

ARTICLES

OPERATIONAL DIPLOMACY: JURISDICTION CERTIFICATION AND THE MARITIME DRUG LAW ENFORCEMENT ACT

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INTRODUCTION

The Maritime Drug Law Enforcement Act (MDLEA)¹ is America's premier statute for enforcing maritime counterdrug laws beyond the United States' territorial sea, and supports the United States' commitments under the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention).² The Act employs a series of interlocking provisions that facilitate a diplomatic process between U.S. agencies—principally the U.S. Coast Guard and the U.S. Department of State—with their counterpart agencies in foreign states to establish U.S. jurisdiction over foreign-flagged and stateless vessels and their crews.³ Central to MDLEA prosecutions is a jurisdiction certification—provided for by the Act and executed in each case by the State Department in cooperation with the Coast Guard—that documents this diplomatic engagement and is used to establish jurisdiction in U.S. courts.

Defendants in MDLEA prosecutions have repeatedly challenged jurisdiction certifications on a number of grounds, and courts have generally, though not

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1. Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70501-70507 (2012).

2. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, 1582 U.N.T.S. 95 [hereinafter 1988 Convention].

3. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. Under the fundamental law of the sea principle of “exclusive flag state jurisdiction,” enforcement action against a vessel on the high seas can only be taken by that vessel's flag state, subject to limited exceptions. *Id.* at Article 92. Vessels that attempt to fly multiple flags can be treated as without nationality and subject to the jurisdiction of any nation. *Id.* Each state is responsible to “fix the conditions for the grant of its nationality to ships . . . and for the right to fly its flag.” *Id.* at Article 91 .

always, declined to scrutinize them. Although acknowledging that the MDLEA's jurisdictional framework serves diplomatic purposes, courts have most often examined the role of jurisdiction certification in the context of Due Process Clause and Confrontation Clause challenges. Occasionally, defendants have argued that MDLEA certifications—and the deference accorded them in the MDLEA—offend separation-of-powers principles by usurping judicial power. Grappling with defendants' constitutional challenges to the use of certifications, courts have generally failed to offer a principled, coherent justification for why separation-of-powers and foreign affairs concerns should compel deference to the political branches in making jurisdictional determinations under the MDLEA.

This Article argues that courts should justify deference to Executive Branch agencies' jurisdiction determinations under the MDLEA on Treaty Power and political question doctrine grounds, as those doctrines most faithfully express the foreign affairs considerations that seemingly motivate courts' decisions in MDLEA cases. As such, MDLEA jurisdiction certification may best be understood as memorializing an Executive Branch diplomatic act that has been expressly delegated to it by Congress—authorized by, and in furtherance of—the United States' treaty commitments under the 1988 Convention against illicit drug trafficking.

I. JURISDICTION CERTIFICATION AND THE MDLEA

A. *Generally*

The MDLEA reflects Congress' concern over the threat posed by international drug trafficking.⁴ The Act criminalizes the manufacture, distribution, and possession of controlled substances “with intent to manufacture or distribute,”⁵ and applies to persons onboard “vessel[s] subject to the jurisdiction of the United States.”⁶ Congress expressly provided for extraterritorial application of the MDLEA's substantive offenses, and the Act effectuates that extraterritorial reach using a series of provisions defining the scope of United States jurisdiction over foreign and stateless vessels beyond United States territorial waters.⁷

The U.S. Coast Guard is the lead federal agency for maritime drug interdiction and “plays a crucial role in efforts to keep dangerous narcotic drugs

4. 46 U.S.C. § 70501 (stating a congressional finding that “trafficking in controlled substances aboard vessels is a serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States”).

5. *Id.* § 70503(a)(1). The Act also criminalizes attempts and conspiracies to violate § 70503, and punishes attempts and conspiracies on the same basis as the underlying offense. *Id.* § 70506(b).

6. *Id.* § 70503(a), (e)(1). The Act also applies to persons onboard United States vessels, and to a person onboard “any other vessel if the individual is a citizen of the United States or a resident alien of the United States.” § 70503(e).

7. *Id.* § 70503(b) (specifying that the Act's criminal prohibitions “appl[y] even though the act is committed outside the territorial jurisdiction of the United States.”); *see also infra* Section I.C (discussing the Act's jurisdictional provisions).

moving by sea from reaching the United States.”⁸ To enforce the MDLEA, the Coast Guard employs “a layered system that extends beyond our land borders.”⁹ That system relies on a combination of ships, “aircraft, boats, and deployable specialized forces” to provide enforcement coverage of maritime drug trafficking routes, “begin[ning] overseas, span[ning] the offshore regions, and continu[ing] into our territorial seas and our ports.”¹⁰

The extraterritorial reach of the MDLEA is crucial to the law’s effectiveness. Indeed, the Coast Guard’s operational focus is “on removing illegal drugs as close to their origins in South America and as far from U.S. shores as possible, where drug shipments are in their most concentrated bulk form,” because shipments are particularly vulnerable when being transported at sea.¹¹ International waters are “where interdiction forces have the highest tactical advantage, and best opportunity to interdict drug movements.”¹²

The Coast Guard interdicted record levels of cocaine at sea in both 2016 and 2017.¹³ A significant reason for America’s success in interdicting record levels of narcotics at sea are the “international and domestic partnerships” that allow the Coast Guard to join forces with other nations and “leverage its unique maritime law enforcement authorities and competencies to address” the trafficking threat in concert with other nations.¹⁴

In operational terms, the MDLEA extends the U.S. Coast Guard’s enforcement reach across the Western Hemisphere. Coast Guard boarding teams enforce the MDLEA not only using their own vessels, but also by deploying Coast Guard boarding teams on U.S. Navy vessels and with foreign navies and coast guards.¹⁵ In 2015, for example, the Coast Guard “expended over 2,300 cutter days, 1,400 Airborne Use of Force capable helicopters days, and 4,000

8. BUREAU FOR INT’L NARCOTICS & LAW ENFORCEMENT AFFAIRS, U.S. DEPARTMENT OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT: DRUG AND CHEMICAL CONTROL 45 (2016), <https://www.state.gov/documents/organization/278759.pdf> [<https://perma.cc/WS23-GUN5>].

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Dan Lamothe, *As Trump Presses for a Border Wall, There’s a New Coast Guard Record for Drug Seizures at Sea*, WASH. POST (Sept. 20, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/09/20/as-trump-presses-for-a-border-wall-theres-a-new-coast-guard-record-for-drug-seizures-at-sea/?noredirect=on&utm_term=.7f2204647c54 [<https://perma.cc/Y8JJ-P37T>] (reporting that the U.S. Coast Guard “seized more than 455,000 pounds of cocaine through Sept. 11 in the [2017] fiscal year . . . , breaking the record of 443,790 pounds set” the previous year, and that the Coast Guard “detained at least 681 suspected smugglers in those operations, up from 585 [in 2016] and 503 in 2015.”).

14. BUREAU FOR INT’L NARCOTICS & LAW ENFORCEMENT AFFAIRS, *supra* note 8.

15. *See, e.g.*, United States v. Persaud, 605 F. App’x 791, 793-94 (11th Cir. 2015) (arising from a Coast Guard boarding “north of Venezuela” in which the Coast Guard boarding team was embarked on a British naval vessel).

surveillance aircraft hours on counterdrug patrols, and [Coast Guard] Law Enforcement Detachments . . . deployed for over 1,100 days aboard U.S. Navy, British, Dutch and Canadian warships.”¹⁶ These operations disrupted more than 200 “drug smuggling attempts,” and “the seizure of 145 vessels, detention of 503 suspected smugglers, and removal of 143 metric tons (MT) of cocaine and 35 MT of marijuana.”¹⁷

B. 1988 Convention & Bilateral Agreements

The MDLEA directly enables the United States to satisfy its commitments under the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, a widely-adopted treaty that promotes international cooperation in the campaign against illegal drug trafficking.¹⁸ The United States is one of 189 state parties to the 1988 Convention.¹⁹

The Convention requires state parties to adopt laws under their respective domestic legal systems to criminalize a host of narcotics activity, including the manufacture, transport, production, distribution, and sale of narcotics.²⁰ States are also expected to criminalize the “acquisition, possession or use of property . . . derived from” the latter offenses, “possession of equipment or materials or substances . . . used in” the cultivation or production of illegal narcotics, and conspiring or assisting in the commission of drug-related offenses.²¹ The Convention categorizes offenses involving some relation to organized crime or violence as “particularly serious.”²²

To satisfy these treaty obligations, states are required to “take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems”²³ and each state’s “constitutional principles and the basic concepts of its legal system.”²⁴

The jurisdictional provisions of the 1988 Convention further underscore the treaty’s commitment to fostering effective operational partnerships among state parties. Although each party is *required* to take measures “to establish its jurisdiction over” offenses “committed in its territory” and those “committed on

16. BUREAU FOR INT’L NARCOTICS & LAW ENFORCEMENT AFFAIRS, *supra* note 8, at 46.

17. *Id.*

18. 1988 Convention, *supra* note 2, art. 2 (“The purpose of this Convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension.”).

19. *Narcotic Drugs and Psychotropic Substances*, UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20VI/VI-19.en.pdf> [<https://perma.cc/UR3R-XMGP>] (last updated Oct. 11, 2017).

20. 1988 Convention, *supra* note 2, art. 3.

21. *Id.*

22. *Id.*

23. *Id.* art. 2.

24. *Id.* art. 3.

board a vessel flying its flag,” all parties are further authorized and encouraged to take *additional* measures to establish jurisdiction over offenses “committed on board a vessel concerning which that Party has been authorized to take appropriate action pursuant to article 17” of the 1988 Convention.²⁵

Article 17 of the Convention provides a mechanism by which state parties can cooperate to expand their collective jurisdiction over illicit narcotics trafficking at sea. Specifically, it sets forth an ad hoc procedure by which states can request operational assistance and permission to exercise jurisdiction over vessels of *other* flag states—that is, vessels registered to other nations. Article 17 also expressly encourages parties to enter into bilateral international agreements to operationalize this ad hoc procedure, and thereby use it efficiently and effectively on a repeated basis.²⁶ To that end, Article 17 provides that whenever a party conducting patrols at sea “has reasonable grounds to suspect that a vessel . . . flying the flag or displaying marks of registry of another Party is engaged in illicit traffic,” the party which encountered the vessel “may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.”²⁷ Under the terms of “any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to . . . [b]oard the vessel[,] . . . [s]earch the vessel[,] . . . [and, i]f evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.”²⁸ That is, international agreements—in practice, often bilateral agreements between two nations party to the 1988 Convention—form the basis for repeated cooperation in counterdrug operations.

The 1988 Convention is a model of international cooperation, and is replete with provisions requiring or encouraging signatory parties to work together, exchange information, and integrate their counterdrug operations.²⁹ The treaty obligates parties to “co-operate closely with one another . . . with a view to enhancing the effectiveness of law enforcement action to suppress” illicit trafficking.³⁰ Bilateral agreements are encouraged as a means of enhancing

25. *Id.* art. 4 (“[P]rovided that such jurisdiction shall be exercised only on the basis of agreements or arrangements referred to in” article 17).

26. *Id.* art. 17 (“The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.”).

27. *Id.*

28. *Id.*

29. *See, e.g., id.* art. 7 (“The Parties shall afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings”); *id.* (“the Parties shall facilitate or encourage, to the extent consistent with their domestic law and practice, the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings.”); art. 8 (encouraging parties to consider “transferring to one another proceedings for criminal prosecution of offences . . . in cases where such transfer is considered to be in the interests of a proper administration of justice.”).

30. *Id.* art. 9.

communication between agencies in different states,³¹ to “establish joint teams” to conduct counterdrug operations,³² and to provide for “effective co-ordination between . . . agencies and services and promote the exchange of personnel and other experts, including the posting of liaison officers.”³³ Acknowledging disparities in the resources that countries can bring to bear in the fight against drug trafficking—particularly in the so-called “transit states”³⁴ where much illegal trafficking takes place—the Convention also encourages states to provide operational,³⁵ technical,³⁶ and financial³⁷ support to less capable nations. States are encouraged to “request the assistance of other Parties” when they have “reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic.”³⁸

Whenever one state requests information from another about a vessel’s claimed flag state, the state receiving the request is obligated under the Convention to “respond expeditiously.”³⁹ The claimed flag state must “determine whether [the] vessel that is flying its flag is entitled to do so”—that is, whether its claim of nationality is valid—and, if the claim is legitimate, the state must also respond to any subsequent requests to board, search, and take enforcement action against the vessel and its crew.⁴⁰ To ensure timely responses to requests for authorization to take enforcement action, all parties are required to “designate an authority . . . to receive and respond to such requests.”⁴¹ A flag state may “subject its authorization to conditions to be mutually agreed between it and the requesting

31. *Id.* (directing state parties to, “on the basis of bilateral or multilateral agreements or arrangements . . . [e]stablish and maintain channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences”).

32. *Id.* (noting that “[o]fficials of any Party taking part in such teams shall act as authorized by the appropriate authorities of the Party in whose territory the operation is to take place; in all such cases, the Parties involved shall ensure that the sovereignty of the Party on whose territory the operation is to take place is fully respected”).

33. *Id.*

34. A “transit state” refers to a state in whose territory narcotic drugs “are being moved, [but] which is neither the place of origin nor the place of ultimate destination” of the drugs. *Id.* art. 1.

35. *Id.* art. 10 (“The Parties may conclude bilateral or multilateral agreements or arrangements to enhance the effectiveness of international co-operation”).

36. *Id.* (“The Parties shall co-operate . . . to assist and support transit States and, in particular, developing countries . . . through programmes of technical co-operation on interdiction and other related activities.”).

37. *Id.* (“The Parties may undertake . . . to provide financial assistance to such transit States for the purpose of augmenting and strengthening the infrastructure needed for effective control and prevention of illicit traffic.”).

38. *Id.* art. 17.

39. *Id.*

40. *Id.*

41. *Id.*

Party.”⁴² Whenever a state takes enforcement action concerning a vessel flagged by another state, it must “promptly inform the flag State concerned of the results of that action.”⁴³

Underscoring the Convention’s broad jurisdictional sweep, it states that the “Convention does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law,” thus expressly permitting a statute like the MDLEA that provides for great extraterritorial reach.⁴⁴ Furthermore, the Convention contemplates—and endorses—the notion that some parties will adopt more stringent criminal prohibitions than those provided for in the Convention itself.⁴⁵

As contemplated by the 1988 Convention, the United States has entered into several dozen bilateral agreements with other state parties to enforce counterdrug laws.⁴⁶ These include agreements primarily with South American states, and they cover a range of topics aimed at enhancing cooperation in counterdrug operations such as communications procedures for requesting authorization to board, search and take enforcement action; allowance for enforcement teams to embark on each other’s ships; and any special concerns relating to particular maritime zones or types of vessels.⁴⁷

The bilateral international agreements that the United States has crafted with other state parties to the 1988 Convention allow the U.S. Coast Guard to effectively enforce the MDLEA in the “transit zone,” which covers roughly six million square miles of ocean and is “far too expansive to randomly patrol” for any one nation.⁴⁸ Through its network of bilateral agreements providing for the

42. *Id.*

43. *Id.*

44. *Id.* art. 4.

45. *Id.* art. 24 (“A Party may adopt more strict or severe measures than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the prevention or suppression of illicit traffic.”).

46. BUREAU FOR INT’L NARCOTICS & LAW ENFORCEMENT AFFAIRS, *supra* note 8 (“A crucial ingredient for continued maritime drug interdiction success, are the USCG’s counter drug bilateral agreements and operational procedures held with over 40 partner nations. By facilitating operational communications and enabling USCG law enforcement officers to stop, board, and search vessels suspected of illicit maritime activity, these agreements deter smugglers from using another nation’s vessel and/or territorial seas as a haven from law enforcement efforts.”).

47. *E.g.*, Agreement Concerning Cooperation for the Suppression of Illicit Maritime Traffic in Narcotic Drugs and Psychotropic Substances, U.S.-Honduras, Jan. 30, 2001, T.I.A.S. No. 13088; Agreement Concerning Cooperation to Suppress Illicit Traffic by Sea and Air, U.S.-Nicaragua, Nov. 15, 2001, T.I.A.S. No. 13153; Agreement Concerning Cooperation in Suppressing Illicit Maritime Drug Trafficking, U.S.-Jamaica, Feb. 6, 2004, T.I.A.S. No. 98-310; Supplementary Arrangement to the Arrangement For Support and Assistance from the United States Coast Guard For the National Maritime Service of the Ministry of Government and Justice, U.S.-Panama, Feb. 5, 2002, T.I.A.S. No. 02-205.1; Agreement to Suppress Illicit Traffic by Sea, U.S.-Colombia, Feb. 20, 1997, T.I.A.S. No. 12835.

48. BUREAU FOR INT’L NARCOTICS & LAW ENFORCEMENT AFFAIRS, *supra* note 8.

sort of cooperation encouraged by the 1988 Convention, the U.S. Coast Guard and “partner nation law enforcement agencies provide monitoring, relaying data, imagery and position information until an appropriate interdiction asset arrives on scene”⁴⁹ with a suspected trafficking vessel.⁵⁰ The more than forty bilateral agreements that the Coast Guard has concluded with partner agencies overseas constitute a “crucial ingredient for continued maritime drug interdiction success . . . [b]y facilitating operational communications and enabling [Coast Guard] law enforcement officers to stop, board, and search vessels suspected of illicit maritime activity.”⁵¹

C. The MDLEA’s Jurisdictional Provisions

To effectuate the purpose and vision of the 1988 Convention,⁵² the MDLEA uses a series of interlocking jurisdictional provisions that facilitate a diplomatic exchange between U.S. officials and their foreign counterparts, and which makes U.S. jurisdiction over foreign and stateless vessels contingent on this diplomatic exchange.

The Act defines the term “vessel subject to the jurisdiction of the United States” to include several categories of vessels.⁵³ In one category are “vessel[s] without nationality,”⁵⁴ and two additional categories of vessels include those that are *not* necessarily stateless because they may be registered in a foreign state.⁵⁵ One of these latter two categories is for vessels “registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States,”⁵⁶ and the other category includes vessels—either

49. *Id.*

50. See *Circular 175 Procedure*, U.S. Dep’t of State, <https://www.state.gov/s/l/treaty/c175/> [<https://perma.cc/CH2F-B3VY>].

51. *Id.*

52. 1988 Convention, *supra* note 2, art. 17 (“The Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.”).

53. 46 U.S.C. § 70502(c)(1).

54. *Id.* § 70502(c)(1)(A).

55. In addition, some other vessels are included in the definition of “vessel[s] subject to the jurisdiction of the United States.” These are vessels assimilated to without nationality status under the 1958 Convention on the High Seas for attempting to fly under multiple flags, vessels in U.S. customs waters, and certain vessels in the U.S. contiguous zone. *Id.* § 70502(c)(1).

56. *Id.* § 70502(c)(1)(C). In considering what is meant by consent and waiver, some courts have held that consent to the enforcement of United States law may be inferred from a flag state’s grant of consent “to the boarding and search of the vessel” when the Coast Guard “routinely intercepts boats in international waters for the purpose of enforcing U.S. law, particularly U.S. drug laws.” *United States v. Estrada-Obregon*, 270 F. App’x 978, 979-80 (11th Cir. 2008). In *Estrada-Obregon*, although there was no evidence that “Panama explicitly consented to the enforcement of U.S. law by the United States,” the court reasoned that it was nonetheless “reasonable to conclude that U.S. authorities request permission to board and search vessels for that purpose, and a flag nation that objected to the enforcement of U.S. law would not grant permission to board and

stateless or registered with a state—that are located “in the territorial waters of a foreign nation if th[at coastal] nation consents to the enforcement of United States law by the United States.”⁵⁷

A “[V]essel without nationality”⁵⁸ is further defined to include three specific types of vessels: (1) “a vessel aboard which the master or individual in charge makes a claim of registry that is *denied* by the nation whose registry is claimed”⁵⁹; (2) “a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry *does not affirmatively and unequivocally assert* that the vessel is of its nationality”⁶⁰; and (3) “a vessel aboard which the master or individual in charge fails, on request of an officer of the United States . . . to make a claim of nationality or registry for that vessel.”⁶¹ These provisions mean that if the United States boards a vessel and the crewmember in charge of that vessel makes a claim of nationality, the United States must reach out to the claimed flag state before the vessel can be classified as a “vessel without nationality” under the MDLEA.

Because these provisions of the MDLEA make the exercise of United States jurisdiction over vessels and their crews contingent on information provided by a foreign flag state, the Act sets forth a procedure by which U.S. officials can demonstrate—in domestic court, to a judge—that they have completed the necessary diplomatic engagement to confirm that a vessel is “without nationality.” For vessels that lack nationality as a result either of a claim of nationality being *denied* by the claimed flag state, or of the claimed flag state failing to “affirmatively and unequivocally” confirm the claim, the MDLEA provides that “[t]he response of a foreign nation to a claim of registry . . . is proved *conclusively* by certification of the Secretary of State or the Secretary’s designee.”⁶² Likewise, in the case of a vessel flagged by a foreign state, the “[c]onsent or waiver of objection by [that] foreign nation to the enforcement of United States law” “is proved conclusively by certification of the Secretary of State or the Secretary’s designee.”⁶³ In practice, jurisdiction certifications are completed by a U.S. Coast Guard officer assigned as a liaison to the U.S. Department of State and designated by the Secretary of State to make those

search.” *Id.* at 979-80.

57. 46 U.S.C. § 70502(c)(1)(E).

58. *Id.* § 70502(c)(1)(A).

59. *Id.* § 70502(d)(1)(A) (emphasis added).

60. *Id.* § 70502(d)(1)(C) (emphasis added).

61. *Id.* § 70502(d)(1)(B). A “claim” of nationality may only be made by “possession on board the vessel and production of documents evidencing the vessel’s nationality,” a vessel “flying its nation’s ensign or flag,” and “a verbal claim of nationality or registry by the master or individual in charge of the vessel.” *Id.* § 70502(e).

62. *Id.* § 70502(d)(2) (emphasis added). The same provision allows for the claimed flag state’s response to be “made by radio, telephone, or similar oral or electronic means.” *Id.*

63. *Id.* § 70502(c)(2). As with its sister provision, the consent or waiver of the flag state “may be obtained by radio, telephone, or similar oral or electronic means.” *Id.* § 70502(c)(2)(A).

certifications on her behalf.⁶⁴

In the 1980 legislation that would later become the MDLEA, Congress made clear its intent to “facilitate increased enforcement by the Coast Guard of laws relating to the importation of controlled substances, and for other purposes.”⁶⁵ In that legislation, Congress established offenses for “possession, manufacture, or distribution” of controlled substances, and made clear that those offenses applied extraterritorially.⁶⁶

The Anti-Drug Abuse Act of 1986⁶⁷ updated the 1980 statute and changed its title to the one it retains today, the Maritime Drug Law Enforcement Act.⁶⁸ In the Anti-Drug Abuse Act, Congress re-affirmed its determination “that trafficking in controlled substances aboard vessels is a serious international problem and is universally condemned,” and also that “trafficking presents a specific threat to the security and societal well-being of the United States.”⁶⁹ The 1986 legislation implemented the provisions of the MDLEA as they substantially remain today, including its jurisdictional provisions defining “vessel[s] subject to the jurisdiction of the United States” and “vessel[s] without nationality.”⁷⁰

The 1986 statute, although providing for the jurisdiction certification procedure that remains today, used permissive language, stating that “[c]onsent or waiver of objection by a foreign nation to the enforcement of United States law by the United States . . . *may* be proved by certification of the Secretary of State or the Secretary’s designee.”⁷¹ In the Coast Guard Authorization Act of 1996,⁷² Congress amended the MDLEA to provide that jurisdiction certifications constitute *conclusive* proof of jurisdiction in U.S. courts.⁷³

The Anti-Drug Abuse Act had also defined a “vessel without nationality” as “a vessel aboard which the master or person in charge makes a claim of registry, which claim is *denied* by the flag nation whose registry is claimed.”⁷⁴ The Coast Guard Authorization Act of 1996 added that, in addition to claims that are *denied* by the claimed flag state, “vessel[s] aboard which the master or person in charge

64. See, e.g., *United States v. Barona-Bravo*, 685 F. App’x 761, 768 (11th Cir. 2017) (involving a State Department certification completed by a U.S. Coast Guard Commander—who had been assigned to the State Department and certified as able to complete jurisdictional certifications on behalf of the Secretary of State—in which the Commander certified that “[d]uring the Coast Guard’s . . . boarding of the [vessel in the case], the ‘master’ told Coast Guard members that the vessel was registered in Sao Tome and Principe, and Coast Guard members found a registration document on board supporting that claim.”).

65. Act of Sept. 15, 1980, Pub. L. No. 96-350, 94 Stat. 1159.

66. *Id.* at 1159-60.

67. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

68. *Id.* at 3207-95.

69. *Id.*

70. *Id.* at 3207-95, 3207-96.

71. *Id.*

72. Coast Guard Authorization Act of 1996, Pub. L. No. 104-324, 100 Stat. 3901.

73. *Id.* at 3989.

74. Pub. L. No. 99-570, 100 Stat. 3207-96 (emphasis added).

makes a claim of registry and the claimed nation of registry *does not affirmatively and unequivocally assert* that the vessel is of its nationality” are also subject to United States jurisdiction, thereby broadening the sweep of the MDLEA to encompass more vessels.⁷⁵ And in 2008 the National Defense Authorization Act⁷⁶ updated the denial prong still further, by providing that in lieu of merely *denial* by a flag state, “[t]he *response* of a foreign nation to a claim of registry . . . is proved conclusively by certification of the Secretary of State.”⁷⁷

The Coast Guard Authorization Act of 1996 made yet another change to the MDLEA by making jurisdiction “with respect to vessels . . . *not an element of any offense*”—instead asserting that “jurisdictional issues . . . are preliminary questions of law to be determined solely by the trial judge.”⁷⁸ The MDLEA retains that provision today.⁷⁹

The history of the MDLEA and its statutory revisions thus make clear that Congress has continually, affirmatively *strengthened* the MDLEA’s jurisdiction certification procedure and the jurisdictional sweep of the Act over time—by bolstering the evidentiary value of certifications, by loosening requirements for what responses by foreign states suffice to establish jurisdiction, and by attempting to limit defendants’ ability to challenge jurisdiction at trial. And indeed, the MDLEA’s jurisdictional provisions have proved popular with lawmakers—several other provisions of the United States Code, especially in Title 18, rely on the MDLEA’s jurisdictional framework and incorporate it.⁸⁰

75. Pub. L. No. 104-324, 100 Stat. 3901, 3989 (emphasis added).

76. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3.

77. *Id.* at 601 (emphasis added).

78. Pub. L. No. 104-324, 100 Stat. 3901, 3989 (emphasis added).

79. 46 U.S.C. § 70504(a).

80. Several provisions of the federal criminal code rely on 46 U.S.C. § 70502. *E.g.*, 18 U.S.C. § 831(c)(5) (2012) (applying offenses involving “[p]rohibited transactions involving nuclear materials” to those “committed on board a vessel of the United States or a vessel subject to the jurisdiction of the United States” as defined in 46 U.S.C. § 70502); § 2280(b)(1)(A)(i) (stating that the U.S. has jurisdiction over various offenses under the general heading of “[v]iolence against maritime navigation” when the offense is committed “against or on board a vessel of the United States or a vessel subject to the jurisdiction of the United States” as those terms are defined in 46 U.S.C. § 70502); § 2332i(b)(2)(B) (establishing jurisdiction over “acts of nuclear terrorism” defined in § 2332i(a) if the offense “is committed on board a vessel of the United States or a vessel subject to the jurisdiction of the United States” as defined in 46 U.S.C. § 70502); § 2280a(b)(1)(A)(i) (establishing jurisdiction over various offenses under the general heading “[v]iolence against maritime navigation and maritime transport involving weapons of mass destruction” to include offenses committed “against or on board a vessel of the United States or a vessel subject to the jurisdiction of the United States” as defined in 46 U.S.C. § 70502); § 2285(h) (applying 46 U.S.C. § 70502’s definition of “vessel without nationality” to an offense for “operat[ing] . . . or embark[ing] in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of a single country or a lateral limit of that country’s territorial sea with an adjacent

Two notable features of the MDLEA that have *not* changed through subsequent revisions of the statute are its bar on defendants raising violations of international law as a defense to their prosecutions⁸¹ and Congress's firm commitment to the MDLEA's extraterritorial application.⁸²

D. Criticism

Criticism of the MDLEA has focused on the law's extraterritorial reach, especially given its application of U.S. federal criminal law to foreign aliens with no or very few connections to the United States.⁸³ In addition, MDLEA

country, with the intent to evade detection"); § 229F(9)(C) (dealing with chemical weapons and including "any vessel of the United States," as defined in 46 U.S.C. § 70502(b), within the meaning of "United States"); § 2237(e)(3) (applying 46 U.S.C. § 70502's definition of "vessel subject to the jurisdiction of the United States" to 18 U.S.C. § 2237(a)(1), making it an offense "for the master, operator, or person in charge of a vessel . . . to knowingly fail to obey an order by an authorized Federal law enforcement officer to heave to that vessel."). Other, non-criminal provisions of the code also employ 46 U.S.C. § 70502's jurisdictional framework. *E.g.*, 16 U.S.C. § 1802(49) (2012) (incorporating 46 U.S.C. § 70502(c)'s definition of "vessel subject to the jurisdiction of the United States" in the context of fisheries conservation); 16 U.S.C. § 5502(10) (2012) (dealing with fisheries and stating that "vessel subject to the jurisdiction of the United States" and "vessel without nationality" have the same meaning as in 46 U.S.C. § 70502(c) and 46 U.S.C. 70502(d), respectively); 22 U.S.C. § 6701(14)(C) (2012) (applying 22 U.S.C. Ch. 75, implementing a chemical weapons convention, to "any vessel of the United States," as defined in 46 U.S.C. 70502(b)); 22 U.S.C. § 8102(13)(C) (2012) (applying 22 U.S.C. Chapter 88, implementing a protocol to a U.S. agreement with the International Atomic Energy Agency, to "any vessel of the United States," as defined in 46 U.S.C. 70502(b)).

81. Pub. L. No. 99-570, 100 Stat. 3207-96 (providing that "A claim of failure to comply with international law in the enforcement of this Act may be invoked solely by a foreign state, and a failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this Act."). The 1996 Coast Guard Authorization Act further added that "[a]ny person charged with a violation of this section shall not have standing to raise the claim of failure to comply with international law as a basis for a defense." Pub. L. No. 104-324, 100 Stat. 3901, 3989. The current provision is located at 46 U.S.C. § 70505.

82. Pub. L. No. 99-570, 100 Stat. 3207-97 (providing that the MDLEA "is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States.").

83. The Ninth Circuit does require the government to show a "nexus" between the vessel and the United States, in order to satisfy constitutional Due Process, thereby limiting the MDLEA's extraterritorial reach. *See, e.g.*, *United States v. Zakharov*, 468 F.3d 1171 (9th Cir. 2006) (applying a "nexus" requirement); *United States v. Perlaza*, 439 F.3d 1149 (9th Cir. 2006) (same); *United States v. Klimavicius-Viloria*, 144 F.3d 1249 (9th Cir. 1998) (same). However, the other Circuits have not imposed such a requirement. *But see, e.g.*, *United States v. Wilchcombe*, 838 F.3d 1179 (11th Cir. 2016) (rejecting a nexus requirement); *United States v. Persaud*, 605 F. App'x 791 (11th Cir. 2015) (same); *United States v. Campbell*, 743 F.3d 802 (11th Cir. 2014) (same); *United States v. Nueci-Peña*, 711 F.3d 191 (1st Cir. 2013) (same, but reviewing only for plain error); *United*

defendants have challenged the MDLEA's jurisdiction certification procedure on several constitutional grounds.⁸⁴

Professor Eugene Kontorovich has been a forceful critic of the MDLEA, arguing "that most or all of the MDLEA's jurisdictional provisions go beyond Congress's Article I powers in several ways."⁸⁵ Kontorovich contends that the Felonies Clause⁸⁶ can only serve as a basis for the MDLEA if the law's substantive drug offenses were to constitute Universal Jurisdiction (UJ) crimes under international law.⁸⁷ Other commentators have challenged that argument,⁸⁸ and courts have generally not been receptive to it.⁸⁹

States v. Suerte, 291 F.3d 366, 375 (5th Cir. 2002) (same); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999) (same); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) (same); *see also* United States v. Ballestas, 795 F.3d 138 (D.C. Cir. 2015) (declining to decide whether Due Process requires a showing of "nexus," because Due Process was clearly satisfied in the case at bar); Seth Freed Wessler, *The Coast Guard's 'Floating Guantánamos'*, N.Y. Times (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/magazine/the-coast-guards-floating-guantanamos.html> [<https://perma.cc/UD2D-XGQ9>] (criticizing Coast Guard counterdrug operations conducted under the MDLEA).

84. *See infra* Part II.

85. Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1194 (2009).

86. U.S. CONST. art. I, § 8, cl. 10 ("The Congress shall have power . . . [t]o define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.").

87. Kontorovich, *supra* note 85, at 1195 (noting that "[t]he issue has both practical and theoretical importance. Hundreds if not thousands of foreigners are in jail under this statute, which lies, at best, at the far edge of Congress's Article I powers.").

88. *See generally* Aaron J. Casavant, *In Defense of the U.S. Maritime Drug Enforcement Act: A Justification for the Law's Extraterritorial Reach*, 8 HARV. NAT'L SEC. J. 113, 118 (2017) ("Although drug trafficking is not subject to UJ because it is not recognized as a universal crime like slavery or genocide, the MDLEA remains a valid exercise of congressional power pursuant to the Define and Punish Clause because UJ is not the only rationale for the exercise of U.S. criminal jurisdiction over maritime drug trafficking. Rather, there are other, equally valid bases under international law supporting the MDLEA that do not require maritime drug trafficking to be considered a universal crime to enable prosecution by U.S. authorities." (footnotes omitted)).

89. *See, e.g.*, United States v. Carvajal, 924 F. Supp. 2d 219 (D.D.C. 2013) (rejecting Professor Kontorovich's argument). *But see* United States v. Cardales-Luna, 632 F.3d 731, 739 (1st Cir. 2011) (Torruella, J., dissenting) ("By the enactment of . . . the MDLEA, allowing the enforcement of the criminal laws of the United States against persons and/or activities in non-U.S. territory in which there is a lack of any nexus or impact in, or on, the United States, Congress has exceeded its powers under Article I of the Constitution. Any prosecution based on such legislation constitutes an invalid exercise of jurisdiction by the United States . . ."). *See also* United States v. Campbell, 743 F.3d 802, 809-10 (11th Cir. 2014) (rejecting an argument "that Congress exceeded its authority under the Felonies Clause when it enacted the Act because [the] drug trafficking offense lacked any nexus to the United States and because drug trafficking was not a capital offense during the Founding era"); *accord* United States v. Ballestas, 795 F.3d 138, 146-47 (D.C. Cir. 2015) (holding that the Define and Punish Clause provides Congress with the power to criminalize

Still, a few courts have imposed Article I limits on the MDLEA's extraterritorial reach. Most importantly, in *United States v. Bellaizac-Hurtado*⁹⁰ the Eleventh Circuit restricted the MDLEA's reach to waters outside the territorial waters of a foreign nation.⁹¹ The unusual case arose from a U.S. Coast Guard patrol of Panamanian territorial waters in 2010.⁹² After spotting "a wooden fishing vessel operating without lights and without a flag," the Coast Guard contacted the Panamanian Navy, which "pursued the vessel until its occupants abandoned the vessel and fled into a jungle."⁹³ After Panama's Navy discovered more than 750 kilograms of cocaine on the abandoned vessel the following morning, "[t]he Panamanian National Frontier Service searched on land for the occupants of the abandoned vessel and arrested [the four defendants] in various locations on the beach and in the jungle."⁹⁴ The Panamanian Foreign Ministry thereafter "consented to the prosecution of the four suspects in the United States."⁹⁵

Considering *Bellaizac-Hurtado* on appeal, the Eleventh Circuit held that the Define and Punish Clause⁹⁶ did not authorize criminalizing drug trafficking in Panamanian territorial seas.⁹⁷ The court reached its conclusion by first observing that the "Felonies Clause is textually limited to conduct on the high seas," thereby limiting the potential source of Article I authority to the Offences Clause only.⁹⁸ Having eliminated the Felonies Clause from consideration, the court proceeded to find the Offences Clause also insufficient to support the exercise of jurisdiction in foreign territorial waters because, in its view, Congress's authority "to define and punish conduct under the Offences Clause is limited by customary international law."⁹⁹ And since "drug trafficking is not a violation of customary international law," the court reasoned, the Offences Clause cannot authorize the MDLEA for a vessel in foreign territorial waters.¹⁰⁰

However, other courts have disagreed with *Bellaizac-Hurtado*, or else found reason to avoid its application.¹⁰¹ The District Court for the District of Columbia,

conspiracy to traffic drugs at sea, involving a defendant arrested in Colombian territory).

90. 700 F.3d 1245 (11th Cir. 2012).

91. *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1258 (11th Cir. 2012).

92. *Id.* at 1247-48.

93. *Id.*

94. *Id.*

95. *Id.* at 1248.

96. U.S. CONST. art. I, § 8, cl. 10.

97. *Bellaizac-Hurtado*, 700 F.3d at 1247.

98. *Id.* at 1248-49. This is because art. I, § 8, cl. 10 of the U.S. Constitution has been interpreted by the Supreme Court "to contain 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." *Id.*

99. *Id.* at 1249.

100. *Id.*

101. In addition, the Eleventh Circuit itself seemed to contain *Bellaizac-Hurtado* in a later case, *United States v. Macias*, 654 F. App'x 458 (11th Cir. 2016). In that case, the court declined

for example, confronted *United States v. Carvajal*,¹⁰² a case which involved “foreign citizens, acting in a foreign country, who never set foot on a vessel transporting narcotics.”¹⁰³ The *Carvajal* case—at what the court called “the far reaches of Congress’s constitutional power to criminalize extraterritorial conduct”—involved conspirators physically located in Colombia and orchestrating trafficking using stateless vessels that were seized in Colombian territorial waters.¹⁰⁴

The *Carvajal* defendants pointed to the Eleventh Circuit’s decision in *Bellaizac-Hurtado* to argue that application of the MDLEA exceeded the Offences Clause, but the court upheld the exercise of Congress’s power in *Carvajal* based on the Felonies Clause.¹⁰⁵ Despite the fact that the defendants in *Carvajal* were charged with a trafficking conspiracy, in furtherance of which they had never actually been aboard a vessel and remained in foreign territory, the court nonetheless found their offense to be within “the ambit of the Felonies on the High Seas Clause.”¹⁰⁶ In considering Congress’s authority under Article I, the court noted the amplified power granted to Congress by the Necessary and Proper Clause, and also recognized—though did not analyze in depth—Congress’s “power to implement and enforce treaties.”¹⁰⁷ Moreover, the *Carvajal* court expressed skepticism of Professor Kontorovich’s claims, which it viewed as a mere “opinion of what the law ought to be, not what it is.”¹⁰⁸ Indeed, in *United States v. Ballestas*, the D.C. Circuit held that the MDLEA’s conspiracy provision also has extraterritorial reach to match the extraterritorial reach of the Act’s underlying offenses, reasoning that to interpret the law otherwise would mean “[d]rug kingpins and other conspirators who facilitate and assist in carrying out trafficking schemes would fall beyond the reach of the statute, compromising the overriding intent of Congress in enacting it.”¹⁰⁹

II. JUDICIAL DEFERENCE TO JURISDICTION CERTIFICATION

Aside from challenges to Congress’s authority under Article I of the

to extend *Bellaizac-Hurtado*, explaining that the defendant “committed his drug trafficking offenses in international waters,” and “[t]herefore, *Bellaizac-Hurtado* does not apply, and . . . prosecution under the MDLEA for drug trafficking crimes committed onboard a stateless vessel in international waters is a constitutional exercise of extraterritorial jurisdiction under the Felonies Clause.” *Id.* at 458, 461.

102. 924 F. Supp. 2d 219 (D.D.C. 2013).

103. *Id.* at 225.

104. *Id.* at 249.

105. *Id.* at 254-56.

106. *Id.* at 259-60.

107. *Id.* at 249-50.

108. *Id.* at 253 (quoting *M’Ilvaine v. Coxe’s Lessee*, 6 U.S. (2 Cranch) 280, 306 (1805)).

109. 795 F.3d 138, 145 (D.C. Cir. 2015) (recognizing that to deny that provision extraterritorial application would “effectively inoculate many members of such organizations—including organizations targeting the United States—against prosecution.”).

Constitution to enact the MDLEA, defendants have challenged the Act's jurisdiction certification procedure. Those challenges have come in several forms—most commonly, they have included assertions that jurisdiction certifications offend the Confrontation Clause of the Sixth Amendment,¹¹⁰ the Due Process Clause of the Fifth Amendment,¹¹¹ or general separation-of-powers principles embodied in the Constitution.¹¹² A review of case law—especially but not exclusively in the Eleventh and Ninth Circuits, where prosecutions under the MDLEA most often take place¹¹³—reveals that courts have generally rejected challenges to jurisdiction certification.

Although courts have generally rejected these constitutional challenges, they have done so by leveraging a broad array of arguments. This Part surveys the constitutional challenges that have been leveled against jurisdiction certifications and considers how courts have addressed them. This Part argues that courts have often relied in their analyses on concerns about the role that jurisdiction certifications play in the conduct of U.S. foreign affairs, although courts have generally done so in only generic terms.

Understanding how courts have grappled with the foreign policy implications of certification in this Part will inform the discussion in Part III, which argues that courts should rely on the Treaty Power and political question doctrine, as more faithful expressions of their concerns for foreign affairs, in grounding deference to Executive Branch jurisdiction determinations under the MDLEA.

A. Confrontation Clause

Confrontation Clause challenges to the MDLEA's jurisdiction certification procedure have been frequent, and courts have generally rejected them. A close analysis of case law reveals that when courts have encountered Confrontation Clause challenges, concerns about the role that the jurisdiction procedure plays in U.S. foreign affairs has often motivated their decisions, even if somewhat opaquely.

110. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”).

111. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law.”).

112. *See infra* Section II.C.

113. Prosecutions for MDLEA offenses often take place in the Courts of Appeals for the Eleventh, Ninth, and First Circuits, owing to several operational, logistical, and legal factors including the presence of Joint Interagency Task Force South in Key West, Florida. *See generally About Us*, JOINT INTERAGENCY TASK FORCE SOUTH, <http://www.jiatfs.southcom.mil/About-Us/> [<https://perma.cc/G2GQ-VSG7>] (last visited Dec. 4, 2018). Disposition for MDLEA cases is coordinated by the U.S. Coast Guard's Office of Maritime and International Law in Washington, D.C., where the author is presently assigned. A WestLaw search of citing references for 46 U.S.C. § 70502 reveals that the overwhelming majority of prosecutions occur in the Eleventh Circuit, followed by the First (Puerto Rico) and Ninth Circuits. Prosecutions in the remaining circuits are few.

In *United States v. Cruickshank*,¹¹⁴ for example, the Eleventh Circuit rejected a Confrontation Clause challenge to the conviction of Carlington Cruickshank.¹¹⁵ Cruickshank's conviction arose from the U.S. Coast Guard's boarding of his vessel in the Caribbean Sea, which resulted in the recovery of 171 kilograms of cocaine.¹¹⁶ Cruickshank challenged the jurisdiction certification used to establish jurisdiction over him, but the court rejected his challenge, reasoning that the "State Department certification of jurisdiction under the MDLEA does not implicate the Confrontation Clause because it does not affect the guilt or innocence of a defendant."¹¹⁷

Ordinarily, the "Confrontation Clause prevents the admission of a witness's testimonial statement when the witness does not appear at trial, unless he is unavailable to testify and the defendant had a prior opportunity to cross-examine him."¹¹⁸ However, in the context of the MDLEA, the *Cruickshank* court observed that the jurisdictional requirements under the MDLEA serve as a "diplomatic courtesy"¹¹⁹ and, therefore, do not implicate the sort of "factual questions that traditionally would have been treated as elements of an offense under the common law, thereby triggering the constitutional safeguards provided by the Due Process Clause and the Sixth Amendment right to a jury trial."¹²⁰ Thus, in *Cruickshank*, the court took note of the fact that jurisdiction certification and the MDLEA's jurisdictional requirements serve a diplomatic purpose, but employed that understanding in defusing a Confrontation Clause challenge.¹²¹

Likewise, in *United States v. Barona-Bravo*,¹²² the Eleventh Circuit entertained a Confrontation Clause challenge to a State Department certification and once again rejected it. The case involved the interdiction of "a dilapidated cargo vessel" traveling between Colombia and Panama, whose "crew had smuggled hundreds of kilograms of cocaine on board."¹²³ When the Coast Guard boarded the vessel mid-transit in international waters off Panama, it "discovered the contraband and arrested all thirteen crew members," ultimately resulting in

114. 837 F.3d 1182 (11th Cir. 2016).

115. *Id.* at 1186, 1190 ("We are also unpersuaded by Cruickshank's claims that the district court erred by establishing jurisdiction under the MDLEA in two respects: (1) by relying on a United States Department of State certification, in violation of the Confrontation Clause of the Constitution; and (2) by removing from the jury the question of fact concerning jurisdiction.").

116. *Id.* at 1186.

117. *Id.* at 1191.

118. *Id.*

119. *Id.*

120. *United States v. Cruickshank*, 837 F.3d 1182, 1191 (11th Cir. 2016) (quoting *United States v. Tinoco*, 304 F.3d 1088, 1107-08 (11th Cir. 2002)).

121. *Id.* ("A United States Department of State certification of jurisdiction under the MDLEA does not implicate the Confrontation Clause because it does not affect the guilt or innocence of a defendant.").

122. 685 F. App'x 761 (11th Cir. 2017).

123. *Id.* at 764.

the indictment of all thirteen and the conviction of seven.¹²⁴

Affirming the seven convictions on appeal,¹²⁵ the *Barona-Bravo* court observed that the MDLEA's jurisdictional requirements did not offend the Confrontation Clause because they concerned only "the diplomatic relations between the United States and foreign governments."¹²⁶ In *Barona-Bravo* the government offered a State Department certification, completed by a U.S. Coast Guard Commander detailed to make certifications by the Secretary of State, who affirmed that when the Coast Guard boarded the vessel the master made a claim of registry in Sao Tome and Principe and the Coast Guard "found a registration document on board supporting that claim."¹²⁷ According to the Commander, after finding the vessel's registration for Sao Tome and Principe, "[t]he Coast Guard asked that country to confirm or deny the vessel's registry, and the Sao Tome government 'refut[ed]' the Borocho's claim of registry."¹²⁸ As a result of this refutation, the Coast Guard boarding team "determined the vessel was without nationality in accordance with 46 U.S.C. § 70502(d)(1)(A), rendering the vessel subject to the jurisdiction of the United States Pursuant to 46 U.S.C. § 70502(c)(1)(A)."¹²⁹

In holding that admission of the Coast Guard Commander's certification to prove the vessel's "stateless" status did not offend the Confrontation Clause. The *Barona-Bravo* court also relied, like the *Cruickshank* court, on the MDLEA's provision stating that jurisdiction does not constitute an element of the underlying trafficking offense.¹³⁰ In justifying its deference to the certification, the court further relied on the Act's conclusive proof provision,¹³¹ rejecting arguments that the certification may have been "vague, insufficient to prove jurisdiction, or inconsistent with the trial testimony."¹³²

In *United States v. Campbell*,¹³³ the Eleventh Circuit again considered whether admission of a jurisdictional certification from the State Department comported with the Confrontation Clause. The court again recognized, in responding to a Sixth Amendment challenge, that the MDLEA's jurisdictional

124. *Id.* at 766.

125. *Id.* at 764.

126. *Id.* at 769 (quoting *United States v. Campbell*, 743 F.3d 802, 807-08 (11th Cir. 2014)).

127. *Id.* at 768.

128. *Id.*

129. *Id.*

130. *Id.* at 769 ("Although the defendants recognize *Campbell*, they argue, without support, that the MDLEA jurisdictional requirement is the 'functional equivalent' of an element of the offense. They argue that, while this element does not go to the jury, 'jurisdiction remains a material element to be proven by the Government as a prerequisite to a conviction under the MDLEA.' *Campbell* binds us in this case, so the defendants' argument necessarily fails." (footnote and citation omitted)).

131. 46 U.S.C. § 70502(d)(2).

132. *Barona-Bravo*, 685 F. App'x at 769.

133. 743 F.3d 802 (11th Cir. 2014).

requirements serve a foreign affairs purpose.¹³⁴ *Campbell* arose from a Coast Guard boarding of “a vessel in the international waters off the eastern coast of Jamaica.”¹³⁵ After the Coast Guard chased the vessel down, “three individuals aboard the vessel discarded dozens of bales into the water, which the Coast Guard later determined to be approximately 997 kilograms of marijuana.”¹³⁶

The State Department certification in *Campbell* affirmed that “[t]he vessel lacked all indicia of nationality: it displayed no flag, port, or registration number,” and further explained that after a crew member named “Glenroy Parchment identified himself as the master of the vessel and claimed the vessel was registered in Haiti[, t]he Coast Guard then contacted the Republic of Haiti to inquire whether the vessel was of Haitian nationality,” and “[t]he government of Haiti responded that it could neither confirm nor deny the registry.”¹³⁷ Defendant Campbell challenged the State Department’s certification on Confrontation Clause grounds, as well as on the ground “that the certification of the Secretary of State provided insufficient evidence for the district court to determine that it had jurisdiction.”¹³⁸

The *Campbell* court again reasoned that “[b]ecause the stateless nature of Campbell’s vessel was not an element of his offense to be proved at trial, the admission of the certification did not violate his right to confront the witnesses against him.”¹³⁹ The court elaborated that the factual inquiry associated with making a jurisdictional determination under the MDLEA did not require the court to address the traditional elements of a criminal offense—that is, the “the actus reus, causation, and the mens rea elements.”¹⁴⁰ Recognizing that the MDLEA’s jurisdiction provisions serve the interest of “international comity,”¹⁴¹ the court asserted that “[p]roof of jurisdiction ‘does not affect the defendant’s blameworthiness or culpability, which is based on the defendant’s participation in drug trafficking activities, not on the smoothness of international relations between countries.’”¹⁴²

In response to Campbell’s allegation that the jurisdictional certification failed to include sufficient “details about the communications between the Coast Guard and Haiti and that the United States did not offer any testimony to corroborate the

134. *Id.* at 804 (“Because the certification proves jurisdiction, as a diplomatic courtesy to a foreign nation, and does not prove an element of a defendant’s culpability, we conclude that the pretrial admission of the certification does not violate the Confrontation Clause.”).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 806.

139. *Id.* at 802.

140. *Id.* at 807; *accord* United States v. Persaud, 605 F. App’x 791, 794-96 (11th Cir. 2015) (rejecting a Confrontation Clause challenge to certification and reasoning that the State Department certification did not address an element of the substantive offense).

141. *Campbell*, 743 F.3d at 807 (quoting United States v. Tinoco, 304 F.3d 1088, 1108 (11th Cir. 2002)) (emphasis added).

142. *Id.* (quoting *Tinoco*, 304 F.3d at 1109) (emphasis added).

certification,” the court simply noted the statute’s conclusive proof provision and stated that “[t]he certification contained the statements of [Coast Guard] Commander Deptula, who explained that he had asked the Haitian government whether the suspect vessel was registered in Haiti and that Haiti responded that it could neither confirm nor deny the registry.”¹⁴³ The Act, the court observed, does not expressly require additional details about how the diplomatic communication was carried out.¹⁴⁴

To establish jurisdiction in *Cardales-Luna*,¹⁴⁵ the government relied on a certification that affirmed that “Bolivian authorities notified the United States that the Government of Bolivia waived objection to the enforcement of U.S. laws by the United States with respect to the vessel . . . including its cargo and all persons onboard.”¹⁴⁶ As in *Campbell*, the defendant in the case argued that the certification lacked important details, asserting it was “deficient because it does not state the name of the Bolivian official involved or the exact time and means of the communication between the two governments.”¹⁴⁷ The First Circuit explained that although the MDLEA had previously allowed for an inquiry into the factual basis behind a certification, “Congress effectively foreclosed that possibility in 1996, when it amended the MDLEA to provide that” certification proves “conclusively” that a flag state has consented to the enforcement of United States law against one of its vessels.¹⁴⁸

By contrast, in *United States v. Mitchell-Hunter*,¹⁴⁹ a case decided under the MDLEA prior to inclusion of the conclusive-proof provision, the court simply considered the jurisdiction certification at issue in the case as “relevant and admissible prima facie evidence of statelessness” and, considering that “[t]he only other evidence submitted pertaining to statelessness was that the . . . vessel displayed no registry numbers, hailing port, or national flag, any of which would have indicated nationality under international law,” the court held that the certification sufficed to establish jurisdiction over the vessel.¹⁵⁰

The Eleventh Circuit has not been alone in deflecting Confrontation Clause challenges to MDLEA jurisdiction certifications based partially on concerns about foreign affairs implications. In *United States v. Martinez*,¹⁵¹ the First Circuit affirmed the convictions of two men, Martinez and Rosario, who were apprehended after the Coast Guard interdicted their “vessel in the strait between

143. *Id.* at 809.

144. *Id.* at 806 (“The Act does not require the certification of the Secretary of State to include the details of how an official received or from whom the official received the response to a claim of registry from a foreign nation.”).

145. *United States v. Cardales-Luna*, 632 F.3d 731 (1st Cir. 2011).

146. *Id.* at 736.

147. *Id.*

148. *Id.*

149. 663 F.3d 45 (1st Cir. 2011).

150. *Id.* at 50.

151. 640 F. App’x 18 (1st Cir. 2016).

the Dominican Republic and Puerto Rico.”¹⁵² As the Coast Guard aircraft that spotted them “approached, [the] two men . . . were seen throwing four white bales overboard, before changing course and heading back toward the Dominican Republic.”¹⁵³ The Coast Guard later recovered the bales, which “were found to contain a total of some sixty-seven kilograms of cocaine.”¹⁵⁴

Despite the fact that the vessel in *Martinez* had “no visible markings, did not carry a national flag, and there was no other evidence of registry onboard,” the Coast Guard nonetheless contacted the Dominican Republic after either Martinez or Rosario stated that “he was in the process of registering the [vessel] in the Dominican Republic.”¹⁵⁵ After “the Dominican Republic indicated that they had no record of the” vessel, the Coast Guard determined that the vessel was “without nationality” under the MDLEA and, therefore, subject to United States jurisdiction.¹⁵⁶

Rosario challenged the court’s finding of jurisdiction based on the State Department certification, pointing to a factual discrepancy: although the “documentation prepared by the [Coast Guard] at the time of the interdiction . . . suggests that the [Coast Guard] queried the Dominican authorities regarding the registry of the ‘Alicantino,’ as was painted on the [vessel’s] hull,” the Dominican Republic official had apparently misspelled the vessel’s name on the documentation it provided in response.¹⁵⁷ As evidenced in the State Department certification, completed by Coast Guard Commander Salvatore Fazio, the Coast Guard interpreted the Dominican Republic’s response to mean that the Dominican Republic “could neither confirm nor deny the claim that the vessel was registered in the Dominican Republic.”¹⁵⁸

In rejecting Rosario’s challenge to the State Department certification, the court observed that the text of the MDLEA made clear that defendants do “not have standing to raise a claim of failure to comply with international law as a basis for a defense,” which “may be made only by a *foreign nation*.”¹⁵⁹ Elaborating on the rights of an MDLEA defendant as compared to the rights that a foreign sovereign retains vis-à-vis the United States, the court explained that defendants may only raise “claims of a failure to comply with United States law,” whereas a foreign sovereign may raise claims related to alleged violations of international law.¹⁶⁰ Despite Rosario’s portrayal of his “appeal as one rooted in

152. *Id.* at 20.

153. *Id.*

154. *Id.*

155. *Id.* at 20, 22.

156. *Id.* at 20.

157. *Id.* at 21-22 (indicating that the Dominican Republic replied that it “had no record of a vessel by the name of the ‘Alcantino,’ seemingly a misspelling of ‘Alicantino.’”).

158. *Id.* at 22.

159. *Id.* at 23 (emphasis added).

160. *Id.* (reasoning that “the MDLEA does not permit a defendant to ‘look behind the State Department’s certification to challenge its representations and factual underpinnings.’” (quoting *United States v. Guerrero*, 114 F.3d 332, 341 (1st Cir.1997))).

the [Coast Guard's] failure to comply with the substantive provisions of the MDLEA," the court found that, in fact, "the record strongly suggest[ed] that the [Coast Guard] made the proper inquiry."¹⁶¹ Although seemingly recognizing the possibility that the Coast Guard provided the incorrect name to Dominican authorities, rather than the other way around, the court declined to scrutinize the certification's "factual underpinnings."¹⁶²

Rosario's co-defendant, Martinez, fared no better in his Confrontation Clause challenge. Relying on First Circuit precedent holding "that State Department certifications are admissible as public records," the court concluded that "the certificate is some evidence—and, in this case, uncontested evidence—of what claim of registry was made."¹⁶³ However, the *Martinez* court did contemplate one scenario in which it suggested that it *would* be willing to examine the so-called "factual underpinnings" of the certification:

Consider a defendant who maintains that although the certificate states that he made a claim of registry in Country X, he actually made a claim of registry in Country Y and the [Coast Guard] then contacted the wrong nation. This unlikely scenario is the only one we can foresee in which a defendant would have a basis on which to challenge statements in the certificate describing his claim of registry. Such a challenge, to the extent that one was to arise, would be properly brought on the basis of the [Coast Guard]'s failure to comply with the substantive provisions of the MDLEA.¹⁶⁴

The First Circuit encountered that precise situation in *United States v. Nueci-Peña*.¹⁶⁵ There, the court considered the appeal of Francisco Nueci-Peña, who along with several other defendants was "convicted of possession with the intent to distribute over 1140 pounds of cocaine and heroin" after his vessel was interdicted on the high seas.¹⁶⁶ In *Nueci-Peña*, the court confronted the situation the *Martinez* court suggested might lead it to probe the factual details supporting a State Department certification: the Coast Guard allegedly contacted the wrong country.¹⁶⁷ Nueci-Peña raised a Confrontation Clause challenge to the State Department certification used in his case.¹⁶⁸

After the Coast Guard boarded the vessel, "Nueci, identifying himself as the master of the ship, said that the vessel was Colombian."¹⁶⁹ Consistent with its bilateral agreement with Colombia, "the Coast Guard contacted Colombian authorities for confirmation," but the Colombian Navy "could neither confirm nor

161. *Id.*

162. *Id.*

163. *Id.* at 26.

164. *Id.* at 26 n.9.

165. *United States v. Nueci-Peña*, 711 F.3d 191 (1st Cir. 2013).

166. *Id.* at 192.

167. *Id.* at 193.

168. *Id.* at 192.

169. *Id.*

deny that the vessel was registered in Colombia.”¹⁷⁰ Concluding that the vessel was “without nationality,” the Coast Guard searched the vessel and “discovered 396 kilograms of cocaine and 123 kilograms of heroin on board.”¹⁷¹

Just before he was set to go to trial, “Nueci moved to dismiss for lack of jurisdiction over the vessel, . . . assert[ing] that at the time of the interdiction Nueci claimed the vessel was registered in Venezuela, not Colombia.”¹⁷² Nueci’s fellow defendants corroborated his version of events.¹⁷³ Thus, Nueci argued that the Colombian Navy’s failure to confirm his vessel’s registry “meant nothing since the United States authorities had requested a consent waiver from the wrong country.”¹⁷⁴

The Coast Guard disputed Nueci’s account,¹⁷⁵ and pointed to its State Department certification documenting the Coast Guard’s exchange with the Colombian Navy.¹⁷⁶ The government’s position was that “any confusion about the vessel’s registry was created by the defendants themselves.”¹⁷⁷ In the end, however, the court had no need to determine whether that confusion posed a problem on Confrontation Clause or other grounds: the government subsequently filed an additional certification that “detailed the Coast Guard’s more recent contact with Venezuelan authorities—contact initiated to determine whether the vessel was indeed registered there as Nueci claimed.”¹⁷⁸ This “Supplemental Certification” documented the Coast Guard’s later communication with Venezuela, which also could not confirm Nueci’s claim of Venezuelan registry.¹⁷⁹ The court rejected Nueci’s Confrontation Clause challenge.¹⁸⁰

170. *Id.*

171. *Id.*

172. *Id.* at 193.

173. *Id.*

174. *Id.*

175. *Id.* (“In its opposition to the defendants’ motion to dismiss, the government rehashed what happened when the Coast Guard boarded the vessel: that Nueci, who claimed to be the person in charge on the vessel, told an officer, who was part of the Coast Guard boarding team, that the vessel was Colombian.”).

176. *Id.* (affirming “that the vessel had no ‘marking or indicia of nationality’ and ‘was not displaying any registry numbers, a hailing port, or flying a national flag, and had no documentation or registry papers’ at the time of the interdiction. The Certification showed that in accordance with the [Coast Guard’s bilateral agreement with Colombia,] the Coast Guard inquired via fax with the Colombian Navy to verify Nueci’s claim of registry, but Colombia could neither confirm nor deny that claim.”).

177. *Id.* at 193-94.

178. *Id.* at 194.

179. *Id.* (“In accordance with Article 3 of the Agreement Between the Government of the United States of America and the Government of the Republic of Venezuela to Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea, the Coast Guard requested the Venezuelan Coast Guard to confirm or deny that Nueci’s vessel . . . was registered in Venezuela. Venezuela could not say the vessel was registered there.”).

180. *Id.* at 199.

In so holding in *Nueci-Peña*, the First Circuit relied partly on its earlier case of *United States v. Mitchell-Hunter*, which arose from the same Coast Guard boarding at issue in *Nueci-Peña*.¹⁸¹ Javier Mitchell-Hunter had been charged with MDLEA offenses, and he challenged the State Department certifications introduced in his prosecution on Confrontation Clause grounds.¹⁸² As detailed above, despite initial disagreement about which flag state had been claimed by the crew, the Coast Guard eventually contacted both nations and neither could confirm registry.¹⁸³ In rejecting Mitchell-Hunter's challenge to the State Department certifications based on that factual dispute, the court refused to extend Confrontation Clause protection beyond the trial context, and observed that "the purpose of the MDLEA's jurisdictional requirement is not to protect a defendant's rights, but instead to maintain comity between foreign nations."¹⁸⁴ In other words, the court did not regard the State Department certifications as protective of the "defendant's interests at trial, but instead . . . the rights of governments" interacting on the world stage.¹⁸⁵

What this review of Confrontation Clause challenges to jurisdiction certifications makes clear is that, in addition to recognition of the MDLEA's statutory provisions making jurisdiction a question of law for the trial judge and making certification conclusive proof of correspondence with a foreign sovereign, both the First and Eleventh Circuits—the two tribunals under whose oversight most MDLEA cases are litigated—have consistently acknowledged that the State Department certification procedure provided for in the MDLEA serves distinctly international, diplomatic purposes.

181. *United States v. Mitchell-Hunter*, 663 F.3d 45, 47 (1st Cir. 2011); *Nueci-Peña*, 711 F.3d at 199.

182. *Mitchell-Hunter*, 663 F.3d at 47.

183. *Id.* at 47-48.

184. *Id.* at 48, 50-53 ("In this non-trial context, where evidence does not go to guilt or innocence, courts have not applied the Confrontation Clause, and we need not do so here. To be clear, we need not and do not decide whether the Confrontation Clause could ever apply to pretrial determination, but only find that it does not apply in the circumstances of this case.") (emphasis added).

185. *Id.* at 51 (emphasis added). The court's decision in *Mitchell-Hunter* also illustrates that State Department certifications may be used to establish jurisdiction *after* the violation of the MDLEA takes place, as is almost necessarily the case. *See United States v. Mitchell-Hunter*, 663 F.3d at 50 n. 7 ("jurisdiction under the MDLEA may be established at any time prior to trial"); *see also United States v. Cardales*, 168 F.3d 548, 551-52, 554 (1st Cir. 1999); *United States v. Bustos-Useche*, 273 F.3d 622, 627-28 (5th Cir. 2001). *But see United States v. Cardales-Luna*, 632 F.3d 731, 740 n. 9 (1st Cir. 2011) (Torruella, J., dissenting) (expressing concern about "the validity of the retroactive application of U.S. criminal law to Appellant, that is, the application of U.S. law to Appellant for actions that were not violations of that law until after the consent was given by the Bolivian government to subject Appellant to" the MDLEA).

B. Due Process

Closely related to Sixth Amendment Confrontation Clause challenges, MDLEA defendants have often argued that the Act violates the Due Process Clause of the Fifth Amendment by making the jurisdiction determination a pretrial question for the judge. Courts have generally—though less uniformly than in the context of Confrontation Clause challenges—rejected those arguments.¹⁸⁶

In *United States v. Vilches-Navarrete*,¹⁸⁷ the First Circuit considered the MDLEA's new provision, added in 1996, providing that "[j]urisdictional issues . . . are preliminary questions of law" for the judge, rather than elements of the crime reserved for determination by the jury.¹⁸⁸ The *Vilches-Navarrete* court upheld the constitutionality of the new provision, reasoning that assignment of the jurisdictional inquiry to the court "was well within the power of Congress."¹⁸⁹ Confronted with a due process challenge to the new provision, in which the defendant argued that he had a right "to have every element of a criminal offense decided by a jury beyond a reasonable doubt," the court explained that the jurisdiction "issue is not an element of the crime in the requisite sense and may be decided by a judge."¹⁹⁰

The court explained, "Congress enjoys latitude in determining what facts constitute elements of a crime which must be tried before a jury and proved beyond a reasonable doubt and which do not."¹⁹¹ To the extent that the Constitution places limits on Congress's ability to define the elements of a crime, the court explained that the inquiry largely turns on "the historic treatment of particular categories of facts."¹⁹² Based on historical practice, the court reasoned, "the determination of whether a vessel is subject to the jurisdiction of the United States would not be an essential element of the offense," because the common law elements of an offense included only the traditional elements of a crime—actus reus, mens rea, and causation.¹⁹³

Thus, because the question "[w]hether a vessel was subject to the jurisdiction of the United States has no bearing on whether defendants manufactured, distributed, or possessed with intent to distribute a controlled substance or whether they did so knowingly or intentionally," jurisdiction under the MDLEA simply "does not meet the common law definition of an element."¹⁹⁴ The *Vilches-*

186. See, e.g., *United States v. Cruickshank*, 837 F.3d 1182, 1192 (11th Cir. 2016) ("[T]he jurisdictional requirement is not an element of the offense, need not be determined by a jury, and does not violate the Due Process Clause").

187. *United States v. Vilches-Navarrete*, 523 F.3d 1 (1st Cir. 2008).

188. *Id.* at 19 (Lynch and Howard, J., opinion of the court in part and concurring in part).

189. *Id.*

190. *Id.* at 19-20.

191. *Id.* at 20.

192. *Id.* at 21.

193. *Id.*

194. *Id.*

Navarrete court, in this respect, was bolstered by the prohibition-era case of *Ford v. United States*,¹⁹⁵ in which the Supreme Court had determined that whether a vessel was “within the zone covered by [a] treaty [with Great Britain] and therefore subject to the jurisdiction of the United States was not an issue a jury needed to decide,”¹⁹⁶ because jurisdiction in the sense of that statute spoke to the enforcement reach of the law, rather than the defendant’s mens rea or actus reus for the alcohol smuggling offense.¹⁹⁷

In *United States v. Campbell*, too, the court had relied on *Ford v. United States* in concluding that courts may “decide before trial the jurisdictional issue about the location of the vessel without submitting that issue to a jury.”¹⁹⁸ In *Ford*, the Supreme Court had reasoned that “[t]he issue whether the ship was seized within the prescribed limit did not affect the question of the defendants’ guilt or innocence,” but rather only the authority of the court to proceed with the case.¹⁹⁹

Like other courts, however, the First Circuit in *Vilches-Navarrete* observed that the MDLEA’s jurisdictional provisions are aimed at international ends: “Congress inserted the requirement that a vessel be subject to the jurisdiction of the United States into the statute as a matter of diplomatic comity.”²⁰⁰ Moreover, the argument that the jurisdiction “question is not an element of the § 70503(a)(1) crime [was] strengthened by the fact that Congress *did not need* to include a provision in the MDLEA that the vessel be subject to the jurisdiction of the United States.”²⁰¹ According to the *Vilches-Navarrete* court, the protective principle of international law authorized Congress to “punish crimes committed on the high seas regardless of whether a vessel is subject to the jurisdiction of the United States” because drug trafficking presents a direct threat to the security of the United States.²⁰² And if Congress could simply have omitted the jurisdictional requirement from the MDLEA, that requirement does not constitute “an essential element of the crime unless Congress so intends.”²⁰³

In approving of the MDLEA’s assignment of the jurisdiction question to the judge, the First Circuit in *Vilches-Navarrete* disagreed with the Ninth Circuit’s resolution of the same question in *United States v. Perlaza*.²⁰⁴ The *Perlaza* court, confronted with the same question concerning the constitutionality of the then-

195. *Ford v. United States*, 273 U.S. 593 (1927).

196. *Vilches-Navarrete*, 523 F.3d at 21 (Lynch and Howard, Circuit Judges, opinion of the court in part and concurring in part).

197. *Ford*, 273 U.S. at 606.

198. *United States v. Campbell*, 743 F.3d 802, 809 (11th Cir. 2014) (citing *Ford v. United States*, 273 U.S. 593, 606 (1927)).

199. *Id.*

200. *Vilches-Navarrete*, 523 F.3d at 22 (Lynch and Howard, J., opinion of the court in part and concurring in part).

201. *Id.* at 21-22 (emphasis added).

202. *Id.* (emphasis added).

203. *Id.*

204. *Id.* at 22.

new provision making the jurisdictional determination a question of law for the trial judge, reversed ten MDLEA convictions and held that the district court should not have “exercised jurisdiction over them without first requiring the Government to . . . prove to a jury beyond a reasonable doubt certain facts necessary to establish jurisdiction.”²⁰⁵

The *Perlaza* court expressly rejected the notion that the “protective” principle of international law obviated the need “to establish . . . jurisdiction over [the] Defendants,” and reasoned that because prior to 1996 the courts had agreed that jurisdiction must be proved to a jury as an element of the MDLEA offense, Congress could not simply, by statute, later remove the question from the jury.²⁰⁶ A jurisdiction determination, the court reasoned, often involves both legal and factual components, and “not all jurisdictional determinations . . . may be split so easily into two questions—one of which is purely legal and . . . is decided by the court, and the other, which is factual, is left for the jury.”²⁰⁷ A determination of where a vessel had been seized would be an example of a factual question, whereas a determination of whether a vessel was stateless would be a legal question.²⁰⁸ In *Perlaza*, there was a factual dispute over whether one of the seized vessels had been stateless, a dispute which neatly illustrates the operational difficulties inherent in maritime counterdrug operations:

Three Navy personnel who observed the [vessel] through binoculars . . . testified at the district court’s evidentiary hearing that they saw no flags of any kind, no markings of any kind, no hull numbers, no name on the boat, and no home-port inscription. Additionally, when Coast Guard Petty Officer Craig Cruz asked the [vessel] Defendants if the vessel had a flag, [two of the crew members] simply shook their heads back and forth, and [another crew member] stated, ‘Barco no tengo bandera,’ which literally means, ‘Boat I have no flag.’ On the other hand, [two crew members] both submitted declarations stating that they were ‘from’ Colombia and that the Go-Fast was ‘from’ Colombia At the evidentiary hearing, Petty Officer Cruz also testified that later, when asked who was in charge of the [vessel], [one crew member] stated that [the vessel]’s captain was a person named ‘Freddy,’ who was never found and, according to Cruz’s report, ‘was the only one who really knew about the boat expedition.’²⁰⁹

The Ninth Circuit reversed the lower court’s resolution of this factual dispute, holding instead that “[t]he evidence relating to the [vessel]’s statelessness presents precisely the kind of disputed factual question that” a jury must decide.²¹⁰

205. *United v. Perlaza*, 439 F.3d 1149, 1153 (9th Cir. 2006).

206. *Id.* at 1164.

207. *Id.*

208. *See id.*

209. *Id.* at 1165.

210. *Id.* at 1165-66 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). Judge Brunetti

Notably, the *Perlaza* decision did not involve a State Department certification, apparently because the Coast Guard did not interpret the crewmembers' statements as a claim of nationality, and so the Coast Guard never reached out to the claimed flag state to seek verification or denial of that claim. Whether introduction of a certification from the government, coupled with the MDLEA's conclusive proof provision, would have changed the *Perlaza* court's analysis regarding whether the jurisdiction question must be submitted to the jury is not clear. However, at the very least, the *Perlaza* court held that when there are factual disputes surrounding jurisdiction, the jury must decide them, at least in the absence of a State Department certification.

Nonetheless, the court's reasoning suggests that—if confronted with a case in which a factual dispute was present alongside a proffered State Department certification affirming jurisdiction—the court would need to assign the jurisdiction question to the jury. After all, following the *Perlaza* court's reasoning, if Congress could not make the jurisdictional question one for the judge by statute where factual disputes are present, why could Congress by statute provide for a certification that overrides the same factual dispute surrounding jurisdiction?

The Eleventh Circuit in *Cruickshank*—in addition to confronting the Confrontation Clause challenge discussed in Section II.A—also rejected the argument that the MDLEA certification procedure offended the Due Process Clause.²¹¹ In reaching that decision, the court recognized that “the jurisdictional requirement is intended to act as a diplomatic courtesy, and does not bear on the individual defendant's guilt,” thereby applying to the Due Process challenge the same reasoning it employed in responding to the Confrontation Clause challenge.²¹² Like the *Vilches-Navarrete* court, the *Cruickshank* court was willing to defer here to the MDLEA's provision making jurisdiction a question of law for the judge.²¹³

The Due Process Clause has also occasionally be used to challenge other aspects of MDLEA jurisdiction and the certification procedure in particular. In *United States v. Martinez*,²¹⁴ the defendants challenged the State Department certification used in their case on the grounds that it “must meet a ‘baseline level of specificity’ by including, for example, the ‘name or other identifying

dissented on this point, noting that “Constitutional limitations on congressional power to remove issues from the jury's determination are narrow.” *Id.* at 1179, 1180 (Brunetti, J., concurring in part and dissenting in part). However, even Judge Brunetti seemed to suggest that had there been *more* of a factual dispute, it may have been proper for the district court to let the jury decide it. *See id.* at 1181-82 (“Since no evidence was presented to create a factual dispute with regard to the [vessel]'s status as a ‘vessel without nationality,’ . . . the district court properly determined that the vessel was stateless based on the uncontroverted evidence in the record”).

211. *See* *United States v. Cruickshank*, 837 F.3d 1182, 1191-92 (11th Cir. 2016).

212. *Id.* (emphasis added).

213. 46 U.S.C. § 70504(a); *Cruickshank*, 837 F.3d at 1191-92.

214. *United States v. Martinez*, 640 F. App'x 18 (1st Cir. 2016).

characteristics’ of the vessel in question.”²¹⁵ Although careful to limit its holding to the facts of *Martinez*, the court was unmoved. Specifically, the court reasoned that “given the lack of any further identifying information on the vessel, the [Coast Guard] certification was not defective based on its purported lack of specificity.”²¹⁶ The court found “no merit to [the defendant]’s claim that an unspecific certification violates due process by posing a risk that one vessel might be mistaken for another,” because in this particular case “there were no other vessels anywhere near the [vessel] at the time it was intercepted.”²¹⁷ Still, the court’s analysis seemingly left open the possibility that, in cases where there *is* some risk of a vessel being confused for another or where a vessel contains more distinguishing characteristics, the court may be willing to scrutinize the certification’s contents more closely.

In the Due Process Clause, the Ninth Circuit has also identified a so-called “nexus” requirement, stemming from concerns about the MDLEA’s targeting of foreign persons far from the United States.²¹⁸ Aside from the Ninth Circuit, however, courts have generally declined to impose a Due Process nexus requirement on MDLEA prosecutions,²¹⁹ although some individual judges have expressed an interest in doing so.²²⁰ The D.C. Circuit, for its part, appears not to have joined either side in either adopting or declining a nexus requirement.²²¹ Courts that have declined to impose a nexus requirement on the MDLEA have emphasized the textual assertion of extraterritoriality in the Act,²²² international

215. *Id.* at 24.

216. *Id.* (“The record establishes that the [vessel] was a small (approximately twenty-one-foot) and primitive vessel powered by a single outboard motor. Aside from the name ‘Alicantino’ painted on the hull, the [vessel] had no visible markings. It did not display a registration number, a hailing port, or a national flag. What is more, when [Coast Guard] crews boarded the [vessel], they were unable to locate registration paperwork or any other documentation that they could use to confirm the identity of the vessel or its passengers.” (footnote omitted)).

217. *Id.* at 24 n.4.

218. *United States v. Zakharov*, 468 F.3d 1171 (9th Cir. 2006).

219. *See, e.g.*, *United States v. Lucas*, 473 F. App’x 877, 878-79 (11th Cir. 2012) (rejecting a defendant’s argument that the “court lacked jurisdiction because the government failed to prove that the boat in which he was transporting cocaine was bound for the United States”); *United States v. Estrada-Obregon*, 270 F. App’x 978 (11th Cir. 2008) (declining to require a nexus).

220. *See United States v. Angulo-Hernandez*, 565 F.3d 2, 19 (1st Cir. 2009) (Torruella, J., concurring in part and dissenting in part) (“Aside from the principles of international law implicated, I have increasing sympathy for the view that due process requires some nexus with the United States before our government can be permitted to board such a vessel and arrest foreign citizens on the high seas for alleged violations of U.S. laws.”).

221. *See, e.g.*, *United States v. Ballestas*, 795 F.3d 138, 148 (D.C. Cir. 2015) (observing that the Circuit had not yet resolved the nexus question, but declining to do so because, even “assuming the existence of a due process limitation, the extraterritorial application of the MDLEA in this case would not run afoul of it.”).

222. *See, e.g.*, *United States v. Wilchcombe*, 838 F.3d 1179, 1186 (11th Cir. 2016) (“The text of the MDLEA does not require a nexus between the defendants and the United States; it

law principles,²²³ and the fact that the Act provides clear notice that all nations prohibit and condemn drug trafficking aboard stateless vessels on the high seas.”²²⁴ Notably, the Ninth Circuit has applied the nexus requirement even to cases where a foreign flag state has confirmed registry and granted affirmative consent to subject the crew to United States law.²²⁵ Still, in cases where a nexus requirement has been held to apply, it appears to set a relatively low evidentiary bar for the government.²²⁶

What a survey of challenges on Due Process grounds to jurisdiction certification reveals, then, is that—as in the Confrontation Clause context—courts have a general awareness that the central function of the MDLEA’s jurisdiction certification procedure relates not to individual defendants, but rather to foreign affairs and international diplomacy.

C. Separation-of-Powers

The MDLEA’s certification procedure has also been challenged on the grounds that it violates the separation-of-powers principles that inhere in the Constitution, and in particular that it improperly infringes on the Judiciary’s proper role in deciding cases.

The Eleventh Circuit case of *United States v. Brant-Epigelio*²²⁷ involved a challenge to State Department certification based on separation-of-powers principles.²²⁸ Antonio Munoz Brant-Epigelio, a Colombian national, along with two Venezuelan nationals, had been interdicted at sea by the Coast Guard.²²⁹ Boarded by the Coast Guard in international waters, “[t]he vessel displayed no

specifically provides that its prohibitions on drug trafficking are applicable ‘even though the act is committed outside the territorial jurisdiction of the United States.’” (quoting 46 U.S.C. § 70503(b)).

223. *See* *United States v. Campbell*, 743 F.3d 802, 810 (11th Cir. 2014); *see also* *United States v. Persaud*, 605 F. App’x 791, 795 (11th Cir. 2015) (stating that “the conduct proscribed by the Act need not have a nexus to the United States because universal and protective principles support its extraterritorial reach,” and deferring to “a State Department certification stating that Jamaica waived primary jurisdiction over” the defendants).

224. *See Campbell*, 743 F.3d at 812.

225. *See* *United v. Perlaza*, 439 F.3d 1149, 1169 (9th Cir.2006) (“The fact that the Government received Colombia’s consent to seize the members of the [vessel], remove them to the United States, and prosecute them under United States law in federal court does not eliminate the nexus requirement. The consent permitted the United States to prosecute defendants under United States law-nothing more.”).

226. *E.g.*, *United States v. Zakharov*, 468 F.3d 1171, 1179 (9th Cir. 2006) (holding that “the location of the vessel, the large amount of cocaine, the types of navigational charts on board, and the existence of some matching logos are sufficient indicators of nexus for the exercise of United States jurisdiction”).

227. *United States v. Brant-Epigelio*, 429 F. App’x 860 (11th Cir. 2011).

228. *Id.* at 863.

229. *Id.* at 861.

indicia of nationality,” but when boarded “[o]ne of the Venezuelan nationals indicated that he was the master of the vessel and that the vessel was registered in Venezuela.”²³⁰ Based on that information, the Coast Guard contacted the Venezuelan government, which both “confirmed Venezuelan registry of the vessel and granted the United States government authorization to board and search the vessel.”²³¹ As a result of that search, the Coast Guard found “forty-five bales of cocaine.”²³² The State Department certification proffered in the case affirmed that “authorities of the Government of Venezuela notified the United States that it waived objection to the enforcement of U.S. law by the United States over the . . . vessel for the Colombian crewmember onboard.”²³³

Appealing his conviction under the MDLEA, Brant-Epigelio challenged the court’s subject matter jurisdiction, arguing before the Eleventh Circuit that § 70502(c)(2)(B)—the MDLEA provision stating that “[c]onsent or waiver of objection by a foreign nation to the enforcement of United States law by the United States . . . is proved conclusively by certification of the Secretary of State or the Secretary’s designee”—“violate[d] the separation of powers doctrine.”²³⁴ In particular, he contended that the MDLEA’s conclusive-proof provision “dictates a district court’s jurisdictional decision and violates the separation of powers” by effectively taking that question away from the court.²³⁵

Clearly attuned to the diplomatic purposes being served by the certification procedure, the *Brant-Epigelio* court observed that “[n]egotiation with a foreign nation for permission to impose United States law in that nation’s territory is . . . not an inherently judicial function,”²³⁶ and explained that “[t]he separation of powers doctrine is ‘implicated when the actions of another Branch threaten an Article III court’s independence and impartiality in the execution of its decisionmaking function.’”²³⁷ Because the jurisdiction certification memorialized a diplomatic engagement between U.S. and foreign officials that is not within the

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 862. An earlier certification issued by the same Coast Guard Commander had stated that: “On August 21, 2009, authorities of the Government of Venezuela notified the United States that it waived objection to the enforcement of U.S. law by the United States over *the Colombian crewmember of the go-fast vessel*.” *Id.* at 862-63 (emphasis added). Although the language in the later certification differed somewhat from the earlier certification, the court found the difference “immaterial” and rejected Brant-Epigelio’s argument that “under the MDLEA jurisdiction runs with the vessel and . . . [therefore] Venezuela only waived objection to the United States’ prosecution of him” and not his vessel. *Id.*

234. *Id.* at 861-63.

235. *Id.* at 863.

236. *Id.* (quoting *United States v. Rojas*, 53 F.3d 1212, 1214-15 (11th Cir.1995)); *see also Rojas*, 53 F.3d at 1215 (“Negotiation with a foreign nation for permission to impose United States law in that nation’s territory is certainly not an inherently judicial function. We readily conclude that the certification procedure does not implicate separation of powers.”).

237. *Brant-Epigelio*, 429 F. App’x at 863-64 (quoting *Rojas*, 53 F.3d at 1214).

competence of the Judiciary—and reflected a determination made by U.S. officials regarding jurisdiction on the basis of that negotiation—the *Brant-Epigelio* court saw no encroachment on judicial power.

The court reasoned that “[t]he MDLEA’s certification provision ‘merely provides a method by which the Executive Branch may evidence that it has obtained a foreign nation’s consent [or waiver of objection] to jurisdiction,’”²³⁸ and that § 70502(c)(2)(B)’s provision making the State Department certification conclusive proof of that consent nonetheless leaves open the possibility for the courts “to determine whether the requirements of the MDLEA have been met”—presumably in ensuring, in cases involving certifications, that those certifications reflect an accurate understanding of the MDLEA provisions regarding vessel status and the like.²³⁹ Moreover, the court noted, “the power to determine the jurisdiction of the courts of the United States is not purely judicial.”²⁴⁰

The *Brant-Epigelio* court relied heavily for its separation-of-powers analysis on an earlier Eleventh Circuit case, *United States v. Rojas*.²⁴¹ *Rojas* was decided under the earlier version of the MDLEA that made State Department certification a *permissible* method of proving a foreign nation’s consent to subject its vessel to U.S. law, but had not yet made certification *conclusive* proof of consent.²⁴² The *Brant-Epigelio* court recognized the legislative change following the *Rojas* decision, but nonetheless found *Rojas*’ “reasoning to be persuasive.”²⁴³

Rojas involved the Coast Guard’s boarding and seizure of a Panamanian-flagged vessel in international waters, on which the Coast Guard discovered hidden cocaine.²⁴⁴ During the subsequent prosecution, the government furnished a State Department certification affirming that it had contacted Panama and that the government of Panama had consented to its search of the vessel.²⁴⁵ The defendants’ argument on appeal was that “the MDLEA’s certification procedure unconstitutionally delegates the ability to determine jurisdiction . . . to the Executive Branch.”²⁴⁶ The ability to determine jurisdiction, the defendants argued, was a central function of the Judicial Branch that Executive Branch agencies should not simply be allowed to prove by certification.²⁴⁷

In evaluating this claim, the court explained that “[t]he Constitution’s

238. *Id.* (quoting *Rojas*, 53 F.3d at 1214).

239. *Id.* (quoting *Rojas*, 53 F.3d at 1214-15).

240. *Id.* (quoting *Rojas*, 53 F.3d at 1215).

241. *Rojas*, 53 F.3d 1212.

242. *Id.* at 1213-14 (observing that the version of the MDLEA then in force provided that consent “may be obtained by radio, telephone, or similar oral or electronic means, and may be proved by certification of the Secretary of State or the Secretary’s designee.” (emphasis added)).

243. *Brant-Epigelio*, 429 F. App’x at 863-64.

244. *Rojas*, 53 F.3d at 1213.

245. *Id.* at 1213-14.

246. *Id.* at 1214.

247. *Id.*

division of power among the three Branches is violated where one Branch invades the territory of another.”²⁴⁸ The inquiry therefore turned on whether another branch had invaded “inherent judicial power,” but the court noted that the precise bounds of that power were unclear.²⁴⁹ Because the Judiciary’s central function is “the impartial, independent, and final adjudication of disputes within the jurisdiction of the courts,”²⁵⁰ “separation of powers would be implicated when the actions of another Branch threaten an Article III court’s independence and impartiality in the execution of its decision-making function.”²⁵¹ In the early years of the Republic, the court observed, the Supreme Court had laid certain clear markers to identify invasions of “inherent judicial power.”²⁵² Nonetheless, in the case at bar, the *Rojas* court concluded that the MDLEA certification procedure did not present “a case in which the other branches have interfered with the independence or impartiality of an Article III court, or with its decisionmaking role in a case which is under its jurisdiction.”²⁵³

Arguably, some of the court’s reasoning may have been more sensible under the old version of the MDLEA in force at the time of *Rojas* than it is today. For example, the *Rojas* court stated that “[n]othing in the certification procedure deprives the court of its ability and obligation to determine whether the requirements of the MDLEA have been met.”²⁵⁴ Here, the court considered the fact that, at the time, “[t]he Act d[id] not dictate the court’s jurisdictional decision” and left the courts “free to determine, and [t]o decide, whether a proffered certificate is sufficient evidence of jurisdiction.”²⁵⁵ Of course, by providing that the certification constitutes *conclusive* proof, Congress scaled back some of the role the *Rojas* court correctly observed had still been reserved for it at the time. Nonetheless, as noted above, the *Brant-Epimelio* court ratified the same understanding when confronted with the later MDLEA which included the

248. *Id.* (quoting *New York v. United States*, 505 U.S. 144 (1992)).

249. *Id.*

250. *Id.*

251. *Id.*

252. For example, in *Hayburn’s Case*, the Supreme Court determined that federal court decisions cannot be reviewed by the Executive Branch. 2 U.S. (2 Dall.) 408 (1792). Later, in *United States v. Klein*, the Supreme Court held that Congress could not decide a particular case in lieu of the Judiciary. 80 U.S. (13 Wall.) 128, 146–147 (1871). *See also* *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856) (“[W]e do not consider [C]ongress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.”).

253. *Rojas*, 53 F.3d at 1214-15. The *Rojas* court looked for support to *United States v. Mena*, 863 F.2d 1522, 1523 (11th Cir. 1989), which had observed that, in providing for the State Department certification procedure, Congress may have wanted to “alleviate difficulties in obtaining and translating foreign-government documents.” *Mena*, 863 F.2d at 1531.

254. *Rojas*, 53 F.3d at 1214-15.

255. *Id.*

conclusive proof provision.²⁵⁶ Thus, *Brant-Epigelio*'s assertion that the modern MDLEA certification procedure continues to leave the Judiciary a meaningful role in evaluating jurisdiction is in some tension with the court's analysis in *Rojas*.

Furthermore, the *Rojas* court made clear—and the *Brant-Epigelio* court agreed—that “the power to determine the jurisdiction of the courts of the United States” does not belong *only* to the courts.²⁵⁷ Rather, both Congress and the Executive Branch play important roles. “Although Article III defines the *outer* limits of jurisdiction, the Judicial Branch relies on the Legislative Branch to define the exact parameters of such power.”²⁵⁸ Moreover, “[t]he courts also rely on the Executive, in conjunction with the Senate, to define the scope of jurisdictional authority through treaty.”²⁵⁹ The Senate provides its approval through the advice and consent process provided for by the Constitution,²⁶⁰ and Congress has via statute defined the perimeters of the Judiciary's jurisdiction in other ways.²⁶¹ In other words, “the scope of the jurisdiction of our courts is a domain which all branches of our government must share to some extent.”²⁶²

III. A MORE PRINCIPLED BASIS FOR DEFERENCE

To date, courts have not expressly invoked either the Treaty Power or the political question doctrine in resolving constitutional challenges to MDLEA certifications. This despite the fact that, as demonstrated by the review of challenges to jurisdiction certifications in Part II, the courts are attuned to the foreign affairs aims served by the MDLEA's jurisdiction framework. Given courts' understanding and acknowledgement of the fact that the MDLEA's jurisdictional provisions promote operational cooperation in the fight against illicit trafficking, this Part identifies two grounds on which courts should justify deference to the Executive Branch. In particular, this Part explores two principled bases—independent, but related—on which courts may justify deference to jurisdiction certifications under the MDLEA: the Treaty Power, and the political question doctrine.

Rather than merely acknowledging the foreign affairs purposes of the

256. *United States v. Brant-Epigelio*, 429 F. App'x 860, 863 n.3 (11th Cir. 2011) (“Congress amended the MDLEA in 1996 to provide [for the conclusive proof provision . . . Although there are minor differences in wording between the 1996 amendment and the version of § 70502(c)(2)(B) currently in force, the substance is the same.”).

257. *Rojas*, 53 F.3d at 1215.

258. *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803)).

259. *Id.*

260. U.S. CONST. art. II, § 2 (“The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties”).

261. 28 U.S.C. § 1331 (2012) (providing that “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

262. *Rojas*, 53 F.3d at 1215.

MDLEA's certification procedure in the course of responding to constitutional challenges by criminal defendants, courts may properly invoke the certifications' foreign affairs purpose in declining such review as an initial matter. Jurisdiction determinations made by Executive Branch officials in the Coast Guard and State Department, and memorialized in State Department certifications, are executed using a blend of congressional and Executive authority to carry out U.S. obligations under the 1988 Convention and ensure smooth diplomatic relations with foreign states. As a result, courts should decline to scrutinize jurisdiction certifications under the MDLEA in cases where they are challenged—for example, where defendants allege mistakes or wrongful behavior by U.S. government officials, or otherwise allege deficiencies in the diplomatic exchange between states.²⁶³

A. The Treaty Power

The power to negotiate, conclude, and meet United States obligations under treaties is a core Executive power, exercised in conjunction with the U.S. Senate.²⁶⁴ Indeed, the court in *Rojas* seemed to acknowledge, though only in passing, the possibility that the Treaty Power could be used by the President and the Senate to set parameters on the courts' jurisdiction.²⁶⁵ Even so, the Treaty Power has not featured prominently in courts' responses to challenges to MDLEA jurisdiction certifications, with a few minor exceptions.

The District Court for the District of Columbia and the D.C. Circuit have provided some of the most valuable insight into the Treaty Power as a source of authority for MDLEA certifications, a somewhat surprising fact given the relatively small number of MDLEA cases that are litigated in those courts.²⁶⁶

In *United States v. Carvajal*,²⁶⁷ the D.C. District Court confronted a situation that it described as being “at the outskirts of Congress’s power to criminalize extraterritorial conduct.”²⁶⁸ Defendants Luis Alberto Munoz Miranda and Francisco Jose Valderrama Carvajal were both “Colombian-based members of an international drug trafficking conspiracy.”²⁶⁹ Miranda and Carvajal were involved “in a conspiracy to use [stateless] vessels with no registration and nationality . . . to transport cocaine from Colombia to a rendezvous point in the seas near

263. “Under this approach, courts could still make exceptions, and conduct review of jurisdiction determinations, where there is incontrovertible evidence that government officials blatantly ignored statutory obligations. Absent such a showing, courts would defer to the determinations made by State Department and Coast Guard officials.”

264. U.S. CONST. art. II, § 2 (“The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties”).

265. *Rojas*, 53 F.3d at 1215.

266. *See supra* note 113.

267. 924 F. Supp. 2d 219 (D.D.C. 2013).

268. *Id.* at 224.

269. *Id.*

Honduras.”²⁷⁰ Of the two vessels at issue in the case, “[o]ne never left the dock” and the other “was seized by Colombian authorities in Colombian territorial waters.”²⁷¹ The U.S. government never claimed “that the cocaine recovered from the captured vessel was destined for [the United States],” and neither Miranda nor Carvajal ever left Colombian territory until they were “extradited to the United States years” later.²⁷²

Miranda and Carvajal challenged their convictions on jurisdictional grounds.²⁷³ In addition to rejecting challenges by Miranda and Carvajal that the MDLEA exceeded Congress’s Article I powers²⁷⁴ and to the extraterritorial application of the law,²⁷⁵ the court directed the parties to brief a “novel” argument: “whether the Treaty Power” gave Congress the authority to criminalize the entirely foreign conduct at issue in their case.²⁷⁶ Although the court ultimately had no need to address that argument in *Carvajal*,²⁷⁷ the government’s and court’s acknowledgement of the Treaty Power as a potential source of authority for

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 230.

274. The court rejected the Article I challenge, holding that both vessels were “stateless” under the MDLEA and that “the vessel seized by the Colombian Navy traveled on the high seas before being seized . . . in the territorial waters of Colombia.” *Id.* at 232, 234-35. To make this determination, the court inquired into the meaning of “high seas” in the Constitution and also its use within the MDLEA. *Id.* at 233-34 (observing that the 1980 version of the MDLEA made it “unlawful for any person . . . on board a vessel subject to the jurisdiction of the United States *on the high seas*, to knowingly or intentionally manufacture or distribute . . .” while the 1986 version of the MDLEA omitted the “on the high seas” language, and further deciding that “the high seas” as used in Article I § 8, clause 10 of the Constitution means “the waters not within any nation’s territorial seas—i.e., the high seas are the waters beyond the coastal state’s sovereignty, meaning those greater than twelve miles from the coast.”).

275. *Id.* at 240 (“No hesitation is required; Congress intended MDLEA to apply extraterritorially. The conduct alleged in this case, while at the outer limits of the statutory text, nonetheless falls within it”). The court emphasized that its “conclusion as to extraterritoriality extends to the conspiracy provision. As the plain text quoted above makes clear and as courts have recognized, MDLEA’s conspiracy prohibition reaches coextensively with the substantive offense.” *Id.*

276. *Id.* at 250 (“[The Treaty Power theory] is not a theory that, to this Court’s knowledge, any court has considered as a possible grant of authority for a MDLEA prosecution.”).

277. The court made a factual finding that the vessel seized in Colombia was stateless and had traversed the high seas, thereby rendering U.S. jurisdiction over it permissible without the need to rely on the Treaty Power. *Id.* at 250-51 (stating that the Department of Justice decided not to rely on the Treaty Power in this case because the court had determined, as a factual matter, that the vessel apprehended in Colombia was “stateless” and had traveled on the high seas, and because the bilateral agreement between Colombia and the United States did “not limit the United States’ ability to pursue MDLEA jurisdiction over a stateless vessel which travels on the high seas” the prosecution was clearly permissible under Article I (citation omitted)).

establishing jurisdiction under the MDLEA is noteworthy.

Indeed, the *Carvajal* court recognized that the United States had negotiated and implemented more than forty bilateral agreements with nations to carry out the goals of the 1988 Convention with individual partner nations.²⁷⁸ Thus, “the Treaty Power may be a grant of power on which the United States can rely in some MDLEA prosecutions.”²⁷⁹ Of course, the MDLEA also effectuates and implements the 1988 Convention, as discussed in Sections I.B and I.C. Its jurisdictional provisions mirror and effectuate the authorizations contained in Article 17 of the 1988 Convention.²⁸⁰ Further underscoring the importance of bilateral arrangements under the 1988 Convention, that treaty’s article dealing with jurisdiction expressly authorizes state parties to “take such measures as may be necessary to establish its jurisdiction over the offences it has established . . . when . . . the offence is committed on board a vessel concerning which that Party has been authorized to take appropriate action pursuant to article 17, provided that such jurisdiction shall be exercised only on the basis of” such bilateral agreements with partner states.²⁸¹

When *Miranda* and *Carvajal* reached the D.C. Circuit on appeal and again challenged jurisdiction, the court affirmed.²⁸² In deciding how to interpret the MDLEA’s limitation that its substantive offenses apply “on board a vessel subject to the jurisdiction of the United States,” the D.C. Circuit observed varying approaches articulated by the circuit courts.²⁸³ The Eleventh and Fifth Circuits had determined that the latter requirement constituted a “congressionally imposed limit on courts’ subject matter jurisdiction, akin to the amount-in-controversy requirement contained in 28 U.S.C. § 1332,” which provides for original federal district court jurisdiction over cases in which the amount in controversy exceeds \$75,000.²⁸⁴ The First Circuit, however, had articulated a different approach,

278. *Id.* at 250.

279. *Id.*

280. Compare 1988 Convention, *supra* note 2, art. 17 (“A Party which has reasonable grounds to suspect that a vessel . . . flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.”) and 1988 Convention, art. 17 (“[I]n accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to” board, search, and “appropriate action with respect to the vessel, persons and cargo on board.”), with 46 U.S.C. § 70502(c)(2) (“Consent or waiver of objection by a foreign nation to the enforcement of United States law by the United States . . . may be obtained by radio, telephone, or similar oral or electronic means; and . . . is proved conclusively by certification of the Secretary of State or the Secretary’s designee.”). See also 46 U.S.C. § 70502(c)(1)(C) (subjecting to U.S. jurisdiction “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”).

281. 1988 Convention, *supra* note 2, art. 4(1)(b) (emphasis added).

282. *United States v. Miranda*, 780 F.3d 1185, 1191 (D.C. Cir. 2015).

283. *Id.* at 1192.

284. *Id.* (quoting *United States v. De La Garza*, 516 F.3d 1266, 1271 (11th Cir. 2008)); see

viewing the MDLEA's "on board a vessel subject to the jurisdiction of the United States" requirement as reflecting merely an assertion by Congress of "its own . . . authority to regulate," as Congress sometimes does by, for example, requiring that an act affect interstate commerce in order for it to be criminal.²⁸⁵ So understood, the "vessel subject to the jurisdiction of the United States" requirement could be considered a "jurisdictional element."²⁸⁶

Confronted with these divergent interpretations, the D.C. Circuit in *Miranda* opted to follow the approach of the Eleventh and Fifth Circuits and consider the question one of subject-matter jurisdiction.²⁸⁷ In his opinion for the court, Judge Srinivasan explained that such an approach frames the jurisdictional inquiry as a "threshold limitation on [the] statute's scope."²⁸⁸ In deciding to follow the subject-matter jurisdiction treatment, the court further noted that 46 U.S.C. § 70504(a)'s prescription that "[j]urisdictional issues . . . are preliminary questions of law to be determined solely by the trial judge" and "operate[] precisely in the nature of a condition on subject-matter jurisdiction: subject-matter jurisdiction presents a question of law for resolution by the court, and courts" must determine subject-matter jurisdiction "as a preliminary matter," thereby "fortifying its jurisdictional character."²⁸⁹

The court elaborated on the practical difference between treating the MDLEA's jurisdiction requirement as a subject-matter requirement versus a question that goes to the merits, and highlighted the diplomatic function served by the jurisdictional provisions of the Act. Among them is the fact that, "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*."²⁹⁰ Because the MDLEA's jurisdictional requirements are so important, and bear on the United States' relations with other nations, the court considered there to be significant value in preserving the jurisdiction question for independent consideration at each level of judicial review.²⁹¹ The court observed that "a foreign nation's 'consent,' 'waiver,' or 'response' plays a central role in determining whether a vessel is 'subject to the jurisdiction of the United States' under the MDLEA."²⁹² Judge Srinivasan explained:

[I]t is eminently understandable why Congress would want [a vessel's

also *United States v. Bustos–Useche*, 273 F.3d 622, 626 (5th Cir. 2001).

285. *United States v. Gonzalez*, 311 F.3d 440, 443 (1st Cir. 2002).

286. *Miranda*, 780 F.3d at 1195 ("Statutes that establish 'jurisdictional elements' . . . treat the relevant condition as an element of the offense to be found by a jury.").

287. *Id.* at 1192.

288. *Id.* at 1193 (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006)).

289. *Id.*

290. *Id.* at 1194 (emphasis added).

291. *Id.* ("Here, . . . there 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.").

292. *Id.*

jurisdiction] to be insulated from waiver or forfeiture by a defendant, and would also want courts in every case—and at every level of review—to assure that the requirement is satisfied. The requirement aims to *protect the interests of foreign nations*, not merely the interests of the defendant. It therefore is not a requirement that the defendant alone can waive by choice or forfeit by inadvertence. If a defendant could waive or forfeit the requirement regardless of the interests of a foreign nation whose prerogatives may be directly at stake, application of the MDLEA could engender considerable *tensions in foreign relations*.²⁹³

A sister provision in the MDLEA provides that defendants may not invoke alleged violations of international law as a defense.²⁹⁴ In *Miranda*, the D.C. Circuit considered that provision to bolster its conclusion that the Act's vessel-jurisdiction requirement should be treated as one of subject-matter jurisdiction.²⁹⁵ Additionally, the MDLEA notably treats *United States* vessels differently.²⁹⁶ Rather than lumping United States vessels in with the other enumerated categories of "Vessel[s] subject to the jurisdiction of the United States" in § 70502(c), United States vessels are discussed in the separate § 70502(b). As the *Miranda* court observed, this has the effect of limiting "the jurisdictional inquiry to MDLEA cases in which foreign relations issues would most likely arise—[i.e.], cases involving non-United States" vessels.²⁹⁷

Judge Srinivasan's analysis in *Miranda* reveals—in emphasizing the important implications for United States foreign affairs of MDLEA jurisdiction determinations—that those provisions clearly further the aims of the 1988 Convention. As discussed in Section I.B., the 1988 Convention highly encourages cooperation between partner states in the form of bilateral agreements and procedures to facilitate the exchange of permissions contemplated by the treaty in Article 17. As such, the Treaty Power should be considered to underpin the authority of bilateral agreements concluded pursuant to the treaty, as well as the jurisdictional provisions of the MDLEA that establish the jurisdiction certification mechanism for proving jurisdictional determinations, which are made in conformance with those bilateral agreements in cases where claims of registry are made.

293. *Id.* ("If a court were to decline to address the issue on the theory that the defendant had waived or forfeited any objection, application of the MDLEA could cause substantial discord with a foreign nation.") (emphasis added).

294. 46 U.S.C. § 70505 (2008).

295. *Miranda*, 780 F.3d at 1194-95 (noting that "Congress demonstrated the same *sensitivity to the interests of affected foreign sovereigns* in" the sister provision barring use of international law violations as a defense (emphasis added)).

296. 46 U.S.C. § 70502(b) (2008).

297. *Miranda*, 780 F.3d at 1194-95 ("In the latter situations [involving United States vessels and citizens], the determination whether the vessel is 'of the United States' or the defendant is a United States citizen or resident alien would go to an element of the offense, and so would be subject to waiver by a defendant who enters an unconditional guilty plea.").

The Treaty Power is also augmented by the Necessary and Proper Clause,²⁹⁸ which may lend special weight to the Executive Branch's jurisdictional determinations made under the MDLEA. The United States ratified the 1988 Convention, a treaty which is replete with provisions promoting, authorizing, and encouraging multilateral engagement and cooperation among state parties generally.²⁹⁹ Indeed, that treaty's Article 17 is entirely devoted to establishing a procedure by which countries may engage one another through their appropriate maritime enforcement agencies to request and authorize permission to board flagged vessels.³⁰⁰ The Necessary and Proper Clause extends "Congress's authority . . . beyond those powers specifically enumerated in Article I, section 8" of the Constitution.³⁰¹ As such, "Congress may enact laws necessary to effectuate the Treaty Power, enumerated in Article II of the Constitution."³⁰²

The U.S. Supreme Court's classic articulation of this power came in *Missouri v. Holland*.³⁰³ In that decision, the Court explained that the Supremacy Clause of the Constitution provides for the general "supremacy of treaties," and elaborated that although "Acts of Congress are the supreme law of the land *only* when made in pursuance of the Constitution, . . . treaties are declared to be so when made under the authority of the United States."³⁰⁴ In other words, the "in pursuance of the Constitution" caveat is missing from the statement that treaties are supreme laws as much as acts of Congress. The Court was confronted with an argument that treaties may not "infringe[] the Constitution," and that "what an act of Congress could not do unaided . . . a treaty cannot do."³⁰⁵

Although disclaiming any categorical assertion "that there are no qualifications to the treaty-making power," the Court explained that those limits "must be ascertained in a different way."³⁰⁶ The Court found it "obvious" that some matters which could not ordinarily be addressed by an Act of Congress alone, could nonetheless be subject to Congress's control through an Act flowing from a treaty.³⁰⁷ The Court elaborated that, when important issues confront the federal government which require action, "it is not lightly to be assumed that . . . 'a power which must belong to and somewhere reside in every civilized

298. U.S. CONST., art. I, §. 8, cl. 18 ("The Congress shall have Power To . . . make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

299. See *supra* Section I.C.

300. See *supra* note 26 and accompanying text (discussing the ad hoc procedures provided for in Article 17 and also that Article's encouragement of bilateral agreements to operationalize the Article 17 procedure).

301. *United States v. Lue*, 134 F.3d 79, 82 (2d Cir. 1998).

302. *Id.*

303. 252 U.S. 416 (1920).

304. *Id.* at 432-33 (emphasis added).

305. *Id.* at 432.

306. *Id.* at 433.

307. *Id.*

government' is not to be found."³⁰⁸

Brushing aside concerns that the treaty at issue in *Missouri v. Holland* may have infringed upon "some invisible radiation from the general terms of the Tenth Amendment," the Court recognized that the treaty did "not contravene any prohibitory words to be found in the Constitution."³⁰⁹ Moreover, it recognized that in cases involving "a national interest of very nearly the first magnitude" which requires "national action in concert with that of another power," the Court had no qualms with extended congressional authority exercised on the basis of a valid treaty commitment.³¹⁰ The federal government, in the Court's view, should not be compelled to "sit by," "forbidden to act" in the face of such a need.³¹¹

The same justifications for expanded congressional authority exercised on the basis of a treaty recognized by the Court in *Missouri v. Holland* are present in the MDLEA jurisdictional context. Specifically, Congress has found that "trafficking in controlled substances aboard vessels is a serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States."³¹² And given the sheer number of states that have signed on to the 1988 Convention, the federal government has a clear interest in meeting its commitments under the treaty and effectively coordinating its counterdrug operations with foreign powers sharing the same goal.

By deferring to jurisdictional determinations of the Coast Guard and State Department in the MDLEA context on the basis of the Treaty Power, courts can also better justify their deference to the extent that constitutional infirmities otherwise exist in the procedure—for example, the Ninth Circuit's concern in *Perlaza* that factual questions surrounding the jurisdiction determination require a jury to decide those disputes, or the concern addressed by the Eleventh Circuit in *Brant-Epigelio* and *Rojas* dealing with possible encroachments on judicial power. As discussed in Part II, moreover, in resolving these disputes courts have often justified their conclusions at least partly on foreign affairs concerns. By relying on the Treaty Power, courts can avoid potentially challenging questions—such as to what extent the presence of foreign affairs motives behind a piece of criminal legislation *obviates* concerns about removing factual determinations from the jury under the Due Process Clause or the Confrontation Clause.

B. The Political Question Doctrine

In addition to the Treaty Power, the political question doctrine offers a principled basis on which courts may decline to consider challenges to jurisdiction certifications under the MDLEA. The classic formulation of the political question doctrine, from the U.S. Supreme Court's 1962 decision in

308. *Id.*

309. *State of Missouri v. Holland*, 252 U.S. 416, 433-34 (1920).

310. *Id.* at 433-35.

311. *Id.*

312. 46 U.S.C. § 70501 (2012).

Baker v. Carr, enumerates several types of questions the Judiciary is not well-suited to, and should not, answer.³¹³ Those questions include those for which:

A textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³¹⁴

Although *Baker v. Carr* enumerated six categories of questions that the Judiciary should avoid, recent developments have cast some doubt on whether all of those categories remain a valid part of the doctrine. In the Supreme Court's 2012 decision in *Zivotofsky ex rel. Zivotofsky v. Clinton*,³¹⁵ the Court was faced with a statute that provided "that Americans born in Jerusalem may elect to have 'Israel' listed as the place of birth on their passports," and "[t]he State Department declined to follow that law, citing its longstanding policy of not taking a position on the political status of Jerusalem."³¹⁶ When a plaintiff sued to take advantage of the statute, the D.C. Circuit held that the political question doctrine applied, as a result of the Constitution's commitment of the power to recognize foreign sovereigns to the President.³¹⁷ The Supreme Court reversed, holding that "[t]he courts are fully capable of determining whether this statute may be given effect, or instead must be struck down in light of authority conferred on the Executive by the Constitution."³¹⁸

In the majority opinion by Chief Justice Roberts, the Court explained that the courts have a general "responsibility to decide cases properly before it" and that the political question doctrine constitutes only a "narrow" exception.³¹⁹ Although acknowledging the existence of the political question doctrine, however, the

313. *Baker v. Carr*, 369 U.S. 186, 217 (1962) ("It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers.").

314. *Id.*

315. 566 U.S. 189 (2012).

316. *Id.* at 191. The position taken by Congress conflicted with guidance in the State Department's Foreign Affairs Manual, which provided only for the listing of "Jerusalem" and not "Israel." *Id.* at 191-92.

317. *Zivotofsky v. Secretary of State*, 571 F.3d 1227, 1232 (D.C. Cir. 2009) ("We therefore hold that Zivotofsky's claim presents a nonjusticiable political question because it trenches upon the President's constitutionally committed recognition power.").

318. *Zivotofsky*, 566 U.S. at 191.

319. *Id.* at 194-95.

Court's formulation of the doctrine made no mention of the final four *Baker* factors.³²⁰ Rather, the only questions acknowledged by the *Zivotofsky* Court as part of the political question doctrine were those falling with *Baker*'s first two factors—i.e., those constitutionally committed to another branch of the federal government, and those lacking “manageable standards” for the Judiciary to rely on.³²¹

For Chief Justice Roberts, *Zivotofsky* did not present a political question, because it did “not ask the courts to determine whether Jerusalem is the capital of Israel,” and instead centered only on the plaintiff's desire to “vindicate his statutory right, under § 214(d), to choose to have Israel recorded on his passport as his place of birth.”³²²

Despite Chief Justice Roberts' opinion for the court, however, not all of the Justices agreed with the Court's cramped interpretation of the political question doctrine. In her concurring opinion, Justice Sotomayor—joined by Justice Breyer—agreed with the Court's conclusion that *Zivotofsky* did not present a political question, but nonetheless argued that “the inquiry required by the political question doctrine [is] *more demanding* than that suggested by the Court.”³²³ In her view, “[t]he political question doctrine speaks to an *amalgam of circumstances* in which courts properly examine whether a particular suit is justiciable—that is, whether the dispute is appropriate for resolution by courts.”³²⁴ The importance of the political question doctrine lies in the need for the courts to accord “appropriate respect to the other branches' exercise of their own constitutional powers.”³²⁵

Justice Sotomayor observed that although *Baker v. Carr* “identified six circumstances in which an issue might present a political question . . . *Baker* left unanswered when the presence of one or more factors warrants dismissal, as well as the interrelationship of the six factors and the relative importance of each in determining whether a case is suitable for adjudication.”³²⁶ To clarify some of the ambiguity left by *Baker v. Carr*, Justice Sotomayor elaborated that “[i]n [her] view, the *Baker* factors reflect three distinct justifications for withholding judgment on the merits of a dispute.”³²⁷ Reaching back to *Marbury v. Madison*,³²⁸

320. See *id.* (“We have explained that a controversy ‘involves a political question . . . where there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.”’” (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993))).

321. *Id.* at 194-95.

322. *Id.* at 195.

323. *Id.* at 202 (Sotomayor, J., concurring in part and concurring in the judgment) (emphasis added).

324. *Id.* (emphasis added).

325. *Id.* “The doctrine is ‘essentially a function of the separation of powers,’” (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

326. *Id.* at 202-03 (Sotomayor, J., concurring in part and concurring in the judgment).

327. *Id.* at 203.

328. 1 Cranch 137, 165-66 (1803) (“By the constitution of the United States, the president is

Justice Sotomayor explained that *Baker*'s first factor accounts for situations in which "a case would require a court to decide an issue whose resolution is textually committed to a coordinate political department, . . . [and] abstention is warranted because the court lacks authority to resolve that issue In such cases, the Constitution itself requires that another branch resolve the question presented."³²⁹

If Justice Sotomayor's view is correct, it may very well place MDLEA jurisdictional determinations properly beyond the Judiciary's reach based on *Baker*'s first factor. In particular, as discussed in Section III.A, the Treaty Power arguably *does* textually commit resolution of jurisdictional determinations under the MDLEA to the political branches. Certainly, judicial respect for the Executive Branch's exercise of its constitutional powers is undermined by judicial scrutiny of jurisdictional certifications, given their function in the MDLEA in support of the 1988 Convention. To the extent that the terms of the MDLEA authorizing the State Department to make conclusive certifications about jurisdiction over vessels carry out the commitments outlined in the 1988 Convention, there is a textual basis for deference to those determinations under the political question doctrine.

In Justice Sotomayor's view, "[t]he second and third *Baker* factors reflect circumstances in which a dispute calls for decision-making beyond courts' competence."³³⁰ The courts' job is to exercise their "traditional role" in the English and American legal tradition, and in order to do that there must be available to the court "some manageable and cognizable standard within the competence of the Judiciary to ascertain and employ to the facts of a concrete case."³³¹ Thus, although the Judiciary is doubtless called to employ "somewhat ambiguous standards using familiar tools of statutory or constitutional interpretation" to resolve concrete disputes, the courts cannot resolve a dispute "[w]hen . . . given no standard by which to adjudicate a dispute."³³² In those cases, "resolution of the suit is beyond the judicial role envisioned by Article III."³³³

Although the case for deference in the MDLEA jurisdictional context may be weaker under the second *Baker* factor, the third factor—concerned with questions requiring the Judiciary to make policy decisions not of a judicial character—presents a stronger case. In particular, MDLEA jurisdictional determinations reflect decisions born from direct, nation-to-nation (more specifically, maritime agency to counterpart maritime agency) interactions.³³⁴

invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience").

329. *Zivotofsky*, 566 U.S. at 203 (Sotomayor, J., concurring in part and concurring in the judgment).

330. *Id.*

331. *Id.*

332. *Id.* at 204.

333. *Id.* at 203.

334. *See United States v. Matos-Luchi*, 627 F.3d 1, 4 & n.4 (1st Cir. 2010) (explaining that

Maintaining a network of bilateral agreements with partner nations governing maritime counterdrug operations—especially in the face of changing political, economic, and social conditions of South American states—can be difficult. Jurisdictional determination in individual cases reflect a number of factors clearly beyond the competence of the Judiciary: operational judgements by Coast Guard personnel, diplomatic responses to registry claims by foreign states, and Executive Branch interpretations of those diplomatic responses. Scrutinizing jurisdiction certifications under the MDLEA inherently involves making determinations that, if not entirely policy-based, certainly carry foreign policy implications.

The concerns about judicial policy determinations in the foreign affairs realm are well-stated as follows, from the Supreme Court’s decision in *Chicago & Southern Air Lines v. Waterman S. S. Corp.*:

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.³³⁵

Finally, in Justice Sotomayor’s view in *Zivotofsky*, “[t]he final three *Baker* factors address circumstances in which *prudence* may counsel against a court’s resolution of an issue presented.”³³⁶ Although courts should not readily defer whenever the presence of just one of the final three factors is present, and courts should “not refuse to adjudicate a dispute merely because a decision ‘may have significant political overtones’ or affect ‘the conduct of this Nation’s foreign relations,’”³³⁷ courts should be attuned to the need to give “the respect due to a coequal and independent department, . . . [and] courts properly resist calls to question the good faith with which another branch attests to the authenticity of its internal acts.”³³⁸ In some situations it “may be appropriate for courts to stay their hand in cases implicating delicate questions concerning the distribution of political authority between coordinate branches until a dispute is ripe, intractable,

the term “jurisdiction” in the MDLEA “refers to the enforcement reach of the statute—not federal court subject-matter jurisdiction, which extends to any federal felony. . . . That reach was limited by Congress to minimize conflict with foreign nations who might also assert rights to regulate.”).

335. *Chicago & Southern Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948).

336. *Zivotofsky*, 566 U.S. at 204-05 (Sotomayor, J., concurring in part and concurring in the judgment) (emphasis added).

337. *See id.* (quoting *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986)).

338. *Id.* at 205-06.

and incapable of resolution by the political process.”³³⁹ “[J]udicial intervention in such cases,” in other words, “is disfavored relative to the prospect of accommodation between the political branches.”³⁴⁰ Justice Sotomayor recognized that “abstention accommodates considerations *inherent in the separation of powers* and the limitations envisioned by Article III.”³⁴¹

And she recognized, “Often when such factors are implicated in a case presenting a political question, other factors identified in *Baker* will likewise be apparent.”³⁴² Thus, it may often be the case that one factor is accompanied by one or several others.

Justice Alito authored his own opinion in *Zivotofsky*, also expressing hesitation with the majority’s winnowing of the political question doctrine. Justice Alito framed the question presented in *Zivotofsky* narrowly, considering that the only issue presented to the Court for resolution was “whether the statutory provision at issue infringes the power of the President to regulate the contents of a passport.”³⁴³ For Justice Alito, because it was clear that the Constitution provided both the President and Congress with “a measure of authority to prescribe the contents of passports,” *Zivotofsky* did not present a political question because although the case required “[d]elineating the precise dividing line between the powers of Congress and the President with respect to the contents of a passport,” that was a task the Judiciary was capable of performing.³⁴⁴ However, Justice Alito made clear that he had reservations about casting aside much of the political question doctrine, expressing that “determining the constitutionality of an Act of Congress may present a political question.”³⁴⁵

Finally, Justice Breyer’s separate dissent further bolsters the continuing validity of the *Baker* factors, particularly in cases having implications for foreign affairs. Justice Breyer observed that the *Baker* factors, and “particularly the last four,” reflect the Court’s acknowledgement of “prudential considerations” that counsel against deciding certain matters before it.³⁴⁶ Justice Breyer would have held that *Zivotofsky* implicated a political question.³⁴⁷

339. *Id.*

340. *Id.*

341. *Id.* at 206 (emphasis added).

342. *Id.* at 207 n.2.

343. *Id.* at 210 (Alito, J., concurring) (“This case does not require the Judiciary to decide whether the power to recognize foreign governments and the extent of their territory is conferred exclusively on the President or is shared with Congress. Petitioner does not claim that the statutory provision in question represents an attempt by Congress to dictate United States policy regarding the status of Jerusalem. Instead, petitioner contends in effect that Congress has the power to mandate that an American citizen born abroad be given the option of including in his passport . . . what amounts to a statement of personal belief on the status of Jerusalem.”).

344. *Id.* at 210-12.

345. *Id.* at 211-12 (2012).

346. *Id.* at 212-13 (Breyer, J., dissenting).

347. *Id.*

In reaching that conclusion, Justice Breyer first observed that the issue in *Zivotofsky* “arises in the field of foreign affairs . . . [and t]he Constitution primarily delegates the foreign affairs powers” to the Executive and Legislative Branches.³⁴⁸ Justice Breyer was especially concerned about making “decisions that have significant foreign policy implications,” and observed that “many of the cases in which the [Supreme] Court has invoked the political-question doctrine have arisen in [the foreign affairs] area.”³⁴⁹

A second and related concern of Justice Breyer’s was the possibility presented by *Zivotofsky* that “if the courts must answer the constitutional question [in that case], they may well have to evaluate the *foreign policy implications of foreign policy decisions*.”³⁵⁰ In particular, “A judge’s ability to evaluate opposing claims” about foreign relations implications of a decision “is minimal,” and “a judicial effort to do so risks inadvertently jeopardizing sound foreign policy decision-making by the other branches of Government.”³⁵¹

Finally, Justice Breyer emphasized that the political branches have alternative mechanisms outside of court for resolving their disputes. Those branches “frequently work out disagreements through ongoing contacts and relationships, involving, for example, budget authorizations, confirmation of personnel, committee hearings, and a host of more informal contacts, which, taken together, ensure that, in practice, Members of Congress as well as the President play an important role in the shaping of foreign policy.”³⁵² And both branches also “understand the need to work . . . with the other in order to create effective foreign policy.”³⁵³

Acknowledging, as Justice Sotomayor did, that a confluence of *Baker* concerns may be implicated in a given case, Justice Breyer concluded that *Zivotofsky* presented risks “that intervention will bring about ‘embarrassment,’ show lack of ‘respect’ for the other branches, and potentially disrupt sound foreign policy decision-making.”³⁵⁴

Arguably, all of the factors that led Justice Breyer to find a political question

348. *Id.* at 213 (emphasis added).

349. *See id.* at 214 (citing “cases in which the validity of a treaty depended upon the partner state’s constitutional authority . . . or upon its continuing existence . . . cases concerning the existence of foreign states, governments, belligerents, and insurgents . . . and cases concerning the territorial boundaries of foreign states.”); *see also id.* (observing that the Court had, in a long series of cases, recognized these “foreign-relations political-question cases” as providing a basis for abstention).

350. *Id.* at 214, 216 (emphasis added) (“[I]t may well turn out that resolution of the constitutional argument will require a court to decide how far the statute, in practice, reaches beyond the purely administrative, determining not only whether but also the extent to which enforcement will interfere with the President’s ability to make significant recognition-related foreign policy decisions.”).

351. *Id.* at 217-18 (Breyer, J., dissenting).

352. *Id.* at 219.

353. *Id.*

354. *Id.* at 220.

in *Zivotofsky* are present in the context of challenges to MDLEA jurisdiction certifications. Thus, Justice Breyer's view articulated a special concern with the potential *effects* of judicial intervention in the foreign policy arena, especially when there are available means by which the Executive and Legislative Branches can work out disagreements, if any, themselves. Given how many times that Congress has updated the MDLEA statute to reflect its changing preferences, it seems clear that Congress and the Executive Branch could resolve disputes surrounding MDLEA jurisdiction on their own.

Moreover, another factor relied upon by the Chief Justice in declining to find a political question in *Zivotofsky* was the fact that Congress had provided the passport-holder with a statutory right:

The existence of a statutory right . . . is certainly relevant to the Judiciary's power to decide *Zivotofsky*'s claim. The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, *Zivotofsky* requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if *Zivotofsky*'s interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.³⁵⁵

This factor distinguishes *Zivotofsky* from the MDLEA jurisdiction scheme, in which Congress has provided no statutory right to the MDLEA defendant, but has in fact affirmatively *removed* rights from the defendant by barring international law-based defenses and taking jurisdiction determinations away from the jury.

Moreover, in *Zivotofsky* the majority seemed comfortable with deciding the case in part because it involved drawing a line between Executive and Congressional power when the two political branches were in *conflict*,³⁵⁶ a question which is not presented to the courts in the context of an MDLEA certification challenge. Rather, Congress purposefully provided the Executive Branch with a mechanism to carry out the United States' commitments under the 1988 Convention by delegating authority to the State Department to make individualized jurisdiction determinations.

Judge Bork aptly summarized the concerns encapsulated by the political question and related justiciability doctrines:

All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate . . . to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an

355. *Id.* at 196.

356. *See id.* at 197 (“[T]he question is whether Congress or the Executive is ‘aggrandizing its power at the expense of another branch.’” (quoting *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991))).

unelected, unrepresentative judiciary in our kind of government.³⁵⁷

The courts have long recognized that special deference is warranted to the Executive Branch when dealing with matters implicating foreign affairs. The Supreme Court has recognized that part of the rationale underlying the courts' substantial deference to the Executive in the field of immigration policy—concededly, an area of law characterized by *exceptional* deference—is the fact that “decisions in these matters may *implicate our relations with foreign powers*, and since a wide variety of classifications [among aliens] must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.”³⁵⁸ Additional justifications include “the need for flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication”³⁵⁹ and “that any policy toward aliens is vitally and *intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations*.”³⁶⁰

Particularly in the field of foreign affairs, the Supreme Court has recognized “the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs.”³⁶¹ Echoing the sentiments of the Court in *Missouri v. Holland*, the Supreme Court has recognized that “[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true *only* in respect of our internal affairs.”³⁶² This is because in the field of internal affairs, “the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states.”³⁶³

As a result of the Revolutionary War and independence from Great Britain, “the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.”³⁶⁴ The sovereign powers once possessed by Great Britain then “passed to the Union.”³⁶⁵ In his classic articulation of this transfer of

357. *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring).

358. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (emphasis added).

359. *Id.* (“Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution.”).

360. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (emphasis added).

361. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936).

362. *Id.* at 315-16 (emphasis added).

363. *Id.* at 316.

364. *Id.*

365. *Id.* at 317.

sovereignty to the federal government in *United States v. Curtiss-Wright Export Corp.*, Justice Sutherland explained:

[T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, *to make treaties, to maintain diplomatic relations with other sovereignties*, if they had never been mentioned in the Constitution, would have vested in the *federal government as necessary concomitants of nationality*. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory . . . and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, *the right and power of the United States in that field are equal to the right and power of the other members of the international family*. Otherwise, the United States is not completely sovereign.³⁶⁶

Explaining why that power must reside in the Executive Branch, as opposed to the other federal branches, Justice Sutherland offered his classic “sole organ” theory of presidential power: “In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.”³⁶⁷

The MDLEA delegates to the Executive Branch authority to make jurisdiction determinations, and certify those determinations for use in court. Thus, the MDLEA jurisdiction procedure entails not merely an exercise of executive authority by itself, but rather “an authority vested in the President by an exertion of legislative power,”³⁶⁸ coupled with “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.”³⁶⁹ In the interest of fostering strong foreign relations with partner nations in the maritime counterdrug domain, then,

366. *Id.* at 318 (emphasis added).

367. *Id.* at 319.

368. Of course, the President and the Executive Branch are distinct entities, notwithstanding the President’s clear influence and control over many agency decisions. See Galbraith, Jean, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1676 (2017); Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43 (2017). However, Executive Branch agencies are also “more likely in the foreign affairs context than in the domestic context to be exercising delegated presidential powers, including the power to conduct international negotiations and the commander-in-chief power.” Galbraith, Jean, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1676 (2017).

369. *Curtiss-Wright Export Corp.*, 299 U.S. at 319-20 (1936).

“congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”³⁷⁰ As in other contexts touching on foreign affairs, in prosecuting offenses under the MDLEA the Executive Branch agencies involved are best situated to making jurisdictional determinations owing to better knowledge of “the conditions which prevail in foreign countries,” to better access to “confidential sources of information,” and relevant connections to “diplomatic, consular and other officials.”³⁷¹

Viewed through the political question doctrine lens, the justification for treating actual vessel registry as irrelevant makes much more sense. In *United States v. Hernandez*,³⁷² for example—another Eleventh Circuit case in which the court clearly recognized the foreign affairs implications and motives of the MDLEA’s jurisdiction provisions but did not invoke either the Treaty Power or political question doctrine as a rationale for deference—the “Coast Guard arrested the four defendants on board” a vessel that the “defendants claimed was registered in Guatemala—and claimed so truthfully, as it later turned out.”³⁷³ At the time of the boarding, however, “when asked by the Coast Guard, the Guatemalan government could neither confirm nor deny the ship’s registry.”³⁷⁴ The case involved a factual dispute: “the defendants claim[ed] . . . that the Coast Guard had [their vessel’s] registration documents before it asked Guatemala about . . . registry.”³⁷⁵

To establish jurisdiction over their vessel, the government relied on a State Department certification attesting that the defendants had claimed “Guatemalan registry, and that the Guatemalan government could neither confirm nor deny that claim.”³⁷⁶ The court declined to scrutinize the factual basis underlying the certification.³⁷⁷ Because the defendants’ vessel fit the statutory definition of “vessel without nationality,” the State Department “certification put the crime within the territorial coverage of the statutory prohibition.”³⁷⁸

Furthermore, the *Hernandez* court reasoned, by making the jurisdiction certification, the “executive branch thereby effectively assumed responsibility for any *diplomatic consequences* of the criminal prosecution.”³⁷⁹ Explaining the irrelevance of the vessel’s actual registry with Guatemala, the court elaborated that “[t]he defendants’ arguments based on actual registry and alleged bad faith [by the Coast Guard] fail . . . as an international-law argument about the U.S.

370. *Id.*

371. *Id.*

372. *United States v. Hernandez*, 864 F.3d 1292, 1296 (11th Cir. 2017).

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.* at 1298.

377. *Id.*

378. *Id.* at 1297.

379. *Id.* (emphasis added).

government's failure to abide by its treaty promise to the Guatemalan government to convey all available identifying information when asking about a ship's registry."³⁸⁰ The Act itself "does not state what information the United States must convey to the foreign government during its communication, and it does not state that actual registry overrides the certification's proof of statutory statelessness."³⁸¹ Thus, "MDLEA statelessness does not turn on actual statelessness, but rather on the response of the foreign government."³⁸²

Explaining why any failure to adhere to a bilateral agreement with Guatemala also failed to defeat jurisdiction, the *Hernandez* court explained that the MDLEA requires sovereign states to litigate complaints with one another directly:

[A]ny battle over the United States' compliance with international law in obtaining MDLEA jurisdiction should be *resolved nation-to-nation in the international arena*, not between criminal defendants and the United States in the U.S. criminal justice system. Assuming as true the defendants' suggestions that they provided the ship's registration document to the Coast Guard as soon as its officers boarded the ship, assuming further that the Coast Guard failed in bad faith to convey information in that document to the Guatemalan government, and assuming finally that that assumed failure violated the United States' obligation to Guatemala, still the defendants' international law argument does not touch the conclusion that the United States properly exercised statutory jurisdiction over this suit. If the United States hid information from Guatemala, then the Guatemalan government may complain in some form to the U.S. government; but Congress has instructed that these defendants may not litigate those complaints in an MDLEA prosecution.³⁸³

By denying the defendants' challenge, the *Hernandez* court explained that, "by relying on the certification to exercise MDLEA jurisdiction over this case, we are . . . holding, as we need only hold, that the statutory requirements for MDLEA prosecution in U.S. courts have been met, while recognizing that any further jurisdictional complaint over that U.S. prosecution is to be *handled by the executive branch, nation-to-nation, in the international arena*."³⁸⁴ The MDLEA thus "allocate[s] power between the courts and the executive as to which of the two will be responsible for complying with U.S. obligations under" international law.³⁸⁵

Courts have not always declined to inspect the factual basis underlying certifications, although they have been more reluctant to do so following the

380. *Id.* at 1299.

381. *Id.*

382. *Id.*

383. *Id.* at 1302 (emphasis added) (footnote omitted).

384. *Id.* at 1304.

385. *Id.*

statutory change making certification conclusive proof of jurisdiction.³⁸⁶ In two cases decided under the prior version of the MDLEA before the conclusive proof provision was added, *United States v. Tinoco*³⁸⁷ and *United States v. Devila*,³⁸⁸ the Eleventh Circuit “proceeded past . . . certification to examine whether the U.S. agents acted in good faith when communicating with the foreign government.”³⁸⁹ Another case, decided under the amended version of the MDLEA that *did* contain the conclusive proof provision, also analyzed the factual basis behind a certification. In *United States v. Wilchcombe*,³⁹⁰ “the defendant claimed the ship’s registry in the Bahamas and the Bahamian government confirmed the ship’s registry.”³⁹¹ Arguing that the Coast Guard had “misled” the Bahamian government in that case, the defendants “urged the court to look past the certification’s conclusive proof of consent.”³⁹² The *Wilchcombe* court did so, but nonetheless “ruled for the Government on one alternative basis (no evidence of bad faith or intentional misrepresentation).”³⁹³

The *Wilchcombe* court’s analysis thus suggested that courts *may* scrutinize the consent or waiver of jurisdiction, *if* it is unclear whether it actually communicates consent.³⁹⁴ However, even in *Wilchcombe*, the court did “not hold that the law *required* looking past the certification’s conclusive proof of consent upon evidence undermining the certification’s veracity.”³⁹⁵ And the *Hernandez* court later cast doubt on the propriety of *Wilchcombe*’s factual inquiry into the certification and declined to perform the same inquiry.³⁹⁶

CONCLUSION

The MDLEA’s jurisdictional provisions set forth a statutory mechanism by which U.S. officials and operational personnel in the Executive Branch can effectively carry out the United States’ commitments under the 1988 Convention against illicit narcotics. Its jurisdiction certification mechanism, in particular, allows the government to demonstrate that it has completed the congressionally-specified diplomatic exchange in each case, and thereby establish that certain

386. *See supra* Section I.C.

387. *United States v. Tinoco*, 304 F.3d 1088 (11th Cir. 2002).

388. *United States v. Devila*, 216 F.3d 1009 (11th Cir. 2000).

389. *Hernandez*, 864 F.3d at 1300.

390. *United States v. Wilchcombe*, 838 F.3d 1179 (11th Cir. 2016).

391. *Hernandez*, 864 F.3d at 1301.

392. *Id.*

393. *Id.*

394. *See* *United States v. Wilchcombe*, 838 F.3d 1179 (11th Cir. 2016) (“The SNO in this case was sufficient to inform the United States that the Bahamian Government consented to the United States’ exercise of jurisdiction over Rolle’s vessel.”); *see also id.* (“[A]s long as the substance of the consent or waiver is communicated, the language contained in SNOs need not exactly track the language contained in § 70502(c)(1)(C) to satisfy the requirements of the MDLEA.”).

395. *Hernandez*, 864 F.3d at 1301 (emphasis added).

396. *Id.* at 1298.

foreign and stateless vessels fall within the ambit of the Act. That diplomatic exchange process is carried out pursuant to a network of more than forty bilateral agreements between the U.S. Coast Guard and partner agencies in foreign states, which are both authorized and encouraged by the 1988 Convention.

A close analysis of defendants' challenges to the MDLEA's certification procedure shows that, although courts have generally addressed constitutional challenges on their own terms, two other doctrinal mechanisms offer more principled justifications for judicial deference to the Executive Branch in making jurisdiction certifications under the Act. Those doctrines—the Treaty Power and the political question doctrine—are doctrinally more faithful to the foreign affairs concerns that courts consistently recognize when confronting MDLEA cases. In particular, the Treaty Power and the political question doctrine provide a means of deferring to Executive agencies' jurisdictional determinations under the MDLEA that rely for their justification on the precise foreign affairs concerns that seem to underpin courts' analyses. By deferring to the Executive Branch on these grounds, courts can better respect that branch's efforts to meet the nation's commitments under the 1988 Convention and thwart illicit narcotics trafficking.