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 PETITION FOR HEARING *EN BANC*

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CONCISE STATEMENT OF ISSUES FOR *EN BANC* REVIEW AND THEIR IMPORTANCE

Appellants Carlos M. Erazo Robles (03-3124), Washington X. Gongora Balon (03-3125) and Wagner E. Gongora Parraga (03-3133) respectfully request, pursuant to Fed. R. App. P. 35, that the Court sitting *en banc* hear the above captioned appeal. Appellants believe that *en banc* review is necessary to maintain uniformity of the Court's decisions and because this proceeding involves a question of exceptional importance.

This appeal calls into question the holding of a Panel of the Court in *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). As a result, *en banc* review is necessary "to secure uniformity and continuity in its decisions." *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 690, 80 S. Ct. 1336, 4 L. Ed. 2d 1491 (1960).

At the heart of Appellants' appeal is the argument that the *Delgado-Garcia* majority misapplied holdings of the U.S. Supreme Court in *Bowman v. United States*, 260 U.S. 94, 43 S. Ct. 39, 67 L. Ed. 149 (1922); *Ker v. Illinois*, 119 U.S. 436, 7 S. Ct. 225, 30 L. Ed. 421 (1886); and *Frisbie v. Collins*, 342 U.S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952). They assert as well that the holding in *Delgado-Garcia* conflicts with decisions of other circuits in *United States v. Best*, 304 F.3d 308 (3d Cir. 2002); *United States v. Hensel*, 699 F.2d 18 (1st Cir. 1983); *United States v. Toscannino*, 500 F.2d 276 (2d Cir. 1974); and *Yenkichi Ito v. United States*, 64 F.2d 73 (9th Cir. 1933).

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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)

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

[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., Erazo. To avoid confusion regarding Appellants Gongora Balon and Gongora Parraga and Codefendant Gongora Cedeño both names will be used throughout this petition.

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 attempt to bring unauthorized aliens into the United States in violation of § 1324(a)(2) and 18 U.S.C. § 2. It obtained arrest warrants that day. App. 9 – 11.[2] All of the defendants except Saeteros Narvaes were 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, 2002. App. 3 – 4.

On August 9, 2002, Gongora Balon, later joined by his codefendants, filed a motion to dismiss the indictment for lack of jurisdiction. *Id.* at 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. *Id.* at 149 – 57.

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.

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

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[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 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, he is charged in the indictment. App. 50 – 5.

STATEMENT OF FACTS

Appellants 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. 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*. Although members of the crew were Ecuadorian nationals, Mexico expelled them by placing them on an airplane bound for Houston, Texas.[4]

THE SEIZURE OF THE SAN JACINTO

Immigration Agent Cheryl Bassett testified that Juan Carlos Palma recruited Erazo Robles, Gongora Balon, Espinoza Macia and Gongora Cedeño to pilot the *San Jacinto*, a coastal freighter, and 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 they returned.[5] *Id.* Palma did not tell Gongora Balon, his father, Gongora Parraga, or his cousin Gongora Cedeño where the ship was bound or the length of the voyage. *Id.* at 40, 52. In La Libertad, Ecuador, 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 Bassett. *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

[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' Joint Appendix.

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

crew did not board either vessel, but determined that both "appear to have good stability, functional propulsion & no serious medical problems among" the people on board. App. 203 – 4. The *Sherman* sailed toward Puerto Madero, Mexico, where the Mexican Navy took custody. The *Sherman*'s orders stated that its crew could board, search and detain either vessel if "necessary and appropriate." Crew members boarded the *Ronald* early May 16th, after the fishing boat left the formation, sailing southward, but they never boarded the *San Jacinto* because the freighter's crew complied with orders.

ARGUMENT

This appeal challenges the holding in *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), that Congress intended 18 U.S.C. § 1324(a) to apply extraterritorially, even though neither the text of the statute nor its legislative history specifically extends the law's reach beyond U.S. territorial waters.

THE JURISDICTIONAL ISSUE IS PRESERVED FOR APPELLATE REVIEW

In *dicta*, the *Delgado-Garcia* majority, *supra*, at 1341, erroneously concluded that defendants, like Appellants, who unconditionally plead guilty to violating § 1324(a) forfeit their right to challenge the Trial Court's jurisdiction to adjudicate their cases. The Panel recognized that a defendant cannot waive his claim that the court lacked subject matter jurisdiction, citing *United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 869 (2002). It recognized as well that an unconditional guilty plea does not waive a defendant's "right not to be haled into court at all," citing *Blackledge v. Perry*, 417 U.S. 21, 30 – 1, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974); *Menna v. New York*, 423 U.S. 61, 62 – 2 & n. 2, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1974)(*per curiam*). Acknowledging that the government did not challenge Delgado-Garcia's argument that the indictment was defective because it did not state an offense under U.S. law, the Panel majority held that the jurisdictional claim fell under neither exception.

In the case at bar, Appellants are not asserting that the indictment was defective in that it failed to provide adequate notice of the conduct for which they would be tried, or because it

failed to recite an essential element of the crime. They are challenging the authority of the grand jury to indict them and the District Court to try them for acts done beyond the reach of U.S. law. In that way, Appellants' situation is similar to that of the defendant in *Menna, supra*, who, having previously been held in contempt and sentenced for refusing to answer grand jury questions, could not later be indicted for contempt arising from the same incident. *Id.* at 62. In this case, as in *Menna*, Appellants' "claim is that the State may not convict [them] no matter how validly [their] factual guilt is established."

Explaining the so-called *Blackledge-Menna* exception, the Supreme Court has said that "the concessions implicit in [Blackledge's] guilty plea were simply irrelevant, because the constitutional infirmity in the proceedings lay in the State's power to bring any indictment at all," and Menna's plea to the contempt indictment was "a redundant confession to the earlier offense." *United States v. Broce*, 488 U.S. 563, 575 – 6, 109 S. Ct. 757, 102 L. Ed. 2^{d} 927 (1989). As in *Blackledge* and *Menna,* Appellants can "prove their claim by relying on [the indictment] and the existing record," therefore they did not waive their right to challenge the District Court's jurisdiction when they pleaded guilty. *Broce, supra,* at 576.

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

The United States Coast Guard seized the *San Jacinto* in international waters 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.

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 Yenkichi Ito v. United States*, 64 F.2d 73, 75 (9th Cir. 1933)(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; *Delgado-Garcia, supra*, at 1352 (Rogers, J. *dissenting*)("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.").

Applying 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, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981). With respect to the conspiracy charge, to which Appellants pleaded guilty, § 1324(a)(1)(A) 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[.]" Regarding the attempted bringing of unauthorized aliens charge, § 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 Ninth Circuit correctly noted in *Yenkichi Ito, supra*, 64 F.2d 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, *supra*, at 1347, 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.

The Panel erroneously concluded 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. *See, e.g., Rosenberg v. Fleuti*, 374 U.S. 449, 452, 83 S. Ct. 1804, 10 L. Ed. 2d 1000 (1963); *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). 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. In addition, jurisdiction to enforce criminal laws extends 12 nautical miles beyond the United States coast, putting alien smugglers aboard ships within the jurisdiction of federal courts. *See below, 8 – 10.*

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. 2d 818 (1989); *see, e.g.,* Biological and Weapons Anti-Terrorism Act of 1989, S. Rep. No. 210, 101st Cong., 2nd Sess., at 193 (exterritorial application of anti-terrorism law); Coast Guard Drug Law Enforcement Act, H. R. Rep. No. 323, 96th Cong., 1st Sess., at 4 – 5, 9, 11 (amending law to make it apply extraterritorially); Coast Guard Enforcement of Drug Laws, S. Rep. No. 855, 96th Cong., 2nd Sess., p. 2. (amendment to clarify extraterritorial jurisdiction); Maritime Drug Law Enforcement Act ("MDLEA")(46 U.S.C. §§ 1901 *et seq.*)(extending law's reach).

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

> 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 prudence 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, dealing with acts of terrorism transcending national boundaries, specifically states that

it applies extraterritorially.[6] *Id.* § 2332b(e). Under § 2332b(b), extraterritorial jurisdiction exists only if "(E) the offense is committed in the territorial sea … of the United States; or (F) the offense is committed within the special maritime and territorial jurisdiction of the United States," which is defined in 18 U.S.C. § 7 as:

> (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….

This "special maritime jurisdiction" recognizes 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. The 1958 High Seas Convention states in Art. 11 that only the "flag State [of the vessel] or of the State of which such person is a national" may institute criminal proceedings against a crew member for acts committed on the high seas. It adds, "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.

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[6] 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).

> 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.

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.

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 international 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, App. 150 – 1. But 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
>
> Justices Brandeis and Holmes, concurring in *Maul* [*v. United States*, 274 U.S. 501, 523 & n. 26, 47 S. Ct. 735 , 71 L. Ed. 1171 (1927)], … 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."

When it enacted § 89(a), "Congress … sought to enact the Brandeis/Holmes concurrence," the *Hensel* Court added.. *Supra* (citing 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. *Hensel*, *supra*, 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. App. 213. The government did not notify Ecuador that the Coast Guard intended to seize the ship and take it to Mexico. The Ecuadorian Navy chief of staff granted permission to provide humanitarian assistance and turn

the ship over to the Ecuadorian Coast Guard. App. 215.

But the District 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 5 – 10), 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 Situation Reports indicate that *San Jacinto* passengers told the *Sherman*'s crew the freighter was headed to Guatemala. At most, the government's factual proffer in the District Court establishes a potential violation of Guatemala's immigration laws, but not of U.S. law. *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 assert jurisdiction.

APPLICATION OF 8 U.S.C. § 1324 EXTRATERRITORIALLY VIOLATES APPELLANTS' FIFTH AMENDMENT RIGHT TO DUE PROCESS

Under the Fifth Amendment, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. Amend. V. 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). 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. *United States v. Davis*, 905 F.2d 245, 248 – 249 (9th Cir. 1990). The Ninth Circuit held that due process is satisfied when there is sufficient nexus between the defendant and the United States. *Id.* 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 this case, none of Appellants' actions were aimed at causing criminal acts within the United States. Their destination was not the United States, and the *San Jacinto* was thousands of miles from the border. 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.

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 § 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, App. 153.

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 9, 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 Erazo Robles, Gongora Balon and 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.[7]

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. *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,*

[7] 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.

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.

CONCLUSION

For the reasons stated above Appellants Carlos M. Erazo Robles, Wagner X. Gongora Balon and Wagner E. Gongora Parraga respectfully request that the Court sitting *en banc* hear this appeal and 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). *En banc* review is necessary to maintain uniformity of decisions and because of the importance of this issue.

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ADDENDUM

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 – 50. 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

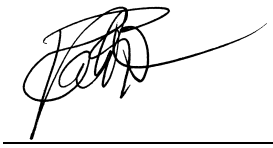
At issue before this Court is the ruling by the Hon. Henry H. Kennedy that the U.S. District Court for the District of Columbia had jurisdiction over Appellants, Ecuadorian nationals who were piloting an Ecuador-registered freighter toward Guatemala when the U.S. Coast Guard seized the ship in international 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).

CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Wagner E. Gongora-Parraga, certify that on January 23, 2006 I served a true copy of the attached Joint Petition for Hearing *en Banc* by first-class mail on the person(s) listed below.



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