarity of such an allocation is determined in light of the statute's text as well as context because it is supposed to track congressional intent.[164] Judges have argued that § 70504's "jurisdiction and venue" title suggests its provision's relation to subject-matter jurisdiction as venue has much more to do with the district court's ability to hear a

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requiring jury proof beyond a reasonable doubt. *See Gaudin*, 515 U.S. at 510 n.1 (citing United States v. Chandler, 752 F.2d 1148, 1151 (6th Cir. 1985) (describing 18 U.S.C. § 1001(a)'s materiality determination for false statements as "not an element of the offense that must be proved beyond a reasonable doubt but a 'judicially-imposed limitation to insure the reasonable application of the statute.'") (quotation omitted)). Although jurisdiction is a quintessentially legal question, its inclusion in § 70503 seems much closer to other jurisdictional elements than the materiality adjective in 18 U.S.C. § 1001.

159. *Prado*, 933 F.3d at 157 (Pooler, J., concurring) (construing § 70504 to refer to subject-matter jurisdiction avoids the above mentioned "constitutional concerns").

160. United States v. Tinoco, 304 F.3d 1088, 1106–07 (11th Cir. 2002). The beyond a reasonable doubt standard would become obvious after *Torres*. *See supra* notes 155 and 158.

161. *Tinoco*, 304 F.3d at 1106.

162. *Id.* at 1106–07; *accord* United States v. Bustos-Useche, 273 F.3d 622, 626 (5th Cir. 2001):

> Congress added subsection (f) [now § 70504(a)] to the statute in 1996. . . . Based on this addition to the statute, we conclude that the district court's preliminary determination of whether a flag nation has consented or waived objection to the enforcement of United States law is a prerequisite to the court's jurisdiction under § 1903 [now § 70503].

According to this argument, fundamentally the subject-matter jurisdiction element is not necessary either. *Tinoco*, 304 F.3d at 1110 n.21.

163. Henderson v. Shinseki, 562 U.S. 428, 435–36 (2011) (internal quotations omitted); *see supra* Section I.C.1.

164. *Henderson*, 562 U.S. at 435–36.

case than a substantive element of the crime.[165] By analogy, "[t]he subject of 'jurisdiction,' addressed in § 70504(a), is best understood likewise to address the authority of district courts to hear a case rather than Congress's (and its prosecutor's) authority to regulate."[166] Further, this interpretation that jurisdiction is not an element but is still required fits much more neatly into conceptions of subject-matter jurisdiction than another category of jurisdiction.[167]

The D.C. Circuit found in *Miranda* that the context surrounding Congress's enactment of § 70504 encourages reading the provision as controlling subject-matter jurisdiction.[168] Since the MDLEA has broad extraterritorial application, conceptualizing the jurisdictional hook as preliminary to and necessary for the court to hear a case might better limit convictions upsetting international comity.[169] These courts assumed that Congress feared executive overreach in arresting certain foreign nationals, so it ensured that the jurisdictional element would enjoy unflagging scrutiny as it is entirely non-waivable even after a guilty plea.[170] The statute's focus on foreign consent and cooperation for obtaining jurisdiction over flagged ships in § 70502(c)–(d) reinforces the centrality of court review of jurisdictional issues.[171] A foreign state can be ensured that it will retain the right at any point in the litigation to assert its national interests against American actions.[172]

According to this theory, extraterritorial application of the MDLEA has two separate limits applicable to different actors in the litigation process. The first is the congressionally-enacted subject-matter jurisdiction stripping, as detailed above. This limit applies to

165. United States v. Miranda, 780 F.3d 1185, 1196 (D.C. Cir. 2015).

166. *Id.*; *accord* United States v. Prado, 933 F.3d 121, 156 (2d Cir. 2019) (Pooler, J., concurring).

167. *Prado*, 933 F.3d at 157–58 (Pooler, J., concurring) ("I reject the notion that Congress instead permissibly created a 'preliminary question[] of law,' 46 U.S.C. § 70504(a), that is not a question of subject-matter jurisdiction or an 'element of an offense,' *id.*, but is still an essential ingredient to a criminal conviction.").

168. *Miranda*, 780 F.3d *passim*.

169. *Id.* at 1193.

170. *Id.*:

> [T]here are strong reasons to conclude that Congress intended the 'jurisdiction of the United States with respect to a vessel' to be non-waivable and non-forfeitable by a defendant and to be independently confirmed by courts regardless of whether it is raised. In particular, Congress made the requirement a jurisdictional one in order to minimize the extent to which the MDLEA's application might otherwise cause friction with foreign nations.

See also id. at 1194–95 (subject-matter jurisdiction not waivable).

171. *Id.* at 1194.

172. *Id.*

the court and serves to temper the general grant of criminal jurisdiction over "all offenses against the laws of the United States" in 18 U.S.C. § 3231.[173] The second limitation asserts that the prosecutors' application of the MDLEA to specific defendants exceeds the Article I grants of power, particularly under the Felonies Clause.[174] Although this limitation is constitutional—just like the limitation of federal subject-matter jurisdiction—it is a merits issue that a defendant may raise and also waive.[175] This is true even if an extraterritoriality analysis would suggest that the conduct at issue was not subject to congressional prohibition and therefore not "against the laws of the United States."[176] These two as-applied limitations cabin in a theoretically vast criminalization of any manufacture or possession of controlled substances with sufficient mens rea *anywhere* (since neither the Felonies Clause nor the "on board" limitation are *elements* of the crime).[177] The expansive application is confirmed by the courts' treatment of § 70503(b) as completely overwhelming the usual presumption against extraterritorial application.[178]

2. The Legislative Jurisdiction Response

Some courts have maintained the straightforward legislative jurisdictional reading because the subject-matter jurisdiction argument

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173. *Id.* at 1189.

174. *Id.* at 1190.

175. *Id.* at 1190–91. *See also supra* Section I.C.1.

176. *Miranda*, 780 F.3d at 1191 (citing Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 254 (2010)); *see Morrison*, 561 U.S. at 254:

> But to ask what conduct § 10(b) [of the Securities Exchange Act, codified at 15 U.S.C. § 78j(b)] reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, refers to a tribunal's power to hear a case. It presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief. The District Court here had jurisdiction under 15 U.S.C. § 78aa to adjudicate the question whether § 10(b) applies to National's conduct.

(internal quotations and citations omitted).

177. United States v. Prado, 933 F.3d 121, 140–41 (2d Cir. 2019):

> [T]he statute prohibits drug possession on foreign-registered vessels and on vessels in the waters of foreign nations, regardless of whether those nations consented. The United States Coast Guard would be authorized to enforce violations by boarding such vessels in the waters of foreign nations, seizing the drugs, and arresting foreign nationals in possession . . . . Passing a law purporting to criminalize drug possession by aliens on vessels registered in other nations or in the waters of other nations would create the very sort of affront to other nations that Congress clearly sought to avoid.

See also id. at 143 (discussing jurisdictional implications on administrative procedures).

178. United States v. Ballestas, 795 F.3d 138, 143–44 (D.C. Cir. 2015).

does have its difficulties. First, the significant extraterritorial reach of the statute—and particularly its administrative procedures—cuts against the idea that Congress sought to restrict subject-matter jurisdiction to preserve comity.[179] Second, the D.C. Circuit argument that foreign nations would want to preserve subject-matter jurisdiction challenges after guilty pleas seems somewhat tenuous considering regular international cooperation in drug enforcement schemes.[180] Third, it seems anomalous for Congress to grant jurisdiction when it already has 18 U.S.C. § 3231's catchall provision,[181] although the opacity dissipates if the jurisdictional provision *limits* § 3231's reach.[182]

In light of these difficulties and *Arbaugh*'s high bar for subject-matter jurisdiction stripping, courts[183] and commentators[184] have suggested that the simpler prescriptive-legislative reasoning is still preferable. In this reading—notably advanced by the Second Circuit in *Prado*—the jurisdictional clause tracks Congress's Article I grant of power in a way similar to a commerce element in many federal crimes.[185] Of course, jurisdictional elements are not required to be *solely* made in reference to an Article I power, but could serve a substantive function as well.[186] These elements "*normally* have nothing to do with the wrongfulness of the defendant's conduct" and so are presumptively excluded from a scienter requirement.[187] While the First Circuit in *González* held the MDLEA's jurisdictional element

179. *Prado*, 933 F.3d at 142–44 (discussing Title 46 administrative procedures).

180. *Id.* at 147; *see also* Casavant, *supra* note 138, at 202–06, 224.

181. *Prado*, 933 F.3d at 141; *see also id.* at 159 (Pooler, J., concurring) (calling this "the majority's most persuasive point").

182. *Id.* at 159 (Pooler, J., concurring) (Stating that "it does not necessarily follow that the MDLEA contains no limit on that seemingly blanket grant of subject-matter jurisdiction" and comparing 28 U.S.C. § 1291's grant of general appellate jurisdiction with 18 U.S.C. § 3742(a)'s limitation of appellate jurisdiction on sentencing.).

183. *Id.* at 132–33; United States v. González, 311 F.3d 440, 442 (1st Cir. 2002).

184. Aquila, *supra* note 51, at 2970–72; *see also* Ellex N. Loper, Case Note, *"Subject to the Jurisdiction of the United States" Statutory Reach or Subject Matter Jurisdiction?: Analysis of United States v. Prado*, 26 OCEAN & COASTAL L.J. 195, 206–09 (2021).

185. *González*, 311 F.3d at 442.

186. Torres v. Lynch, 578 U.S. 452, 468 (2016); *accord* United States v. Feola, 420 U.S. 671, 676 n.9 (1975) ("The question, then, is not whether the requirement is jurisdictional, but whether it is jurisdictional only" for the purpose of a mens rea requirement.). *Compare* Lewis v. United States, 523 U.S. 155, 183 (1998) (Kennedy, J., dissenting) (discussing a hypothetical state versus federal bank robbery statute for the purposes of the Assimilative Crimes Act), *with* Awawda v. Barr, 813 F. App'x 29, 32–33 (2d Cir. 2020) (considering state and federal requirements in parallel tax evasion statutes jurisdictional).

187. Rehaif v. United States, 139 S. Ct. 2191, 2196 (2019) (emphasis added).

was a run-of-the-mill invocation of Article I authority,[188] the Second Circuit's interpretation in *Prado* suggests Congress more actively tailored the statute's coverage to fit its real policy goals.[189] The *Prado* court argued that Congress intended to avoid conflict with foreign nations and international law, so it limited the MDLEA's application to situations in which a ship was stateless or the interested state consented to American enforcement.[190]

This reading solves some of the problems the Second Circuit raised against *Miranda*: Congress is more likely to avoid extraterritorial conflict through direct limitation of a statute's coverage than through a convoluted subject-matter jurisdiction scheme;[191] its interpretation is more in line with *Arbaugh*;[192] and its interpretation melds better with the rest of Title 46.[193] However, the Second Circuit's substantive reading of the jurisdictional provision makes it seem even more like an element of an MDLEA violation. The court recognized that Congress's allocation of this element to the judge would likely violate the Constitution as described above,[194] but suggested that when Congress enacted § 70504 in 1996 the Supreme Court had not clarified the constitutional implications of allocating jurisdictional elements.[195] The legislative jurisdiction theory is rather intuitive then: Congress enacted § 70504 in 1996 when it thought such a move was permissible. Later Supreme Court rulings suggest that Congress was mistaken in its interpretation of the Sixth Amendment, but there is no reason to assume that in 1996 Congress *intended* to not violate the Supreme

188. 311 F.3d at 443 ("Congress . . . does the same thing whenever it fixes an 'affects interstate commerce' or 'involved in a federally insured bank' as a condition of the crime.").

189. 933 F.3d 121, 136–37 (2d Cir. 2019).

190. *Id.* at 136–38, 138 n.8.

191. *Id.* at 138.

192. *Id.* at 135 (highlighting how extreme subject-matter jurisdiction stripping is).

193. *Id.* at 142–44.

194. *Id.* at 139 n.9:

> [T]he Court's utterances in *Torres* and *Taylor* [v. United States, 579 U.S. 301, 308 (2016)] increase the likelihood that the Court will invalidate § 70504(a)'s provision that the jurisdiction of the United States be determined *solely* by the trial judge. In future prosecutions under § 70503 with respect to vessels "subject to the jurisdiction of the United States," trial courts might well be advised after making the preliminary determination required by § 70504(a) so that the trial may proceed, to submit the issue of jurisdiction over the vessel to the jury notwithstanding the statutory word "solely."

See also supra note 154 and accompanying text.

195. *Prado*, 933 F.3d at 139 ("[A]s of 1996, the Supreme Court had made no such ruling [referring to *Torres*], and there is no reason to suppose that Congress believed it could not, consistent with the Constitution, give the court the sole authority to determine a jurisdictional element.").

Court's ruling in 2016.[196] Therefore, the simplest way to read the MDLEA's jurisdictional provisions is as referring to legislative jurisdiction and as Congress illicitly allocating that determination to the courts.[197]

B. Circuit Treatment of Land-Based Conspirators: The Legislative Approach

So far, the circuit courts have agreed that at least when some conspirators commit a substantive MDLEA violation on the high seas, their land-based partners are subject to § 70506(b) conspiratorial liability.[198] On the level of statutory interpretation, the courts have concluded that since the substantive provision of the MDLEA clearly extends extraterritorially, and ancillary offenses like conspiracy generally have extraterritorial application at least coterminous with the substantive offense, the conspiracy provision "also has extraterritorial reach."[199] This interpretation makes sense: By enacting the MDLEA, "Congress sought to address concerns about difficulties encountered in prosecuting persons involved with shipments of drugs to the United States on vessels, both with respect to the crew on board and others associated with the enterprise."[200] Covering land-based conspirators would allow Congress to better stem the international drug trade

196. There are certain other constitutional issues that arise through § 70502's scheme of establishing jurisdiction under § 70503, but these are accessory to the § 70504(a) determination. *Compare* United States v. Nunez, 1 F.4th 976, 987–89 (11th Cir. 2021) (since jurisdiction is "not an element of the crime . . . the admission of documentary evidence to prove jurisdiction under the Act, without affording the defendant an opportunity to cross-examine the declarant, does not violate the Confrontation Clause."), *with* United States v. Van Der End, 943 F.3d 98, 102–04 (2d Cir. 2019) (following the legislative jurisdiction reading in *Prado*, MDLEA defendants enjoy Confrontation Clause and jury trial rights on jurisdictional questions, but these may be waived under Boykin v. Alabama, 395 U.S. 238 (1969) and McMann v. Richardson, 397 U.S. 759 (1970)). For more on this, see *Nunez*, 1 F.4th at 984 (constitutional vagueness concerns over § 70502(d) avoided if jurisdiction is not an element); Brief for the United States in Opposition to Certiorari at 16–17, Vargas v. United States, *cert. denied*, 140 S. Ct. 895 (2020) (No. 19-6039) (analogizing to double jeopardy).

197. *See* Edmond v. United States, 520 U.S. 651, 658 (1997). *See generally* Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331 (2015).

198. *See supra* note 141 and accompanying text.

199. United States v. Ballestas, 795 F.3d 138, 144 (D.C. Cir. 2015).

200. *Id.* at 145.

because it would apply to "drug kingpins and other conspirators who facilitate and assist in carrying out trafficking schemes."[201]

Judge Pooler—who wrote the concurrence in *Prado*—addressed the land-based conspiracy question for the Second Circuit in *Alarcon Sanchez*. In that case, the Department of Homeland Security was investigating a Colombian drug cartel ring, tracking Daniel German Alarcon Sanchez among others.[202] An undercover agent met with Alarcon Sanchez in Bogotá in order to work out the details of how the cartel would ship narcotics from Colombia to Australia.[203] The agent arranged to provide an American-registered vessel for the shipment, and Alarcon Sanchez said his group would meet the agent in two speed boats to transfer the narcotics.[204] On the date of the transfer, the United States Navy intercepted an Ecuadorian ship, and after receiving permission from that state, arrested its crewmembers—Alarcon Sanchez's conspirators—and applied American law.[205] Alarcon Sanchez was not on board, nor did he ever leave Colombia, but was indicted for conspiracy to violate the MDLEA.[206]

The court began its analysis by defining the conspiracy violation. Section 70506(b) criminalizes conspiracy to violate § 70503. Since the Second Circuit in *Prado* determined that the jurisdictional provision in § 70503 targeted legislative jurisdiction and was likely an element of an MDLEA offense, Judge Pooler naturally replicated it in the conspiracy elements.[207] She rephrased § 70506(b) as the MDLEA criminalizes "attempting to engage in prohibited drug trafficking activity on board a covered vessel or conspiring with others to do so."[208] Central to her argument is that the *activity* has to be on board a covered vessel, rather than the individuals involved in that activity.[209] The judge observed, "[t]he attempt-and-conspiracy provision . . . requires only that the object of the conspiracy encapsulate conduct that violates

201. *Id.*; *accord* United States v. Alarcon Sanchez, 972 F.3d 156, 166 (2d Cir. 2020). *But see* Aquila, *supra* note 51, at 2982–87 (arguing against this interpretation of the MDLEA's scope). While Aquila's approach is interesting and provocative, no courts have agreed with it, and it is somewhat beyond the bounds of this Note which analyzes circuit theories that assume § 70506(b) applies extraterritorially.

202. *Alarcon Sanchez*, 972 F.3d at 159–60.

203. *Id.* at 160.

204. *Id.*

205. *Id.* at 160–61.

206. *Id.* at 161.

207. *Id.* at 164.

208. *Id.*

209. *Id.* at 165.

one of the specified narcotics trafficking prohibitions on a covered vessel."[210] By including § 70503's jurisdictional provision in the § 70506(b) offense, Congress was able to maintain the legislative focus on certain vessels—those that are stateless or for which the otherwise controlling jurisdiction has consented to American prosecution—and not others.[211]

In this case the government argued that the MDLEA's conspiracy provision can still constitutionally apply here either because of "settled principles of conspiracy law" or because of the Necessary and Proper Clause.[212] Judge Pooler only addressed the second argument.[213] The Necessary and Proper Clause grounds exercises of congressional power that are "conducive" and "rationally related to the implementation of a constitutionally enumerated power."[214] The goal of the statute is to prosecute and stem drug trafficking on the high seas.[215] Congress could rationally conclude that "the conspirators most likely to control, direct, finance, and profit from such drug trafficking are more apt to remain on land than to venture on the high seas."[216] Therefore, Congress was rational in concluding that it was necessary and proper to convict all possible conspirators—whether land-based or accosted on the high seas.[217]

The Second Circuit's explanation of § 70506(b)'s application is very fitting. It argued that § 70503's jurisdictional provision controlled legislative rather than subject-matter jurisdiction, which gives good reason to think that Congress believed the high seas element to be important for its exercise of jurisdiction here.[218] By that understanding, land-based conspirators would not fall under a "high seas" jurisdictional element, and are excluded from the Felonies Clause

210. *Id.*

211. *Id.* at 168. *See supra* Section III.A.2.

212. *Alarcon Sanchez*, 972 F.3d at 167.

213. *Id.* The first argument is more in line with Judge Srinivasan's approach. *See infra* Section III.C.

214. United States v. Comstock, 560 U.S. 126, 132–35 (2010) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 408–12 (1819), and Sabri v. United States, 541 U.S. 600, 605 (2004)).

215. *Alarcon Sanchez*, 972 F.3d at 167.

216. *Id.*

217. *See also supra* Section I.C.2.

218. *See* United States v. Prado, 933 F.3d 121, 132–33 (2d Cir. 2019); *see also* United States v. González, 311 F.3d 440, 442 (1st Cir. 2002).

grant of power.[219] Thus, conceptualizing conspiratorial liability as ancillary to—or necessary and proper for—substantive MDLEA liability was appealing to Judge Pooler. Land-based conspirator's conduct is not included within the central grant of power in the Felonies Clause but is certainly reasonably adopted—or necessary and proper—for the congressional use of the Felonies Clause to stem the maritime drug trade.

On this understanding, while the actual commission of the substantive MDLEA violation would make certain the connection between the § 70506(b) violation and the interests of § 70503, it is not strictly necessary. Consider a situation like *Davila-Mendoza* above. Davila-Mendoza and others planned to transfer 3,500 kilograms of marijuana from Jamaica to Costa Rica.[220] They created an adequate plan but were forestalled from leaving Jamaican waters because their engines stalled.[221] Under the *Alarcon Sanchez* approach, Davila Mendoza should have been convicted of a § 70506(b) violation: He conspired to transfer marijuana in violation of § 70503, and the fact that he never left Jamaica should not have been a sticking point. The only distinction here is that the associated conspiracy never accomplished a § 70503 violation because the ship never entered the high seas.[222] The anomaly is clear: two conspirators had identical plans but were subject to a conspiracy conviction differently based on whether their plans were accomplished.[223] Again, this violates the normal principle of conspiracy law that the substantive offense *need not* be completed to secure a conspiracy conviction.[224]

There are two potential explanations for this oddity. First, this case may fall in to the exception articulated in *Feola*.[225] In that case, the Supreme Court asserted that if the object of the conspiracy was too distant from the federal concern, or if the plan did not have enough

219. *Cf.* United States v. Morrison, 529 U.S. 598, 613 (2000) (discussing "jurisdictional elements").

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

221. *Id.*

222. *Id.* at 1268.

223. Note, this is distinct from the question of the different counts of liability which of course may turn on the actual accomplishments of co-conspirators. *E.g.*, United States v. Ashley, 606 F.3d 135, 143 (4th Cir. 2010) ("The *Pinkerton* doctrine is distinct from the substantive offense of conspiracy, which makes the very act of conspiring criminal. *See* 18 U.S.C. § 371. Instead, the *Pinkerton* doctrine is a means of apportioning criminal responsibility for the commission of substantive offenses."); *see also* Ocasio v. United States, 578 U.S. 282, 308–10 (2016) (Sotomayor, J., dissenting) (discussing *Pinkerton* liability).

224. *See supra* notes 21–30 and accompanying text.

225. *See supra* Section I.C.2.

certainty to endanger the federal interest, then Congress would lose federal jurisdiction over that conspiracy.[226] In this case, some of the variables in asserting American jurisdiction, namely various sorts of state cooperation elaborated in § 70502(c)–(e),[227] will be too speculative to sufficiently ground American jurisdiction. After all, the boat may or may not be stateless,[228] it is geographically possible the boat may or may not enter international waters,[229] and the otherwise controlling jurisdiction may or may not consent.[230]

This argument fits well with *Prado*'s more substantive legislative jurisdiction. That argument supposed Congress's particular concern was with drug trafficking on certain boats but not others, and consequently limited the applicability of the MDLEA to foreign vessels without the flag state's permission.[231] The more the American motivation to punish the act includes being on a vessel subject to the jurisdiction of the United States, the more concerned a court should be about the lack of actual threat to American interests. This is because if the United States is truly only concerned with narcotics trafficking aboard a select category of vessels *and not others*—likely because of concerns about comity[232]—then the federal interest will be sufficiently endangered only if there is certainty about the nature of the ship, its trajectory, and the cooperation with other countries. Theoretically, one could prove intent without an overt act, and while this would be rare,[233]

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226. *See* United States v. Feola, 420 U.S. 671, 695–96 (1975).

227. *See supra* Section I.B.

228. United States v. Alarcon Sanchez, 972 F.3d 156, 160–61 (2d Cir. 2020) (conspiracy using both flagged and stateless vessels).

229. United States v. Bellaizac-Hurtado, 779 F. Supp. 2d 1344, 1351 (S.D. Fla. 2011) ("[D]efendants argue that this Court lacks jurisdiction over in [sic] this case under the MDLEA because the subject vessel in which they allegedly traveled was within the territorial waters of either Colombia or Panama during the 'entirety of the alleged criminal activity' . . . ."), *rev'd*, 700 F.3d 1245 (11th Cir. 2012). Of course, in some situations travel over international waters will be unavoidable—for example, as in United States v. Davila-Mendoza, 972 F.3d 1264, 1267 (11th Cir. 2020) (conspiracy to traffic drugs from Jamaica to Costa Rica); United States v. Van Der End, 943 F.3d 98, 101 (2d Cir. 2019) (conspiracy to traffic drugs from Grenada to Canada).

230. United States v. Mosquera-Murillo, 902 F.3d 285, 291 (D.C. Cir. 2018) (considering the extent of Colombian consent).

231. *See supra* Section III.A.2.

232. *See supra* notes 189–193 and accompanying text.

233. *Cf.* Oral Argument at 38:30–39:30, United States v. Ballestas, 795 F.3d 138 (D.C. Cir. 2015) (No. 13-3107) [hereinafter *Ballestas* Oral Argument], https://www.courtlistener.com/audio/10739/united-states-v-davis/?q=ballestas&type=oa&order_by=score%20desc&court=cadc [https://perma.cc/CU7N-EYEW]:

it could be implicated in certain scenarios especially where there is an undercover agent.[234]

Second, it could represent the reification of circuit doubts about the applicability of the MDLEA without "tag" jurisdiction.[235] One could understand the Eleventh Circuit's reasoning here that no one in the conspiracy was ever accosted while on a stateless vessel upon the high seas, so there is less reason to think the Felonies Clause would apply. This argument would recreate the jurisdictional element in the conspiracy charge, as the *Alarcon Sanchez* court has done, but it would do so in an unusual way. Normally, the elements of the substantive crime would have to be intended, but not necessarily fulfilled. Here too, one could imagine that the element of being on board a ship subject to the jurisdiction of the United States as being incorporated in terms of conspiratorial plan without any overt action on that part. Conspirators might have a boat at the ready but have not yet entered the high seas.[236] However, if the *actual* fulfilment of the jurisdictional element (being on the high seas) is required to invoke Article I jurisdiction, as was briefly suggested in the *Ballestas* oral argument,[237] a mere conspiratorial plan would not enter the high seas and therefore not be subject to the Article I grant. This theory fits well into a strong version of legislative jurisdiction where Congress made the jurisdictional reach of the MDLEA coterminal with that of the Felonies Clause.[238] On that theory, the Felonies Clause jurisdictional grant only arises when there is a stateless vessel on international waters or when the flag nation consents to jurisdiction there.[239] While this argument is compelling, if *González*'s analogy to the Commerce Clause truly holds, the mere threat of an effect on the high seas would trigger federal jurisdiction.[240]

> [U.S.] [c]onspiracy law criminalizes the unlawful agreement itself. It would be exceedingly difficult to prove. You could imagine a scenario where there was a wiretap and a detailed explanation of what happened. In that rare scenario one could imagine prosecution, but it would be exceedingly difficult to prove that. I think you'd have to have a concrete planned use of the high seas. Again, this is I think I'm talking really here about a constitutional matter, not as a statutory matter. One could imagine, again, a planned . . . use of a stateless vessel that would qualify as a vessel subject to US jurisdiction.

234. *Van Der End*, 943 F.3d at 100–02.

235. *See supra* Section I.C.3.

236. *E.g.*, United States v. Davila Mendoza, 972 F.3d 1264, 1264–67 (11th Cir. 2020).

237. *See supra* note 233.

238. United States v. González, 311 F.3d 440, 442–43 (1st Cir. 2002).

239. *See* Kontorovich, *supra* note 11, at 1217–33, 1252.

240. *E.g.*, United States v. Davila, 461 F.3d 298, 306–07 (2d Cir. 2006)*; see also* United States v. Hooks, No. 05–20329 (JDB), 2005 WL 3370549 at *3–9 (W.D. Tenn. Dec. 12, 2005)

This appropriate understanding of the Necessary and Proper Clause also justifies the coverage of land-based conspirators against commentator criticism. A recent law review note argued that Congress could not reach land-based conspirators using the Felonies Clause because their acts of conspiracy did not occur on the high seas.[241] It advanced that since the United States could stem the flow of drugs without going after land-based conspirators and could otherwise rely on those foreign nations to arrest drug conspiracy members, § 70506(b) was not a necessary and proper extension of § 70503.[242] As noted above, the Necessary and Proper Clause is not limited to measures that are *actually* necessary for the accomplishment of the congressional goal; rather, the Clause includes all those measures that Congress rationally concluded were convenient for the accomplishment of its Article I goal.[243] Certainly Congress could rationally understand that drug conspiracies often include land-based participants and criminalizing their actions would help stop the maritime trade.[244] This is especially true since it is uncertain that other countries are in fact arresting their drug conspirators.[245] In short, the Second Circuit correctly recognized that, just like many other Necessary and Proper Clause conspiracy extensions of Article I jurisdiction, § 70506(b) was an appropriate part of § 70503's scheme.[246]

C. Extending to Land-Based Conspiracies and Judge Srinivasan's Innovation

In *Ballestas*, the D.C. Circuit began considering the application of the MDLEA to land-based conspirators but did so through the

(collecting cases concerning Commerce Clause authority where the element affecting interstate commerce was either unfulfilled or a hoax).

241. Aquila, *supra* note 51, at 2980–82. Aquila also argued that Congress did not intend for the MDLEA to reach land-based conduct, *id.* at 2982–87, but since the courts have uniformly disagreed with her (very reasonable) reading, even when finding this conclusion conflicted with international law, United States v. Dávila-Reyes, 23 F.4th 153 (1st Cir. 2022), *reh'g en banc granted, opinion withdrawn*, 38 F.4th 288 (1st Cir. 2022) (mem.), I will not address the merits of her argument. *See also* Anfang, *supra* note 84.

242. Aquila, *supra* note 51, at 2982, 2989.

243. United States v. Comstock, 560 U.S. 126, 134–35 (2010).

244. Casavant, *supra* note 138, at 232–34.

245. *Id.*

246. *See supra* notes 101–102 and accompanying text.

subject-matter jurisdiction theory.[247] At oral argument[248] and in briefing[249] the United States advanced arguments based on traditional conspiracy principles and on the Article I grants alone. Judge Wilkins recognized that these two arguments do not necessarily mesh.[250] Consistent with counsel's suggestion in oral argument,[251] Judge Srinivasan used the *Pinkerton* theory to analyze § 70506(b) without addressing the pure Article I theory.[252]

The idea of the *Pinkerton* theory meshes with the subject-matter jurisdiction framework Judge Srinivasan established for the D.C. Circuit. The jurisdictional scheme in §§ 70503–04 controls what activities or actions are within the purview of American courts. In cases like *Ballestas*, these include co-conspirator's possession of controlled substance on board a vessel subject to the jurisdiction of the United States. *That* potential "criminal conduct" is what the district court has subject-matter jurisdiction over.[253] The subsequent question is who is responsible for this conduct. The *Pinkerton* doctrine tells us that when Ballestas's co-conspirators were responsible for this conduct, he too is held liable as having "committed a prohibited act on board."[254] Thus, the entire conduct at question is a felony "committed" on the high seas and within the MDLEA's grant. In the subject-matter jurisdiction determination, the inquiry hangs on the § 70503(e) process by which the enforcement agency certifies that the vessel is subject to the

247. United States v. Ballestas, 795 F.3d 138, 142 (D.C. Cir. 2015) (Srinivasan, J.) (citing United States v. Miranda, 780 F.3d 1185 (D.C. Cir. 2015) (Srinivasan, J.)); *see also* Aquila, *supra* note 51, *passim* (discussing the District Court's ruling in *Ballestas*).

248. *Ballestas* Oral Argument, *supra* note 233, at 36:56–42:07.

249. Brief for the Appellee at 35, United States v. Ballestas, 795 F.3d 137 (D.C. Cir. 2015) (No. 13-3107), 2014 WL 3962853, at *45–48.

250. *Ballestas* Oral Argument, *supra* note 233, at 39:30–40:30:

> [Wilkins, J.:] This seems to completely contradict the argument in your brief. The argument in your brief was that under *Pinkerton*-type theory of liability for conspiracy, you could impute the acts on the high seas to someone who stayed on land, and therefore, if you construed the statute that way, then there's no Article I problem because you're just imputing the acts on the high seas, where there's clearly jurisdiction, to someone who stays on land. Now you're saying that even if no acts are ever committed on the high seas the statute still applies. Which interpretive engine are you using here? [Counsel:] I think we're using both.

251. *Id.* at 40:30–41:00.

252. *Ballestas*, 795 F.3d at 146–47; *see also* United States v. Mosquera-Murillo, 902 F.3d 285, 289 (D.C. Cir. 2018).

253. *Ballestas*, 795 F.3d at 146 ("The stipulated facts establish, first, that criminal conduct took place 'on board' vessels covered by the MDLEA.").

254. *Mosquera-Murillo*, 902 F.3d at 291; *Ballestas*, 795 F.3d at 146.

jurisdiction of the United States.[255] Section 70506(b) then does not provide a new subject-matter jurisdiction element; rather, it establishes a different MDLEA offense and supplies for an American theory of conspiratorial liability which will then locate the situs of the *Pinkerton* act "on board" the vessel even if the defendant herself never went to sea.[256] It should be reiterated that this interaction is conceptually distinct from that in *Prado*: Here, § 70506(b) is truly ancillary to § 70503 in the sense that it only considers the latter's subject-matter but merely implicates other "legal" actors. In *Prado*, by contrast, § 70506(b) concerns *different* actions—conspiratorial agreements rather than § 70503(a) actions—and thus targets *literal* actors.[257]

Accordingly, the D.C. Circuit's interpretation does not obviously replicate the "on board a covered vessel" requirement as a subject-matter jurisdiction limitation in § 70506(b). Indeed, under the current language, the "on board a covered vessel" provision in § 70503(a) seems almost preambulatory rather than substantive.[258] Nonetheless, subject-matter jurisdiction courts insist that some nexus with a ship is necessary for a § 70506(b) conviction *even if* it is not an element.[259] At a most extreme position, a § 70506(b) guilty plea in the Middle District of Florida lists standard conspiracy elements and then notes, "[a]lthough not an element of the offense charged in Count One, the government has the burden of establishing that the subject vessel was subject to the jurisdiction of the United States."[260] In this case, the prosecutor—and the court through acceptance—did not even *mention* a vessel being involved in the conspiracy charge, but nonetheless had to show that the vessel was subject to the jurisdiction of the United

255. *Mosquera-Murillo*, 902 F.3d at 290–91.

256. *Ballestas*, 795 F.3d at 146.

257. *See supra* Section III.B.

258. Section 70503(a) reads: "[W]hile on board a covered vessel, an individual may not knowingly or intentionally—(1) manufacture . . . a controlled substance . . . ." The previous language dropped the "while on board" clause to after the other elements which made it seem more likely that the condition was an element of the offense. *See* An Act to Complete the Codification of Title 46, United States Code, Pub. L. 109-304, 120 Stat. 1485 (2006); United States v. Carvajal, 924 F. Supp. 2d 219, 244–45 (D.D.C. 2013) (agreeing with the Department of Justice's reading that "it is clear that what § 70506(b) prohibits is any person from conspiring . . . to distribute drugs through the use of a vessel, *as long as the vessel is deemed subject to the jurisdiction of the United States under § 70502(c)(1)*.") (emphasis added).

259. *E.g.*, United States v. Cardona-Cardona, 500 F. Supp. 3d 123, 129 (S.D.N.Y. 2020); United States v. Liang, No. 4:17-CR-00001 (ALM), 2021 WL 5323570, at *1 (E.D. Tex. Nov. 16, 2021); United States v. Enriquez, No. 3:17-CR-03292 (RTB), 2021 WL 3772379, at *2 (S.D. Cal. Aug. 24, 2021).

260. Plea Agreement at 2–3, United States v. Quinones, No. 8:20-cr-00003 (CEH), (M.D. Fla. Mar. 4, 2020) (ECF No. 37), *accepted* (ECF No. 45).

States. The agreement does show the other possible understanding of how the jurisdictional clause could work in a subject-matter jurisdiction circuit like the Eleventh.[261] Without the obvious involvement of a vessel in the conspiracy charge, it would be plausible that *any* conspiracy to possess controlled substances would be subject to § 70506(b) prosecution because § 70503(a) criminalizes conspiracy to possess controlled substances and the jurisdictional clause limits only the subject-matter jurisdiction of the court not the elements of the offense.[262] In light of these expansive and absurd results, the courts have reasonably read § 70506 in light of §§ 70502–04 that center on a vessel and its jurisdiction and have replicated those requirements in § 70506(b).[263]

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261. United States v. Nunez, 1 F.4th 976, 983, 988 (11th Cir. 2021).

262. *See supra* note 177 and accompanying text.

263. This is also supported by the first legislative finding in § 70501. *See also Ballestas* Oral Argument, *supra* note 233, at 26:12–28:00:

> [United States:] This statute has a specific congressional declaration to apply extraterritorially. . . .
>
> [Wilkins, J.:] But isn't it a problem that the explicit extraterritorial application is for § 70503 instead of [§ 705]06?
>
> [United States:] I don't think so your honor. The only difference between this statute in the MDLEA and the hostage taking statute [in United States v. Ali, 718 F.3d 929 (D.C. Cir. 2013)] has been imbedded in the substantive provision or whether it has been dropped down a bit. And this statute is modeled after the general drug statutes in Title 21 . . . . That's just the way Congress often or usually drafts conspiracy provisions. Another point I'd make is that § 70503(a) is the prohibition, § 70503(b) is the extraterritorial declaration, § 70503(c) is an affirmative defense, and I can't imagine that the government in a § 70506 conspiracy case would say that the affirmative defense doesn't carry over to conspiracy. The conspiracy provision § 70506(b) says § 70503 as a whole. It doesn't say § 70503(a).

See also Oral Argument at 16:15–18:34, United States v. Alarcon Sanchez, 972 F.3d 156 (2d Cir. 2020) (Nos. 18-671, 18-1231), https://www.courtlistener.com/audio/64874/united-states-v-aragon-alarcon-sanchez/?q=alarcon&type=oa&order_by=score%20desc&court=ca2 [https://perma.cc/UZN8-AJ8J]:

> [United States:] In response to the court's questions about why the conspiracy provision does not also apply extraterritorially if the substantive offense under § 70503 applies extraterritorially, I heard Mr. Alarcon Sanchez's counsel to argue that the language of the statute limits it to individuals on board vessels subject to the jurisdiction of the United States. First, I think that you have to read § 70503 which is the substantive offense and § 70506 the conspiracy provision together. And when you read those provisions together it's clear that Congress's intent was that both provisions would apply extraterritorially even though § 70506 doesn't contain the extraterritorial language. . . . I would also note there are other statutes where the conspiracy provision is in a separate section, and where there is some form of limitation in the substantive provision that doesn't appear in the conspiracy section, and this court has upheld United States' jurisdiction. I'm thinking specifically of 21 U.S.C. § 959 cases, which criminalizes transporting drugs on an airplane that's registered in the Unites States. The conspiracy provision is in § 963, there is no extraterritorial language in the

Accordingly, D.C. courts have first dealt with the subject-matter jurisdiction question before turning to the Article I grant of authority.[264] Courts in that circuit have considered three arguments for finding Article I jurisdiction over land-based conspirators. The D.C. Circuit found such jurisdiction first under a direct application of the *Pinkerton* doctrine to the Felonies Clause.[265] The Felonies Clause allows Congress to "define and punish Piracies and Felonies committed on the high Seas."[266] Here, the crime is conspiracy to violate § 70503. The definition of the location is provided by the *Pinkerton* doctrine which allows the court to consider the conspiracy to be committed in any jurisdiction where one of the acts in furtherance of it was committed.[267] Section 70506(b) represents a legitimate application of the Felonies Clause because it punishes the defendant for Felonies committed on the high seas, albeit by co-conspirators. This also is an appropriate application of American conspiracy law because it is under the specific grant of defining felonies, rather than skirting due process with conspiracy law—an active dispute in the courts.[268] Second, D.C. district courts have considered the Necessary and Proper Clause as a way to extend the Felonies Clause to land-based conspirators much in the way Judge Pooler advanced.[269]

The final—and most expansive—argument, turning toward the plenary nature of Congress's Section 8 powers, has been considered by the circuit but never fully adopted.[270] At oral argument in *Ballestas*,

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> conspiracy provision, there's not limitation to being on board the plane in the conspiracy provision, but in United States v. Epskamp [832 F.3d 154, 162–68 (2d Cir. 2016)] this court upheld United States jurisdiction over such conduct for foreign nationals operation wholly in a foreign country organizing a shipment of drugs from one country to another with no connection to the United States other than the plane they were using was registered in the United States, which is similar to a vessel subject to the jurisdiction of the United States.

264. *Ballestas*, 795 F.3d at 145–47.

265. *Id.* at 147.

266. U.S. CONST. art. I, § 8, cl. 10.

267. *Ballestas*, 795 F.3d at 147; United States v. Cifuentes-Cuero, 808 F. App'x 771, 776 (11th Cir. 2020) (per curiam).

268. *E.g.*, Mackey v. Compass Mktg., Inc., 892 A.2d 479, 483–92 (Md. 2006) (collecting cases); United States v. Perlaza, 439 F.3d 1149, 1160, 1163 (9th Cir. 2006) (discussing the application of American conspiracy law and due process). Aquila, *supra* note 51, at 2977–81, misunderstands *Perlaza*'s argument as referring to legislative jurisdiction instead of personal jurisdiction or due process protections.

269. United States v. Mosquera-Murillo, 153 F. Supp. 3d 130, 162–63 (D.D.C. 2015), *aff'd*, 902 F.3d 285 (D.C. Cir. 2018).

270. *See Ballestas* Oral Argument, *supra* note 233, at 37:40–39:30; United States v. Carvajal, 924 F. Supp. 2d 219, 259–60 (D.D.C. 2013), *aff'd sub nom.* United States v. Miranda, 780 F.3d 1185 (D.C. Cir. 2015); *supra* Section I.C.2.

counsel for the United States wavered on whether a conspiracy without *Pinkerton* liability (because lacking an overt act on the high seas) and without the Necessary and Proper Clause could be subject to the Felonies Clause.[271] This would be very similar to the expansive jurisdictional idea advanced above in the discussion about *Feola*.[272] According to this theory, Article I allows Congress to legislate around—and criminalize—the various Section 8 grants of power. When a plan is sufficiently concrete to endanger the area of legitimate congressional concern that plan can fall under the same Article I grant of power.[273] In certain cases, the plan to transport drugs on a stateless vessel could be concrete enough to sufficiently endanger the federal interest advanced in § 70501.

From this vantage we can now answer Judge Srinivasan's question of whether a purely inchoate land-based conspiracy could be constitutionally subject to the MDLEA.[274] Under the *Pinkerton* theory, the answer is likely "no." The *Pinkerton* theory works by attributing the actual § 70503 conduct to the § 70506(b) conspirator and thus locating the latter's "conduct" on the high seas. In a case without a § 70503 violation—where the boat never left territorial waters—there would be no *Pinkerton* joint liability since all the conduct would be within a foreign country. On the other hand, under the *Feola* incidental-accessorial and Necessary and Proper theories, Congress would be able to apply the MDLEA to inchoate land-based conspirators as part of, or closely related to, the broader scheme of curtailing actual drug trafficking on the high seas.[275] Still, under the D.C. Circuit's subject-matter jurisdiction interpretation, the legislative reach may be

271. *Compare Ballestas* Oral Argument, *supra* note 233, at 38:22–38:37 ("The High Seas power . . . would apply to an agreement where there was no overt act committed on the high seas, but they contemplated and planned use of the high seas."), *with id.* at 39:20–39:29 ("that wouldn't necessarily comply with Article I.").

272. *See supra* Section I.C.2.

273. United States v. Feola, 420 U.S. 671, 695–96 (1975); *see also, e.g.*, United States v. Amato, 31 F. App'x 21, 26 (2d Cir. 2002) (summary order); United States v. Cox, 705 F. App'x 573, 576 (9th Cir. 2017) (mem.).

274. *Ballestas* Oral Argument, *supra* note 233, at 37:40:

> [Srinivasan, J.:] If you don't have the travel on and seizure in international waters does your argument change? In other words, assume away the Necessary and Proper Clause for the second and just focus on the Felonies Clause. So, it's to "Define and Punish Felonies committed on the High Seas." So, if all you have is two individuals reaching an agreement on foreign soil and nothing ever happens on the high seas, there's still a conspiracy, particularly if you don't need an overt act. There's still a conspiracy and are you saying that your interpretation of the constitutional provision is that even though everything occurred—all the actus reus occurred—on foreign soil, that's still a felony "committed on the high seas?"

275. *See supra* notes 212–216 and accompanying text; *supra* Section I.C.2.

broader than that of the *Alarcon Sanchez* and *González* courts. In the legislative jurisdiction courts the jurisdictional limiting in § 70502(c) tracks the extent of the Felonies Clause, while in the D.C. Circuit's reading those sections only exclude the court's subject-matter jurisdiction which could imply that the Felonies Clause grant is broader. If the D.C. Circuit were to follow an interpretation of the Felonies Clause that was closer to Judge Barron's or Justice Story's,[276] the Felonies Clause could cover stateless ships in territorial waters or perhaps flagged ships on the high seas. Further, if that Circuit is correct in reading the jurisdictional provision into the § 70506(b) charge,[277] then it will still require the court to find that the vessel is subject to the jurisdiction of the United States, but only by a preponderance of the evidence rather than beyond a reasonable doubt.[278]

While the D.C. Circuit's reasoning is compatible with the Necessary and Proper approach, the *Pinkerton* theory is more fitting with its view of the jurisdictional clause as limiting subject-matter jurisdiction and being replicated in § 70506(b). If the jurisdictional clause removes a certain group of cases—e.g., those on flagged ships over which the state has not consented to the exercise of United States jurisdiction—from the general grant of criminal jurisdiction,[279] then it is difficult to see how the administrative procedures that create subject-matter jurisdiction could be satisfied in an inchoate conspiracy.[280] For stateless vessels, subject-matter jurisdiction is available when the "master or individual in charge" does not adequately prove the

276. *See supra* Section I.C.3.

277. *See supra* Section I.C.1.

278. *See supra* note 158.

279. 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.").

280. *See Ballestas* Oral Argument, *supra* note 233. One could imagine two scenarios under which an inchoate (or sufficiently inchoate) conspiracy can still obtain subject-matter jurisdiction. First, law enforcement intercepts the vessel while it is in territorial waters. *See id.* at 20:55–21:45 (questioning about the statutory coverage of an unsuccessful attempt under § 70506(b)); *cf.* United States v. Davila-Mendoza, 972 F.3d 1264, 1267–68 (11th Cir. 2020). In this case, law enforcement could board the vessel, ask the master the nationality, and comply with § 70502(d)–(e)'s requirement. Second, if a vessel is "registered in a foreign nation" or sitting "in the territorial waters of a foreign nation" (for example, docked there), then that nation might consent or waive objection to the application of United States law. § 70502(c)(1)(C), (c)(1)(E). Of course, this scenario would be rather odd given the applicable bilateral treaties, United States v. Mosquera-Murillo, 902 F.3d 285, 287, 291 (D.C. Cir. 2018), but is not unheard of. United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1247–48 (11th Cir. 2012).

nationality of the ship she is aboard.[281] While some courts have said that § 70502(d) does not provide an exclusive mechanism for proving statelessness,[282] it would be difficult to imagine that the law enforcement agency could adequately determine that the vessel was stateless if it did not have a "master or individual in charge" to ask and it was not yet on the seas.[283] Under the *Pinkerton* theory, the path toward subject-matter jurisdiction is much clearer (the Coast Guard stops the vessel in transit as normal), which may explain why Judge Srinivasan has embraced it.[284]

D. Historical Precedent Supporting Criminalization of Land-Based Conspiracies

The historical record concerning the Felonies Clause's inclusion of conspirators who were not themselves appropriately under the Clause but were included because of conspiratorial liability confirms the appropriateness of the circuit courts' expansive interpretations. These records provide nuance to the picture the academe—Professor Kontorovich and Elaina Aquila—paint of consensus that the Felonies Clause cannot extend to land-based activities.[285] These scholars both start out with a careful read of the constitutional provision and consider sufficient dicta to suggest a real high seas limitation;[286] however, they do not pay close enough attention to other understandings of the power to define felonies and its relation to conspiracy provisions. This Section brings to light those understandings of accessorial liability, reflected in early court opinions and actions by the first Congress. In light of such a mixed record, circuit unanimity on the propriety of land-based conspirator convictions should not be dismissed.[287]

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281. § 70502(d)–(e).

282. United States v. Nunez, 1 F.4th 976, 984–88 (11th Cir. 2021).

283. United States v. Prado, 933 F.3d 121, 130–32 (2d Cir. 2019) (detailing the Coast Guard's failure to ask the "person in charge").

284. *See supra* note 280.

285. *See* Aquila, *supra* note 51, at 2970–73, 2980–82; Kontorovich, *supra* note 129, *passim*; Kontorovich, *supra* note 11, Parts II–III.

286. *See* Kontorovich, *supra* note 11, at 1219–22, 1232–37; Kontorovich, *supra* note 129, Part IV (relying on grand jury charges, speeches by John Marshall, Attorney General briefs and letters, and Chief Justice Marshall's limiting statutory interpretation).

287. *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1980–88 (2019) (Thomas, J., concurring) ("Although precedent does not supersede the original meaning of a legal text, it may remain relevant when it is not demonstrably erroneous.").

Early court interpretation considering the Felonies Clause endorses the idea that Congress can define felonies in such a way to include those who did not commit common law felonies on the high seas. In *United States v. McGill*, the Circuit Court in Pennsylvania considered a case in which a prisoner on a ship fatally struck the ship's captain off the coast of Haiti while the captain died on shore.[288] Under the common law, the actual death was an element of murder, so since not all of the elements of murder occurred on the high seas, the charge was beyond the Felonies Clause power.[289] Judge Peters ruled that the court lacked jurisdiction over the case because only part of the murder occurred on the high seas.[290] Justice Washington agreed that as the case rested on principles of English admiralty law it was beyond the district court's jurisdiction, but he argued that "[C]ongress, exercising the constitutional power to define *felonies* on the high seas, may certainly provide, that a mortal stroke on the high seas, wherever the death may happen, shall be adjudged to be a felony."[291] In other words, this dictum suggests that the Felonies Clause enables Congress to redefine the elements of a crime to confine the actus reus to the high seas. Justice Story in his Commentaries advanced a similar argument that the Felonies Clause could not limit Congress to the common law definitions of felonies.[292] According to Justice Story, the Clause not only allows Congress to set America's definition of piracies as different from other nations', it also allows a breadth of definitions among more "municipal offenses" than might have been cognized under English law.[293] These two early understandings encourage the idea that the Felonies Clause would allow Congress to define the trafficking of narcotics as a felony on the high seas, and to further limit the territorial scope of the associated conspiracy provision to the high seas. This most directly supports the conceptual move the D.C. Circuit advances of using § 70506(b) to locate land-based conspirator's punishable actions on the high seas

288. United States v. McGill, 4 U.S. 426, 426 (C.C.D. Pa. 1806).

289. *Id.*

290. *Id.* at 429. Interestingly, Judge Peters was a party (at least in a technical sense) in two Supreme Court cases. In the first case, the Supreme Court issued a writ of prohibition against the District of Pennsylvania from hearing a libel case against a French vessel in French Haiti because it was under the admiralty jurisdiction of France. United States v. Peters, 3 U.S. (3 Dall.) 121, 129–32 (1795). The second case was essentially the reverse of the first and involved a writ of mandamus in an admiralty libel case against Pennsylvania. United States v. Peters, 9 U.S. (5 Cranch) 115, 139–41 (1809).

291. *McGill*, 4 U.S. at 430.

292. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 562, at 405–06 (1987).

293. *Id.* §§ 563–64, at 406–07.

along the traditional lines of Anglo-American conspiracy law.[294] These examples remain dicta, but provide a different side to Professor Kontrovich's more restrictive dicta from the period.[295]

Early congressional practice and interpretation additionally suggest that, in 1790, the Felonies Clause was understood to support conviction of conspirators who were connected to high seas felonies but did not commit the substantive violation. The First Congress's legislative acts have been used to show the original meaning of the Constitution and can shed light here too.[296] In 1790, Congress passed an omnibus act criminalizing various offenses against the United States.[297] This Crimes Act was drafted in a way that the substantive offenses would have a certain limitation of place because "the right to punish [these] depends on place," while "accessorial" crimes did not have such a hook because "the right of punishment does not depend upon place."[298] This distinction was reflected several times throughout the act. For example, murder and manslaughter were punished if they were committed in a federal jurisdiction like a fort or on the high seas.[299] However, punishment for misprision of these felonies, or not reporting them, did not have such a geographic limitation.[300] Interpreting these provisions, Chief Justice Marshall implied that these accessorial forms of liability did not actually require a high seas element and that the legislature could legitimately reach them whether on "land or sea."[301] Further, Justice Story riding circuit concurred that when Congress removed the geographic limitation—in this case in section 12 for confining "the master of any ship or other vessel"—jurisdiction was not limited to the high seas but could be exercised even if the offense occurred in a foreign port.[302] Similarly, for several

294. *See* United States v. Carvajal, 924 F. Supp. 2d 219, 259–60 (D.D.C. 2013) (citing State v. Buchanan, 5 H. & J. 317, 334–36 (Md. 1821), for its discussion of English conspiracy law).

295. *See* Kontorovich, *supra* note 129, at 176–84, 198.

296. *E.g.*, Fin. Oversight and Mgm't Bd. for Puerto Rico v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1657–59 (2020) ("[W]e think the practice of the First Congress is strong evidence of the original meaning of the Constitution."); Myers v. United States, 272 U.S. 52 *passim* (1926); Comptroller of Treasury of Maryland v. Wynne, 575 U.S. 542, 580 (2015) (Thomas, J., dissenting) (collecting cases).

297. An Act for the Punishment of Certain Crimes Against the United States, ch. 9 §§ 1–33, 1 Stat. 112–19 (1790).

298. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 104 (1820).

299. Crimes Act, ch. 9 §§ 3, 6, 1 Stat. 113; U.S. CONST. art. I, § 8, cl. 17.

300. Crimes Act, ch. 9 §§ 6, 11, 1 Stat. 113–14.

301. *Wiltberger*, 18 U.S. at 101–04.

302. United States v. Keefe, 26 F. Cas. 685, 685–86 (No. 15,509) (C.C.D. Mass. 1824).

accessorial crimes related to piracy, particularly aiding, confederating, and conspiring, Congress explicitly expanded jurisdiction to any person "either on land or the seas."[303] There is a compelling argument then from this record that Congress exercised the Felonies Clause to address accessorial crimes either without a geographical limitation to the high seas, or further even including land-based conspirators.[304]

There are three potential ways to understand this inclusion of accessorial crimes within the Article I grant of jurisdiction. First, one could understand it as included in the definition of "felonies committed on the high seas" as advanced in the third understanding of the D.C. Circuit's jurisdictional argument.[305] Under this understanding, the Constitution granted Congress not only the power to make certain specific types of laws, but also to exercise plenary authority in that field.[306] This is one way to understand Chief Justice Marshall's discussion of the misprision of felony statute in *Cohens*.[307] Although Congress only has the power to criminalize murder if it is committed in a federal jurisdiction, "the power vested in Congress [to legislate under appropriate federal jurisdiction] . . . carries with it, as an incident, the right to make that power effectual."[308] Applied to the misprision of felony section, Virginia could not arrest someone beyond its borders for misprision of felony, but Congress's power over each field of regulation "carries with it all those incidental powers which are necessary to [the power's] complete and effectual execution."[309] This understanding could be in line with the use of incidental in defining the

303. Crimes Act, ch. 9 §§ 10–11, 13, 1 Stat. 114–15; *Wiltberger*, 18 U.S. at 104–05.

304. One could read the land hook as including *domestic* land. *See, e.g.*, United States v. Wilson, 28 F. Cas. 718, 719–20 (No. 16,731) (C.C.S.D.N.Y. 1856) (ship between the East River and the Long Island Sound was not on the high seas); *Ex parte* Byers, 32 F. 404, 405–10 (E.D. Mich. 1887) (discussing a statutory no-man's land on the Detroit River). Either way, Congress has "no general right to punish murder committed within any of the States" and "[i]t is clear, that Congress cannot punish felonies generally." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 426, 428 (1821).

305. *See supra* notes 270–273 and accompanying text.

306. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196–97 (1824).

307. *Cohens*, 19 U.S. at 426–29.

308. *Id.* at 428.

309. *Id.* at 429.

powers of Article III courts,[310] the Executive branch,[311] or corporate charters.[312] These lack the Necessary and Proper Clause which would indicate that the constitutional grant of power itself includes these implied powers. Some considerations of congressional incidental power seem in line with this reading.[313]

The second understanding is that this reflects the Necessary and Proper Clause argument advanced by Judge Pooler.[314] Considering Chief Justice Marshall's use of "incidental" in *McCulloch* to reference the Necessary and Proper Clause, his use of the term in *Cohens* can be more naturally read to mean the same thing.[315] Professor Currie advanced this reading as the most natural understanding of the accessory liability statutes in the 1790 Crimes Act.[316] Grounding the MDLEA's criminalization of land-based conspirators as a necessary and proper part of the Felonies Clause seems rather uncontroversial;

310. *See Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 531 (1824) ("The power is one which ought to be exercised with great caution, but which is, we think, incidental to all Courts, and is necessary for the preservation of decorum, and for the respectability of the profession."); McDonough v. Dannery, 3 U.S. (3 Dall.) 188, 196–98 (1796) (Cushing, J., concurring) (discussing supplemental jurisdiction as "incidental").

311. *See* Am. Ins. Co. v. Canter, 1 F. Cas. 658, 660 (No. 302a) (Johnson, Circuit Justice, C.C.D.S.C. 1800) ("The right, therefore, of acquiring territory is altogether incidental to the treaty-making power . . . .").

312. *See* Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) (a corporation "possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.").

313. *E.g.*, Janney v. Columbian Ins. Co., 23 U.S. (10 Wheat.) 411, 418 (1825) (power to condemn ships incidental to "survey power" and under federal admiralty jurisdiction); The Wilson v. United States, 30 F. Cas. 239, 243 (No. 17,846) (Marshall, Circuit Justice, C.C.D. Va. 1820) ("From the adoption of the constitution, till this time, the universal sense of America has been, that the word 'commerce,' as used in that instrument, is to be considered a generic term, comprehending navigation, or, that a control over navigation is necessarily incidental to the power to regulate commerce."); Tappan v. United States, 23 F. Cas. 690, 691 (No. 13,749) (Story, Circuit Justice, C.C.D. Mass. 1822) (regulations incidental to Article I powers).

314. *See supra* notes 212–223 and accompanying text.

315. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406–21 (1819). *Compare* Samuel R. Olken, *Chief Justice John Marshall and the Course of American Constitutional History*, 33 J. MARSHALL L. REV. 743, 764 (2000) (conflating incidental and necessary and proper powers), *with* Jake Karr, *Federalism, Foreign Affairs, and State Courts: The Habeas Corpus Act of 1842 and the Permanent Debate over the Status of International Law*, 50 N.M. L. REV. 320, 330–31 (2020) (considering incidental and Necessary and Proper powers to be separate but linked).

316. David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress*, *1789–1791*, 61 U. CHI. L. REV. 775, 832 (1994).

most of the commentary has questioned the ability of the Foreign Commerce Clause or the Treaty Power to reach such conduct.[317]

The third understanding of Congress's intention in punishing accessorial liability on a broader geographic basis than that of the substantive offense is derived from the power to "define" the felony in play. This is reflected in a later Supreme Court ruling and its discussion of earlier precedent. In *United States v. Flores*, the Court considered the United States criminal code's applicability to an American's murder of another American on an American boat but 250 miles inland on a river in Belgian Congo.[318] The Court rejected the defendant's argument that since the Felonies Clause limited punishment to the high seas, it also implied that Congress could not use its admiralty jurisdiction to punish crimes aboard American ships in foreign waters.[319] The Court concluded in affirming that the statute at hand reached Flores's conduct through the citation of admiralty jurisdiction.[320] Justice Stone cited to *Wiltberger* and *McGill* as cases confirming his interpretation of Congress's Felonies Clause and admiralty powers.[321] In both cases the statutes were interpreted to not reach the offense in the territorial waters of another state, and Justice Stone argued that those early courts did not doubt "the power of Congress" to criminalize such actions.[322] In citing to *McGill*, Justice Stone drew on his predecessor's understanding of the Felonies Clause as allowing Congress to redefine the elements of a common law crime to locate the offense on the high seas.[323] Reading the 1790 Crimes Act in this way could permit Congress to use § 70506(b) to incorporate *Pinkerton* liability into the MDLEA and thus locate a conspiracy on the high seas.

317. Kontorovich, *supra* note 11, at 1237–51; *see also* Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 124, 136–54 (2007) (discussing the Necessary and Proper Clause in conjunction with the Law of Nations Clause, Foreign Commerce Clause, and Treaty Power). Of course, some argue that as an original matter, the *McCulloch* doctrine misunderstands the Necessary and Proper Clause as expansive rather than limited. *See* Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 262 (2010) (citing Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 313–14 (1993)).

318. United States v. Flores, 289 U.S. 137, 144–45 (1933).

319. *Id.* at 149–51.

320. *Id.* at 157.

321. *Id.* at 152 & n.6.

322. *Id.* at 152 n.6.

323. *Id.*; *see supra* notes 288–294 and accompanying text.

CONCLUSION

Currently, there is circuit unanimity that, at least when there is a substantive § 70503 violation, land-based co-conspirators can be prosecuted under § 70506(b). This Note has demonstrated that the circuits have correctly arrived at this conclusion and could expand the MDLEA's reach to co-conspirators even without a high-seas action. While each circuit could be justified in extending this conclusion to land-based participants in inchoate conspiracies, the Second Circuit's reliance on the Necessary and Proper Clause most clearly enables their criminalization. Further, even while the D.C. Circuit's *Pinkerton* theory may limit § 70506(b)'s applicability to cases in which there is some high seas element, the statute and Article I will still legitimately cover land-based conspirators without the Necessary and Proper Clause. The historical record supports § 70506(b)'s application to land-based conspirators—even in inchoate conspiracies—as an exercise of accessory liability to a Felonies Clause offense. For prosecutors, this understanding could be used to cover conspiracies whose members are all captured within the territory of another state and bring them within legitimate Article I prosecution, obviating the Eleventh Circuit's rulings in *Bellaizac-Hurtado* and *Davila-Mendoza*. Both of those decisions assumed that the Felonies Clause could not reach criminal activity beyond the high seas. But as this Note has shown, this conclusion is unfounded—even in the Eleventh Circuit. Conspirators beyond the high seas can be punished either in connection with a high-seas conspiracy, or without any such connection.

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