IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-3124, 03-3125 & 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 REHEARING & SUGGESTION OF REHEARING *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* rehear the above captioned appeal. *En banc* review is necessary because the order of the Panel stating that this case is controlled by 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), and affirming Appellants' conviction, conflicts with precedent established by the U.S. Supreme Court, and because this case involves a question of exceptional importance.

At the heart of Appellants' appeal is the argument that the *Delgado-Garcia* majority misapplied Supreme Court holdings 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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES[†]

CASES

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

STATUTES

RULES & REGULATIONS

CONSTITUTIONAL PROVISIONS

TREATIES & INTERNATIONAL LAW

OTHER AUTHORITIES

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)**
WAGNER X. GONGORA BALON, **APPELLANT,**	**No. 03-3125** **(02-Cr.-252-06)**
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 (03-3124), Wagner X. Gongora Balon (03-3125), Wagner E. Gongora Parraga (03-3133), and three codefendants 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 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.[1] 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 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),

[1] 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 Appellants' Joint Appendix. References to the Addenda to this Petition are designated "Add." followed by the relevant page number, i.e. Add. A-3.

(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 Appellants. *Id.* at 28 – 30. On May 29, 2006, a panel of this Court affirmed their convictions. Add. A-3.

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 two codefendants 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.[2]

THE SEIZURE OF THE SAN JACINTO

Immigration Agent Cheryl Bassett testified that Juan Carlos Palma recruited Erazo Robles, Gongora Balon and two other defendants in Manta, Ecuador, 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. Palma did not tell them 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*. *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 a fishing boat, and a short time later it spotted the *San Jacinto*

[2] 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*. Relevant portions of the messages are reproduced in the Joint Appendix.

about 20 nautical miles away, according to Bassett. *Id.* at 4, 48. Believing that the vessels were smuggling immigrants, the *U.S.C.G. Sherman* intercepted them and ordered their crews to follow the cutter. The *Sherman*'s 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, 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 fishing boat after it left the formation, but they never boarded the *San Jacinto* which followed orders.

ARGUMENT

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 *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) 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 Appellants' conduct on the high seas

As Judge Rogers said in her dissent in *Delgado-Garcia*, a federal statute applies only within the territorial boundaries of the United States unless Congress clearly states its intent that the law apply extraterritorially. *Supra*, 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. *See Yenkichi Ito, supra,* 64 F.2d at 75.

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. Appellants were not in proximity to the U.S. when arrested off Guatemala.

Even if Congress intended § 1324(a) to apply extraterritorially, it did not intend to give the statute the unlimited reach the *Delgado-Garcia* Court gave it. Under the majority's interpretation, if a statute applies extraterritorially it applies anywhere in the world to any person, regardless of nationality.

Appellants have been unable to find any federal statute in which Congress explicitly created extraterritorial jurisdiction and gave it the broad reach assumed by the *Delgado-Garcia* majority. Usually, after stating that the statute applies extraterritorially, such statutes explicitly enumerate to whom they apply or the circumstances under which they apply.

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

Congress 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). 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.

Recently passed or amended anti-terrorism statutes demonstrate that even in the extremely sensitive area of national security Congress in most cases does not intend United States law to ensnare foreign nationals, like Appellants, seized on the high seas. Congress has very carefully circumscribed the jurisdictional limits of U.S. criminal statutes that punish international terrorism against the United States. 18 U.S.C. § 2331(1). Add. A-5 – A-6.

For example, a statute dealing with acts of terrorism transcending national boundaries specifically states that it applies extraterritorially if the offense is committed in the territorial sea, or within the special maritime and territorial jurisdiction of the United States. 18 U.S.C. § 2332b,[3] Add. A-6. This "special maritime jurisdiction," defined in 18 U.S.C. § 7, Add. A-5, 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

[3] 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).

limits grounds for boarding a merchant ship outside territorial waters. A warship may stop and board a foreign merchant ship only if the latter is suspected of engaging in piracy or slave trade, or, "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.

Another example, 18 U.S.C. § 2332f, enacted after September 11, 2001, criminalizes "bombings of places of public use, government facilities, public transportation systems and infrastructure facilities," if the offense takes place outside the United States and a perpetrator is a United States national or a stateless person who resides in the United States, a victim is a United States national, a perpetrator is found in the United States, the offense is intended to compel the United States to act, the target is a U.S. government facility, or the offense is committed aboard a U.S. flag vessel or aircraft. Add. A-7.

Both 18 U.S.C. § 2332g, Missile systems designed to destroy aircraft, and 18 U.S.C. § 2332h, Radiological dispersal devices,[4] apply extraterritorially if the offense occurred in interstate or foreign commerce, was committed by or against a United States national, or the target was government property. Foreign nationals may be prosecuted as aiders and abettors if the United States has jurisdiction over at least one conspirator. Add. A-7 – A-8. For purposes of Title 18 of the U.S. Code a criminal act occurs in or affects "foreign commerce" when it begins or ends in the United States. *See, e.g., United States v. Montford*, 27 F.3^{d} 137, 140 (5th Cir. 1994)(victim kidnapped in United States and taken to foreign country or visa versa; counterfeit security transported from foreign country to United States).

[4] Both were enacted in 2004, P.L. 108-458, Title VI, Subtitle J, § 6903, 118 Stat. 3770 (Dec. 17, 2004)(§ 2332g); P.L. 108-458, Title VI, Subtitle J, § 6905, 118 Stat. 3772 (Dec. 17, 2004)(§ 2332h).

Congress was more specific in 18 U.S.C. § 2339B,[5] Providing material support or resources to designated foreign terrorist organizations, which applies to United States nationals, legal and illegal resident aliens, foreign nationals brought to or found in the United States, and foreign nationals who aid and abet an individual over whom the United States has jurisdiction. Add. A-8. The extraterritorial jurisdiction of 18 U.S.C. § 2339D,[6] Receiving military-type training from a foreign terrorist organization, is very similar. Add. A-10.

Most specific of all is 18 U.S.C. § 2339C,[7] Prohibition against the financing of terrorism, which broadens jurisdiction to cover foreign nationals outside the United States who commit crimes against property of United States nationals and businesses outside U.S. territorial jurisdiction. Add. A-8 – A-9.

Congress explicitly intended every one of these statutes to reach conduct occurring outside the territorial jurisdiction of United States courts. But it constrained United States extraterritorial jurisdiction within limits imposed by international law and treaties, including the 1958 High Seas Convention and the 1958 Territorial Sea Convention.

Recognizing the sensitive nature of foreign relations, Congress did not leave to judges the job of inferring the scope of extraterritorial jurisdiction from the context of any of these laws. *See Delgado-Garcia*, supra, at 1352 (Rogers, J. dissenting). If Congress had not included explicit jurisdictional parameters in these statutes, and it fell to the *Delgado-Garcia* Panel to determine the scope of jurisdiction, undoubtedly the majority would interpret each of them, as it did § 1324(a), to apply anywhere in the world to any potential defendant if the conduct at issue might have an effect in the United States. The majority's interpretation would be wrong as to

[5] Amended twice since September 11, 2001: P.L. 107-56, Title VIII, § 810(d), 115 Stat. 380 (Oct. 26, 2001); P.L. 108-458, Title VI, Subtitle G, § 6603(c) – (f), 118 Stat. 3762 (Dec. 17, 2004).
[6] Enacted in P.L. 108-458, Title VI, Subtitle G, § 6602, 118 Stat. 3761 (Dec. 17, 2004).
[7] Enacted in P.L. 107-197, Title II, § 202(a), 116 Stat. 724 (June 25, 2002); amended in P.L. 107-273, Div. B, Title IV, § 4006, 116 Stat. 1813 (Nov. 2, 2002); P.L. 108-458, Title VI, Subtitle G, § 6604, 118 Stat 3764 (Dec. 17, 2004).

Congressional intent behind most, if not all, of these statutes.

Analysis of these recent statutes demonstrates that in the absence of specific statutory language or legislative history, a court must answer at least two questions before it concludes from a statute's context that it applies extraterritorially. The *Delgado-Garcia* majority answered the first — finding that the conduct criminalized by § 1324(a) often occurred outside the United States and the statute was "outward looking." But the Panel never considered the second, which asks, if this statute applies extraterritorially, to whom it applies outside U.S. territorial jurisdiction.[8] Each of the statutes cited above applies to crimes involving United States nationals and aliens who live here, and crimes aboard U.S. flag vessels and aircraft committed by foreign nationals. Some apply to foreign nationals aboard foreign flag vessels or aircraft, but only when the crime affects foreign commerce — where the transaction begins or ends in the United States. Some apply to foreign nationals if they aid and abet an individual over whom the United States has jurisdiction, such as a U.S. national.

It is important to note as well that these statutes apply extraterritorially only where there is a real victim — a person, government entity, or sometimes a corporation or other legal entity. Unlike § 1324(a), they do not criminalize conduct having only an inchoate effect on the United States.

The case at bar meets none of these criteria.[9]

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[8] It may also be necessary to determine under what circumstances the law applies extraterritorially. For example, several of these statutes appear to allow prosecution of foreign nationals aboard a ship of foreign registry who injure or kill a U.S. national on the high seas.

[9] 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. 2^{d} 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. 2^{d} 628 (1974); *Menna v. New York*, 423 U.S. 61, 62 – 2 & n. 2, 96 S. Ct. 241, 46 L. Ed. 2^{d} 195 (1974)(*per curiam*). Acknowledging that the government did not challenge Delgado-Garcia's

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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.2d 1063 (5th Cir. 1980), and *United States v. Cadena*, 585 F.2d 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

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… Continued from previous page.
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 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. 2d 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.

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. The Coast Guard did not suspected the ship of engaging in piracy or slave trade. It did not obtained permission from Ecuador to seize the *San Jacinto* and its crew, and there is no formal agreement with Ecuador permitting the United States to assert jurisdiction over Ecuadorian flag vessels on the high seas. The government did not notify Ecuador that the Coast Guard intended to seize the ship and take it to Mexico. Ecuador granted permission only 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 3 – 7), 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 established 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, and that extraterritorial application of § 1324 comported 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 did not analyze whether this case falls under either exception.

The case at bar falls within both exceptions. As noted above at 6, 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.[10]

Contrary to the requirements of the Vienna Convention on Consular Affairs, the Immigration and Nationalization Service did not notify Ecuador that Appellants were in custody until five weeks after seizure of the *San Jacinto* and 11 days after Appellants were brought to the United State. *See, Medellin v. Dretke*, 544 U.S. 660, 665 n. 3, 125 S. Ct. 2088, 161 L. Ed. 2^{d} 982 (2005); *Breard v. Greene*, 523 U.S. 371, 375 – 6, 118 S. Ct. 1352, 140 L. Ed. 2^{d} 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.2^{d} 276 (2^{d} 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.2^{d} 62 (2^{d} Cir. 1975)(defendant abducted from Mexico and brought to court five days later). *See, also, United States v. Yunis*, 859 F.2^{d} 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

[10] 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.

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).

Respectfully submitted,

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ADDENDA

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

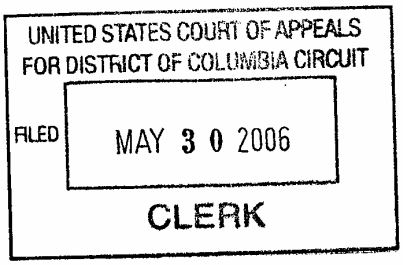
This case has not previously been before the Court, and no other cases currently on appeal are related to it. However, this appeal calls into question the holding of a Panel of this Court in *United States v. Delgado-Garcia*, 374 F.3^{d} 1337 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1696, 161 L.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

ORDER FROM WHICH REHEARING IS SOUGHT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-3124 September Term, 2005



UNITED STATES OF AMERICA,
APPELLEE

v.

CARLOS G. ERAZO ROBLES,
APPELLANT

Consolidated with 03-3125, 03-3133

Appeals from the United States District Court
for the District of Columbia
(No. 02cr00252-02)
(No. 02cr00252-05)
(No. 02cr00252-06)

Before: SENTELLE and BROWN, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

JUDGMENT

These appeals were considered on the record from the United States District Court for the District of Columbia and on the briefs by the parties and oral arguments of counsel. The court has determined that the issues presented occasion no need for an opinion. *See* D.C. CIR. R. 36(b). It is

ORDERED AND ADJUDGED that the District Court's decision is affirmed. Appellants' arguments are foreclosed by our recent decision in *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004). "One three-judge panel . . . does not have the authority to overrule another three-judge panel of the court. That power may be exercised only by the full court . . . ." *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) (citations omitted).

Pursuant to Rule 36 of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED R. APP. P. 41(b); D.C. CIR. R. 41.

Per curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

18 U.S.C. § 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.

…

(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.

…

(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….

18 U.S.C. § 2331. Definitions

As used in this chapter [18 USCS §§ 2331 et seq.] --

(1) the term "international terrorism" means activities that--

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended--

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;

(2) the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act [8 USCS § 1101(a)(22)];

(3) the term "person" means any individual or entity capable of holding a legal or beneficial interest in property;

…

18 U.S.C. § 2332b. Acts of terrorism transcending national boundaries

…

(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.

…

(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).

…

(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;

…

(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

…

18 U.S.C. § 2332f. Bombings of places of public use, government facilities, public transportation systems and infrastructure facilities

…

(b) Jurisdiction. There is jurisdiction over the offenses in subsection (a) if--

…

(2) the offense takes place outside the United States and--

(A) a perpetrator is a national of the United States or is a stateless person whose habitual residence is in the United States;

(B) a victim is a national of the United States;

(C) a perpetrator is found in the United States;

(D) the offense is committed in an attempt to compel the United States to do or abstain from doing any act;

(E) the offense is committed against a state or government facility of the United States, including an embassy or other diplomatic or consular premises of the United States;

(F) the offense is committed on board a vessel flying the flag of the United States or an aircraft which is registered under the laws of the United States at the time the offense is committed; or

(G) the offense is committed on board an aircraft which is operated by the United States.

…

(e) Definitions. As used in this section, the term--

…

(2) "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

…

(12) "state" has the same meaning as that term has under international law, and includes all political subdivisions thereof.

§ 2332g. Missile systems designed to destroy aircraft

…

(b) Jurisdiction. Conduct prohibited by subsection (a) is within the jurisdiction of the United States if--

(1) the offense occurs in or affects interstate or foreign commerce;

(2) the offense occurs outside of the United States and is committed by a national of the United States;

(3) the offense is committed against a national of the United States while the national is outside the United States;

(4) the offense is committed against any property that is owned, leased, or used by the United States or by any department or agency of the United States, whether the property is within or outside the United States; or

(5) an offender aids or abets any person over whom jurisdiction exists under this subsection in committing an offense under this section or conspires with any person over whom jurisdiction exists under this subsection to commit an offense under this section.

….

§ 2332h. Radiological dispersal devices

…

(b) Jurisdiction. Conduct prohibited by subsection (a) is within the jurisdiction of the United States if--

(1) the offense occurs in or affects interstate or foreign commerce;

(2) the offense occurs outside of the United States and is committed by a national of the United States;

(3) the offense is committed against a national of the United States while the national is outside the United States;

(4) the offense is committed against any property that is owned, leased, or used by the United States or by any department or agency of the United States, whether the property is within or outside the United States; or

(5) an offender aids or abets any person over whom jurisdiction exists under this subsection in committing an offense under this section or conspires with any person

over whom jurisdiction exists under this subsection to commit an offense under this section.

…

§ 2339B. Providing material support or resources to designated foreign terrorist organizations

(a) Prohibited activities.

(1) Unlawful conduct. Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization ….

…

(d) Extraterritorial jurisdiction.

(1) In general. There is jurisdiction over an offense under subsection (a) if--

(A) an offender is a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22))) or an alien lawfully admitted for permanent residence in the United States (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)));

(B) an offender is a stateless person whose habitual residence is in the United States;

(C) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States;

(D) the offense occurs in whole or in part within the United States;

(E) the offense occurs in or affects interstate or foreign commerce; or

(F) an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or conspires with any person over whom jurisdiction exists under this paragraph to commit an offense under subsection (a).

(2) Extraterritorial jurisdiction. There is extraterritorial Federal jurisdiction over an offense under this section.

…

§ 2339C. Prohibitions against the financing of terrorism

…

(b) Jurisdiction. There is jurisdiction over the offenses in subsection (a) in the following circumstances--

(1) the offense takes place in the United States and--

(A) a perpetrator was a national of another state or a stateless person;

(B) on board a vessel flying the flag of another state or an aircraft which is registered under the laws of another state at the time the offense is committed;

(C) on board an aircraft which is operated by the government of another state;

(D) a perpetrator is found outside the United States;

(E) was directed toward or resulted in the carrying out of a predicate act against--

(i) a national of another state; or

(ii) another state or a government facility of such state, including its embassy or other diplomatic or consular premises of that state;

(F) was directed toward or resulted in the carrying out of a predicate act committed in an attempt to compel another state or international organization to do or abstain from doing any act; or

(G) was directed toward or resulted in the carrying out of a predicate act--

(i) outside the United States; or

(ii) within the United States, and

either the offense or the predicate act was conducted in, or the results thereof affected, interstate or foreign commerce;

(2) the offense takes place outside the United States and--

(A) a perpetrator is a national of the United States or is a stateless person whose habitual residence is in the United States;

(B) a perpetrator is found in the United States; or

(C) was directed toward or resulted in the carrying out of a predicate act against--

(i) any property that is owned, leased, or used by the United States or by any department or agency of the United States, including an embassy or other diplomatic or consular premises of the United States;

(ii) any person or property within the United States;

(iii) any national of the United States or the property of such national; or

(iv) any property of any legal entity organized under the laws of the United States, including any of its States, districts, commonwealths, territories, or possessions;

(3) the offense is committed on board a vessel flying the flag of the United States or an aircraft which is registered under the laws of the United States at the time the offense is committed;

(4) the offense is committed on board an aircraft which is operated by the United States; or

(5) the offense was directed toward or resulted in the carrying out of a predicate act committed in an attempt to compel the United States to do or abstain from doing any act.

(c) Concealment. Whoever--

(1) (A) is in the United States; or

(B) is outside the United States and is a national of the United States or a legal entity organized under the laws of the United States (including any of its States, districts, commonwealths, territories, or possessions); and

(2) knowingly conceals or disguises the nature, location, source, ownership, or control of any material support or resources, or any funds or proceeds of such funds--

(A) knowing or intending that the support or resources are to be provided, or knowing that the support or resources were provided, in violation of section 2339B of this title [18 USCS § 2339B]; or

(B) knowing or intending that any such funds are to be provided or collected, or knowing that the funds were provided or collected, in violation of subsection (a),

shall be punished as prescribed in subsection (d)(2).

…

(e) Definitions. In this section--

…

(12) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

…

(14) the term "state" has the same meaning as that term has under international law, and includes all political subdivisions thereof.

…

§ 2339D. Receiving military-type training from a foreign terrorist organization

(a) Offense. Whoever knowingly receives military-type training from or on behalf of any organization designated at the time of the training by the Secretary of State under section 219(a)(1) of the Immigration and Nationality Act [8 USCS § 1189(a)(1)] as a foreign terrorist organization shall be fined under this title or imprisoned for ten years, or both. To violate this subsection, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (c)(4)), that the organization has engaged or engages in terrorist activity (as

defined in section 212 of the Immigration and Nationality Act [8 USCS § 1182]), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 [22 USCS § 2656f(d)(2)]).

(b) Extraterritorial jurisdiction. There is extraterritorial Federal jurisdiction over an offense under this section. There is jurisdiction over an offense under subsection (a) if--

(1) an offender is a national of the United States (as defined in 101(a)(22) of the Immigration and Nationality Act [8 USCS § 1101(a)(22)]) or an alien lawfully admitted for permanent residence in the United States (as defined in section 101(a)(20) of the Immigration and Nationality Act [8 USCS § 1101(a)(20)]);

(2) an offender is a stateless person whose habitual residence is in the United States;

(3) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States;

(4) the offense occurs in whole or in part within the United States;

(5) the offense occurs in or affects interstate or foreign commerce; or

(6) an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or conspires with any person over whom jurisdiction exists under this paragraph to commit an offense under subsection (a).

…

CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Wagner E. Gongora-Parraga, certify that on July 6, 2006 I served a true copy of the attached Joint Petition for Re-hearing and Suggestion of Rehearing *en Banc* by first-class mail on the person(s) listed below.

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