DOCTRINE ON THE RUN: THE DEEPENING CIRCUIT SPLIT CONCERNING APPLICATION OF THE FUGITIVE DISENTITLEMENT DOCTRINE TO FOREIGN NATIONALS

Abstract: The circuits are currently split on applying the fugitive disentitlement doctrine to a defendant who is a foreign national who resides outside of the United States and is being prosecuted in the United States for conduct that occurred elsewhere. The doctrine provides that a fugitive is prohibited from seeking relief from the justice system whose jurisdiction and authority they evade. Appropriate application of the doctrine is particularly important to foreign defendants as it affects their ability to travel outside of their home country, maintain employment, and protect their personal reputation. This Note discusses the evolution of the fugitive disentitlement doctrine and its current application to international defendants. It argues that the Seventh Circuit's interpretation and application of the fugitive disentitlement doctrine, as opposed to the Second Circuit's, is correct because imposing fugitive status on foreign defendants who have never been to the United States does not serve the underlying purposes of the doctrine. Globalization has resulted in increased U.S. prosecution of foreign nationals, a trend that is expected to continue. Successfully prosecuting these individuals depends in part on the existence of a clear standard for determining the circumstances under which a defendant can be declared a fugitive.

INTRODUCTION

Roger Darin is a Swiss citizen who has never stepped foot in the United States.[1] He is a former trader who worked for UBS in Singapore, Tokyo, and Zurich.[2] In his capacity as a trader, his professional conduct was never aimed at the United States.[3] His only connection to the United States was

[1] Petition for Writ of Certiorari at 7, Darin v. United States, 137 S. Ct. 1223 (2016) (No. 16-564) [hereinafter Petition].

[2] *Id.* UBS is a global financial services company that is headquartered in Zurich, Switzerland with offices all around the world. UBS, http://www.ubs.com/global/en/about_ubs/about_us/our profile.html [https://perma.cc/P9XD-AD7Q]. During the relevant time period of this case, UBS operated among wholly-owned subsidiaries in Japan and Singapore. Complaint at 5, United States v. Hayes (*Hayes II*), 118 F. Supp. 3d 620 (S.D.N.Y. 2015) (No. 12 MAG 3229).

[3] *See* United States v. Hayes, 99 F. Supp. 3d 409, 412 (S.D.N.Y. 2015) (describing the countries and currencies that Darin dealt with in his position, neither of which included the United States nor the American dollar). Darin's primary responsibility at UBS was trading in short-interest rates in Asia and Switzerland. *Id.* He was responsible for UBS's Yen LIBOR submissions to the British Bankers' Association (BBA). *Id.* None of his work involved working directly with entities in the United States. *Id.*

indirect, through his work with Thomson Reuters.[4] Imagine his surprise when, on December 12, 2012, the United States government filed a criminal complaint against him.[5] He was charged with conspiracy to commit wire fraud pursuant to 18 U.S.C. § 1349 and 18 U.S.C. § 1343.[6] The complaint alleged that Darin's conduct resulted in Thomson Reuters publishing misleading Yen LIBOR fixings that were favorable to UBS trading positions.[7] An arrest warrant was issued but, as a Swiss citizen living in Switzerland, Darin has not been arrested.[8]

On October 2, 2014, Darin's attorneys filed a motion to dismiss, citing a Fifth Amendment violation and inappropriate extraterritorial application of U.S. law.[9] Magistrate Judge James Francis IV, sitting on the United States District Court for the Southern District of New York, found that the fugitive disentitlement doctrine did not bar the court from hearing Darin's motion to dismiss and simultaneously denied the motion to dismiss.[10] Judge Paul Crotty agreed in part and disagreed in part, determining that the fugitive disentitlement doctrine barred the court from hearing the merits of Darin's

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[4] Petition, *supra* note 1, at 8. The United States contends that Darin's alleged manipulation of interest rates favored Tom Hayes' trading positions and resulted in fraudulent trades inside the United States. *Id.* Although both individuals were not located in the United States, a counterpart of Hayes' was located in Purchase, New York. *Id.* This means the only connection between Darin and the United States is that his manipulated interest rate affected the ultimate Yen-LIBOR interest rate published by Thomson Reuters, which is published worldwide, including in the United States. *Id.*

[5] *Hayes II*, 118 F. Supp. 3d at 623. The complaint listed three counts: conspiracy to commit wire fraud, wire fraud, and antitrust violations. Complaint, *supra* note 2, at 1–3. The complaint names as a co-defendant Tom Hayes, who was charged with all three counts whereas Darrin was only charged with conspiracy to commit wire fraud. *Id.* Hayes was tried and convicted of eight counts of fraud for his role in manipulating LIBOR rates in an English court in August 2015. *Hayes II*, 118 F. Supp. 3d at 623 n. 2.

[6] 18 U.S.C. § 1343 (2012) (explaining conduct that constitutes wire, radio, and television fraud and accompanying punishment); *id.* § 1349 (stating that anyone who attempts or conspires to commit a crime enumerated in this chapter will be subjected to the same penalties as those listed for the offense, as if the underlying crime had been committed).

[7] Complaint, *supra* note 2, at 21. "The Japanese Yen LIBOR interest rate is the average interbank interest rate at which a large number of banks on the London money market are prepared to lend one another unsecured funds denominated in Japanese Yen." *Japanese Yen LIBOR Interest Rate*, GLOBAL RATES, www.global-rates.com/interest-rates/libor/japanese-yen/japanese-yen.aspx [https://perma.cc/356Y-48AL].

[8] *Hayes II*, 118 F. Supp. 3d at 623.

[9] *Id.* Darin argued that his Fifth Amendment right to due process was violated because there was an insufficient connection between him and the United States to support charging him in the United States. *Id.* He also claimed his Fifth Amendment right to due process was violated because he did not receive commensurate notice that his alleged conduct was criminal. *Id.*

[10] *See* United States v. Hayes, 99 F. Supp. 3d 409, 416 (S.D.N.Y. 2015) (declining to determine Darin's fugitive status because, even if he was a fugitive, the fugitive disentitlement doctrine would not be applicable to the facts of the case). After applying the rationales behind the doctrine to the facts of the case, the judge denied Darin's motion to dismiss. *Id.* at 430–26.

motion to dismiss.[11] The United States Court of Appeals for the Second Circuit granted the United States' motion to dismiss and denied Darin's petition for mandamus relief.[12]

The fugitive disentitlement doctrine allows a court to deny a party's request to make use of the American judicial system when they purposely evade the jurisdiction to avoid criminal prosecution.[13] When a defendant purposefully removes himself from the court's jurisdiction, he is signaling his disrespect for the judicial system and process.[14] As a result, he should not be rewarded with benefits that stem from access to the appellate process.[15] Rationales supporting the doctrine include difficulty of enforcing a judgment against a fugitive, the idea that flight acts as a waiver of the right to appeal, discouragement of prisoner escape, and efficient operation of criminal appeals, to name a few.[16] Another theory supporting this discretionary doc-

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[11] United States v. Hayes (*Hayes II*), 118 F. Supp. 3d 620, 623 (S.D.N.Y. 2015) (No. 12 MAG 3229). The district court rejected the magistrate's determination that Darin was not a fugitive and that the fugitive disentitlement doctrine should not be applied. *Id.* at 629. The district court instead found that Darin was a fugitive because an arrest warrant was issued against him and he has actively avoided being arrested by staying in Switzerland. *Id.* at 626. The court did not believe that someone who otherwise would be considered a fugitive had they committed the crime in the United States, should not be labeled a fugitive just because of the impossibility of leaving the United States. *Id.* at 625. The court also found that the fugitive disentitlement doctrine applies because the four factors underpinning the doctrine counsel in favor of disentitlement. *Id.* at 626–27. Finally, the district court explained why, if it were to review Darin's motion to dismiss, it would fully adopt the magistrate judge's order denying the motion. *Id.* at 627–29.

[12] United States v. Hayes, at 1–2, No. 15-2597 (2d Cir. Mar. 15, 2016) [hereinafter Appellate Order]. The judge explained that the district court's order was not immediately appealable under the collateral order doctrine and therefore the court did not have jurisdiction to hear the appeal. *Id.* Additionally, the court found that Darin did not meet his burden of demonstrating "exceptional circumstances" that merit mandamus relief. *Id.*

[13] 28 U.S.C. § 2466 (2012). A judicial officer may forbid an individual from using the U.S. court system in furtherance of a claim if, after the individual has knowledge that a warrant has been issued for his apprehension, such individual flees the jurisdiction in order to avoid prosecution. *Id.* § 2466(a)(1)(A). The individual may be forbidden from using the court system for failing to enter or reenter the United States in order to submit to its jurisdiction. *Id.* § 2466(a)(1)(B). An individual who is in custody in another jurisdiction for illegal conduct in that jurisdiction is not a fugitive for purposes of this law. *Id.* § 2466(a)(2).

[14] *See* Patrick J. Glen, *The Fugitive Disentitlement Doctrine and Immigration Proceedings*, 27 GEO. IMMIGR. L.J. 749, 754–55 (2013) (explaining that the Supreme Court's decision in *Allen v. Georgia*, 166 U.S. 138, 141 (1896), rested partially on enforceability grounds but also on the fact that fleeing after commencing the appeals process demonstrates irreverence for the process and tarnishes the court's dignity).

[15] *See* Paige Taylor, *The Good, the Bad, the Ugly: A Survey of Selected Fifth Circuit Immigration Cases*, 41 TEX. TECH. L. REV. 989, 1005 (2009) (explaining that the doctrine can be seen as an incentive device to keep convicted criminals from escaping because non-compliance with jail sentences divests the criminal of access to the appeals process).

[16] *See* Estelle v. Dorough, 420 U.S. 534, 537 (1975) (per curiam) (stating that the disentitlement doctrine supports the sanctity of the appeals courts and promotes efficient operation of the appellate process). The Court also, for the first time, proposed that discouraging prisoner escape and supporting escapee self-surrender were valid rationales supporting invocation of the doctrine.

trine is preserving judicial resources by allowing appellate judges to deny a fugitive's claim.[17] The doctrine should be applied when (1) the defendant is determined to be a fugitive, and (2) when the four factors underlying the doctrine counsel disentitlement, considering principles such as mutuality and aversion to flouting the judicial system, and only then should the court forgo hearing the appeal.[18]

Determining fugitive status, however, is not as simple as whether or not the defendant escaped prison or evaded law enforcement.[19] There are two preliminary questions to answer: (1) whether actual flight is necessary to label someone a fugitive, and (2) whether a foreign defendant's failure to surrender by remaining outside the country is sufficient to label them a fugitive.[20] Courts are divided on both of these questions.[21] With no legal obliga-

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Id.; Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (explaining that flight from custody acts as a defendant's waiver to claim a right of appeal and can disentitle him from seeking relief); Smith v. United States, 94 U.S. 97, 97 (1876) (addressing enforceability concerns).

[17] *In re* Grand Jury Subpoenas, 179 F. Supp. 2d 270, 285–86 (S.D.N.Y. 2001).

[18] *See* Empire Blue Cross & Blue Shield v. Finkelstein, 111 F.3d 278, 280 (2d Cir. 1997) (discussing the four factors that determine whether the fugitive disentitlement doctrine should be applied to a defendant). Courts will weigh the following factors in deciding whether disentitlement is warranted: (1) whether a decision on the merits would be enforceable; (2) whether a defendant is flouting the judicial process; (3) whether a decision on the merits would encourage similarly situated defendants to act in the same manner; and (4) whether the government is prejudiced by the defendant's continued evasion of authority. *Id.*; United States v. Hayes (*Hayes II*), 118 F. Supp. 3d 620, 624 (S.D.N.Y. 2015) (No. 12 MAG 3229).

[19] *See Hayes II*, 118 F. Supp. 3d at 624–26 (reviewing various definitions of the word fugitive). The court explained that the general public's idea of a fugitive can be described based on a recent prisoner's escape from the Clinton Correctional Facility in Dannemora, New York. *Id.* A fugitive is someone who flees. *Fugitive*, BLACK'S LAW DICTIONARY (10th ed. 2014). More precisely, a fugitive is a suspect in a criminal case who evades prosecution, arrest or imprisonment by leaving the jurisdiction or hiding. *Id.*; *see, e.g.*, United States v. Bokhari, 757 F.3d 664, 672 (7th Cir. 2014) (explaining that the term fugitive may be used in subtly different ways depending on the various legal contexts in which the term is invoked); United States v. Blanco, 861 F.2d 773, 779 (2d Cir. 1988) (stating that a person can be classified as a fugitive if he learns, while outside of U.S. jurisdiction, that he will be indicted and makes no effort to return to the country); United States v. Catino, 735 F.2d 718, 722 (2d Cir. 1984) (noting that a defendant does not have to actually flee in order to be labeled a fugitive by the court but that "intent to flee" suffices and this intent can be gleaned when an individual refuses to turn himself over to the authorities once he is aware that charges have been filed against him).

[20] *Hayes II*, 118 F. Supp. 3d at 624; *see also infra* notes 105–108 and accompanying text (describing the different courts' approaches to answering these two questions).

[21] *Compare In re* Hijazi, 589 F.3d 401, 412–13 (7th Cir. 2009) (declaring foreign national not to be a fugitive when his only presence in the United States was over twenty years prior and unrelated to the case at bar), *and In re Grand Jury Subpoenas*, 179 F. Supp. at 287 (explaining that an individual who constructively flees the jurisdiction is not a fugitive unless: (1) he was physically present in the jurisdiction when he allegedly committed the crime, (2) while he is outside of the jurisdiction he becomes aware that he is wanted for arrest, and (3) he chooses to remain outside of the jurisdiction to avoid facing charges), *with* 28 U.S.C. § 2466(a) (2012) (allowing the fugitive disentitlement doctrine to be applied in the civil forfeiture context to individuals who, after learning they are wanted by the authorities, refuse to enter the United States), *and* United States v.

tion to surrender himself to U.S. jurisdiction, how could a foreign national who has never been to the United States be considered a fugitive?[22] In the event fugitive status is imposed on the defendant, the court must decide whether application of the doctrine to the case at bar serves the underlying interests.[23] Just because a defendant is deemed a fugitive does not mean that the doctrine should automatically be invoked.[24] Would it make sense to disentitle a fugitive of his right to appeal under the doctrine if the sanction would not serve the purposes of the doctrine?[25]

Part I of this Note provides an overview of the historical development of the fugitive disentitlement doctrine and its application and limitations.[26] Part II reviews the procedural history of *Darin v. United States* and compares it to the Seventh Circuit's decision in *In re Hijazi*.[27] Part III argues that the Seventh Circuit, in contrast to the Second Circuit, correctly applied the fugitive disentitlement doctrine in *In re Hijazi* and the Supreme Court erred in denying Darin's petition for certiorari, thereby not resolving the current circuit split.[28]

Hernandez, 2010 WL 2652495, at *5 (S.D.N.Y. June 30, 2010) (stating that the circumstances surrounding how an individual becomes a fugitive may be irrelevant because the crucial factor to examine is the individual's intent to submit to the jurisdiction).

[22] *See* United States v. Hayes, 99 F. Supp. 3d 409, 416 (S.D.N.Y. 2015) 416 (concluding that, based on the record before him, Darin is a foreign national who has never entered the United States and has not concealed his location from U.S. authorities but has simply chosen to remain in his home country of Switzerland). The judge did not reach a decision on whether Darin is a fugitive, explaining rather that even if he were considered a fugitive, it would be improper to apply the fugitive disentitlement doctrine to the facts of the case. *Id.*

[23] *See* Degen v. United States, 517 U.S. 820, 824–25 (1996), *superseded on other grounds by statute*, Civil Forfeiture Reform Act of 2000, Pub. L. No 106-185, 114 Stat. 202 (codified at 18 U.S.C. §§ 983, 985 and 28 U.S.C. §§ 2466–2467) (reviewing the specific contextual factors of the case against the backdrop of the rationales underlying the fugitive disentitlement doctrine in deciding whether to invoke the doctrine).

[24] *See* United States v. Cauwenberghe, 934 F.2d 1048, 1055 (9th Cir. 1991) (acknowledging that the doctrine grants the court discretionary authority to dismiss the appeal, however there is no per se requirement that the court must dismiss the appeal in these cases); Angelo M. Russo, *The Development of Foreign Extradition Takes a Wrong Turn in Light of the Fugitive Disentitlement Doctrine: Ninth Circuit Vacates the Requirement of Probable Cause for a Provisional Arrest in* Parretti v. United States, 49 DEPAUL L. REV. 1041, 1051–52 (2000) (discussing various factors courts should consider, and the weight they should be accorded, in determining whether the doctrine should be invoked at all). The Supreme Court, in *Cauwenberghe*, took a "totality of the circumstances" approach in deciding whether to apply the doctrine and determined that prisoner escape is only one factor of many to consider. Russo, *supra*, at 1052.

[25] *See* Petition, *supra* note 1, at 31 (explaining that once a defendant is labeled a fugitive, the court must look to the rationales behind the doctrine, and not just the fugitive label, in deciding whether to hear the motion).

[26] *See infra* notes 29–110 and accompanying text.

[27] *See infra* notes 111–163 and accompanying text.

[28] *See infra* notes 164–193 and accompanying text.

I. EVOLUTION AND PURPOSE OF THE FUGITIVE DISENTITLEMENT DOCTRINE

The power to manage the appeals process belongs to the courts themselves and is a broad and inherent power.[29] The fugitive disentitlement doctrine emerged from this inherent power at the end of the 19th century when it was applied to prevent fugitives from making unfair use of the judicial system.[30] It was developed as a rule of criminal appellate procedure when it was invoked to dismiss the appeal of a convicted criminal who escaped from jail during the pendency of his appeal.[31] At first, the doctrine was principally applied in criminal cases involving prison escapees.[32] Since then, the doctrine has broadened its application to appeals filed by those not yet arrested or charged, but who leave the jurisdiction to avoid answering for an alleged crime, among other instances.[33] Section A of this Part sets out the power of the federal courts to apply the fugitive disentitlement doctrine.[34] Section B discusses the original formulation of the doctrine and its application to escaped prisoners.[35] Section C examines the complications arising from invoking the doctrine against a foreign defendant living outside the United States.[36]

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[29] *See* Glen, *supra* note 14, at 751 (stating the fugitive disentitlement doctrine stems from the court's inherent authority to regulate the appellate process); Russo, *supra* note 24, at 1049 (relying on Rule 47 of the Federal Rules of Appellate Procedure for the assertion that appellate courts have the authority to promulgate procedural rules for their court so long as they are not in conflict with any other rule or the Constitution).

[30] United States v. $40,877.59 in U.S. Currency, 32 F.3d 1151, 1152 (7th Cir. 1993) (stating the Supreme Court's aversion to ruling on a motion when a favorable decision benefits the fugitive defendant and an unfavorable decision can be avoided by the fugitive defendant).

[31] *See* Smith v. United States, 94 U.S. 97, 97 (1876) (exercising the Court's inherent authority to dismiss an appeal of a criminal who escaped from prison); Gary P. Naftalis & Alan R. Friedman, *Fugitive Disentitlement in Civil Forfeiture Proceedings*, N.Y.L.J., Dec. 19, 2002, at 1 (explaining that the doctrine initially arose as a mechanism of judicial construction granting appellate courts the power to dismiss appeals of defendants who remained fugitives at the time of their appeal).

[32] *E.g.*, Allen v. Georgia, 166 U.S. 138, 138 (1897); Bonahan v. Nebraska, 125 U.S. 692, 692 (1887); *Smith*, 94 U.S. at 97.

[33] N. Brock Collins, Note, *Fugitives and Forfeiture—Flouting the System or Fundamental Right?*, 83 KY. L.J. 631, 637 (1994-1995). Courts have previously deemed defendants to be a fugitive based on their "state of mind." *Id.*; *see* United States v. Eng, 951 F.2d 461, 464 (2d Cir. 1991) (explaining that evading authorities does not necessitate a physical act). The court found that the defendant was a fugitive, despite being imprisoned overseas, because he had not made sufficient effort to return to the United States. *Eng*, 951 F.2d at 465.

[34] *See infra* notes 37–54 and accompanying text.

[35] *See infra* notes 55–84 and accompanying text.

[36] *See infra* notes 85–110 and accompanying text.

A. Appellate Power to Disentitle Fugitives from the Right to Appeal

The United States Constitution does not provide for an absolute right of appeal.[37] The right to appeal was developed over time and has primarily been established via precedent and codified in rules of appellate procedure.[38] With no constitutional provision binding the United States Courts of Appeals to review an appeal, they are free to use their implied powers to formulate rules that allow for the most efficient operation of their courts.[39]

The Supreme Court first articulated this principle in 1985 in *Thomas v. Arn*.[40] The petitioner was convicted of homicide in Ohio state court.[41] On

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[37] Abney v. United States, 431 U.S. 651, 656 (1977) (recognizing that the Constitution does not provide an absolute right to appeal and detailing how the right to appeal developed); *see also* Griffin v. Illinois, 351 U.S. 12, 18 (1956) (stating that the Constitution does not require the states to provide appellate courts or a right to appeal); McKane v. Durston, 153 U.S. 684, 687 (1894) (explaining that a state's statute that did not allow for an appeal does not violate the Second and Fourth Amendments of the Constitution). Review by an appellate court after final judgment in a criminal case was not a right at common law, nor now a fundamental element of due process. *McKane*, 153 U.S. at 687. *See generally* U.S. CONST. (lacking any reference to an individual's right to appeal a court ruling). The Constitution does not mention anything about an individual's right to appeal a court ruling. *See generally* Alexandra Reimelt*, An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal,* 51 B.C. L. REV 871, 904 (2010) (discussing the government's ability to strip a defendant of his right to appeal in exchange for a more favorable sentence in a plea agreement).

[38] *See, e.g.*, 28 U.S.C. § 1291 (2012) (laying out the jurisdiction of federal appellate courts); FED. R. APP. P. 3 (explaining the process for filing a valid appeal); James E. Lobsenz, *A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction*, 8 U. PUGET SOUND L. REV. 375, 376 (1985) (explaining that almost every state in the United States recognizes a right to appeal in serious criminal cases either by statute or state court rule).

[39] Chambers v. Nasco, 501 U.S. 32, 43 (1991) (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (explaining that the courts' ability to exercise their implied powers is necessary in order for them to exercise their given powers). The rule granting jurisdiction to appellate courts does not explicitly confer on the courts the authority to establish procedural rules governing their decisions, but this does not render rules they create inconsistent with the Constitution or federal statutes. Anthony Michael Altman, *The Fugitive Dismissal Rule:* Ortega-Rodriguez *Takes the Bite out of Flight*, 22 PEPP. L. REV. 1047, 1050 (1995). The courts will engage in rule making by working within the bounds of the Federal Rules of Civil Procedure in conjunction with their adjudication of cases. *Id.*; *see* Martha B. Stolley, *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine*, 87 J. CRIM. L. & CRIMINOLOGY 751, 752 (1997) (stating the inherent powers of the federal courts are of immense importance in exercising their duties). Relying on *Link v. Wabash, Railroad Co.,* 370 U.S. 626 (1962), Stolley explains that the inherent powers the appeals courts have allows them to impose rules that demand "silence, respect, and decorum" in order to maintain the integrity of the court. Stolley, *supra*, at 752.

[40] *See* 474 U.S. 140, 146 (1985) (stating that there is no dispute that the courts of appeals have, at a minimum, presiding power to formulate procedural rules for the management of litigation).

[41] *Id.* at 142. Ms. Thomas was convicted of fatally shooting her common-law husband during an argument. *Id.* The Court of Appeals of Cuyahoga County reversed the conviction, finding that the exclusion of testimony on Battered Wife Syndrome was error. *Id.* at 143. The Ohio Supreme Court reversed the appeals court, holding that the testimony was irrelevant to petitioner's self-defense claim and the prejudicial effect of the testimony would outweigh its probative value. *Id.* The petitioner subsequently sought habeas corpus relief in the United States District Court for the Northern District of Ohio, which assigned the case to a magistrate judge. *Id.* The magistrate's

appeal to the United States Court of Appeals for the Sixth Circuit, the court announced that petitioner had waived her right to appeal by failing to file timely objections.[42] On petition of certiorari to the Supreme Court, the Court held that, so long as an appellate court's rule did not clash with the Constitution or a statute, the court was free to devise its own rules that allow for the most efficacious operation of judicial proceedings.[43]

The right to punish a party who fails to follow an appellate rule or who evinces disrespect in front of the court also derives from the court's implied powers.[44] The court can impose various penalties, including contempt sanctions, exclusion of evidence or even denial of the right to a statutory appeal.[45] Because the court's inherent powers are not subject to checks and balances, the rules must be narrowly tailored and invoked with restraint.[46] In order for a court-made rule to stand as a valid exercise of the court's implied powers it must meet three requirements: (1) the rule must not contradict the Constitution, (2) the rule must be reasonable in terms of the interest it wishes to promote, and (3) the court must be vested with the authority to establish it through adjudication.[47]

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report recommended that the writ be denied, concluding that omission of Battered Wife Syndrome testimony did not destroy basic fairness at the trial and therefore no sufficient ground for habeas relief exists. *Id.* at 144.

[42] *Id.* The petitioner did not file a timely appeal to the judge's report so the district court judge dismissed the case. *Id.* Without reaching the merits of the case, the Sixth Circuit relied on its holding in *United States v. Walters*, 638 F.2d 947 (1981), "which established the prospective rule that failure to file timely objections with the district court waives subsequent review in the court of appeals." *Id.*

[43] *See id.* at 155 (holding that a court of appeals has the authority to proscribe rules conditioning appeals so long as they do not violate the Federal Magistrates Act or the Constitution); *see also* Altman, *supra* note 39, at 1049 (discussing the holding in *Thomas* allowing appellate courts to create rules that best allow them to run their courtrooms).

[44] *See* Stolley, *supra* note 39, at 752 (explaining that the implied powers provide the courts with the ability to impose rules or penalties in order to command order in the court); *see also infra* note 52 and accompanying text.

[45] Stolley, *supra* note 39, at 752–53 (relying on various cases where these types of punishments were upheld for parties who defied the authority of the appellate court); *see*, *e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 763–64 (holding that sanctions for failure to comply with discovery orders is a valid penalty to impose based on an individual's conduct or in order to deter others from engaging in similar conduct).

[46] *Piper*, 447 U.S. at 754. Although invocation of inherent powers should be done with restraint, there exist particular circumstances where federal courts should exercise their inherent power to assess attorney's fees against counsel. *Id.*; *see* Stolley, *supra* note 39, at 753 (explaining that the lack of democratic controls on the rule-making procedure renders the court-made rules particularly powerful and therefore must be exercised carefully).

[47] *See* Thomas v. Arn, 474 U.S. 140, 145–53 (1985) (detailing the Court's reasoning in determining whether the Sixth Circuit's exercise of inherent power to dismiss the appeal was valid). The Court did not lay these factors out in this manner, but these are the factors they examined in rendering their decision. *See id.*

Appellate courts long ago reached consensus that they have the right to sanction a defendant who files a post-conviction appeal and thereafter escapes custody by dismissing the appeal, as this practice complies with the above framework.[48] The fugitive disentitlement doctrine, which emerged from this practice and has subsequently matured, is not inconsistent with the Constitution.[49] The doctrine does not appear to be in conflict with any federal statute.[50] The rule is reasonable in achieving the interests, including deterring escape, encouraging self-surrender, promoting enforceability of rulings and furthering efficient and dignified operation of appellate courts, the court wishes to promote.[51] Finally, the Federal Rules of Appellate Procedure confer on the courts broad rule-making power.[52] This broad power affords the court the right to create the doctrine through adjudication in its court.[53] Accordingly, the fugitive disentitlement doctrine and its corollary sanctions on criminal defendants are well within the court's rule-making power.[54]

B. Criminals on the Lam: Dismissal of Post-Conviction Appeals

It is well established that an appeals court has the right to dismiss a post-conviction appeal of a criminal who subsequently flees from prison.[55]

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[48] *See* Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (holding that courts may dismiss a defendant's pending appeal if he escapes custody during the pendency period); Smith v. United States, 94 U.S. 97, 97 (1876) (announcing the court's ability to dismiss an escaped prisoner's appeal); United States v. Amado, 754 F.2d 31, 31 (1st Cir. 1985) (concluding that dismissal of an appeal with prejudice is acceptable if the petitioner flees after filing the appeal).

[49] *See* Abney v. United States, 431 U.S. 651, 656 (1977) (recognizing that there is no constitutional right to an appeal and that it is entirely a statutory invention).

[50] 28 U.S.C. § 1291 (2012). The provision states that courts of appeals shall have jurisdiction over all appeals from decisions of all district courts of the United States. *Id.*; Jason Joseph, *The Fugitive Dismissal Rule Applied to Pre-Appeal Fugitivity*, 84 J. CRIM. L. & CRIMINOLOGY 1086, 1097 (1994). In his dissenting opinion, on other grounds, in *Ortega-Rodriguez v. United States*, Chief Justice Rehnquist noted that the fugitive dismissal rule does not violate a state statute conferring a right to appeal on criminal defendants because the statute does not establish the procedural requirements to file a valid appeal. 507 U.S. 234, 253 (1993) (Rehnquist, C.J., dissenting); Joseph, *supra*, at 1097.

[51] Altman, *supra* note 39, at 1051–58 (illustrating the rule's reasonableness by virtue of its continued use over time); *see, e.g.*, Allen v. Georgia, 166 U.S. 138, 141 (1896) (holding that the defendant's escape from custody deprived him of his right to appeal his conviction).

[52] FED. R. APP. P. 47. "Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice." *Id.* 47(a). "A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit." *Id.* 47(b); Altman, *supra* note 39, at 1051.

[53] Altman, *supra* note 39, at 1051.

[54] *Id.* at 1050.

[55] D.J.R., *Recent Cases*, 19 GEO. WASH. L. REV. 397, 429 (1950) (stating that dismissal of an escaped prisoner's pending appeal is an established principle in the U.S. court system); *see Smith*, 94 U.S. at 97 (noting that it is within the court's discretion to decline to hear a criminal appeal unless the defendant appears before the court and can be bound by any judgment).

Ensuring that the defendant would be bound to the consequences of a determinative ruling on the appeal, known as mutuality, was the central issue in the 1876 case of *Smith v. United States*.[56] The Court posited that once the convicted party has escaped, he is not inclined to voluntarily surrender himself to the very authorities he evaded.[57] It would be a waste of judicial resources, the Court explained, to take the time to review an appeal and make a ruling when any order will have no functional effect.[58]

The Supreme Court relied on this same reasoning in 1887 in deciding *Bonahan v. Nebraska*.[59] The Court again refused to hear an appeal where there would be no opportunity for the judgment to be enforced until the plaintiff reappeared in the jurisdiction and came under control of the lower court.[60]

In 1897, the Supreme Court proffered a new justification for fugitive disentitlement in *Allen v. Georgia*.[61] The Court stated that by escaping from prison, the fugitive has committed yet another criminal offense; to conclude that this conduct acts as a waiver of his appeal is an extremely light punishment.[62] Justice Brown explained that the fugitive in effect mocks the court's power by stating that he will return if his appeal is heard and there is a chance

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[56] 94 U.S. at 97. In this case, the plaintiff had escaped from jail and therefore was not actually or constructively under control of the court. *Id.* The court announced that it was not inclined to review and rule on an appeal when its ruling is likely to be ineffective. *Id.* Mutuality is concerned with binding the defendant to any judgment made by the court. *See id.* Mutuality is said to be lacking when a favorable judgment benefits the defendant and an adverse judgment has no effect on the defendant. United States v. Hayes (*Hayes II*), 118 F. Supp. 3d 620, 626 (S.D.N.Y. 2015) (No. 12 MAG 3229). Under the fugitive disentitlement doctrine, a lack of mutuality counsels in favor of disentitlement. *Id.*

[57] *See* Smith v. United States, 94 U.S. 97, 97 (1876) (discussing the Court's rationale in *Smith* in deciding whether to review defendant's appeal). The likelihood of voluntary surrender is further reduced when it is doubtful that the fugitive will get a favorable pronouncement from his pending appeal. *Id.*

[58] *Id.* The Court reasoned that if it were to affirm the plaintiff's conviction, he would be unlikely to reappear and submit himself to the ruling. *Id.* If the court were to reverse his conviction and order a new trial, the plaintiff may or may not present himself to be bound by the order. *Id.* As a result, it seemed pointless to hear and decide a case whose outcome may be unenforceable. *Id.*

[59] 125 U.S. at 692 (announcing that, because the plaintiff had escaped, and was not under control of the lower court by being either in custody or out on bail, his appeal must be set aside until he is recaptured).

[60] *Id.*

[61] 166 U.S. 138, 141 (1896) (stating that, because the act of escaping from prison is its own distinct crime, it is appropriate to treat this conduct as the escapee's waiver of his right to file an appeal). This case marked the first extension of the doctrine's rationales by asserting that a defendant's flight after commencing the appellate process evidences contempt for the process and damages the dignity of the judicial system. Glen, *supra* note 14, at 754–55.

[62] Glen, *supra* note 14, at 754; *see* Commonwealth v. Andrews, 97 Mass. 543, 544 (1867) ("So far as the defendant had any right to be heard under the Constitution, he must be deemed to have waived it by escaping.").

for retrial but if the court denies the appeal, he will never submit to its rule.[63] The Court also drew upon its precedent in civil cases to further justify its decision to deny a fugitive's appeal, explaining that it was the Court's common practice to dismiss a case when no dispute remained or the parties had come to a settlement agreement.[64] The Court saw no reason to limit this custom to the civil context.[65] The doctrine was later expanded to apply to other classes of fugitives, such as those who did not escape from jail.[66]

Early applications of the fugitive disentitlement doctrine were primarily concerned with enforceability issues and disentitlement as an appropriate sanction.[67] As tougher cases presented themselves, the courts voiced other rationalizations in support of the doctrine's purpose.[68] For example, the Supreme Court opined that allowing discretionary dismissal of a prisoner's pending appeal discourages escape and promotes self-surrender after escape.[69] Some states enacted their own statutes that automatically dismissed an appeal once a prisoner escaped and provided that the appeal could only be reinstated if the prisoner self-surrendered within a fixed period of time.[70] In 1975 the Supreme Court referenced these justifications in *Estelle v. Dor-*

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[63] *Allen*, 166 U.S. at 141; *see* Stolley, *supra* note 39, at 754 (explaining that this phenomenon permits the fugitive to dictate his terms for surrender and that the court should not reward this disrespect for their authority).

[64] *Allen*, 166 U.S. at 140. The Court relied on *California v. San Pablo & T.R. Co.*, 149 U.S. 308 (1893) (stating that the case must be dismissed because the obligation by the defendant to pay sums of money to the state terminated when defendant deposited money in a bank for the state, giving the state everything it could have recovered in an action); *Little v. Bowers*, 134 U.S. 547 (1890) (holding that reversal or affirmance of certain taxes already paid would have no significance because they are not the taxes in controversy in the case at bar); and *Dakota Co. v. Glidden*, 113 U.S. 222 (1885) (holding that a valid compromise and settlement extinguishes a cause of action).

[65] *Allen*, 166 U.S. at 140. As long as the lower court has acted within the constitutional laws of its state and has conformed to procedural practice, the Supreme Court should seldom interfere with its ruling and pronounce that there had been a violation of due process. *Id.*

[66] *See* Molinaro v. New Jersey, 396 U.S. 365, 365–66 (1970). In *Molinaro*, the defendant had been released from prison on bail and failed to appear in court. *Id.* The refusal to appear does not make the case nonjusticiable but rather the defendant should not be allowed to use the court system to his benefit when he has expressly disrespected its authority. *Id.*; Eisler v. United States, 338 U.S. 189, 190 (1949). The petitioner fled from the country after a grant for his petition for a writ of certiorari. *Eisler*, 338 U.S. at 190. Relying on *Smith* and *Bonahan*, the Court announced that it would adhere to its precedent and that the petitioner's case would be removed from the docket. *Id.*

[67] Ortega-Rodriguez v. United States, 507 U.S. 234, 240 (1993) (relying on the Court's decisions in *Smith*, *Bonahan,* and *Eisler* to demonstrate these were the court's original key concerns in applying the doctrine).

[68] *See* Estelle v. Dorough, 420 U.S. 534, 537 (1975) (per curiam) (announcing that deterring prisoner escape and encouraging escapee self-surrender also supported the purposes underpinning the doctrine); *see also* Glen, *supra* note 14, at 752 (noting that although the doctrine has evolved from its primary purpose of ensuring compliance with court decisions, the different rationales that have allowed for the evolution build on one another).

[69] *Estelle*, 420 U.S. at 537.

[70] *See*, *e.g.*, TEX. CODE CRIM. PROC. ANN. art. 44.09 (West 1966) (repealed 1986).

ough, and upheld, in the face of an equal protections claim, the constitutionality of a statute that mandated automatic dismissal of a prisoner's pending appeals at the time of his escape.[71] The Court also stated that the statute promotes the "efficient, dignified operation of the Texas Court of Criminal Appeals."[72] The concern for efficient operation of the courts constituted a new principle underlying the doctrine: promotion of fairness in the adversarial process.[73]

The Supreme Court has firmly settled that the fugitive disentitlement doctrine permissibly strips the right to a decision on the merits of a pending appeal from fugitives while also demarcating the bounds of its application by declining to encompass prior fugitives who later wish to make use of the appellate process.[74] In 1993, in *Ortega-Rodriguez v. United States*, the Supreme Court decided whether the same rationales similarly justified a rule that mandates automatic dismissal of an appeal from a criminal whose flight and recapture occurred post-sentencing but prior to the filing of an appeal.[75] The case signaled a pullback on the previously expanding fugitive disentitlement doctrine.[76] The United States Court of Appeals for the Eleventh Circuit had previously extended the fugitive disentitlement doctrine to a

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[71] 420 U.S. at 541. The Supreme Court found that the statute's creation and treatment of two separate classes (prisoners with different sentences and prisoners returned to prison under different circumstances) was not violative of the Equal Protection Clause. *Id.* at 537–39. The Constitution does not say things that are factually different should be treated legally the same. *Id.* at 538.

[72] *Id.* at 537. The Court relied on *Loyd v. State*, 19 Tex. Ct. App. 137, 155 (1885), which addressed the time period a court should wait for a prisoner to surrender himself in order to rule on his appeal and coming to the conclusion that the courts should not operate on a prisoner's schedule. *Id.*

[73] *See* Stolley, *supra* note 39, at 755 (noting the new justification for the fugitive disentitlement doctrine announced by the Court in *Estelle*); *see also* Ortega-Rodriguez v. United States, 507 U.S. 234, 249 (1993) (relying on *United States v. Holmes*, and acknowledging that when a long period of fugitivity coincides with a pending appeal, the government's case may become improperly prejudiced by the delay in commencement of appellate proceedings). Factors that may negatively affect the government's case after undue delay are the fact that witnesses become harder to locate and memories fade as time passes. Stolley, *supra* note 39, at 755.

[74] *Ortega-Rodriguez*, 507 U.S. at 239–49. The Court examined the long history and development of the doctrine, as rationales were added, and where the court declines to extend application of the doctrine. *See id.*; *see also supra* notes 55–73 and accompanying text; *infra* notes 75–84 and accompanying text.

[75] 507 U.S. at 242. The petitioner was convicted of various narcotics charges. *Id.* at 237. He did not appear for sentencing, was sentenced *in absentia* and was apprehended eleven months after the sentencing date. *Id.* The petitioner's attorney filed a motion to vacate the sentence and for resentencing. *Id.* at 238–39. Only the former was granted and the petitioner subsequently filed an appeal to the denied motion for resentencing. *Id.*

[76] Altman, *supra* note 39, at 1048. The Court's holding halted the expanding application of the doctrine by allowing defendants who escaped from custody prior to filing an appeal to file an appeal once they are recaptured or self-surrender. *Id.*; *see also Ortega-Rodriguez*, 507 U.S. at 251 (holding that when a defendant's flight and recapture both happen prior to filing an appeal, there lacks a sufficient nexus between the defendant's past fugitive status and the appellate process that would warrant dismissal via the fugitive disentitlement doctrine).

petitioner who failed to appear for post-conviction sentencing but was recaptured before filing his appeal.[77] As the Eleventh Circuit offered no explanation for its decision, the Supreme Court engaged in a thorough analysis to make a proper determination on the relevance of the doctrine to this particular class of petitioners.[78] The Court noted that allowing the court of appeals to exercise discretion in dismissing an appeal presupposes a nexus between the petitioner and the appellate process.[79] When a would-be petitioner has yet to file an appeal, their absence from the jurisdiction has zero effect on the appellate process.[80] The enforceability concern is non-existent here because appellate review has not yet been invoked.[81] Similarly, the conduct of the petitioners in *Ortega* could not be said to be demonstrate disrespect for the appeals court because any disrespect evidenced from the defendant's escape would be directed at the district court.[82] Finally, the deterrence theory announced in *Estelle* is not persuasive for application of the doctrine in this case because the defendant remains under control of the dis-

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[77] United States v. Holmes, 680 F.2d 1372, 1374 (11th Cir. 1982) (per curiam), *abrogated by Ortega-Rodriguez*, 507 U.S. 234 (1993). The petitioner was convicted in the United States District Court for the Northern District of Georgia for violation of federal narcotics laws in February 1979. *Id.* at 1373. The sentencing was set for March 29, 1979, but petitioner failed to appear and he was not recaptured until March 6, 1981. *Id.* The court found the reasoning in *Molinaro* to be equally persuasive, whether a convict flees before or after sentencing. *Id.* at 1374. To conclude otherwise would "fly in the face of common sense and sound reason." *Id.*

[78] *See* Ortega-Rodriguez v. United States, 507 U.S. 234, 234 (1993). The Court found the rationales relied upon by the Eleventh Circuit in *Holmes* did not support a rule dismissing an appeal by a fugitive who is recaptured prior to invoking the appellate process. *Id.*

[79] *See id.* at 244 (explaining that rationales for past application of the fugitive disentitlement doctrine assume a sufficient connection between the defendant and the appeals court such that a sanction imposed by the appeals court is justifiable).

[80] *See id.* (stating that when a defendant's flight from the jurisdiction and subsequent recapture occur prior to invocation of the appellate process, where the defendant's fugitive status never coincides with his appeal, the justification for allowing discretionary appellate dismissal becomes attenuated); United States v. Anagnos, 853 F.2d 1, 2 (1st Cir. 1988) (declining to apply the holding in *Holmes* because the former fugitive's misbehavior occurred when he was under the authority of the district court and therefore the consequences should be decided by the district court and not the appellate court); *cf.* United States v. London, 723 F.2d 1538, 1539 (11th Cir. 1984) (stating that a defendant who escapes during his trial but is recaptured after sentencing waives his right to appeal the conviction). Even though the period of fugitivity did not occur during the pendency of the appeal and thus did not delay those proceedings, a defendant who voluntarily leaves the jurisdiction during trial creates a myriad of problems and thus disentitlement is an appropriate sanction. *See London*, 723 F.2d at 1539.

[81] *Cf.* United States v. Gordon, 538 F.2d 914, 915 (dismissing petitioner's pending appeal, post-escape, explaining that a convicted party is unlikely to reappear if an adverse judgment is entered against him).

[82] *See Ortega-Rodriguez*, 507 U.S. at 246. The derisory conduct was aimed at the district court and by the rationales of *Molinaro* and *Ali v. Sims*, 788 F.2d 954 (3d Cir. 1986), that is the appropriate court to impose sanctions. *Id.*

trict court and has not yet created a nexus with the appellate process.[83] As a result, the Court held that the fugitive disentitlement doctrine cannot be expanded to deny the right of appeal to defendants who escaped and were recaptured prior to filing an appeal.[84]

C. Application of the Doctrine to International Parties

The application of the fugitive disentitlement doctrine is aptly understood and applied within U.S. boundaries.[85] Alleged fugitives, however, do not always stay in the United States or they may never have been in the United States.[86] At this juncture, challenges to jurisdiction often arise.[87] Compounding the challenge of jurisdiction, defendants who live in countries that do not have an extradition treaty with the United States have no legal obligation to travel to the United States and submit themselves to its jurisdiction.[88]

International law recognizes the significance of prescribing laws that regulate individual conduct that occurs outside of a country if that conduct

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[83] *See id.*; Katz v. United States, 920 F.2d 610, 613 (9th Cir. 1990), *abrogated by* Lozada v. Deeds, 964 F.2d 956 (9th Cir. 1992) (stating that the disentitlement doctrine is not a deterrent for escape when the defendant is still under the authority of the district court); *cf.* United States v. Holmes, 680 F.2d 1372, 1374 (11th Cir. 1982) (per curiam). Punishing an escapee through appellate dismissal "introduces an element of arbitrariness and irrationality." *Ortega-Rodriguez*, 507 U.S at 248 (citing Estelle v. Dorough, 420 U.S. 534, 544–45 (1975) (Stewart, J., dissenting)). The district court is adequately equipped to impose a punishment that efficaciously supports escape deterrence. *Id.* at 247–48.

[84] Ortega-Rodriguez v. United States, 507 U.S. 234, 251 (1993) (noting that "the defendant's former fugitive status may well lack the kind of connection to the appellate process that would justify an appellate sanction of dismissal" and that a district court is the correct authority to impose a sanction when fugitivity occurs under its authority).

[85] *See id.* at 239–40 (explaining that the doctrine is well accepted among the courts).

[86] *See* Petition, *supra* note 1, at 7. Roger Darin is a Swiss citizen living in Switzerland who has never visited the United States. *Id.*

[87] *See* Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 116 (1983) (stating that the rapid expansion of international business has increased the number of claims in U.S. courts against foreigners and that exercising in personam jurisdiction over these defendants raises special problems). *See generally* Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006) (comparing the different treatments of the personal jurisdiction requirement for domestic and foreign defendants).

[88] *In re* Hijazi, 589 F.3d 401, 407 (7th Cir. 2009). The court remarked that Hijazi was under no legal obligation to travel to the United States and as long as he did not voluntarily enter the country, he could not be forced to appear before the tribunal in the Central District of Illinois for arraignment. *Id.* The United States does not have an extradition agreement with Kuwait and as a result the Kuwaiti government is free to determine what it will do with Hijazi. *See generally Countries with No Extradition Treaty with U.S.*, NBC (July 31, 2015, 1:00 PM), http://www.wsfa.com/story/22665099/countries-with-no-extradition-treaty-with-us [https://perma.cc/Z6HV-KV2X] (listing Kuwait as a country that does not have an extradition treaty with the United States).

is likely to have significant effects within the prescribing country.[89] In order to maintain favorable and peaceable international relations, U.S. courts will interpret the extraterritorial application of facially ambiguous statutes in a manner least likely to impinge upon another country's sovereignty.[90] In so doing, "the courts have created a rebuttable presumption that federal statutes regulate only domestic conduct."[91]

Seeing as federal statutes only regulate domestic conduct, foreign defendants often file a motion to dismiss in addition to jurisdictional challenges.[92] Courts have discretion to hear or not hear a motion to dismiss, similar to their power to forgo hearing appeals, and contextual factors of a case will influence their decision.[93] If, for example, the court determines that the defendant is a fugitive, the underlying facts of the case may demand an appli-

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[89] Amie Cafarelli, Comment, *Transnational Criminal Law—Non-Fugitive Foreign Defendant Entitled to Ruling on Motion to Dismiss Indictment for Lack of Jurisdiction Without Surrendering*—In re Hijazi, 589 F.3d 401 (7th Cir. 2009), 34 SUFFOLK TRANSNAT'L L. REV. 255, 257 (2011); *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 422, 423 (AM. LAW INST. 1987) (listing restrictions on application of laws based on jurisdiction). International law curbs a country's authority to control conduct that takes place outside the country's confines. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(1)(c).

[90] EEOC v. Arabian Oil Co., 499 U.S. 244, 248 (1991). The Court noted that, absent clear congressional intent to the contrary, it is a longstanding principal that American legislation is meant only to apply within the United States. *Id.* The Court assumes Congress passes legislation following this canon of statutory interpretation. *Id.* This principle serves a compelling interest, which is to avoid conflict between the laws of the Unites States and the laws of foreign nations, which could lead to international tumult. *Id.*

[91] Cafarelli, *supra* note 89, at 257 n.17. This presumption is only rebuttable upon a finding that Congress explicitly expressed an intent that the statute be applicable outside the United States. *Id.* The Supreme Court stated in *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 444 (2007), that the controlling presumption on application of U.S. law is that it governs domestic conduct. *See id.*

[92] *See Hijazi*, 589 F.3d at 405 (explaining that Hijazi filed a motion to dismiss after his initial indictment arguing that the statutes he is charged with violating cannot apply to "the conduct of foreign nationals outside the boundaries of the United States."); Petition, *supra* note 1, at 33 (stating that Darin filed a motion to dismiss on October 2, 2014, based on an alleged insufficient nexus between himself and the United States, which is required under the Due Process Clause); Ugo Mattei & Jeffrey Lena, *U.S. Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications*, 24 HASTINGS INT'L & COMP. L. REV. 381, 388 (2001) (explaining that defendants consistently file motions to dismiss in these matters [Holocaust claims] asserting that American courts lack jurisdiction to hear the claim or should decline to exercise jurisdiction).

[93] *See* United States v. Sharpe, 470 U.S. 675, 681 (1985) (stating that the invocation of the fugitive disentitlement doctrine is based on equitable considerations); Eisler v. United States, 338 U.S. 189, 194 (1949) (Murphy, J., dissenting) (stating that consideration of the interests at issue must be given when exercising discretion in deciding whether to apply the fugitive disentitlement doctrine); United States v. Cauwenberghe, 934 F.2d 1048, 1055 (9th Cir. 1991) (weighing the fact that petitioner left the jurisdiction without obtaining necessary permission with the fact that he does not appear to be "flouting the judicial process" and is not attempting to gain an advantage over the court in deciding whether to apply the fugitive disentitlement doctrine); Hussein v. I.N.S., 817 F.2d 63, 63 (9th Cir. 1986) (Norris, J., concurring) (explaining that the court has exercised discretionary authority in denying an appeal and that in cases of prisoner escape from federal custody there is no per se requirement of dismissal).

cation of the fugitive disentitlement doctrine.[94] This means the court is likely justified in refusing to issue a ruling on the defendant's motion to dismiss until they surrender themselves to the jurisdiction, despite no legal obligation to do so.[95] This forces the defendant into a catch-22.[96]

The fugitive disentitlement doctrine offers foreign defendants two undesirable options.[97] If the defendant chooses not to travel to the United States, he will not be able to maintain any defenses against the charge(s).[98] It is very likely that INTERPOL will set up a "red notice" so that if the defendant leaves his home country, he can be provisionally arrested, effectively confining the defendant to his home country.[99] In addition, the charges

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[94] *Compare* Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (stating that an individual who escapes from constraints placed on him by the criminal justice system is unequivocally a fugitive and thus should be barred from asking the court to review his case), *with* Degen v. United States, 517 U.S. 820, 829 (1996), *superseded on other grounds by statute*, Civil Forfeiture Reform Act of 2000, Pub. L. No 106-185, 114 Stat. 202 (codified at 18 U.S.C. §§ 983, 985 (2012) and 28 U.S.C. §§ 2466–2467) (concluding that the doctrine cannot be used to disentitle an individual in a civil forfeiture case under the auspices of him failing to appear in the United States to confront a different set of charges).

[95] Petition, *supra* note 1, at 33. This is the petitioner's main concern. *Id.* at 34. If all foreign defendants are automatically deemed fugitives and the courts are permitted to apply the disentitlement doctrine to all fugitives, regardless of whether doing so will serve the underlying purposes, there will be no check on the government's decision on how far to extend application of U.S. law internationally. *Id.*

[96] *See id.* at 34 (detailing the factors the foreign defendant must consider in deciding whether to appear in the United States or not). What this amounts to is the following: The U.S. government can charge any foreign citizen for any foreign conduct aimed at the United States, so long as it violates a U.S. statute. *Id.* The constitutionality of the charge will remain safe from any scrutiny until the defendant willingly travels to the United States and submits to its jurisdiction. *Id.* at 33–34. Most defendants in this predicament are unlikely to travel to the United States, because a basis for their claim is that it would be "fundamentally unfair to force them to appear in this country." *Id.*

[97] *See* Robert E. Connolly & Masayuki Atsumi, *Defending the Foreign "Fugitive" Against the Fugitive Disentitlement Doctrine (Part 1*), ANTITRUSTCONNECT BLOG (Mar. 21, 2017), www.antitrustconnect.com/2017/03/21/defending-the-foreign-fugitive-against-the-fugitive-disentitlement-doctrine [https://perma.cc/8X4R-TP5R] (detailing the consequences of either fighting the case from abroad or appearing in the United States). The foreign defendant faces unique consequences that a domestic defendant does not. *Id.*

[98] Kaitlyn Golden, *The "Fugitive Disentitlement" Doctrine Warrants a Close Look by the United States Supreme Court*, LEXOLOGY (Nov. 5, 2014), www.lexology.com/library/detail.aspx?g=03f2a359-0cde-4af5-a2ea-70a3dcc2fbab [http://perma.cc/7JK9-NDXT] (discussing a recent case where the district court refused to allow the defendant to put on a defense while remaining in his home country thereby forcing the defendant to remain in an insecure situation for the foreseeable future). United States District Judge James Selna of the Central District of California refused to hear defenses of Han Yong Kim, a South Korean citizen living and working in Seoul, who had been charged with foreign bribery under the FCPA. *Id.* Han Yong Kim maintains that he has not fled from the United States but has simply made the decision not to uproot his life to appear in the United States to face charges he does not believe are accurate. *Id.*

[99] Golden, *supra* note 98 (explaining that issuance of an INTERPOL Red Notice essentially imposes an international travel ban on the flagged individual); *see Red Notices,* INTERPOL, https://www.interpol.int/INTERPOL-expertise/Notices/Red-Notices [http://perma.cc/3NRB-LUTF]. "A

and pending indictment will continue to follow the defendant, likely affecting his ability to get work and his personal reputation.[100]

If the defendant chooses to travel to the United States and is subsequently arrested, there is a strong likelihood that he would be denied bail because he poses a legitimate flight risk.[101] In the off-chance the court grants the defendant bail, he may be required to remain in the United States until resolution of the case, taking him away from friends and family and potentially forcing him to give up his job back home.[102] The defendant must proceed to trial unless a plea bargain is arranged.[103] In the case of a plea bargain or conviction, the defendant would be subject to serving a prison sentence in the United States.[104]

District Courts and Appellate Courts are divided on the application of the fugitive disentitlement doctrine to non-U.S. citizens.[105] The United States Court of Appeals for the Seventh Circuit and the United States District Court for the Northern District of Georgia have held that a non-U.S. citizen is not a fugitive and the doctrine is not applicable unless the individ-

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Red Notice is a request to locate and provisionally arrest an individual pending extradition. It is issued by the General Secretariat at the request of a member country or an international tribunal based on a valid arrest warrant." INTERPOL, *supra*. Once the red notice has undergone a compliance check, it is published and it alerts police around the world that this individual is wanted for prosecution by a member country. *Id.* The Red Notice is particularly potent because it grants "high international visibility to cases" and by virtue of being logged into the Red Notice system, criminals/suspects are "flagged to border officials," making international travel nearly impossible. *Id.*

[100] Golden, *supra* note 98; Rebecca Shaffer, *INTERPOL Red Notices: Towards Due Process and Human Rights Protection*, GEO. J. INT'L AFF. (Dec. 9 2013), https://www.georgetownjournalofinternationalaffairs.org/online-edition/interpol-red-notices-towards-due-process-and-human-rights-protection-by-rebecca-shaeffer?rq=Interpol [https://perma.cc/44S9-NDJY] (explaining that an INTERPOL red notice, even when it does not result in an arrest, creates immigration and employment issues and is likely to affect the individual's reputation and financial interests). Frequently, INTERPOL notices are not thoroughly vetted for legitimacy before they go live, amounting to significant punishment without a trial on the merits. *See* Shafer, *supra*; Ethan E. Litwin, et al., *The Third Way: The Constitutional Imperative of Allowing Foreign Nationals to Seek to Dismiss Indictments Prior to Arraignment*, CONCURRENCES REV., no. 2, 2016, at 3. https://www.concurrences.com/en/review/issues/No-2-2016/legal-practice/the-third-way-the-constitutional-imperative-of-allowing-foreign-nationals-to-79482 [http://perma.cc/QWH6-KHFL].

[101] Golden, *supra* note 98. If the defendant is denied bail, he will be held in a prison cell and will be forced to defend himself from there. *Id.*

[102] *Id.* Because cases of this nature are not quickly resolved, the defendant will likely have to remain in the United States for a number of years which will likely strain their personal and professional interests back home. *Id.*

[103] *See* Connolly *supra* note 97 (detailing the series of events that happens once the defendant sets foot in the United States). Preparing for trial is often expensive and can take years. *Id.* Many defendants cannot afford to remain in the United States for the pre-trial period so often agree to plead guilty under a plea agreement. *Id.*

[104] Golden, *supra* note 98.

[105] *See In re* Han Yong Kim, 571 Fed. App'x 556, 557 (9th Cir. 2014) (noting the existence of a circuit split on the vital question of whether fugitive disentitlement can be decided based on constructive flight of a defendant); *infra* notes 106–108 and accompanying text.

ual actually fled the United States in order to avoid prosecution.[106] Other courts, including the United States Court of Appeals for the Sixth and Eleventh Circuits and the United States District Court for the Southern District of Texas accept the "constructive flight" theory announced in *United States. v. Catino*.[107] This theory imposes fugitive status on a defendant who has not actually fled the jurisdiction but whose "intent to flee from prosecution may be inferred from a failure to surrender to authorities once he learns that charges against him are pending."[108] The lack of uniformity in application of the fugitive disentitlement doctrine to non-U.S. citizen defendants raises important issues of fairness for both the defendant and the U.S. government.[109] Given that application of the doctrine has significant real-life consequences for individual defendants and for relations between the United States and other nations, a uniform application must be devised and implemented.[110]

II. SECOND CIRCUIT'S APPLICATION OF THE FUGITIVE DISENTITLEMENT DOCTRINE IN *UNITED STATES V. DARIN* SERVES NONE OF THE UNDERLYING RATIONALES FOR THE DOCTRINE

After being charged with violating 18 U.S.C. §§ 1343 and 1349, federal law that makes it illegal to transmit information relating to a scheme to defraud, Darin filed a motion to dismiss.[111] The case made its way to the United States Court of Appeals for the Second Circuit, which upheld the

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[106] *See In re* Hijazi, 589 F.3d 401, 409–10 (7th Cir. 2009) (concluding that a Lebanese citizen residing in Kuwait should be allowed to maintain a defense without traveling to the United States because invoking the doctrine would not serve any of its purposes); United States v. Pub. Warehousing Co., 2011 WL 1126333, *3 (N.D. Ga. Mar. 28, 2011) (allowing a Kuwaiti company to dispute service of a criminal complaint without having to travel to the United States, which would otherwise vitiate the service rules).

[107] *In re* Prevot, 59 F.3d 556, 557 (6th Cir. 1995); Schuster v. United States, 765 F.2d 1047, 1050–51 (11th Cir. 1985); United States v. Oliveri, 190 F. Supp. 2d 933, 936 (S.D. Tex. 2001).

[108] United States v. Catino, 735 F.2d 718, 724 (2d Cir. 1984). The court announced that the doctrine must apply to those who *actually* flee once they are on notice that charges have been filed against them as well as to those individuals who are outside of the United States who know of the charges but refuse to submit to U.S. jurisdiction. *Id.*

[109] *See* Golden, *supra* note 98 (discussing the various issues of fairness that pertain to both sides of the controversy). The author discusses whether it is fair to call someone a fugitive if they were never in the United States or had left the country long before any charges were filed. *Id.* By making use of the constructive flight theory, which is a legal fiction, do courts lose legitimacy by using that to secure a beneficial outcome for the government although there is no practical basis in fact for that outcome? *Id.* Is it fair to force the court to rule on a motion when an adverse ruling will not truly bind the party affected by the decision? *Id.* The way these questions are decided end up having very real-life consequences for both the foreign defendant and the U.S. government. *Id.*

[110] United States v. Hayes (*Hayes II*), 118 F. Supp. 3d 620, 622 (S.D.N.Y. 2015) (No. 12 MAG 3229). The motion stated that the complaint failed to establish a competent nexus between Darin and the United States in compliance with Due Process under the Fifth Amendment. *Id.*

[111] Memorandum of Law in Support of Defendant Roger Darin's Motion to Dismiss the Criminal Complaint, *Hayes II*, 118 F. Supp. 3d 620 [hereinafter Defendant's Memorandum].

district court's decision finding Darin to be a fugitive and refusing to review the merits of his motion to dismiss.[112] This decision stands in stark contrast to the 2009 decision of the United States Court of Appeals for the Seventh Circuit in *In re Hijzai*.[113] The Seventh Circuit's analysis of the doctrine and final holding are proper considering the purposes behind the fugitive disentitlement doctrine, and the Supreme Court was incorrect in denying certiorari to Darin.[114] Section A of this Part reviews the procedural history of *United States v. Darin*, predating the filing of the petition for certiorari with the United States Supreme Court.[115] Section B sets out the facts and procedure of *In re Hijazi*, highlighting the conspicuous similarity of facts with *Darin*.[116] Section C explains why the Seventh Circuit, rather than the Second Circuit, appropriately employs the doctrine.[117]

A. Procedural Posture of United States v. Darin

In support of his motion to dismiss, Darin relied on both procedural and substantive arguments.[118] The United States opposed the motion, relying on the fugitive disentitlement doctrine.[119] A magistrate judge for the United States District for the Southern District of New York rejected the United States' insistence that the fugitive disentitlement doctrine precluded

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[112] Petition, *supra* note 1, at 9–13. The magistrate judge did not find that Darin was a fugitive for purposes of invoking the fugitive disentitlement doctrine but denied the motion to dismiss. *Id.* at 10. The district court found that Darin was a fugitive for purposes of the doctrine, finding that all the purposes underlying the doctrine were present and thus supported disentitlement. *Id.* at 12. The court also explained why it would deny the motion to dismiss, if it were to reach the merits. *Id.* The Second Circuit dismissed Darin's appeal and denied mandamus relief and subsequently denied panel and en banc reconsideration. *Id.* at 13.

[113] *Compare In re* Hijazi, 589 F.3d 401, 414 (7th Cir. 2009) (finding that Hijazi risks a serious enough threat of prosecution in the United States if he loses his challenge to the indictment sufficient to satisfy any concerns of mutuality and that disentitlement is "too blunt an instrument" to punish a defendant for his absence so mandamus relief must be granted), *with* Appellate Order, *supra* note 12, at 2 (holding that Darin has not proven extraordinary circumstances that warrant mandamus relief).

[114] *See infra* notes 118–163 and accompanying text.

[115] *See infra* notes 118–130 and accompanying text.

[116] *See infra* notes 131–144 and accompanying text.

[117] *See infra* notes 145–163 and accompanying text.

[118] United States v. Hayes, 99 F. Supp. 3d 409, 412 (S.D.N.Y. 2015). Darin maintained that the complaint violated his Fifth Amendment Due Process rights because as "a foreign national [charged] with conspiring to manipulate a foreign financial benchmark, for a foreign currency, while working for a foreign bank, in a foreign country" a sufficient nexus did not exist between himself and the United States to support prosecution in the country. *Id.* (relying on Defendant's Memorandum, *supra* note 111 at 1–2). He also argued that his prosecution under the circumstances contravened the presumption against extraterritorial application of U.S. law. *Id.*

[119] *Id.* at 414–15. The United States contended that Darin was a fugitive because he did not surrender himself in accordance with the arrest warrant. *Id*. at 417. The government also claimed that the four factors supporting application of the doctrine favored disentitlement in this case. *Id.* at 412–13.

the court from reviewing the merits of Darin's motion to dismiss.[120] The judge found that Darin was not a fugitive and even if he were, the rationales supporting application of the doctrine would not be applicable in this case.[121] The district court judge concurrently reviewed the merits and ultimately denied the motion to dismiss, finding that a sufficient nexus existed between Darin and the United States for purposes of due process.[122]

Subsequently, the United States District Court for the Southern District of New York determined that Darin was a fugitive and that the factors buttressing use of the doctrine were present in this case.[123] The court determined that (1) a decision on Darin's motion will not be enforceable against him as long as he remains in Switzerland, (2) that he is flouting the judicial process by remaining in Switzerland, (3) that similarly situated defendants would be encouraged to remain outside the United States, and (4) that his continued absence from the United States prejudices the government.[124] Additionally, the court noted that it would affirm the magistrate judge's denial of the motion to dismiss if it had, in the alternative, found that Darin

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[120] *Id.* at 414–18 (detailing the magistrate judge's reasoning for determining that Darin is not a fugitive and thus the fugitive disentitlement doctrine should not be applied). The magistrate judge relied on cases that limit the definition of "fugitive" to individuals who are present in the requisite jurisdiction at the time of the alleged offense. *Id.* at 415–16. He expressed apprehension that Darin was a fugitive under this definition because nothing in the record indicated that he had ever been to the United States or was attempting to conceal his location from U.S. authorities. *Id.*

[121] *Id.* at 416–18. The magistrate judge found that a decision to endorse the complaint and maintain the arrest warrant was enforceable against Darin by virtue of the limitations they place on his ability to travel, employment prospects and personal interests. *See id.* at 416–17. The judge also found unpersuasive the government's argument that Darin flouted the judicial process by refusing to appear in court because the refusal to appear in court "is the *sine qua non* of fugitive status." *Id*. at 417. As a result, he found the government had not explained what actions constitute flouting of the judicial process and that absent any facts indicating this disrespect, the court could not conclude that Darin is culpable for doing so. *Id*. The judge also found the government's argument that ruling on Darin's motion to dismiss would encourage similarly situated defendants to flee the jurisdiction equally unpersuasive stating that again, the government put forward no facts to suggest that other defendants or potential defendants in LIBOR cases would be inspired by Darin's conduct in the future. *Id*. Finally, the judge found that no prejudice would befall the government if the court ruled on the motion to dismiss. *Id*. 417–18.

[122] United States v. Hayes (*Hayes II*), 118 F. Supp. 3d 620, 628–29 (S.D.N.Y. 2015) (No. 12 MAG 3229) (describing why a sufficient nexus exists between Darin and the United States, allowing him to be rightfully prosecuted in the United States). Judge Crotty explained that at this stage, a nexus inquiry is not necessary to determine whether Due Process has been provided but merely requires a review of "fundamental fairness of the criminal complaint." *Id.* He also held that Darin's argument that the allegations connecting him to the United States must be reviewed outside the purview of the allegations against his alleged co-conspirator, Hayes, was groundless. *Id*. at 629.

[123] *Hayes II*, 118 F. Supp. 3d at 624–27. The court applied the constructive flight definition to the term fugitive, explaining that the court should not be "bound by the semantics that limit fugitive status to fleeing or failing to return" when the defendant is a foreign national living abroad and whose alleged criminal conduct took place abroad. *Id.* at 626.

[124] *Id.* at 626–27.

was not a fugitive.[125] Darin filed a timely appeal to the Second Circuit in conjunction with a petition for mandamus relief.[126] The Second Circuit dismissed the appeal and denied mandamus relief.[127] Subsequently, the Second Circuit denied both panel and en banc reconsideration.[128] In October 2016, Darin filed a petition for a writ of certiorari to the United States Supreme Court.[129] On March 6, 2017, the Supreme Court denied the petition.[130]

B. In re Hijazi*: A Strikingly Similar Case with an Opposite Outcome*

Ali Hijazi is a Lebanese citizen residing in Kuwait who was indicted in 2005 on fraud-related charges in the United States District Court for the Central District of Illinois.[131] The record indicates that Hijazi had only been

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[125] *Id.* at 628–29. The court held that a nexus inquiry was not necessary at this stage and that at this time, Fifth Amendment protections merely required "fundamental fairness of the criminal complaint." *Id.* at 628 (relying on United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011)). The complaint alleged that Darin conspired to manipulate LIBOR interest rates using United States wires, therefore prosecution in the United States would not be fundamentally unfair. *Id.* at 628–29. Even under a sufficient nexus test, the acts of his alleged co-conspirator can be imparted on Darin, under general conspiracy principles, which would then satisfy the Fifth Amendment nexus requirement. *Id*. at 629. The reality is that today many crimes against the United States and American citizens happen outside of the country and the definition of fugitive should take into consideration the realities that go along with globalization. *Id.* The court also held that a ruling on the merits of Darin's motion lacked mutuality, that Darin's absence in the jurisdiction was sufficient to conclude that he was flouting the judicial process, that ruling on the motion would encourage other similarly situated defendants to evade an arrest warrant, by remaining in their country while invoking protections of the Fifth Amendment and that the government would be prejudiced by Darin's refusal to submit to the jurisdiction. *Id.* at 8–10.

[126] Petition, *supra* note 1, at 12. The United States filed a motion to have the appeal dismissed for lack of appellate jurisdiction, citing the collateral order doctrine. *Id.* Darin opposed the motion, saying the order was immediately appealable under the doctrine and conjointly filed his petition for mandamus. *Id.* at 12–13. The collateral order doctrine allows appellate courts to hear "appeals from interlocutory rulings . . . so long as those rulings conclusively decide an issue separate from the merits of the case and would be effectively unreviewable after final judgment." *Collateral Order Doctrine*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/collateral_order_doctrine [http://perma.cc/2WBZ-2AXB].

[127] Appellate Order, *supra* note 12, at 2.

[128] United States v. Hayes at 1, No. 15-2597 (2d Cir. June 28, 2016).

[129] Petition, *supra* note 1, at 35.

[130] *Proceedings and Orders in* Darin v. United States, SCOTUSBLOG, www.scotusblog.com/case-files/cases/darin-v-united-states/ [http://perma.cc/D8NZ-DNEQ].

[131] *In re* Hijazi, 589 F.3d 401, 403 (7th Cir. 2009). In 2001, the U.S. Army contracted with Kellogg Brown & Root (KBR) to provide goods and services to military locations worldwide, including in Kuwait. *Id.* at 404. KBR was in charge of soliciting bids for military services, including those needed at the Kuwaiti airport. *Id.* Jeff Mazon, the procurement manager stationed in Kuwait, was responsible for hiring subcontractors to perform under KBR's contract. *Id.* Hijazi, on behalf of his company, was the winning bidder for the contract. *Id.* After only two bidders replied, one being Hijazi on behalf of his company, Mazon increased prices more than three-fold and awarded the contract to Hijazi's company, LaNouvelle General Trading & Contracting Co. *Id.* The government contended that Mazon did this with the understanding that Hijazi would "reward" him for his efforts and a subcontract was executed in Kuwait. *Id.* Mazon sent emails regarding the

to the United States once, for a brief visit on an unrelated purpose in 1993.[132] The United States did not (and currently does not) have an extradition treaty with Kuwait and the Kuwaiti government informed the United States that it had no intention of voluntarily turning over Hijazi to American authorities.[133] After the first indictment, Hijazi filed a motion to dismiss, citing inappropriate extraterritorial application of U.S. law.[134] A magistrate judge denied the motion to dismiss, concluding that Hijazi was a fugitive for purposes of the fugitive disentitlement doctrine and thus was not entitled to have his motion considered.[135] The district court, on de novo review, was not as convinced of Hijazi's fugitive status nor that the doctrine barred the court from hearing his motion.[136] The court decided not to enter a judgment on Hijazi's motion to dismiss until he was arraigned.[137] Hijazi subsequently filed a second motion to dismiss, which was also held in abeyance, and in August 2008 he filed a writ of mandamus in the Seventh Circuit.[138]

Notwithstanding that both defendants were foreign nationals whose alleged conduct occurred outside the United States and who were not otherwise subject to U.S. jurisdiction, the two circuits reached opposite conclusions regarding the respective petitioners' fugitive status under the fugitive disentitlement doctrine.[139] The Seventh Circuit in *Hijazi* declined to impose

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subcontract managers (who were located in the United States) between March to August 2003, and LaNouvelle submitted allegedly inflated invoices to KBR, who paid them and then billed the United States for reimbursement. *Id.* The U.S. Army complied with the reimbursements using checks and wire transfers. *Id.* In September 2003, Hijazi paid Mazon $1 million and signed a promissory note, in order to mask the "reward" payment as a loan. *Id.* Hijazi then sent an email to Mazon, whose email account was based in the United States, stating the entire sum was his money alone. *Id.* Mazon was in Greece at the time he opened the email but when he returned to the United States he unsuccessfully attempted to open a bank account in order to deposit the $1 million. *Id.* Hijazi emailed Mazon again, to an allegedly U.S. based email account, with instructions on how to successfully deposit the money. *Id.* Hijazi sent a third email to Mazon cautioning him to be conscientious of what he said to "ex-friends in Kuwait" and the government alleged that Mazon was back in the United States when he received this third email. *Id.* Both Mazon and Hijazi were indicted in the Central District of Illinois. *Id.* All of the alleged criminal conduct occurred in Kuwait and not the United States. *Id.*

[132] *Id.* at 412.

[133] *Id.* at 403.

[134] *Id.* at 405.

[135] *Id.* The judge cited to the doctrine announced in *Molinaro v. New Jersey* and expressed primary concern over the issue of mutuality. 396 U.S. 365, 366 (1970); *Hijazi*, 589 F.3d at 405.

[136] *Hijazi*, 589 F.3d at 406. The court noted that "Hijazi has never been convicted of a crime, Hijazi has never been physically present within the jurisdiction of this Court, and he has submitted to Kuwaiti authorities." *Id.* Yet the court considered the same mutuality concern announced by the magistrate judge. *Id.*

[137] *Id.* The court noted that Hijazi would be entitled to a ruling on the merits of his motion if and when he decided to appear in the jurisdiction. *Id.*

[138] *Id.*

[139] Appellate Order, *supra* note 12, at 1–2; *In re* Hijazi, 589 F.3d 401, 411 (7th Cir. 2009). The Seventh Circuit affirmed the district court's finding that the fugitive disentitlement doctrine

fugitive status and thus had no need to apply the fugitive disentitlement doctrine.[140] Relying on the fact that Hijazi did not actually flee the jurisdiction, the court abstained from entertaining the "constructive flight" definition of "flee" and found that mutuality was not a concern.[141] In contrast, the Second Circuit in *Darin* found mutuality to be of concern, that Darin was flouting the judicial process and that ruling on Darin's motion would embolden similar defendants to remain outside of the United States.[142] Differing interpretations of the mutuality concern appear to be driving the factor dividing the two circuits.[143] When the circuit courts issue decisions in two cases that are so factually similar, such as *Hijazi* and *Darin*, the Supreme Court should resolve the conflict and establish a single standard, thereby promoting predictability of outcomes in future cases.[144]

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did not apply to Hijazi because he is not a fugitive for purposes of invoking the doctrine. *Hijazi*, 589 F.3d at 411. The court also found that mutuality was not lacking, another reason to disfavor invocation of the doctrine. *Id.* at 413. The Second Circuit granted the government's motion to dismiss for lack of appellate jurisdiction and denied Darin mandamus relief. Appellate Order, *supra* note 12, at 1–2. In so doing, the court affirmed the district court's finding that Darin was a fugitive and that he is not able to challenge the complaint until he submits to the court's jurisdiction. United States v. Hayes (*Hayes II*), 118 F. Supp. 3d 620, 629 (S.D.N.Y. 2015) (No. 12 MAG 3229).

[140] *Hijazi*, 589 F.3d at 412. The court determined that, excepting the brief visit to the United States once, sixteen years prior the filing of the complaint, Hijazi had never been in the United States, never been in Illinois and did not own any property in the United States. *Id.* In light of these facts, it would be improper to say that Hijazi had fled the jurisdiction or fled from restraints placed upon him. *Id.* As a result, the doctrine did not "directly" apply to him. *Id.*

[141] *See id.* at 412–13 (detailing Hijazi's past presence in the United States, which amounted to a brief visit sixteen years ago on unrelated affairs, which clearly demonstrate he did not flee from the jurisdiction nor was he attempting to evade any restraints placed on him). As a result, he is not a fugitive and the doctrine was not an appropriate mechanism to rely on in refraining from hearing his motion. *Id.* The Seventh Circuit found that mutuality was not a concern because, unlike the district court, they took into consideration the real-life consequences that would befall Hijazi if he were to lose on his motion to dismiss. *Id.*

[142] *Hayes II*, 118 F. Supp. 3d at 626–27.

[143] *See Hijazi,* 589 F.3d at 413 (finding that Hijazi's motion did not lack mutuality because he would suffer various consequences if he were to lose on his motion to dismiss); *Hayes II*, 118 F. Supp. 3d at 626 (declaring that Darin's motion to dismiss lacks mutuality because there is no mechanism for the court to enforce an adverse judgment against him until he submits to U.S. jurisdiction). The Seventh Circuit viewed mutuality concerns in a broader context than did the Second Circuit. *Hijazi*, 589 F.3d at 413 (stating that the district court did not fully appreciate the extent of the consequences that would befall Hijazi if he lost on his motion to dismiss). Just because Hijazi would be able to remain in Kuwait where the decision to deny his motion to dismiss would seem to have no practical effect does not negate the real-life effects of having criminal charges pending in a foreign country. *See id.* In adopting the district court order, the Second Circuit believed that the burdens imposed by disentitlement, such as restricted ability to travel, tarnished reputation and difficulty in obtaining/retaining employment, are common to all fugitives and cannot be seen to outweigh the benefits bestowed on the defendant by being able to remain free in Switzerland. *Hayes II*, 118 F. Supp. 3d at 626–27.

[144] *See* Golden, *supra* note 98 (noting that application of the fugitive disentitlement doctrine involves an issue of integral fairness to both foreign defendants and the U.S. government and

C. Does a Narrow or Broad Interpretation of Mutuality Better Serve the Purposes of the Fugitive Disentitlement Doctrine?

Although several rationales underlie the fugitive disentitlement doctrine, mutuality of enforcement is the pivotal concern when a defendant legally remains outside of U.S. jurisdiction.[145] Mutuality refers to the ability of a court's pronouncement to be effective on a party.[146] For purposes of the doctrine, mutuality favors disentitlement when a favorable outcome benefits the defendant and an unfavorable decision will not affect the defendant.[147] The Second Circuit in *Darin* considered a comparatively narrow set of consequences that would befall Darin if his motion were not reviewed, in contrast to those assessed by the Seventh Circuit in *Hijazi*.[148] The Seventh Circuit's broader analysis of mutuality in *Hijazi* is a better interpretation of the doctrine's essential purposes and thus is the correct standard because it accounts for the real life consequences for a foreign defendant who has pending criminal charges in the United States.[149]

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therefore warrants Supreme Court review). The doctrine is one of equity, i.e. one foreign defendant should not be treated differently than another foreign defendant based solely on which court they are charged in. *Id.*

[145] *See Enforcement of Judgments*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/legal-considerations/judicial/enforcement-of-judgments.html [http://perma.cc/EH45-UNH6] (explaining how enforcement of foreign judgments works). Because recognition and enforcement of foreign judgments is largely governed by local domestic law of a country, a defendant who is not present in the country where he has been charged or convicted is unlikely to be directly constrained by the consequences of the charge or conviction. *Id.*; *see*, *e.g.*, Bonahan v. Nebraska, 125. U.S. 692, 692 (1887) (refusing to rule on defendant's motion because he was not in custody and therefore not bound by any pronouncement); Smith v. United States, 94 U.S. 97, 97 (1876) (focusing on the importance of enforceability in deciding whether to rule on defendant's motion). The Supreme Court has continuously relied on the enforceability rationale when choosing to invoke the doctrine. *See* Stolley, *supra* note 39, at 754.

[146] *See supra* note 145 and accompanying text (defining mutuality).

[147] United States v. Hayes (*Hayes II*), 118 F. Supp. 3d 620, 626 (S.D.N.Y. 2015) (No. 12 MAG 3229).

[148] *See In re* Hijazi, 589 F.3d 401, 413 (7th Cir. 2009) (noting that the district court reviewed the mutuality concern too narrowly and as a result, granted mandamus relief); Petition, *supra* note 1, at 31 (stating that the Second Circuit's interpretation and application of the fugitive disentitlement doctrine is in conflict with Supreme Court precedent on the issue). Counsel explained that the Second Circuit's decision to ignore the practical effects of disentitlement and only review the legal and procedural effects on Darin does not further the goal of enforceability. Petition, *supra* note 1, at 31. Additionally, Darin is not defying any legal order by remaining in Switzerland and thus cannot be said to be flouting the juridical process. *Id.* As noted in *Degen* and *Ortega-Rodriguez*, disentitling Darin would not serve any remaining rationales underlying the doctrine. *Id.*; *see* Degen v. United States, 517 U.S. 820, 824–25 (1996), *superseded on other grounds by statute*, Civil Forfeiture Reform Act of 2000, Pub. L. No 106-185, 114 Stat. 202 (codified at 18 U.S.C. §§ 983, 985 (2012) and 28 U.S.C. §§ 2466–2467); Ortega-Rodriguez v. United States, 507 U.S. 234, 239–42 (1993).

[149] *See Hijazi*, 589 F.3d at 413 (listing the real-life consequences Hijazi would face whether his motion was denied or held in abeyance until he appeared in the United States). The Seventh Circuit critiqued the district court's overly narrow conception of mutuality when it explained that

The Second Circuit's pronouncement that reviewing Darin's motion will either secure him a dismissal or bind him to an unenforceable judgment with no real-life ramifications is overly simplistic because it ignores the realities of being charged with a crime.[150] When the prosecuting party is concerned with punishing an individual for violating the law, binding the defendant to an adverse judgment is not the only way in which punishment is accomplished.[151] Alternative punishments traditionally include a prison sentence, restitution or probation.[152] If the court were to deny Darin's motion to dismiss, it would restrict his ability to travel and his ability to maintain employment, among other repercussions.[153] Additionally, Switzerland could at any time decide to cooperate with the U.S. government and voluntarily extradite him, forcing him to confront the charges.[154] These are not

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Hijazi had little to lose from an adverse ruling on the merits of his motion. *Id.* Beyond disagreeing with the district court's limited concept of what constitutes mutuality, the Seventh Circuit relied on the Supreme Court's decision in *Degen*, which held that the fugitive disentitlement doctrine may not be applied on the sole basis of "a perceived lack of mutuality." *Id.* at 414; *see* Petition, *supra* note 1, at 33 (describing that the Seventh Circuit's approach to the fugitive disentitlement doctrine in this context is better because it does not reach beyond its means and uses the doctrine properly, unlike the Second Circuit).

[150] *See* Petition, *supra* note 1, at 31–33. Counsel relied on the similar factual scenarios between Darin's situation and *Hijazi* and explained that the similar constraints placed on Hijazi, prior to the granting of mandamus relief, of pending criminal charges in the United States would constrain Darin in the same manner. *Id.*

[151] *See id.* (espousing that real-life consequences, such as inability to travel, loss of job, freezing of bank accounts, are punishments that Darin would bear until he submitted to U.S. jurisdiction to obtain a determinative ruling on his motion to dismiss). By choosing not to rule on the merits of Darin's motion to dismiss, Darin cannot possibly be bound by an adverse judgment but he is nonetheless punished by the reality of being tied to pending criminal charges in the United States. *Id.* Although this is likely not what the government had in mind in terms of punishing Darin's alleged extraterritorial criminal conduct, to say his situation does not amount to a punishment ignores the reality. *Id.*

[152] Dennis Massino, *Forms of Punishment in the Criminal Justice System*, LEGAL BEAGLE, https://legalbeagle.com/8400916-forms-punishment-criminal-justice-system.html [http://perma.cc/34A7-TLRS].

[153] *See supra* notes 151–152 and accompanying text. *See generally Hijazi*, 589 F.3d 401 (listing various consequences that are likely to affect a foreign defendant if he does not travel to the United States to answer charges against him); Petition, *supra* note 1, at 30–34 (detailing the results of applying the fugitive disentitlement doctrine to defendants similarly situated to Darin); *Golden*, *supra* note 98; *Shaffer*, *supra* note 100.

[154] MICHAEL J. GARCIA & CHRIS DOYLE, CONG. RESEARCH SERV., 98-958, EXTRADITION TO AND FROM THE UNITED STATES: OVERVIEW OF THE LAW AND RECENT TREATIES 41 (2010). The United States has had an extradition treaty with Switzerland since September 10, 1997. *Id.* Despite the existence of an extradition treaty, a country has a right to refuse to extradite its own nationals, which is probably the single largest impediment in extradition proceedings. *Id.* at 13. Switzerland has also been known to refuse U.S. extradition requests in the past. Nick Giambruno, *The Best Countries for Your Escape Plan*, INT'L MAN http://www.internationalman.com/articles/which-countries-can-the-nsa-whistleblower-escape-to [http://perma.cc/K983-5JGP]. Despite Switzerland's history of declining to extradite nationals to the United States, it can choose at any time to

insignificant burdens; they are real life consequences that Darin would have to bear indefinitely.[155] The Second Circuit, unlike the Seventh Circuit, however, has chosen to restrict itself to viewing mutuality only in terms of legally binding the defendant to a final judgment on the merits.[156]

In restricting its view of mutuality in this way, the Second Circuit is not furthering the underlying goals of labeling a defendant a fugitive for purposes of disentitling him of his rights to use the judicial system.[157] Rather, this view uses the doctrine as way of forcing an outcome that it desires, namely to get Darin to submit to U.S. jurisdiction.[158] If the court had considered other goals of the doctrine, such as discouragement of flight or en-

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turn over Darin to U.S. authorities and he has no idea of when this could happen to him and at that point he has no choice to but to submit to U.S. jurisdiction. *See id.*

[155] *See* Kingsley Napley, *Interpol Red Notices and How to Deal with Them*, LEXOLOGY (Jan. 7, 2013) www.lexology.com/library/detail.aspx?g=1279d646-9189-40b0-817a-25ae9a4e873a [http://perma.cc/PLP6-N6UJ]. Not only would international travel become extremely risky for Darin and his personal and professional reputations be tarnished but banks may force Darin to close his account(s) with them because they may be concerned about complying with Anti-Money Laundering obligations. *Id.* Darin will also risk that the Swiss government will open its own criminal investigation into him, separate from the one initiated in the United States. *Id.*

[156] *Compare* United States v. Hayes (*Hayes II*), 118 F. Supp. 3d 620, 626–27 (S.D.N.Y. 2015) (No. 12 MAG 3229) (explaining why disentitling Darin supports the rationales behind the doctrine), *with In re* Hijazi, 589 F.3d 401, 413 (7th Cir. 2009) (detailing why disentitling Hijazi would not serve the purposes of the doctrine).

[157] Petition, *supra* note 1, at 33; *cf. Hayes II*, 118 F. Supp. 3d at 626–27. The court only examined how Darin would be affected by any order entered against him and noted that he will "continue to ignore any order made by this court by simply remaining in Switzerland, his home country." *Hayes II*, 118 F. Supp. 3d at 626. The court further noted that an adverse judgment will force him to choose between two undesirable situations, continue to live in Switzerland with the restraints imposed by criminal charges in the United States or submit to extradition. *Id.* at 627. In essence, Darin's choice is to either continue to elude U.S. authorities or comply with an arrest warrant, and because Darin is unlikely to comply with an unfavorable disposition, there is no mutuality. *Id.* The decision to disentitle Darin under the doctrine is not appropriate because it does not support the other rationales for applying the doctrine such as promoting self-surrender, discouraging prison escapes, and supporting the efficient operation of appellate courts. *See supra* notes 56–73 and accompanying text (outlining various rationales underpinning the doctrine). By carving out one definition of mutuality and saying that is the only one that matters ignores reality. *See* Petition, *supra* note 1, at 31–33 (describing why ascribing to only one narrow definition of mutuality does not take into consideration real life).

[158] *See* Petition, *supra* note 1, at 14–15 (stating how the Second Circuit's interpretation of the collateral order doctrine and the fugitive disentitlement doctrine allowed the court to find that Darin was a fugitive and thus did not have to review the merits of his motion to dismiss). Darin's constitutional argument is that he should not have to appear in the United States and stand trial because there isn't a sufficient nexus between himself and the United States. *Id.* The problem, however, is that the Second Circuit's application of the fugitive disentitlement doctrine maintains that Darin cannot assert that defense without entering the United States and submitting himself to its jurisdiction. *Id.* The Second Circuit's application of both doctrines was done with one goal in mind yet the application is incongruous with prior Supreme Court rulings and cannot stand. *See id.*

couragement of self-surrender, it is abundantly evident that declaring Darin a fugitive for purposes of disentitling him would not further these goals.[159]

The Second Circuit's decision creates a "constitutional vacuum" for similarly situated defendants.[160] It essentially renders the prosecution of a foreign citizen for any alleged criminal conduct that occurs outside the United States immune from review unless the foreign citizen voluntarily submits himself to U.S. jurisdiction.[161] Such individuals, automatically deemed fugitives, are unlikely to travel to the United States, thus leaving unresolved the underlying issue of the reach of extraterritorial application of U.S. law.[162] If the United States wants Darin, and similar defendants, to appear in its courts and ensure that he be bound by any adverse judgment, the fugitive disentitlement doctrine, as it stands, is not the appropriate vehicle for achieving that goal.[163]

III. FOREIGN DEFENDANTS WHO REFUSE TO APPEAR IN THE UNITED STATES SHOULD NOT AUTOMATICALLY BE LABELED FUGITIVES AND DISENTITLED OF THEIR RIGHTS IN JUDICIAL PROCEEDINGS

The Second Circuit's decision in *Darin* created a circuit split on the appropriate application of the fugitive disentitlement doctrine to foreign defendants.[164] In October 2016, Darin filed a petition of certiorari to the United States Supreme Court and on March 6, 2017 the Supreme Court denied the petition without comment.[165] This Part argues that the Supreme Court should have granted certiorari in order to establish a uniform application of the doctrine so as to guarantee non-disparate treatment of similarly

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[159] *See Hijazi*, 589 F.3d at 403 (explaining that the doctrine did not exactly apply to Hijazi because he had yet to be convicted of a crime and had never been physically present within the court's jurisdiction). The Seventh Circuit declined to determine that Hijazi was a fugitive and thus disentitling him would not serve the purposes of discouraging escape and promoting self-surrender. *See id.* Additionally, *Hijazi* was not about the dismissal of an appeal but about demanding review of the merits of a motion, and disentitling him would not serve the purpose of promoting efficacious operation of the appellate process. *See id.* Darin is in the exact same situation. *See* Petition, *supra* note 1, at 7–8.

[160] *See* Petition, *supra* note 1, at 33.

[161] *Id.* at 33–34.

[162] *See id.* at 33 (relying on *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 115 (1997), for the notion that a careful inquiry must be conducted when extending application of U.S. law and asserting U.S. jurisdiction in the international field); *infra* notes 184–193 and accompanying text (explaining the importance of testing the boundaries of U.S. law on the international stage and how the Seventh Circuit's, and not the Second Circuit's, construction of the fugitive disentitlement doctrine will allow this).

[163] *See* Petition, *supra* note 1, at 31 (stating that the Second Circuit's application of the fugitive disentitlement doctrine is not in conformance with the Supreme Court's prior decisions and thus is not an available tool to force Darin to appear in the United States).

[164] *See supra* note 139 and accompanying text (comparing the Second and Seventh Circuit's application of the fugitive disentitlement doctrine).

[165] *See* Darin v. United States, 137 S. Ct. 1223 (2017) (mem.) (denying petition for certiorari).

situated defendants.[166] Section A explains the unfair and factional treatment that foreign defendants will continue to receive as a result of the ongoing circuit split.[167] Section B argues that the Seventh Circuit's position should be chosen as the standard, as this will serve the purposes of the doctrine and allow the outer limits of extraterritorial application of U.S. law to become more defined.[168]

A. Inconsistent Treatment for Similarly Situated Defendants Based Solely on Prosecuting Jurisdiction Is Fundamentally Unfair

Similarly situated foreign defendants should not be treated differently based only on the fact that they are charged in different U.S. jurisdictions.[169] Hijazi and Darin represent two defendants in that exact situation: both were foreign nationals charged in the United States for alleged criminal conduct that took place outside the United States yet their cases had opposite outcomes for no discerning reason.[170] Factually similar cases with contradictory outcomes are precisely the cases that the Supreme Court should be hearing.[171] Denying certiorari was a missed opportunity for the Supreme Court to rectify this discordant treatment, however the Court cannot avoid con-

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[166] See *infra* notes 169–193 and accompanying text.

[167] *See infra* notes 169–183 and accompanying text.

[168] *See infra* notes 184–193 and accompanying text.

[169] *See* Kiran H. Griffith, *Fugitives in Immigration: A Call for Legislative Guidelines on Disentitlement*, 36 SEATTLE U. L. REV. 209, 212 (2012) (explaining that issues arise in immigration cases when a petitioner may be a fugitive in one jurisdiction and not another for purposes of the fugitive disentitlement doctrine). The circuit courts are divided on whether an alien is considered a fugitive for failing to appear for a DHS hearing but is otherwise in the jurisdiction. *Id.* at 211. This individual is not a fugitive in the Ninth Circuit, will probably not be a fugitive in the Second Circuit but probably will be a fugitive in the Fifth and Seventh Circuits. *Id.* at 212. This split creates inequality and reinforces unpredictability in application of the doctrine to this class of petitioners. *Id.*

[170] *See supra* notes 111–138 and accompanying text (comparing the factual similarities between *Hijazi* and *Darin*).

[171] *See* Evan Bernick, *The Circuit Splits Are out There—and the Court Should Resolve Them*, 16 ENGAGE 36, 36 (2015) (detailing factors that influence the Supreme Court's decision to grant certiorari). In a talk given by Chief Justice John Roberts at the District of Columbia judicial conference, he underscored the fact that circuit splits are by far the most compelling factor in deciding whether to grant certiorari. *Id.* Supreme Court Rule 10 instructs the justices to consider, in deciding whether to grant certiorari, whether a federal circuit court has entered a decision that is in conflict with another circuit court's decision on an important federal question. SUP. CT. R. 10. The Supreme Court is under no obligation to review writs of certiorari but often chooses to hear cases based on whether a ruling might reconcile conflicting positions on an issue between the federal circuit courts. *Supreme Court Procedures*, UNITED STATES COURTS, http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [http://perma.cc/G798-6PCU].

fronting the issue for long because the nature of globalization means it will reappear sooner rather than later.[172]

The deepening circuit split on appropriate application of the doctrine is a cause for concern.[173] Similar, if not identical, criminal conduct will continue to be treated differently based solely on the jurisdiction that decides to prosecute the conduct.[174] Both sides to the dispute will continue to confront issues of fundamental fairness.[175] Until the Supreme Court chooses to hear a case on this issue, similarly situated foreign defendants who are prosecuted in jurisdictions overseen by the Second Circuit will continue to receive less favorable and misguided treatment than counterparts prosecuted in the jurisdictions controlled by the Seventh Circuit.[176]

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[172] *See* Lisa Savitt & Melissa Pierre, *Personal Jurisdiction and the Foreign Defendant*, GPSOLO MAG., Sept. 2006, at 36, 36–37 (stating how globalization has forced a departure from standard rules that regulate personal jurisdiction in the United States). Advances in technology and a growing global economy have forced a broadening of traditional jurisdictional rules to hail foreign defendants into court in the United States. *Id.* How these rules actually work is important because foreign defendants increasingly use the defense of lack of personal jurisdiction to avoid the burden of traveling to and litigating an expensive case in the United States. *Id.*

[173] *See* Petition, *supra* note 1, at 34 (explaining that if the Second Circuit's application of the doctrine continues to be deemed valid, Fifth Amendment protections will continue to be undercut); Jeanine Kerridge, *Is a Non-United States Citizen Who Refuses to Leave His Home Country to Face FCPA Charges a Fugitive from Justice?*, LEXOLOGY (Sept. 30, 2014) http://www.lexology.com/library/detail.aspx?g=29f7045d-f161-4534-a7c2-806be9ec0426 [http://perma.cc/CBC9-AKC2] (outlining the facts of *In re Han Yong Kim* and the Ninth Circuit's decision to label him a fugitive). As part of his petition for certiorari to the Supreme Court, the defendant pointed to the U.S. government's increased extraterritorial prosecution of civil and criminal cases to highlight the fact that the issue will continue to appear and thus the Court should hear his case and take the opportunity to resolve the circuit split. *See* Petition, *supra* note 1, at 33–34.

[174] *See generally* Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137 (2012) (examining the unequal rights given to individuals because of circuit splits, through the lens of Fourth Amendment rights). As a result of the Supreme Court declining to hear numerous cases concerning the Fourth Amendment, the rights of citizens and the scope of law enforcement's authority vary across jurisdictions resulting in disparate rights for citizens of the same country. Mary Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605, 621 (2003) (arguing why federal circuit splits need to be resolved); Logan, *supra*, at 1140. Professor Daniel Meador understands the rationales behind allowing constitutional questions to percolate in the circuit courts but does not find this rationale has any merit when it comes to interpretation of statutes. Algero, *supra*, at 621. Statutory law should have a precise definition so that all litigants in federal court are subject to the same law, thereby being treated equally. *Id.*

[175] Golden, *supra* note 98. Not only does the doctrine affect both parties in cases involving prosecution of foreign defendants, but the application of the doctrine has realistic consequences for both parties and determining the appropriate application is crucial. *See id.*

[176] *Compare In re* Hijazi, 589 F.3d 401, 414 (7th Cir. 2009) (concluding that the rationales behind the fugitive disentitlement doctrine do not support disentitlement based on the facts), *with* United States v. Hayes (*Hayes II*), 118 F. Supp. 3d 620, 627 (S.D.N.Y. 2015) (No. 12 MAG 3229) (imposing fugitive status on Darin and finding that the motives supporting the fugitive disentitlement doctrine support disentitlement based on the facts).

The Southern District of New York has jurisdiction over major financial centers with a home base in New York, specifically in Manhattan, making it the venue for disposition of a significant number of cases pertaining to international business matters.[177] As international business continues to expand, the Southern District of New York will likely prosecute increasing numbers of financial and other white-collar crimes involving foreign defendants.[178] It is thus reasonable to posit that cases where the fugitive disentitlement doctrine is invoked will also increase.[179] The Supreme Court's decision to deny certiorari in *Darin*, was a missed opportunity to enunciate a clear standard and it is reasonable to assume that the number of indefinite pending cases in that district will accumulate rapidly as a result.[180]

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[177] *See United States District Court for the Southern District of New York*, WIKIPEDIA, https://en.wikipedia.org/wiki/United_States_District_Court_for_the_Southern_District_of_New_York [http://perma.cc/PC6A-2RCH] (stating that appeals from decisions in the Southern District are heard by the Second Circuit). Decisions from the Southern District of New York, and by extension appeals from the Second Circuit, are very persuasive because of the courts' jurisdiction over a large number of prominent financial businesses. *Id.*; *see*, *e.g.*, *Second Circuit Docket List*, BLOOMBERG L., https://www.bloomberglaw.com/product/blaw/search/results/2cfc5e40cb02799966115867ab441eab (listing 325 anti-trust cases currently pending in the Second Circuit). This docket list is only one of several representing the high volume of ongoing business litigation in the Second Circuit. *Id.*

[178] *See* Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 U.C. DAVIS L. REV. 497, 524 (2015) (relying on a statement from a Commerce Department official about the United States' heightened concern with combatting increased corruption in global business transactions); Editorial Board, United States v. Yeh *Illustrates the Challenges in International Trade Secrets Cases*, TRADE SECRETS WATCH (Apr. 10, 2014) https://blogs.orrick.com/trade-secrets-watch/2014/04/10/u-s-v-yeh-illustrates-the-challenges-in-international-trade-secrets-cases/ [http://perma.cc/JPS6-L6BD] (explaining that the trial of Ellen Yeh involves a number of important issues relevant to an "increasingly global knowledge economy"); Kirby Behre et al., *DOJ Is Losing the Battle to Prosecute Foreign Executives*, LAW360 (Mar. 3, 2015) https://www.law360.com/articles/626482/doj-is-losing-the-battle-to-prosecute-foreign-executives [https://perma.cc/BD5X-5UZL] (stating that increases in global white-collar investigations has resulted in a growing number of individual defendants who are not located in the United States); Marshall L. Miller, Principal Deputy Assistant Att'y Gen., Crim. Div., U.S. Dep't of Justice, Remarks at the Global Investigation Review Program (Sept. 17, 2014) https://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller [https://perma.cc/45SJ-FF9P] (stating that prosecuting individuals for white-collar crimes is a top priority for the DOJ's criminal division).

[179] *See* Peter H. Acker, *A Critique of the Fugitive Disentitlement Doctrine and Why It Should Not Apply in Certain Immigration Proceedings*, IMMIGRATION LAW OFFICES OF P.H. ACKER & ASSOCS., LLC (stating that the doctrine has become an important strategic tool that has been invoked with increased frequency in order to get cases dismissed at the federal appellate level).

[180] *See* Behre et al., *supra* note 178 (explaining how white-collar investigations charging companies are significantly more successful than when individual defendants are charged). Foreign individuals are significantly less likely to plead guilty to FCPA charges than companies. *See id.* As a result, it is harder to secure convictions against them. *Id.* Those individuals who choose not to plead guilty remain in their home nation, while hundreds of similar charges against other foreign defendants remain pending and backlog the U.S. court system. *Id.*; *see also infra* note 181 and accompanying text (explaining the consequences from the lack of a national standard in application of the fugitive disentitlement doctrine to foreign defendants).

In establishing a standard for the application of the fugitive disentitlement doctrine to foreign defendants, the Supreme Court would enhance predictability in these types of cases.[181] A clear standard will address the legitimate concerns of both parties to the dispute and should reduce, if not eliminate, unnecessary delay due to disagreement over the peculiar treatment of foreign defendants and their judicial rights.[182] With these preliminary disagreements no longer an issue, the courts will be able to move on to the merits of the case, where their attention should be focused.[183]

B. Adoption of the Seventh Circuit Standard Will Permit the United States to Test the Outer Limits of Extraterritorial Application of U.S. Law

Resolving the fugitive disentitlement doctrine split is important in its own right, but it may also help refine the limits of applying U.S. law extraterritorially.[184] At their core, the cases of *Darin* and *Hijazi* were not about fugitives and their judicial rights but about prosecuting foreign nationals

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[181] *See* Arthur D. Hellman, *Precedent, Predictability and Federal Appellate Structure*, 60 U. PITT. L. REV. 1029, 1031 (1999) (explaining how federal appellate courts have rendered an increasing number of decisions, many of which conflict, without continued Supreme Court supervision). When the Supreme Court chooses not to hear cases where the circuits are split, leaving in place judge made law, the outcomes of cases are less predictable and "quirky." *Id.* Thus, a Supreme Court decision on whether the Second or Seventh Circuit's application of the fugitive disentitlement doctrine is the national standard would serve as a control over judge-made law and enhance predictability in cases. *See id.*

[182] *See* Colin W. Maguire, *The Fugitive Disentitlement Doctrine,* WMU-COOLEY L. REV. 4 (2012) https://works.bepress.com/colin_maguire/7/ [https://perma.cc/W4SN-SHM3] (describing why it is imperative that either Congress or the Supreme Court provide clarity as to who qualifies as a fugitive under the fugitive disentitlement doctrine). The term fugitive could be restricted to its common law application, which encompasses only someone who has committed a crime in a jurisdiction and subsequently flees and hides himself, or it could be interpreted expansively to where it would include a foreign alien who has never been in the United States. *See id.* The current issue is that the Supreme Court, in deciding to repeatedly deny petitions of certiorari on the matter, has left unregulated the appellate courts' discretionary authority under the fugitive disentitlement doctrine and left unresolved important preliminary issues affecting both sides to a case. *See id.* at 6–7.

[183] *See generally* Nathan Capone, *Trial of Serious Harm by Preliminary Issue Not Appropriate in All Cases*, FIELDFISHER: DEFAMATION L. BLOG (Jan. 15, 2016, 5:09 PM) [perma.cc/7Y5K-3AUU] (explaining how the courts would become even more backlogged if every defamation case was subject to a preliminary issue trial on the definition of "serious harm"). Preliminary hearings on non-core issues increase delay and costs of litigation. *See id.*

[184] Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1222 (1992) (explaining that the application of American federal statutes is not merely an academic problem but an issue that raises serious practical concerns). Extraterritorial application of U.S. law has been a dominant tool in furthering American policy goals overseas. *Id.* If courts are not able to so liberally invoke the fugitive disentitlement doctrine against foreign defendants, more defendants will be able to present defenses against alleged violations of the Foreign Corrupt Practices Act or RICO violations. Golden, *supra* note 98. By allowing foreign defendants to contest U.S. criminal charges, while residing outside the United States, the limits of extraterritorial reach of U.S. federal statutes will become apparent/will continue to evolve. *See id.*

under U.S. law for conduct that occurred outside of the United States.[185] Once the fugitive controversy is resolved, the courts can then turn their attention to the various substantive questions presented by the cases.[186]

Extraterritorial application of U.S. law is foremost a question of legislative intent.[187] There is a presumption that U.S. federal law applies only within the country and that courts will interpret and apply congressional statutes in a fashion that does not impinge on international law.[188] In some cases, Congress has explicitly stated that certain statutes apply outside of the United States, evidencing clear congressional intent.[189] In other situations, courts have found implied congressional intent for certain federal criminal statutes to operate overseas.[190] The congressional intent must then

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[185] *See In re* Hijazi, 589 F.3d 401, 403 (7th Cir. 2009) (charging Ali Hijazi with violation of the major fraud statute under 18 U.S.C. § 1031(a) (2012) and violation of the wire fraud statute under 18 U.S.C. § 1343); Complaint, *supra* note 2, at 1 (charging Roger Darin with conspiracy to commit wire fraud under 18 U.S.C. §§ 1343, 1349).

[186] *See* Jay Tidmarsh, *Resolving Cases "On the Merits*,*"* 87 DENV. U. L. REV. 407, 409 (2010) (stating Roscoe Pound's dissatisfaction with the need to decide procedural technicalities before reaching the true merits of the case). In order to resolve a case on the merits, it is necessary to decide the procedural barriers that preclude a court from moving forward and deciding the substantive issues of law in a case. *Id.*

[187] *See* Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 L. & CONTEMP. PROBS. 11, 14 (1987) (explaining that the American court system operates under the obligation to promote conduct in conformance with legislative mandates, whether such mandates may conflict with another nation's laws or international law); CHRIS DOYLE, CONG. RESEARCH SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW (Summary) (2016) (stating that application of American criminal law outside of the United States is first and foremost a question of express or implied legislative intent).

[188] Cafarelli, *supra* note 89, at 257. If Congress's intent on the extraterritorial reach of a statute is unclear, U.S. courts will construe the statute in a manner that is least likely to result in unreasonable intervention in a sovereign country's affairs. *Id.*

[189] Doyle, *supra* note 187, at 9. Many federal criminal statutes enjoy express extraterritorial application, such as 18 U.S.C. § 115 (violence against federal officials, former officials and members of their families), 18 U.S.C. § 1111 (murder), 18 U.S.C. § 1460 (sale or possession with intent to sell obscene material), and 18 U.S.C. § 1957 (prohibited monetary transactions from specific unlawful activity). *Id.* at 42–43. These statutes have been expressly granted extraterritorial application mainly in the context when the conduct occurs "within the special maritime and territorial jurisdiction of the United States." *Id.* at 15.

[190] *Id.* at 19. District courts have interpreted the holdings in *United States v. Bowman*, 260 U.S. 94 (1922) (announcing that the nature and purpose of a statute indicate whether Congress intended it to apply outside the United States) and *Ford v. United States*, 273 U.S. 593, 623 (1927) (stating that an individual, who is outside of the United States, who partakes in conduct that affects interests in the United States will be held liable in the United States) to mean a large number of federal criminal statutes are binding on individuals outside of the United States via Congress's implied intent. *Id.* The Court in *RJR Nabisco, Inc. v. The European Community* endorsed implied congressional intent to extend extraterritorial application of "piggyback" statutes—conspiracy, attempting, aiding and abetting—whose application is based on a separate crime. 136 S.Ct. 2090, 2102 (2016); Doyle, *supra* note 187, at 20.

be considered in light of best practices in foreign relations.[191] If courts are not allowed to automatically invoke the fugitive disentitlement doctrine in cases involving extraterritorial application of U.S. law, foreign defendants will be allowed to test the U.S. government's ability to bring criminal charges for violations of the Foreign Corrupt Practices Act, antitrust laws, and securities laws, among others.[192] This will create a more developed and practical body of legal precedent for these types of cases.[193]

CONCLUSION

The fugitive disentitlement doctrine is aimed at preventing criminals who have escaped imprisonment or fled the jurisdiction from reaping the benefits of the judicial process. The doctrine was not meant to be a means to force foreign defendants who have never been to the United States to travel to the jurisdiction if they want to challenge the criminal complaint filed against them. In light of this, the Second Circuit's application of the doctrine in *United States v. Darin* is inappropriate. The Supreme Court should have granted certiorari and mandated that the Seventh Circuit's application of the doctrine controls as it pertains to foreign defendants. With this standard in place, the U.S. court system will be able to adjudicate pressing issues concerning extraterritorial application of U.S. law.

CHLOE S. BOOTH

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[191] Doyle, *supra* note 187, at 1. An astonishing number of federal criminal statutes are eligible for extraterritorial application however the number of prosecutions of foreign defendants under these statutes has been low. *Id.* Besides the obvious legal and practical hurdles that factor in in deciding whether to prosecute foreign defendants under U.S. federal criminal statutes, diplomatic concerns are another factor that may advise against exercising extraterritorial jurisdiction. *Id.*; Ethan A. Nadelman, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT'L L. & POL. 813, 814 (1993). Even if the United States has a legal basis to obtain custody of a fugitive overseas, the decision on whether to exercise that authority has primarily been hindered by "considerations of sovereignty, laws and political reactions of foreign states." Nadelman, *supra*, at 814. Extradition is the most favored route of securing fugitives, but it is not always an available option and at that point the government must consider numerous factors in how to go about retrieving the fugitive. *See id.*

[192] Golden, *supra* note 98.

[193] *See* Brilmayer, *supra* note 187, at 17 (explaining the issues federal judges currently face in determining where a statute should apply to extraterritorial conduct). If a statute does not explicitly say when and to whom it should apply, the court assuredly ends up relying on its own views in making a decision. *Id.* Without explicit direction from Congress on correct application, it would be proper to interpret the statute in a manner the court finds most palatable. *Id.* This results in different courts announcing different rules based on interpretation of the same statutes and does not provide uniform and predictable legal standards. *See id.*