Oral Argument Not Yet Scheduled

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-3024, 03-3025 & 03-3133

United States,
Appellee,

vs.

Carlos G. Erazo Robles,
Appellant.

United States,
Appellee,

vs.

Wagner X. Gongora Balon,

Appellant.

United States,
Appellee,

vs.

Wagner E. Gongora Parraga,
Appellant.

On Appeal from the
U.S. District Court for the District of Columbia
02-Cr.-252-02, 02-Cr.-252-06 & 02-Cr.-252-05

JOINT BRIEF OF APPELLANTS

Filed: December 22, 2005

Joseph Virgilio
Counsel of Record
1000 Connecticut Avenue, N.W.
No. 155
Washington, D.C. 20036
(202) 686-6914
Attorney for Carlos G. Erazo Robles
(Appointed by the Court)

A. J. Kramer
Federal Public Defender
Counsel of Record
Tony Axam
625 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 208-7500
Attorney for Wagner X. Gongora Balon

Robert S. Becker
Counsel of Record
5505 Connecticut Avenue, N.W.
No. 155
Washington, D.C. 20015
(202) 364-8013
Attorney for Wagner E. Gongora Parraga
(Appointed by the Court)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES AND AMICI.

Appellants Carlos G. Erazo Robles, Wagner X. Gongora Balon and Wagner E. Gongora Parraga and Appellee the United States of America appeared in the United States District Court for the District of Columbia. They are the only parties before this Court presently. The District Court docket is reproduced in Appellants' Joint Appendix (App.), 1 On June 13, 2005 the Court granted a motion to dismiss the appeal of Cesar M. Espinoza Macia. Codefendant Washington R. Gongora Cedeño did not appeal his conviction.

The Immigrant and Refugee Rights Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs filed an *amicus curiae* brief in the District Court supporting the defendants' motion to dismiss the indictment.

B. RULINGS UNDER REVIEW

At issue before this Court is the ruling by the Hon. Henry H. Kennedy that the U.S. District Court for the District of Columbia had jurisdiction over Appellants, Ecuadorian nationals who were piloting an Ecuador-registered freighter toward Guatemala when the U.S. Coast Guard seized the ship in international waters 2,500 miles from the United States border. Each Appellant's Judgment of Conviction is reproduced in the Joint Appendix at 177 – 94.

C. RELATED CASES

This case has not previously been before the Court, and no other cases currently on appeal are related to it. However, this appeal calls into question the holding of a Panel of this Court in *United States v. Delgado-Garcia*, 374 F.3^d^ 1337 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1696, 161 L. Ed. 2^d^ 528 (2005).

STATUTES & RULES

Pursuant to Fed. R. App. P. 28(f) and D.C. Cir. R. 28(a)(5), relevant statutes and rules are set forth in the Addendum to this brief.

STATEMENT OF JURISDICTION

This is an appeal from final judgments of conviction and imposition of sentences by the U.S. District Court for the District of Columbia on each Appellant of 27 months in prison and three years of supervised release for conspiracy to induce illegal aliens to enter the United States. The District Court asserted jurisdiction pursuant to 18 U.S.C. § 1324. Each Appellant filed a timely Notice of Appeal in compliance with FED. R. APP. P. 4(b) and this Court has jurisdiction pursuant to 18 U.S.C. § 1291. The Notices of Appeal are reproduced in the Joint Appendix, 195 - 201.

QUESTIONS PRESENTED

1. Whether the District Court lacked subject-matter jurisdiction over Appellants' case because they are Ecuadorian nationals who were seized by the U.S. Coast Guard in international waters while traveling between Ecuador and Guatemala on a ship registered in Ecuador, and because Congress did not intend for the statute under which they were charged, 8 U.S.C. § 1324(a), to be applied extraterritorially against persons who have never had contact with the United States?
2. Whether the U.S. Coast Guard exceeded its authority by seizing the *San Jacinto* in international waters 2,500 miles from the United States, after determining that the vessel was of Ecuadorian registry, that it was bound from Ecuador to Guatemala, that it was seaworthy, and that persons onboard were not in need of humanitarian assistance?
3. Whether the District Court lacked personal jurisdiction over Appellants because Appellants' seizure without legal authority on the high seas and their involuntary transport to appear over a month later in the District Court in Washington, D.C., violated the Fifth Amendment Due Process Clause in that the government's actions contravened U.S. and international law and shock the conscience?

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

STATUTES & RULES I

STATEMENT OF JURISDICTION II

QUESTIONS PRESENTED III

TABLE OF AUTHORITIES V

NATURE OF THE CASE 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

THE SEIZURE OF THE SAN JACINTO 4

SUMMARY OF THE ARGUMENT 6

ARGUMENT 7

THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER APPELLANTS' CASE BECAUSE 8 U.S.C. § 1324 DOES NOT APPLY EXTRATERRITORIALLY 7

Standard of review 7

As a matter of statutory construction, § 1324 does not reach conduct outside the United States 8

When Congress intends a statute to have extraterritorial reach it makes that clear 11

THE INDICTMENT MUST BE DISMISSED BECAUSE THE COAST GUARD EXCEEDED ITS AUTHORITY WHEN IT SEIZED THE *SAN JACINTO*, ITS CREW AND PASSENGERS ON THE HIGH SEAS 15

APPLICATION OF 8 U.S.C. § 1324 EXTRATERRITORIALLY VIOLATES APPELLANTS' FIFTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THERE WAS NO EVIDENCE OF A NEXUS BETWEEN APPELLANTS AND THE UNITED STATES 19

Standard of review 19

The government failed to establish a sufficient nexus between the defendants and the United States to satisfy due process requirements 19

CONCLUSION 24

ADDENDUM

TABLE OF AUTHORITIES[†]

CASES

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989) ---- 11

Bowman v. United States, 260 U.S. 94, 43 S. Ct. 39, 67 L. Ed. 149 (1922) ---- 20, 21

Breard v. Greene, 523 U.S. 371, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1998) ---- 23

Correa v. Thornburgh, 901 F.2d 1166 (2d Cir. 1990) ---- 10

E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991) ---- 8

Ex Parte Chow Chok, 161 F. 627 (N.D.N.Y.), *aff'd sub nom. Chow Chok v. United States*, 163 F. 1021 (2d Cir. 1908) ---- 10

Foley Brothers, Inc. v. Filardo, 336 U.S. 281, 69 S. Ct. 575, 93 L. Ed. 680 (1949) ---- 8

Frisbie v. Collins, 342 U.S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952) ---- 22

Herbert v. Nat'l Acad. of Sciences, 974 F.2d 192 (D.C. Cir. 1992) ---- 7

Ker v. Illinois, 119 U.S. 436, 7 S. Ct. 225, 30 L. Ed. 421 (1886) ---- 22

Maul v. United States, 274 U.S. 501, 47 S. Ct. 735 , 71 L. Ed. 1171 (1927) ---- 16

Medellin v. Dretke, ___ U.S. ___, 125 S. Ct. 2088, 161 L. Ed. 2d 982 (2005) ---- 23

Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 2 L. Ed. 208 (U.S. 1804) ---- 16

Rosenberg v. Fleuti, 374 U.S. 449, 83 S. Ct. 1804, 10 L. Ed. 2d 1000 (1963) ---- 10

Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 113 S. Ct. 2549, 125 L. Ed. 2d 128 (1993) ---- 8

United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975) ---- 23

**United States v. Best*, 304 F.3d 308 (3d Cir. 2002) ---- 22

United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978) ---- 15, 17

United States v. Caicedo, 47 F.3d 370 (9th Cir. 1995) ---- 20

United States v. Cardales, 168 F.3d 548 (1st Cir. 1999) ---- 19

**United States v. Davis,* 905 F.2d 245 (9th Cir. 1990) ---- 8, 19

United States v. Delgado-Garcia, 374 F.3d 1337 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1696, 161 L. Ed. 2d 528 (2005) ---- passim

United States v. Glen-Archila, 677 F.2d 809 (11th Cir. 1982) ---- 19

**United States v. Hensel*, 699 F.2d 18 (1st Cir. 1983) ---- 16

[†] Citations to cases principally relied upon are preceded by asterisks (*).

United States v. Klimavicius-Viloria, 144 F.3d 1249 (9th Cir. 1998) ---- 20, 21

United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982) ---- 20

United States v. Martinez-Hidalgo, 993 F.2d 1052 (3d Cir. 1993) ---- 19

United States v. Pacheco-Medina, 212 F.3d 1162 (9th Cir. 2000) ---- 10

United States v. Pinto-Mejia, 720 F.2d 248 (2d Cir. 1983) ---- 8

United States v. Postal, 589 F.2d 862 (5th Cir. 1979) ---- 22

United States v. Rezaq, 134 F.3d 1121 (D.C. Cir. 1998) ---- 22

United States v. Robles, et al., No. 02-MJ-525 (S.D. Tex. *filed* June 10, 2002) ---- 3

United States v. Suerte, 291 F.3d 366 (5th Cir. 2002) ---- 20

**United States v. Toscannino*, 500 F.2d 276 (2d Cir. 1974) ---- 23

United States v. Turkette, 452 U.S. 576 (1981) ---- 9

United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990) ---- 19

United States v. Williams, 617 F.2d 1063 (5th Cir. 1980) ---- 15, 17

United States v. Yeh Hsin Yung, 97 F.Supp.2d 24 (D.D.C. 2000) ---- 20, 21

United States v. Yunis, 859 F.2d 953 (D.C. Cir. 1988) ---- 23

**Yenkichi Ito v. United States*, 64 F.2d 73 (9th Cir. 1933) ---- 8, 9

STATUTES

8 U.S.C. § 1101 ---- 13

8 U.S.C. § 1227 ---- 3

8 U.S.C. § 1324 ---- passim

14 U.S.C. § 89 ---- 6, 15, 16, 17

18 U.S.C. § 2 ---- 2, 24

18 U.S.C. § 7 ---- 13, 21, 22

18 U.S.C. § 1291 ---- ii

18 U.S.C. § 2332b ---- 12

18 U.S.C. § 3181 ---- 23

18 U.S.C. § 3231 ---- ii

Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 1901 *et seq.* ---- 12, 19

P.L. 107-197, Title III, § 301(b), 116 Stat. 728 (June 25, 2002) ---- 12

P.L. 107-56, Title VII, § 808, 115 Stat. 378 (Oct. 26, 2001) ---- 12

P.L. 108-458, Title VI, Subtitle G, § 6603(c)(3), Subtitle J, § 6908, 118 Stat. 3762, 3769, 3774 (Dec. 17, 2004) ---- 12

RULES & REGULATIONS

D.C. Cir. R. 28 ---------- i

FED. R. APP. P. 4(b) ---------- ii

Fed. R. App. P. 28 ---------- i

CONSTITUTIONAL PROVISIONS

U.S. CONST., amend. V ---------- passim

TREATIES & INTERNATIONAL LAW

18 Stat. 199, T.S. 76, June 28, 1872 ---------- 23

55 Stat.1196, T.S. 972, Sept. 22, 1939 ---------- 23

Convention on the Law of the High Seas ---------- passim

Convention on the Law of the Territorial Sea and Contiguous Zone ---------- 13, 15

U.N. Convention on the Law of the Sea ---------- 14, 15

Vienna Convention on Consular Affairs ---------- 2, 23

OTHER AUTHORITIES

Biological and Weapons Anti-Terrorism Act of 1989, S. Rep. No. 210, 101st Cong., 2nd Sess. ---------- 11

Coast Guard Drug Law Enforcement Act, H. R. Rep. No. 323, 96th Cong., 1st Sess. ---------- 12

Coast Guard Enforcement of Drug Laws, S. Rep. No. 855, 96th Cong., 2nd Sess. ---------- 12

H.R. Rep. No. 2452, 74th Cong., 2d Sess. 2-3 (1936) ---------- 16

S. Rep. No. 2211, 74th Cong., 2d Sess. 2 (1936) ---------- 16

THE LAW OF THE SEA CONVENTION AND U.S. POLICY, Congressional Research Service, Feb. 10, 2005 ---------- 15

THE U.N. LAW OF THE SEA CONVENTION AND THE UNITED STATES: DEVELOPMENTS SINCE OCTOBER 2003, Congressional Research Service, June 3, 2005 ---------- 15

U.N. Convention on the Law of the Sea, Hearing on Treaty Doc. 103-39, before Senate Committee on Environment and Public Works, 108th Cong., 2d Sess., D269 (2004) ---------- 14

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES, APPELLEE, vs. **CARLOS G. ERAZO ROBLES,** APPELLANT.	No. 03-3124 (02-Cr.-252-02)
UNITED STATES, APPELLEE, vs. **WAGNER X. GONGORA BALON,** APPELLANT.	No. 03-3125 (02-Cr.-252-06)
UNITED STATES, APPELLEE, vs. **WAGNER E. GONGORA PARRAGA,** APPELLANT.	No. 03-3133 (02-Cr.-252-05)

NATURE OF THE CASE

In this case the Court must decide whether the government exceeded the authority granted by Congress to enforce statutes intended to punish those who bring illegal aliens into the United States against Ecuadorian seamen arrested in international waters 2,500 miles from our border as they piloted a ship from Ecuador to Guatemala. The statute under which Appellants Carlos M. Erazo Robles, Wagner X. Gongora Balon and Wagner E. Gongora Parraga were convicted, 8 U.S.C. § 1324, does not state that it applies extraterritorially, and nothing in its legislative history indicates that Congress intended it to be applied beyond the territorial waters

of the United States.

The Court must decide as well whether the government violated Appellants' Fifth Amendment right to due process of law by seizing them for conduct beyond the reach of § 1324, forcing them to sail to a port in Mexico where they were arrested by Mexican immigration agents, interrogating them repeatedly and bringing them to the United States to be prosecuted. In doing so the government, for five weeks deliberately deprived Appellants of their right under the Vienna Convention on Consular Affairs to consular assistance, effectively preventing the Ecuadorian government from interceding to repatriate them.

Because the U.S. District Court for the District of Columbia lacked subject matter jurisdiction over Appellants' case, and because that Court obtained personal jurisdiction over them only due to the government's blatant, egregious violation of the Fifth Amendment, their convictions must be vacated.

STATEMENT OF THE CASE

The government filed an information June 5, 2002 charging Appellants Carlos G. Erazo Robles[1] (03-3124), Wagner X. Gongora Balon (03-3125), Wagner E. Gongora Parraga (03-3133), and codefendants José R. Saeteros Narvaes (02-Cr.-252-01), Cesar M. Espinoza Macia (02-Cr.-252-03), and Washington R. Gongora Cedeño (02-Cr.-252-04), with conspiracy to encourage and induce illegal aliens to enter the United States in violation of 8 U.S.C. § 1324(a)(1)(A)(v), (iv), and (B)(i), and attempting to bring unauthorized aliens into the United States in violation of § 1324(a)(2) and 18 U.S.C. § 2. Magistrate Judge John M. Facciola issued arrest warrants that day. App. 3, 18, 34.[2] All of the defendants except Saeteros Narvaes were

[1] Customarily, Spanish names include both the father's last name and the mother's maiden name. But only the father's last name is used in addressing the person, i.e., Mr. Erazo, Mr. Gongora, Mr. Espinoza, Mr. Saeteros. To avoid confusion regarding Appellants Gongora Balon and Gongora Parraga and Defendant Congora Cedeño both names will be used throughout this brief.
[2] References to Appellants' Joint Appendix will be designated "App." followed by the relevant page number, i.e. App. 2. References to transcripts of proceedings will be designated "Tr." followed by the date of the proceeding and the relevant page number, i.e. Tr. 6/25/02, 3. References to transcripts of grand jury proceedings will be designated "G.J. Tr." followed by the date of the proceeding and the relevant page number, i.e. G.J. Tr. 6/6/02, 3. Transcripts of grand

arrested June 10 in Houston, Texas, after being expelled from Mexico.[3] *United States v. Robles, et al.*, No. 02-MJ-525 (S.D. Tex. *filed* June 10, 2002). They waived removal to the District of Columbia in a hearing June 13, 2002.

The grand jury indicted the defendants June 20, and Judge Facciola arraigned them June 25. App. 3 – 4, 18 – 19, 34 – 5. On August 9, 2002 Mr. Gongora Balon filed a motion, in which his codefendants joined, to dismiss the indictment for lack of jurisdiction. App. 56 - 93. Judge Henry H. Kennedy held a hearing September 26, 2002 on the defendants' jurisdictional motion and denied it in an Order filed November 19. App. 149 – 57. On February 20, 2003, the defendants requested reconsideration of the ruling, App. 166 – 8, and The Immigrant and Refugee Rights Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs filed an *amicus curiae* brief supporting their motion..

Each defendant pleaded guilty July 17, 2003 to conspiracy to induce illegal aliens to enter the United States in violation of § 1324(a)(1)(A)(v), (iv) and (B)(i). *Id.* at 23 – 4. On October 3, 2003 Judge Kennedy sentenced each defendant to 27 months in prison and three years of supervised release. *Id.* at 26 – 8. As to each defendant the Judge issued stipulated orders of expulsion as an alien convicted of an aggravated felony, pursuant to 8 U.S.C. § 1227(a)(1)(E), and a special assessment of $100. *Id.* at 25 – 8. The judgments were entered October 21, 2003 *Id.* at 28 – 9.

Timely Notices of Appeal were filed by Mr. Erazo Robles on October 10, 2003, Mr. Gongora Balon on October 14, Mr. Espinoza Macia on October 20, and Mr. Gongora Parraga on October 31. *Id.* at 28 – 30. On June 13, 2005, this Court granted Mr. Espinoza Macia's motion to dismiss his appeal. *Id.* at 32.

---

jury proceedings June 6 and 12, 2002, and the Motions Hearing September 26, 2002, are reproduced in the Joint Appendix.

[3] Mexico released Saeteros Narvaes or repatriated him to Ecuador on May 31, 2002. Because federal officials were unaware of this, Saeteros Narvaes is charged in the indictment. App. 50 – 5, His case was severed from those of his five codefendants on December 12, 2002. On November 16, 2004 Saetero Narvaes's case was transferred to the U.S. District Court for the Southern District of New York.

STATEMENT OF FACTS

Appellants and codefendants Saeteros Narvaes, Espinoza Macia, and Gongora Cedeño were among 530 persons onboard two ships seized by the U.S. Coast Guard about 150 nautical miles southwest of San José, Guatemala, on May 15, 2002. The ships and their passengers were turned over to the Mexican Navy near Puerto Madero, Mexico, and Mexican immigration officials detained all of the passengers. During interrogation, Mexican and U.S. immigration officials identified Appellants and Codefendants Espinoza Macia and Gongora Cedeño as the crew of one of the ships, the *San Jacinto*, and Saeteros Narvaes as a passenger on that ship who assumed a leadership role among passengers.

Although members of the crew were Ecuadorian nationals, Mexico expelled them by placing them on an airplane bound for Houston, Texas, where they were arrested on warrants issued by the U.S. District Court for the District of Columbia.[4]

THE SEIZURE OF THE SAN JACINTO

Immigration Agent Cheryl Bassett testified that Juan Carlos Palma recruited Mr. Erazo Robles, Mr. Gongora Balon, Mr. Espinoza Macia and Mr. Gongora Cedeño to pilot the *San Jacinto*, a coastal freighter, and Mr. Gongora Parraga as the ship's mechanic. G.J. Tr. 6/6/02, 20, 30, 35, 38, 40. This occurred in Manta, Ecuador, a major port. Each man said Palma paid him $100 and promised to pay $200 more when he returned.[5] *Id.* Mr. Gongora Balon, his father, Mr. Gongora Parraga, and his cousin Mr. Gongora Cedeño were playing cards in a park frequented by people in the shipping industry when Palma enlisted them, without telling them where the ship was bound or the length of the voyage. *Id.* at 40, 52. Mr. Gongora Parraga joined the crew after the ship left port. *Id.* at 41. According to Bassett, Mr. Erazo Robles, Mr. Gongora Balon and

---

[4] The factual account is derived from the grand jury testimony of Immigration Agent Cheryl Bassett and messages transmitted by the Coast Guard Cutter U.S.C.G. Sherman, which the government turned over to defense counsel in discovery. Relevant portions of the transcripts and messages are reproduced in Appellants' Appendix.

[5] Bassett said the U.S. dollar is the currency used in Ecuador. G.J. Tr. 6/6/02, 50.

Mr. Gongora Parraga told investigators they did not know Palma was a "coyote" — an alien smuggler.

The ship sailed to La Libertad, Ecuador, where small boats transported about 270 passengers to the *San Jacinto* from the shore. *Id.* at 3, 11, 32. Then it sailed for Guatemala. *Id.*

On May 15, shortly after 9 a.m., a U.S. Coast Guard helicopter involved in narcotics interdiction operations spotted the "Ronald," a fishing boat that appeared to have about 50 people on board. *Id.* at 48. A short time later the helicopter spotted the *San Jacinto* about 20 nautical miles away, and saw a large number of people onboard, according to Basset. *Id.* at 4. Believing that the two vessels were smuggling immigrants, the U.S.C.G. Sherman intercepted the Ronald and ordered it to follow the cutter, and then intercepted the *San Jacinto*. The Sherman's crew did not board either the *San Jacinto* or the Ronald, but determined that both "appear to have good stability, functional propulsion & no serious medical problems among" the people on board. App. 203 – 4. With both vessels in custody the Sherman sailed toward Puerto Madero, Mexico, where its orders said the Mexican Navy would take custody. Along the way the Sherman delivered fresh water and food to the ships. Its orders stated that the Sherman's crew could board, search and detain either vessel if "necessary and appropriate."

Early in the morning May 16 the Ronald left the formation, sailing southward, and the Sherman sent a boarding party to take control of it, but not the *San Jacinto*. App. 207 – 8. Shortly before the Sherman turned the two boats over to the Mexican Navy on May 17, members of its crew boarded the *San Jacinto* to provide medical treatment to several persons suffering from dehydration. App. 211 – 12.

SUMMARY OF THE ARGUMENT

In this case the U.S. Coast Guard seized Mr. Erazo Robles, Mr. Gongora Balon and Mr. Gongora Parraga, Ecuadorian nationals aboard a freighter registered in Ecuador, as they sailed from Ecuador to Guatemala. Claiming that 8 U.S.C. § 1324(a) applied extraterritorially to foreign nationals who have had no contact with the United States, the government charged them with alien smuggling and conspiracy.

When Congress enacted § 1324 it did not explicitly give it extraterritorial reach or express in the legislative history intent to apply the statute to foreign nationals on the high seas. In the absence of a clear expression of intent the Court must conclude that § 1324(a) does not apply to Appellants merely because passengers aboard the *San Jacinto* ultimately planned to enter the United States illegally after debarking from the ship.

When the U.S. Coast Guard seized the *San Jacinto* in international waters 2,500 miles from the United States its authority was limited to determining the ships registry, its seaworthiness, and whether persons on board needed humanitarian assistance. Once it determined that the *San Jacinto* was registered in Ecuador and that it was capable of completing its voyage to Guatemala without assistance, the Coast Guard exceeded the authority granted by 14 U.S.C. § 89(a) by forcing the ship to sail to Mexico, where the Mexican Navy took the vessel, its passengers and crew into custody at the behest of the United States.

The District Court's decision that it could assert personal jurisdiction over Appellants, despite the illegal actions of the Coast Guard and Immigration and Naturalization Service in bringing them before the Court violated Appellants Fifth Amendment right to due process of law. This is so because Congress has incorporated into U.S. law limitations on federal jurisdiction expressed in the Convention on the Law of the High Seas, and because the government's actions over five weeks in bringing Appellants before the District Court shock the conscience.

ARGUMENT

THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER APPELLANTS' CASE BECAUSE 8 U.S.C. § 1324 DOES NOT APPLY EXTRATERRITORIALLY

At the outset Appellants acknowledge that, in a case with facts somewhat similar to this one, a Panel of this Court has ruled that § 1324 applies extraterritorially, and that the District Court had jurisdiction over both the subject matter and the defendants. *United States v. Delgado-Garcia*, 374 F.3[d] 1337 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1696, 161 L. Ed. 2[d] 528 (2005). For the reasons stated below and in Judge Rogers's dissent Appellants believe that case was wrongly decided.

The United States Coast Guard seized the *San Jacinto* in international waters 2,500 miles from the United States border as the vessel steamed toward a port in Guatemala. Unlike the situation in *Delgado-Garcia*, in this case a Coast Guard helicopter approached the *San Jacinto* in daylight, and when asked, the crew clearly identified the freighter and provided registration papers. The crew of the U.S.C.G. Sherman quickly determined that the *San Jacinto* was seaworthy and that its crew and passengers did not need medical attention.

There was no humanitarian or safety justification for boarding the *San Jacinto*, and the government never obtained Ecuador's permission to board or seize the ship to enforce U.S. criminal law. Nonetheless, the Sherman took the Ecuadorian vessel into custody in the belief that its passengers intended to enter the United States illegally.

Standard of review

This Court reviews *de novo* the District Court's rulings on questions of law and its application of the law to undisputed facts in the record in denying appellants' motion to dismiss on jurisdictional grounds. *See Herbert v. Nat'l Acad. of Sciences*, 974 F.2[d] 192, 197-98 (D.C. Cir. 1992). The Court reviews the trial court's factual findings for clear error. *Id.* at 197.

As a matter of statutory construction, § 1324 does not reach conduct outside the United States

As Judge Rogers recognized, a federal statute applies only within the territorial boundaries of the United States unless Congress clearly states its intent that the law apply extraterritorially. *Delgado-Garcia*, at 1351 – 2 (citing *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991); *Foley Brothers, Inc. v. Filardo,* 336 U.S. 281, 285, 69 S. Ct. 575, 93 L. Ed. 680 (1949)). *See also United States v. Davis,* 905 F.2d 245 (9th Cir. 1990)(Congress must explicitly provide for the extraterritorial application of drug laws); *United States v. Pinto-Mejia,* 720 F.2d 248 (2d Cir. 1983)(Congress must expressly indicate its intent for a criminal statute to reach conduct outside the United States); *Yenkichi Ito v. United States*, 64 F.2d 73, 75 (9th Cir. 1933)("[T]he intent of Congress to extend the federal criminal jurisdiction to offenses committed on the high seas must clearly appear from the language of the statute.").

In short, there is a presumption against extraterritoriality. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 113 S. Ct. 2549, 125 L. Ed. 2d 128 (1993). This presumption ensures that Congress, rather than the judiciary, determines how best to balance the interest in enforcing criminal laws against the interest in maintaining harmonious relations with other countries. *See E.E.O.C., supra*, 499 U.S. at 248; *Sale, supra,* 509 U.S. at 174.

> Decisions about when to subject foreign nationals and foreign conduct to the United States' laws involve delicate questions of jurisdiction and international relations, and courts, which lack the foreign policy expertise of the legislative and executive branches, must tread carefully and err on the side of limiting statutes to domestic application if there is doubt as to Congress' intentions.

Delgado-Garcia, supra, at 1352 (Rogers, J. *dissenting*).

Determining whether Congress has exercised its authority to extend application of a statute extraterritorially is "a matter of statutory construction," *E.E.O.C., supra*, at 248. The mere possibility that Congress intended such application does not suffice. *Sale, supra*, 509 U.S. at 176.

Applying well-settled principles of statutory construction, in conjunction with the presumption against extraterritorial application, there is no affirmative evidence that Congress

intended § 1324 to apply extraterritorially.

The beginning point of any statutory construction analysis is the plain language of the statute. *United States v. Turkette,* 452 U.S. 576, 580 (1981). With respect to the conspiracy charge, to which Mr. Erazo Robles, Mr. Gongora Balon and Mr. Gongora Parraga pleaded guilty, § 1324(a)(1)(A)(iv) proscribes engaging in a conspiracy to:

> (iv) encourage[] or induce[] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law[.]

With respect to the attempted bringing of unauthorized aliens charge, which the government dismissed, § 1324(a)(2) makes it unlawful for:

> Any person . . . , knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, [to] bring to or attempt[] to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien[.]

Nothing in these provisions provides "affirmative evidence" that Congress intended to reach beyond United States territorial limits. The first provision merely proscribes the encouragement or inducement of unlawful entry, without specifying that encouragement or inducement occurring extraterritorially is criminal. The second provision requires "bring[ing] or attempt[ing] to bring" another individual "to the United States." Because it is impossible for one individual to *bring* or attempt to *bring* another individual "to the United States" without coming or attempting themselves to come to the United States, this language strongly suggests Congress's intent not to make the statute apply extraterritorially. Thus, as the Ninth Circuit correctly noted in *Yenkichi Ito, supra*, 64 F.2^{d} at 75, "there is nothing in [8 U.S.C. § 1324] to indicate that Congress intended it to be effective outside of the recognized territorial limits of the United States."

The *Delgado-Garcia* majority's error results largely from its conclusion, despite the plain language of the statute, that the purpose of § 1324 would be frustrated if it were not read broadly to cover extraterritorial conduct. It held that § 1324(a),

> by its terms, applies to much extraterritorial conduct. Subsections (a)(1)(A) and (a)(2) of that provision both proscribe "attempts to bring" aliens "to the United States." Many incomplete attempts occur outside the territorial jurisdiction of the United States. "Bringing" someone suggests entry — or at least physical proximity. Because an alien will not be in the United States if the attempt is incomplete, the offender will ordinarily also be outside the United States during the attempt. This is true even if the government foils many incomplete attempts at the borders of the United States. That many attempts to bring someone into the United States will occur outside the United States is strongly suggestive that these subsections and their neighbors apply, as a matter of ordinary language, to extraterritorial acts.

Id. at 1347.

This interpretation derives from a misunderstanding of terms that have specific legal definitions. The Panel erroneously concludes that a failed attempt to "bring" someone to the United States illegally "ordinarily" involves an offender outside the country, even if the alien is barred at the border. But as a practical matter, a United States resident would violate § 1324(a) if s/he paid a smuggler to bring an undocumented alien across the border.

Furthermore, a person who has "landed" in the United States has not necessarily "entered" the country. "Entry" is defined as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise...." *Rosenberg v. Fleuti*, 374 U.S. 449, 452, 83 S. Ct. 1804, 10 L. Ed. 2d 1000 (1963). " 'Enter' means more than the mere act of crossing the border line. Those who seek to enter in the sense of the law, and those the policy of the law seeks to prevent from entering, are those who come to stay permanently, or for a period of time, or to go at large and at will within the United States." *Ex Parte Chow Chok*, 161 F. 627 (N.D.N.Y.), *aff'd sub nom. Chow Chok v. United States*, 163 F. 1021 (2d Cir. 1908). Thus, there are three steps to entry: physical presence; inspection and admission or intentional evasion of inspection; and "freedom from official restraint." An alien has not "entered" the United States until s/he is free from restraint *Correa v. Thornburgh*, 901 F.2d 1166, 1171 – 2 (2d Cir. 1990). *See, also, United States v. Pacheco-Medina*, 212 F.3d 1162, 1163 – 4 (9th Cir. 2000). Thus, if the attempt to enter fails, the smuggler "bringing" illegal aliens into the United States may be physically within the jurisdiction of the federal courts and subject to penalties imposed under § 1324, even though s/he never entered the country.

As will be discussed more fully below at 12 – 15, jurisdiction to enforce criminal laws extends 12 nautical miles beyond the United States coast, putting alien smugglers aboard ships in the so-called contiguous zone within the jurisdiction of federal courts.

The Panel's reasoning becomes circular when it asserts that the forfeiture provision of § 1324(a) demonstrates that Congress intended to apply the criminal provision extraterritorially. It states:

> The forfeiture provision applicable to § 1324(a) bolsters the inference that § 1324(a) applies extraterritorially. It provides:
>
> > Any conveyance, including any vessel, vehicle, or aircraft, which has been or is being used in the commission of a violation of subsection (a) of this section shall be seized and subject to a forfeiture.
>
> 8 U.S.C. § 1324(b)(1). The breadth of this provision strongly suggests that subsection (a) itself has extraterritorial application. Vessels, vehicles, and aircraft used in committing violations of subsection (a) are often used internationally, as transporting illegal immigrants requires movement from one country to another. Therefore, § 1324(b)(1) itself has extraterritorial application. It seems unlikely that Congress would give the government broad power to seize the conveyances used to effect illegal immigration in subsection (b)(1) without simultaneously conferring the power, in subsection (a), to punish the offenders operating those conveyances internationally. Congress would not, for example, have given the executive the power to seize ships abroad if it were not also possible to convict those operating the ships abroad.

Delgado-Garcia, supra, at 1347. The forfeiture provision is not explicitly extraterritorial; it merely states that vehicles used to transport illegal aliens may be forfeited, without regard to whether those vehicles were used within the United States or elsewhere. Ships used to convey illegal aliens to the United States would be subject to forfeiture if they are seized within the 12-mile contiguous zone.

When Congress intends a statute to have extraterritorial reach it makes that clear

Congress clearly knows how to create extraterritorial jurisdiction when it wishes to do so. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440, 109 S. Ct. 683, 102 L. Ed. 2^{d} 818 (1989); *see, e.g.,* Biological and Weapons Anti-Terrorism Act of 1989, S. Rep. No. 210, 101st Cong., 2nd Sess., at 193 (explicitly providing for exterritorial application of anti-

terrorism law);[6] Coast Guard Drug Law Enforcement Act, H. R. Rep. No. 323, 96th Cong., 1st Sess., at 4 – 5, 9, 11 (discussing deficiency in previous law that did not allow for extraterritorial application of Act, and so providing in revised law); Coast Guard Enforcement of Drug Laws, S. Rep. No. 855, 96th Cong., 2nd Sess., p. 2. (adopting an amendment "to clarify that the bill is intended to address acts committed outside the territorial jurisdiction of the United States."); Maritime Drug Law Enforcement Act ("MDLEA") (46 U.S.C. §§ 1901 *et seq.*) (explicitly extending the application of MDLEA's provisions extraterritorially in Section 1903(a), (c) and (f)).

But in the absence of a clear statement of intent in § 1324, the *Delgado-Garcia* majority, *supra*, at 1345, played the terrorism card to justify its expansive, extraterritorial reading of § 1324(a), saying,

> On its face, it concerns much more than merely "domestic conditions." It protects the borders of the United States against illegal immigration. As the terrorist attacks of September 11, 2001 reminded us starkly, this country's border-control policies are of crucial importance to the national security and foreign policy of the United States, regardless whether it would be possible, in an abstract sense, to protect our borders using only domestic measures.

The problem with this analysis is that Congress, even after September 11, 2001, has demonstrated far more restraint in crafting anti-terrorism legislation than the Panel did in broadly interpreting § 1324 as a bastion against threats from abroad. For example, 18 U.S.C. § 2332b,[7] dealing with acts of terrorism transcending national boundaries, specifically states that it applies extraterritorially. *Id.* § 2332b(e). Under § 2332b(b), extraterritorial jurisdiction exists only if "(E) the offense is committed in the territorial sea (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon) of the United States; or

---

[6] Notably, at the time of enactment, no act of terrorism had ever occurred on U.S. mainland soil. Thus, the logical presumption would be that an antiterrorism law was intended to be applied extraterritorially. Congress nevertheless made its intent for extraterritorial application explicit.

[7] 18 U.S.C. § 2332b was enacted April 24, 1996 and has been amended three times since September 11, 2001: P.L. 107-56, Title VII, § 808, 115 Stat. 378 (Oct. 26, 2001); P.L. 107-197, Title III, § 301(b), 116 Stat. 728 (June 25, 2002); P.L. 108-458, Title VI, Subtitle G, § 6603(c)(3), Subtitle J, § 6908, 118 Stat. 3762, 3769, 3774 (Dec. 17, 2004).

(F) the offense is committed within the special maritime and territorial jurisdiction of the United States."

> The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:
> (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.
> ...
> (8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.
> (9) With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act [8 U.S.C. § 1101] —
> ...
> Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts....

18 U.S.C. § 7.

In creating "special maritime jurisdiction" Congress recognized that the 1958 Convention on the Law of the High Seas (1958 High Seas Convention) and Convention on the Law of the Territorial Sea and Contiguous Zone (1958 Territorial Sea Convention), to which the United States is a signatory, limit the reach of federal jurisdiction. The latter establishes a 12-nautical-mile band along the United States coastline and states in Art. 19 that

> 1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:
>
> (a) If the consequences of the crime extend to the coastal State; or
>
> (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea....

The 1958 High Seas Convention states in Art. 11,

> 1. In the event of a collision or of any other incident of navigation concerning a ship on

> the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.
>
> ...
>
> 3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.

Art. 22 limits grounds for boarding a merchant ship outside territorial waters.

> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:
>
> (a) That the ship is engaged in piracy; or
>
> (b) That the ship is engaged in the slave trade; or
>
> (c) That though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

The Bush Administration has advocated ratification of the 1982 U.N. Convention on the Law of the Sea, which combines provisions of both 1958 conventions into a single document and expands to 24 nautical miles a coastal state's jurisdiction to enforce its criminal laws related to immigration. Part II, Art. 27 & 33. Art. 11 of the 1958 High Seas Convention is incorporated verbatim as Part VII, Art. 97, and Art. 22 is incorporated into Part VII, Art. 110.

In testimony before the Senate Environment and Public Works Committee, Asst. Sec'y of State John F. Turner said, "The Convention carefully balances the interests of States in controlling activities off their own coasts with those of all States in protecting the freedom to use ocean spaces without undue interference.." U.N. Convention on the Law of the Sea, Hearing on Treaty Doc. 103-39, before Senate Committee on Environment and Public Works, 108th Cong., 2d Sess., D269 (2004)(Statement of John F. Turner, Asst. Sec'y of State). He rejected suggestions that activities under the Proliferation Security Initiative would be jeopardized, saying:

> The Convention provides solid legal bases for taking enforcement action against vessels and aircraft suspected of engaging in proliferation of WMD, e.g., exclusive port and coastal State jurisdiction in internal waters and national airspace; coastal State jurisdiction in the territorial sea and contiguous zone; exclusive flag State jurisdiction

over vessels on the high seas (which the flag State may, by agreement, waive in favor of other States); and universal jurisdiction over stateless vessels.

See, also, THE LAW OF THE SEA CONVENTION AND U.S. POLICY, Congressional Research Service, Feb. 10, 2005; THE U.N. LAW OF THE SEA CONVENTION AND THE UNITED STATES: DEVELOPMENTS SINCE OCTOBER 2003, Congressional Research Service, June 3, 2005. The Senate Foreign Relations Committee voted unanimously to recommend U.S. Accession to the 1982 Convention.

In short, even when it passes legislation extending the reach of federal criminal statutes outside the United States and its territorial waters, Congress has demonstrated its intent to be bound by both 1958 conventions. As it looks toward ratification of the 1982 Convention the Executive Branch has concluded that it can, within the strictures imposed by the Convention, protect national security. Viewed in that light, the *Delgado-Garcia* majority's reading of § 1324(a) is untenable.

THE INDICTMENT MUST BE DISMISSED BECAUSE THE COAST GUARD EXCEEDED ITS AUTHORITY WHEN IT SEIZED THE *SAN JACINTO*, ITS CREW AND PASSENGERS ON THE HIGH SEAS

The U.S. Coast Guard's authority to search and seize vessels and to make arrests on the high seas is limited by statute, as well as the 1958 High Seas and Territorial Sea conventions. 14 U.S.C. § 89(a). It permits "inquiries, examinations, inspections" and law enforcement actions "upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States."

The Trial Court recognized that the Coast Guard is empowered to inspect and make inquiries only of "vessel[s] subject to the jurisdiction, or to the operation of any law, of the United States." Memorandum Opinion and Order, 2 – 3. Relying on *United States v. Williams*, 617 F.2^d^ 1063 (5th Cir. 1980), and *United States v. Cadena*, 585 F.2^d^ 1252 (5th Cir. 1978), the Judge found that the crew of the U.S.C.G. Sherman was authorized to seize the *San Jacinto* once it determined that the freighter was transporting undocumented aliens bound for the United States.

This interpretation of § 89(a) suffers from the same infirmity as the *Delgado-Garcia* majority's interpretation of § 1324(a). Neither the statute nor its legislative history indicates that Congress intended to authorize the Coast Guard to exercise its authority in violation of international law. As Chief Justice John Marshall stated, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L. Ed. 208 (U.S. 1804).

The First Circuit explained in *United States v. Hensel*, 699 F.2d 18, 27 (1st Cir. 1983) that

> Section 89(a) was enacted in response to a Supreme Court opinion holding that the Coast Guard could seize American ships on the high seas to enforce revenue laws, but implying that it could not do so to enforce other laws. *See Maul v. United States*, 274 U.S. 501, 47 S. Ct. 735 , 71 L. Ed. 1171 (1927); H.R. Rep. No. 2452, 74th Cong., 2d Sess. 2-3 (1936); S. Rep. No. 2211, 74th Cong., 2d Sess. 2 (1936). Justices Brandeis and Holmes, concurring in *Maul*, ... believed the Coast Guard should be able to seize American ships on the high seas to enforce any American law. They assumed, however, that Congress would conform with general principles of international law — principles which did not "confer the general authority to seize foreign vessels upon the high seas." *Maul v. United States*, 274 U.S. at 523 & n.26 (Brandeis & Holmes, J.J., concurring). Congress ... sought to enact the Brandeis/Holmes concurrence. See H.R. Rep. No. 2452, 74th Cong., 2d Sess. 1-3 (1936); S. Rep. No. 2211, 74th Cong., 2d Sess. 1-2 (1936).

Under the 1958 High Seas Convention a ship under foreign registry may be searched if there is suspicion that it is engaging in piracy or slave trade, or that despite the foreign flag it is of domestic registry, the First Circuit noted. *Id.* at 28. A search may be conducted with approval of the country of registry, if the search is made in hot pursuit of a vessel leaving territorial waters, or if the vessel is "stateless."

When hailed by the crew of the U.S.C.G. Sherman, the *San Jacinto*'s crew identified the freighter as being of Ecuadorian registry and made its registration papers available for inspection. From the outset the Coast Guard suspected the ship of engaging in alien smuggling, not piracy or slave trade. Nothing in the record demonstrates that the Coast Guard obtained permission from Ecuador to seize the *San Jacinto* and its crew, or the existence of a formal

agreement with Ecuador permitting the United States to assert jurisdiction over Ecuadorian flag vessels on the high seas. On March 15, 2002 the U.S. Defense Attaché in Quito, Ecuador, requested verification of the *San Jacinto*'s registry and permission to board to determine whether the passengers and crew needed humanitarian assistance — food, water or medical care. App. 213. The government did not notify Ecuador that the Coast Guard suspected the *San Jacinto*'s crew of violating federal law, or that it intended to seize the ship, its crew and passengers, and take them to Mexico. Nearly 12 hours after the seizure of the *San Jacinto*, the Ecuadorian Navy chief of staff granted permission to provide humanitarian assistance and to escort the ship to a position near Puerto de Esmeraldas, Ecuador, where the Ecuadorian Coast Guard would assume charge. App. 215.

The Trial Court's reliance in this case on *Williams* and *Cadena* is misplaced. In *Williams, supra* at 1070 – 1, the Coast Guard did not search the ship until members of its crew provided reasonable suspicion; the ship was bound for a United States port; and the State Department obtained permission from Panama, the country of registry, to board, search and seize the ship if contraband was found. In *dicta* the Fifth Circuit engaged in a lengthy exposition of why it believed the Coast Guard could have searched and seized the ship under § 89(a). *Id.* at 1075 – 7. But eventually it acknowledged that even if the Coast Guard exceeded its statutory authority, its actions "would have been authorized by Panama's consent." *Id.* at 1077.

In *Cadena, supra*, at 1264, the Court assumed that the search and seizure of the foreign ship 200 miles off the coast of Florida violated international law.

But the Court lacked jurisdiction over this case even if § 89(a) provided authority to stop a foreign flag vessel on the high seas to prevent a violation of United States law. This is so because the *San Jacinto*, in international waters, was beyond the territorial reach of § 1324(a) (see above at 7 – 15), and because the Coast Guard lacked reasonable suspicion to believe that the freighter was engaged in activity subject to the operation of United States law.

The District Court ruled that on May 15, 2002,

> the USCG had previously encountered a similar vessel and determined that it had originated in Ecuador and was bound for Guatemala. After attempting to make contact with the *San Jacinto*, the USCG concluded that the ships were likely engaged in an alien smuggling operation, and so ordered both vessels to port in Puerto Madre, Mexico.

Memorandum Opinion, 2.

The government has never established a connection between the Ronald, a 45-foot long fishing boat, and the *San Jacinto*, other than their proximity to each other, approximately 20 nautical miles, when spotted by the Coast Guard helicopter. The Ronald did not respond to repeated attempts to communicate by radio, and when a boarding party approached the fishing boat's occupants said there was no crew aboard. Two persons on the fishing boat jumped overboard, but later returned to the Ronald.

In contrast, the *San Jacinto* responded to calls from the Coast Guard and identified itself as being registered in Ecuador. The Coast Guard approached the *San Jacinto* in daylight and was able to read its name painted on the pilothouse. The crew complied with a request from the boarding party to examine the freighter's registration documents, which apparently were in order. Unlike the occupants of the Ronald, the crew of the *San Jacinto* did nothing to arouse suspicion, and the fact that the ship was not flying the Ecuadorian flag did not provide reasonable suspicion of alien smuggling. Although the Coast Guard situation reports indicate that the *San Jacinto* appeared to have about 150 people on board, they also indicate that the ship was seaworthy, stable and capable of navigating without assistance. App. 203 – 4. The Coast Guard found "no immediate medical concerns on board," and concluded that there was no reason to board the freighter.

Furthermore, there is no evidence in the record that the Coast Guard had reasonable suspicion when it seized the *San Jacinto* that the vessel's intended destination was the United States. The Situation Reports indicate that passengers told the Coast Guard the ship was headed to Guatemala. Even if the District Court accepted the government's unsupported assertions, the factual proffer establishes a potential violation of Guatemala's immigration laws, but not those of the United States. *Compare United States v. Glen-Archila*, 677 F.2d 809 (11th Cir.

1982)(reasonable suspicion of intent to import marijuana to the United States found where the vessel carrying marijuana was only 20 miles from the Florida coast). Given the *San Jacinto*'s location, 2,500 miles from the United States, and the lack of any evidence of a nexus between appellants and the United States, the Coast Guard was without reasonable suspicion and without authority to attempt to assert jurisdiction.

APPLICATION OF 8 U.S.C. § 1324 EXTRATERRITORIALLY VIOLATES APPELLANTS' FIFTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THERE WAS NO EVIDENCE OF A NEXUS BETWEEN APPELLANTS AND THE UNITED STATES

Standard of review

Whether application of a statute violates due process is a mixed question of law and fact, which this Court reviews *de novo*. *Davis, supra*, 905 F.2d at 248.

The government failed to establish a sufficient nexus between the defendants and the United States to satisfy due process requirements

Under the Fifth Amendment, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Due process rights extend to international contexts in which foreign defendants are brought to the United States from abroad to answer charges before U.S. courts. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 264, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990).

In the context of criminal law, the Due Process Clause requires the government to establish that application of a criminal statute extraterritorially against a foreign citizen is not arbitrary or fundamentally unfair. *Davis, supra*, at 248-249. In *Davis*, the Ninth Circuit held that due process is satisfied when there is sufficient nexus between the defendant and the United States. *Id.; Cf. United States v. Cardales*, 168 F.3d 548 (1st Cir. 1999)(under the MDLEA, nexus between foreign vessel and United States exists if vessel's flag nation authorizes application of U.S. law to defendants); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993)("consent from the flag nation eliminates a concern that the application of the MDLEA may be

arbitrary or fundamentally unfair"); *United States v. Suerte*, 291 F.3d 366 (5th Cir. 2002)(due process requires a nexus for extraterritorial application of MDLEA only where flag nation has *not* consented); *United States v. Caicedo*, 47 F.3d 370, 373 (9th Cir. 1995)(nexus is required to satisfy due process where vessel seized under MDLEA is not stateless); *United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir. 1982)(U.S. may assert criminal jurisdiction over stateless vessel involved in drug trafficking).

In *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998), the court explained that "there is a sufficient nexus 'where an attempted transaction is aimed at causing criminal acts within the United States.'"

In the instant case, none of the specific actions attributed to appellants were aimed at causing criminal acts within the United States. Appellants' destination was not the United States, and the *San Jacinto* was thousands of miles from the border. The government provided no evidence concerning the means of illegal immigration into the United States, or even the location where this was to occur. There was no evidence that appellants encouraged or agreed to assist anyone in coming to the United States. According to the government, they did not know the person who hired them was a "coyote" — an alien smuggler — and did not learn the passengers' intended goal of reaching the United States until the ship was at sea.

Because the record is devoid of evidence of a nexus between appellants and the United States the exercise of jurisdiction over them is fundamentally unfair.

Instead of resolving the factual and legal issues related to the fairness of asserting jurisdiction over appellants, the district court cited *United States v. Yeh Hsin Yung*, 97 F.Supp.2d 24 (D.D.C. 2000), for the proposition that a sufficient nexus to apply § 1324 extraterritorially existed "because of evidence demonstrating that Defendants knew the persons they were transporting intended to enter the U.S. illegally." Memorandum Opinion, 3 — 4. It relied, as did the *Delgado-Garcia* majority, *supra*, 374 F.3d 1345 – 6, on *Bowman v. United States*, 260 U.S. 94, 98, 43 S. Ct. 39, 67 L. Ed. 149 (1922), stating that § 1324 is in a class of laws "not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the

right of the Government to defend itself against obstruction, or fraud wherever perpetrated." Memorandum Opinion, 4.

The error in this analysis is that it ignores the fact that when Congress established "special maritime and territorial jurisdiction" under 18 U.S.C. § 7(9), it applied the limits of that jurisdiction to offenses by or against United States nationals under the immigration laws. See above at 13.

In *Yung*, the court specifically found that the vessel, the *Wing Fung Lung* (WFL), was stateless, and as a result no nexus was required. *Id.* at 27. The Court noted that the "WFL's intended destination was the U.S.," in concluding that the crew's actions would have had a direct effect in the United States. *Id.* In *Bowman*, the Supreme Court

> dealt with the extraterritorial applicability to United States citizens of offenses against the United States government, noting that the government has a right to defend itself against such crimes "especially if committed by its own citizens, officers, or agents," ... whom the court ruled could be held to answer to the "crime against the government to which they owe allegiance."

Delgado-Garcia, supra, at 1354 (Rogers, J. dissenting).

In the present case, the government did not contest that the *San Jacinto* was operating under a valid Ecuadorian registration. Statements of the crew and passengers, proffered by the government, demonstrated that the *San Jacinto* was bound for Guatemala. Even assuming that appellants knew of the passengers' future plans, knowledge that third parties intend to violate U.S. law is not itself a violation of U.S. law, and the act of transporting third parties from Ecuador to Guatemala does not establish minimum contacts with the United States, such that appellants could reasonably anticipate being haled into court in the United States to face criminal charges. *See Klimavicius-Viloria*, 144 F.3[d] at 1257 ("The nexus requirement serves the same purpose as the 'minimum contacts' test in personal jurisdiction.").

Even if this Court accepts as true the government's factual assertions, including many wholly unsupported by evidence in the record, these assertions do not provide a sufficient nexus between Appellants and the United States. The Trial Court erred as a matter of law in finding

that Appellants' acts had an effect on, and therefore had a nexus with, the United States, so that extraterritorial application of 8 U.S.C. § 1324 comports with due process.

Nonetheless, relying on *Frisbie v. Collins*, 342 U.S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952); *Ker v. Illinois*, 119 U.S. 436, 7 S. Ct. 225, 30 L. Ed. 421 (1886); and *United States v. Rezaq*, 134 F.3[d] 1121 (D.C. Cir. 1998); the Trial Court stated that "a defendant cannot challenge the means by which he is brought before the court." Memorandum Opinion, 5.

There are two exceptions to application of the *Ker-Frisbie* doctrine: one involves cases where "the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights" amounts to a deprivation of due process; and the second involves cases where the defendant was seized in violation of a treaty. *United States v. Best*, 304 F.3[d] 308, 312 – 3 (3[d] Cir. 2002). The second exception requires that the treaty be "self-executing," or that the treaty "affect[s] the municipal law of the United States" because it has been "given effect by congressional legislation." *Id.* (quoting *United States v. Postal*, 589 F.2[d] 862, 875 (5th Cir. 1979)). The Trial Court cited *Best* but did not analyze whether this case falls within either *Ker-Frisbie* exception.

The case at bar falls within both exceptions. As noted above at 13 – 14, in enacting 18 U.S.C. § 7, Congress created "special maritime and territorial jurisdiction," incorporating into federal law the jurisdictional limitations embodied in Art. 11 of the 1958 High Seas Convention. As a result, the Convention affects "the municipal law of the United States."

The government's seizure, detention and interrogation of Appellants "shock's the conscience," and therefore due process required the District Court to "divest itself of jurisdiction over the person[s]" of Mr. Erazo Robles, Mr. Gongora Balon and Mr. Gongora Parraga. *Best, supra*, at 312. The Coast Guard immediately suspected the *San Jacinto*'s crew of smuggling aliens and seized the ship. The U.S. Justice Department fully intended to prosecute the crew for smuggling aliens, but the government intentionally misled the Chief of Staff of the Ecuadorian Navy to obtain after-the-fact permission for the seizure. The U.S. government falsely gave assurances that the Coast Guard's concern was purely "humanitarian," to make sure the *San*

Jacinto was seaworthy and to provide food, water and medical care if needed.[8]

Over the next 2 ½ days the U.S.C.G. Sherman guided the *San Jacinto* to Mexico. Between May 18 and June 10, 2002, without providing counsel to advise Appellants, U.S. and Mexican immigration agents subjected them to repeated interrogations.

Contrary to the requirements of the Vienna Convention on Consular Affairs, the Immigration and Nationalization Service did not notify Ecuador until June 21, five weeks after seizure of the *San Jacinto* and 11 days after Appellants were brought to the United States, that Appellants were in custody. App. 217 – 9. *See, Medellin v. Dretke*, ___ U.S. ___, 125 S. Ct. 2088, 2091, 161 L. Ed. 2d 982 (2005); *.Breard v. Greene*, 523 U.S. 371, 375 – 6, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1998)(*per curiam*) (Vienna Convention "arguably confers on an individual the right to consular assistance following arrest."). The deliberate delay prevented Ecuadorian officials from interceding on Appellants' behalf to ensure repatriation from Mexico.

From the beginning, the actions of the Coast Guard and INS agents were orchestrated by the Department of Justice in Washington. In short, this case is more like *United States v. Toscannino*, 500 F.2d 276 (2d Cir. 1974)(defendant abducted in Uruguay, drugged, interrogated and tortured before appearing in court 20 days later), than *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975)(defendant abducted from Mexico and brought to court five days later). *See, also, United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988)(defendant presented in court four days after seizure from yacht).

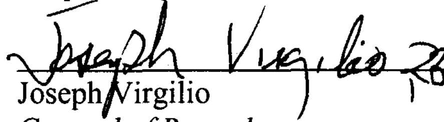
The government violated Appellants' Fifth Amendment right to due process by seizing them on the high seas, interrogating them, depriving them of Ecuadorian consular assistance and bringing them before the District Court in Washington. Therefore, the Trial Court erred in concluding that it had personal jurisdiction over them.

[8] The United States has a bilateral extradition treaty with Ecuador. 18 Stat. 199, T.S. 76, June 28, 1872; 55 Stat.1196, T.S. 972, Sept. 22, 1939. *See*, 18 U.S.C. § 3181.

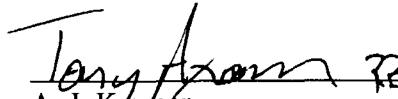
CONCLUSION

For the reasons stated above and any others that may appear to the Court following oral argument, Appellants Carlos M. Erazo Robles, Wagner X. Gongora Balon and Wagner E. Gongora Parraga respectfully request that the Court vacate their convictions because the District Court lacked both subject matter and personal jurisdiction to try them under 8 U.S.C. § 1324(a) and (b) and 18 U.S.C. § 2..

Respectfully submitted,



Joseph Virgilio
Counsel of Record
1000 Connecticut Avenue, N.W.
Suite 613
Washington, D.C. 20036
(202) 686-6914
Attorney for Carlos G. Erazo Robles
(*Appointed by the Court*)



A. J. Kramer
Federal Public Defender
Counsel of Record
Tony Axam
625 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 208-7500
Attorney for Wagner X. Gongora Balon

Robert S Becker, Esq.
D.C. Bar No. 370482
PMB # 155
5505 Connecticut Avenue, N.W.
Washington, D.C. 20015
(202) 364-8013
Attorney for Wagner E. Gongora-Parraga
(*Appointed by the Court*)

ADDENDUM

TITLE 8. ALIENS AND NATIONALITY
CHAPTER 12. IMMIGRATION AND NATIONALITY
ADJUSTMENT AND CHANGE OF STATUS
GENERAL PENALTY PROVISIONS

§ 1324. Bringing in and harboring certain aliens

(a) Criminal penalties.

(1) (A) Any person who--

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v) (I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts,

shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs--

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under title 18, United States Code, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A) (ii), (iii), (iv), or (v)(II), be fined under title 18, United States Code, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A) (i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as defined in section 1365 of title 18, United States Code) to, or places in jeopardy the life of, any person, be fined under title 18, United States Code, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A) (i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under title 18, United States Code, or both.

(C) It is not a violation of clauses (ii) or (iii) of subparagraph (A), or of clause (iv) of subparagraph (A) except where a person encourages or induces an alien to come to or enter the United States, for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the

denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.

(2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs--

(A) be fined in accordance with title 18, United States Code, or imprisoned not more than 1 year, or both; or

(B) in the case of--

(i) an offense committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit an offense against the United States or any State punishable by imprisonment for more than 1 year,

(ii) an offense done for the purpose of commercial advantage or private financial gain, or

(iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry,

be fined under title 18, United States Code, and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years, in the case of a first or second violation of subparagraph (B)(i) or (B)(ii), not less than 3 nor more than 10 years, and for any other violation, not less than 5 nor more than 15 years.

(3)

(A) Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both.

(B) An alien described in this subparagraph is an alien who--

(i) is an unauthorized alien (as defined in section 274A(h)(3) [8 USCS § 1324a(h)(3)]), and

(ii) has been brought into the United States in violation of this subsection.

(4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if--

(A) the offense was part of an ongoing commercial organization or enterprise;

(B) aliens were transported in groups of 10 or more; and

(C) (i) aliens were transported in a manner that endangered their lives; or

(ii) the aliens presented a life-threatening health risk to people in the United States.

(b) Seizure and forfeiture.

(1) In general. Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a), the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.

(2) Applicable procedures. Seizures and forfeitures under this subsection shall be governed by the provisions of chapter 46 of title 18, United States Code [18 USCS §§ 981 et seq.], relating to civil forfeitures, including section 981(d) of such title, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in that section shall be

performed by such officers, agents, and other persons as may be designated for that purpose by the Attorney General.

(3) Prima facie evidence in determinations of violations. In determining whether a violation of subsection (a) has occurred, any of the following shall be prima facie evidence that an alien involved in the alleged violation had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law:

(A) Records of any judicial or administrative proceeding in which that alien's status was an issue and in which it was determined that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(B) Official records of the Service or of the Department of State showing that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(C) Testimony, by an immigration officer having personal knowledge of the facts concerning that alien's status, that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(c) Authority to arrest. No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

(d) Admissibility of videotaped witness testimony. Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence.

(e) Outreach program. The Secretary of Homeland Security, in consultation with the Attorney General and the Secretary of State, as appropriate, shall develop and implement an outreach program to educate the public in the United States and abroad about the penalties for bringing in and harboring aliens in violation of this section.

TITLE 8. ALIENS AND NATIONALITY
CHAPTER 12. IMMIGRATION AND NATIONALITY
IMMIGRATION
INSPECTION, APPREHENSION, EXAMINATION, EXCLUSION, AND REMOVAL

§ 1227. General classes of deportable aliens

(a) Classes of deportable aliens. Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status.

...

(E) Smuggling.

(i) In general. Any alien who (prior to the date of entry, at the time of any entry, or

within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.

TITLE 14. COAST GUARD
PART I. REGULAR COAST GUARD
CHAPTER 5. FUNCTIONS AND POWERS

§ 89. Law enforcement

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

(b) The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing any law of the United States shall:
(1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and
(2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

(c) The provisions of this section are in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers, or any other officers of the United States.

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 1. GENERAL PROVISIONS

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 1. GENERAL PROVISIONS

§ 7. Special maritime and territorial jurisdiction of the United States defined

The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(6) Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.

(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

(8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.

(9) With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act [8 USCS § 1101]--

(A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and

(B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph

conflicts. This paragraph does not apply with respect to an offense committed by a person described in section 3261(a) of this title [18 USCS § 3261(a)].

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 113B. TERRORISM

§ 2332b. Acts of terrorism transcending national boundaries [Caution: See prospective amendment note below.]

(a) Prohibited acts.
(1) Offenses. Whoever, involving conduct transcending national boundaries and in a circumstance described in subsection (b)--
(A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United States; or
(B) creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States;
in violation of the laws of any State, or the United States, shall be punished as prescribed in subsection (c).
(2) Treatment of threats, attempts and conspiracies. Whoever threatens to commit an offense under paragraph (1), or attempts or conspires to do so, shall be punished under subsection (c).

(b) Jurisdictional bases.
(1) Circumstances. The circumstances referred to in subsection (a) are--
(A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense;
(B) the offense obstructs, delays, or affects interstate or foreign commerce, or would have so obstructed, delayed, or affected interstate or foreign commerce if the offense had been consummated;
(C) the victim, or intended victim, is the United States Government, a member of the uniformed services, or any official, officer, employee, or agent of the legislative, executive, or judicial branches, or of any department or agency, of the United States;
(D) the structure, conveyance, or other real or personal property is, in whole or in part, owned, possessed, or leased to the United States, or any department or agency of the United States;
(E) the offense is committed in the territorial sea (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon) of the United States; or
(F) the offense is committed within the special maritime and territorial jurisdiction of the United States.
(2) Co-conspirators and accessories after the fact. Jurisdiction shall exist over all principals and co-conspirators of an offense under this section, and accessories after the fact to any offense under this section, if at least one of the circumstances described in subparagraphs (A) through (F) of paragraph (1) is applicable to at least one offender.

(c) Penalties.
(1) Penalties. Whoever violates this section shall be punished--
(A) for a killing, or if death results to any person from any other conduct prohibited by this section, by death, or by imprisonment for any term of years or for life;
(B) for kidnapping, by imprisonment for any term of years or for life;
(C) for maiming, by imprisonment for not more than 35 years;
(D) for assault with a dangerous weapon

or assault resulting in serious bodily injury, by imprisonment for not more than 30 years;

(E) for destroying or damaging any structure, conveyance, or other real or personal property, by imprisonment for not more than 25 years;

(F) for attempting or conspiring to commit an offense, for any term of years up to the maximum punishment that would have applied had the offense been completed; and

(G) for threatening to commit an offense under this section, by imprisonment for not more than 10 years.

(2) Consecutive sentence. Notwithstanding any other provision of law, the court shall not place on probation any person convicted of a violation of this section; nor shall the term of imprisonment imposed under this section run concurrently with any other term of imprisonment.

(d) Proof requirements. The following shall apply to prosecutions under this section:

(1) Knowledge. The prosecution is not required to prove knowledge by any defendant of a jurisdictional base alleged in the indictment.

(2) State law. In a prosecution under this section that is based upon the adoption of State law, only the elements of the offense under State law, and not any provisions pertaining to criminal procedure or evidence, are adopted.

(e) Extraterritorial jurisdiction. There is extraterritorial Federal jurisdiction--

(1) over any offense under subsection (a), including any threat, attempt, or conspiracy to commit such offense; and

(2) over conduct which, under section 3 [18 USCS § 3], renders any person an accessory after the fact to an offense under subsection (a).

(f) Investigative authority. In addition to any other investigative authority with respect to violations of this title, the Attorney General shall have primary investigative responsibility for all Federal crimes of terrorism, and any violation of section 351(e), 844(e), 844(f)(1), 956(b), 1361, 1366(b), 1366(c), 1751(e), 2152, or 2156 of this title [18 USCS § 351(e), 844(e), 844(f)(1), 956(b), 1361, 1366(b), 1366(c), 1751(e), 2152, or 2156], and the Secretary of the Treasury shall assist the Attorney General at the request of the Attorney General. Nothing in this section shall be construed to interfere with the authority of the United States Secret Service under section 3056 [18 USCS § 3056].

(g) Definitions. As used in this section--

(1) the term "conduct transcending national boundaries" means conduct occurring outside of the United States in addition to the conduct occurring in the United States;

(2) the term "facility of interstate or foreign commerce" has the meaning given that term in section 1958(b)(2) [18 USCS § 1958(b)(2)];

(3) the term "serious bodily injury" has the meaning given that term in section 1365(g)(3) [18 USCS § 1365(g)(3)];

(4) the term "territorial sea of the United States" means all waters extending seaward to 12 nautical miles from the baselines of the United States, determined in accordance with international law; and

(5) the term "Federal crime of terrorism" means an offense that--

(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and

(B) is a violation of--

(i) section 32 [18 USCS § 32] (relating to destruction of aircraft or aircraft facilities), 37 [18 USCS § 37] (relating to violence at international airports), 81 [18

USCS § 81] (relating to arson within special maritime and territorial jurisdiction), 175 or 175b [18 USCS § 175 or 175(b)] (relating to biological weapons), 175c (relating to variola virus), 229 [18 USCS § 229] (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 [18 USCS § 351] (relating to congressional, cabinet, and Supreme Court assassination and kidnaping), 831 [18 USCS § 831] (relating to nuclear materials), 832 [18 USCS § 832] (relating to participation in nuclear and weapons of mass destruction threats to the United States)[,] 842(m) or (n) [18 USCS § 842(m) or (n)] (relating to plastic explosives), 844(f)(2) or (3) [18 USCS § 844(f)(2) or (3)] (relating to arson and bombing of Government property risking or causing death), 844(i) [18 USCS § 844(i)] (relating to arson and bombing of property used in interstate commerce), 930(c) [18 USCS § 930(c)] (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) [18 USCS § 956(a)(1)] (relating to conspiracy to murder, kidnap, or maim persons abroad), 1030(a)(1) [18 USCS § 1030(a)(1)] (relating to protection of computers), 1030(a)(5)(A)(i) [18 USCS § 1030(a)(5)(A)(i)] resulting in damage as defined in 1030(a)(5)(B)(ii) through (v) [18 USCS § 1030(a)(5)(B)(ii)-(v)] (relating to protection of computers), 1114 [18 USCS § 1114] (relating to killing or attempted killing of officers and employees of the United States), 1116 [18 USCS § 1116] (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 [18 USCS § 1203] (relating to hostage taking), 1361 (relating to government property or contracts), 1362 [18 USCS § 1362] (relating to destruction of communication lines, stations, or systems), 1363 [18 USCS § 1363] (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States), 1366(a) [18 USCS § 1366(a)] (relating to destruction of an energy facility), 1751(a), (b), (c), or (d) [18 USCS § 1751(a), (b), (c), or (d)] (relating to Presidential and Presidential staff assassination and kidnaping), 1992 [18 USCS § 1992] (relating to wrecking trains), 1993 [18 USCS § 1993] (relating to terrorist attacks and other acts of violence against mass transportation systems), 2155 [18 USCS § 2155] (relating to destruction of national defense materials, premises, or utilities), 2156 (relating to national defense material, premises, or utilities), 2280 [18 USCS § 2280] (relating to violence against maritime navigation), 2281 [18 USCS § 2281] (relating to violence against maritime fixed platforms), 2332 [18 USCS § 2332] (relating to certain homicides and other violence against United States nationals occurring outside of the United States), 2332a [18 USCS § 2332a] (relating to use of weapons of mass destruction), 2332b [18 USCS § 2332b] (relating to acts of terrorism transcending national boundaries), 2332f [18 USCS § 2332f] (relating to bombing of public places and facilities), 2332g [18 USCS § 2332g] (relating to missile systems designed to destroy aircraft), 2332h [18 USCS § 2332h] (relating to radiological dispersal devices), 2339 [18 USCS § 2339] (relating to harboring terrorists), 2339A [18 USCS § 2339A] (relating to providing material support to terrorists), 2339B [18 USCS § 2339B] (relating to providing material support to terrorist organizations), 2339C [18 USCS § 2339C] (relating to financing of terrorism, or 2340A [18 USCS § 2340A] (relating to torture) of this title;

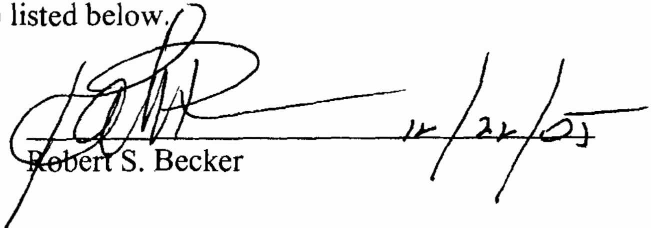
(ii) sections 92 (relating to prohibitions governing atomic weapons) or 236 (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2122 or 2284); or

(iii) section 46502 (relating to aircraft piracy), the second sentence of section

46504 (relating to assault on a flight crew with a dangerous weapon), section 46505(b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft), section 46506 if homicide or attempted homicide is involved (relating to application of certain criminal laws to acts on aircraft), or section 60123(b) (relating to destruction of interstate gas or hazardous liquid pipeline facility) of title 49.

CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Wagner E. Gongora-Parraga, certify that on I served a true copy of the attached by first-class mail on the person(s) listed below.



Robert S. Becker

Roy McLeese
U.S. Attorney's Office
555 Fourth Street, N.W.
Washington, D.C. 20001