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The third way: The constitutional imperative of allowing foreign nationals to seek to dismiss indictments prior to arraignment

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ABSTRACT

Les ressortissants étrangers, inculpés pour violation du droit pénal américain, font face à un dilemme. La plupart des tribunaux américains considéreront les recours contre l'acte d'accusation comme irrecevables à moins que le défendeur se rende aux États-Unis et se soumette à la compétence personnelle de la cour. Dans le cas contraire, le Department of Justice américain demandera à ce que les accusés qui ne soumettent pas volontairement à la compétence des juridictions américaines fassent l'objet d'une notice rouge INTERPOL. Ces ressortissants étrangers, et en particulier ceux qui sont accusés d'infractions qui ne sont pas de nature criminelle dans leur pays d'origine (telle que la participation à un cartel), font face à un choix difficile : s'engager dans une procédure longue et coûteuse pour contester les accusations portées contre eux, ou accepter de facto d'être "emprisonnés" à l'intérieur des frontières de leur pays d'origine. Ce choix, qui n'en est pas un, soulève des questions de procédure relevant du droit constitutionnel américain. Ici, les auteurs proposent une troisième voie, permettant à certains ressortissants étrangers la possibilité de contester la légitimité des accusations portées contre eux avant leur mise en accusation aux États-Unis.

Foreign nationals who are under indictment for violations of U.S. criminal law face a dilemma. Most U.S. courts will not entertain challenges to the indictment unless the defendant travels to the United States and surrenders to the personal jurisdiction of the court. The Department of Justice will request that those defendants who do not voluntarily submit to jurisdiction be placed on an INTERPOL Red Notice list. These foreign nationals, particularly those who are charged with offenses that are not criminal in their home jurisdiction (such as participation in a cartel), face a difficult choice: accept the time and expense required to challenge the charges against them in the United States, or otherwise accept de facto imprisonment within the borders of their home country. This Catch-22 raises serious due process concerns under U.S. constitutional law. Herein, the authors propose a third way, allowing certain foreign nationals the right to challenge the legal sufficiency of the charges against them before arraignment in the United States.

The third way: The constitutional imperative of allowing foreign nationals to seek to dismiss indictments prior to arraignment

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1. Consider the following fact pattern. In the course of a cartel investigation of a European company, Widgets, the United States Department of Justice ("DOJ") targets a European national, Mr. X, who is a retired senior executive of Widgets. Over the course of his long career with Widgets, Mr. X has never been to the United States. Indeed, because Mr. X rose through the ranks at Widgets on the manufacturing side of the business, Mr. X has never had any direct dealings with customers in the United States either. Mr. X never attended any cartel meetings, although the existence of the cartel was an open secret at Widgets for most of his career. While Mr. X never directed anyone to attend a cartel meeting, he did receive reports about decisions made at those meetings once he assumed a senior-level management position several years ago. For the five years prior to his retirement from Widgets, Mr. X held ultimate pricing authority at Widgets and approved global prices that he knew were discussed and agreed upon at meetings with competitors.

2. At the conclusion of the DOJ's investigation, Mr. X is indicted by the grand jury. The DOJ then informs Mr. X's counsel that if Mr. X does not travel to the United States and voluntarily surrender to U.S. jurisdiction, the DOJ will place Mr. X on the "Red Notice" list maintained by INTERPOL, which will restrict his ability to leave his home country for the rest of his life.

3. This hypothetical scenario is not uncommon: several dozen foreign nationals have faced the same choice in recent years. It is a daunting decision, as voluntarily surrendering to U.S. jurisdiction could prove to be a lengthy and expensive process. Our Mr. X would be compelled to surrender his passport upon his arrival in the United States. He would need to find accommodations and secure the services of a criminal defense attorney. Realistically, if Mr. X decided to defend his case, he could expect to spend several months, at the very minimum, living exclusively in the United States. The time and expense of doing so may not be practical for many reasons, even if Widgets agrees to pay for Mr. X's defense. Accordingly, many foreign nationals in this position agree to plead guilty to a criminal violation of U.S. law and spend a considerable amount of time in a U.S. prison. Indeed, between 1999 and 2010, more than 40 foreign nationals were serving or had served prison sentences in the United States for violations of antitrust laws alone.[1] That number has increased dramatically over the last five years.

4. What if there were a third way? What if Mr. X, before being forced to choose between surrendering to U.S. jurisdiction or effective imprisonment in his home country, could ask the U.S. court to rule on the merits of a motion to dismiss the indictment? In this article, we review recent attempts by foreign defendants to move to dismiss prior to their arraignment. In placing this debate squarely within the context of the central constitutional issues raised by the DOJ's use of INTERPOL Red Notices—that is, whether the deprivation of a foreign national's freedom of movement without trial comports with U.S. due process principles—we conclude that a foreign national who did not commit a crime in the United States and did not physically flee from the jurisdiction should not be considered a fugitive, and thus, a U.S. court should rule on a motion to dismiss prior to the defendant's arraignment.

1 Scott D. Hammond, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, The 24th Annual National Institute on White Collar Crime (Feb. 25, 2010), http://www.justice.gov/atr/speech/evolution-criminal-antitrust-enforcement-over-last-two-decades. ("Since May 1999, more than 40 foreign defendants have served, or are serving, prison sentences in the United States for participating in an international cartel or for obstructing an investigation of an international cartel. Foreign nationals from France, Germany, Japan, Korea, Norway, the Netherlands, Sweden, Switzerland, Taiwan and the United Kingdom are among those defendants.")

I. INTERPOL Red Notices and due process

1. DOJ's use of INTERPOL Red Notices

5. INTERPOL, the world's largest international police organization, currently has 190 member countries.[2] INTERPOL defines its role as providing "*proactive and systematic assistance to member countries and other international entities in order to locate and arrest fugitives who cross international boundaries.*"[3] In assisting law enforcement in tracking down and detaining fugitives, INTERPOL's Red Notice list is perhaps the organization's most powerful tool. An INTERPOL Red Notice is, in essence, a request for the provisional arrest and detention of a fugitive, pending extradition based on an arrest warrant or court decision issued by the requesting country. Red Notices,[4] which are processed through the member country's National Central Bureau ("NCB"), essentially serve as international wanted notices, leading to the arrest, detention, and extradition of individuals placed on the list.[5] Red Notices are most effective at the borders, where individuals must surrender personal information for other purposes, and therefore are used by authorities to track and detain wanted persons who travel frequently through conventional means (commercial aircraft, cruise ships, trains, etc.) and who pass through official ports of entry staffed by customs or immigration personnel.

2 Interpol, About Interpol, http://www.interpol.int/About-INTERPOL/Overview (last visited Mar. 29, 2016).

3 Interpol, Fugitive Investigations, http://www.interpol.int/Crime-areas/Fugitive-investigations/Fugitive-investigations (last visited Mar. 29, 2016).

4 Red Notices typically contain two primary categories of information: (i) information about the identity of the fugitive (physical description, fingerprints, etc.) and (ii) the relevant legal particulars (offense charged, maximum penalty, etc.).

5 United States Department of Justice, Criminal Resource Manual 611 (last visited Mar. 29, 2016), http://www.justice.gov/usam/criminal-resource-manual-611-INTERPOL-red-notices ("*An INTERPOL Red Notice is the closest instrument to an international arrest warrant in use today.*"); Rebecca Shaeffer, *INTERPOL Red Notices: Towards Due Process and Human Rights Protection*, Geo. J. Int'l Affairs (2013), http://journal.georgetown.edu/INTERPOL-red-notices-towards-due-process-and-human-rights-protection-by-rebecca-shaeffer/ ("*Red Notices are not arrest warrants, but they are often treated as such by national authorities, leading to the arrest, detention, and extradition of flagged individuals.*"); Peter M. Thomson, *INTERPOL's Transnational Policing By "Red Notice" and "Diffusions": Procedural Standards, Systemic Abuses, and Reforms Necessary to Assure Fairness and Integrity*, 16 The Federalist Society for Law & Public Policy Studies, (2015), http://www.fed-soc.org/publications/detail/INTERPOLs-transnational-policing-by-red-notice-and-diffusions-procedural-standards-systemic-abuses-and-reforms-necessary-to-assure-fairness-and-integrity ("*In many countries, Red Notices have the weight of an international arrest warrant, but they lack sufficient procedural safeguards to prevent regimes from using them to oppress, harass, and silence political and economic opponents.*").

6. In recent years, there has been a significant increase in the number of Red Notices issued across the world, and they carry significant consequences for those to whom they are applied.[6] In effect, they trap an individual inside his home country for the duration of the Red Notice's existence; any attempted border crossing will likely lead to the subject's arrest and extradition. In 2001, the DOJ's Antitrust Division adopted a policy of placing fugitives on the Red Notice list and committing to seek extradition for any fugitive defendant apprehended through INTERPOL's Red Notice Watch.[7] Since that time, the Antitrust Division has aggressively sought to place indicted individuals on the Red Notice list if they refuse to voluntarily surrender to U.S. jurisdiction.

2. Due process concerns

7. DOJ's use of Red Notices raises serious due process concerns, similar to those raised by the issuance of an ordinary arrest warrant. Although there are exceptions, the Fourth Amendment generally requires that an arrest warrant be issued by a magistrate, based on a sworn statement that (i) a crime has been committed and (ii) there is probable cause to suspect that the prospective arrestee was responsible for the commission of that crime.[8] There are no similar prerequisites for the issuance of a Red Notice listing.[9] Moreover, while effective means exist to challenge the legality of a U.S. arrest warrant,[10] an individual's ability to challenge a Red Notice listing is extremely limited and unlikely to be resolved in a timely fashion. Specifically, an individual who seeks to challenge his Red Notice listing must first contact the local authorities in the jurisdiction that requested it and/or appeal to the Commission for the Control of INTERPOL's files ("CCF"), which has no specific deadline for responding to such requests.[11] Challenges to Red Notices may be made under Article 3 of INTERPOL's Constitution (prohibiting intervention or activities of a political, military, religious or racial character), Article 83 of the Rules (establishing thresholds for severity of the offense), or Article 76 of the Rules (discretion not to issue a Red Notice if it could harm INTERPOL's image).

8. Due process concerns are especially high in circumstances such as our Mr. X's, as placement on the Red Notice list amounts to a significant punishment—one imposed without a trial on the merits. While the Fifth Amendment to the United States Constitution prohibits the deprivation of life, liberty or property without due process of law, once a foreign national is placed on the Red Notice list, his freedom to travel will be substantially restricted, he may be separated from his family for months if not years, his ability to work will be impaired, his banks may close his accounts, and his reputation will be tarnished.[12] Despite these serious consequences, individual challenges have proven remarkably ineffective, even in extreme cases. It took INTERPOL 18 months, for example, to determine that a Red Notice issued against Patricia Poleo, an investigative journalist, had been the result of a politically motivated attack by her government. Environmental protesters, student activists, and government whistleblowers have encountered similar delays.

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6 Nina Marino & Reed Grantham, *WANTED BY INTERPOL: Strategic Thinking about Red Notices, Diffusions, and Extradition*, 30 Criminal Justice, 2 (2015), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/2015_cjfall15_marino.authcheckdam.pdf ("[S]*ince 2002, INTERPOL—the world's largest international law enforcement agency—has seen a 700 percent increase in the number of red notices issued seeking the location and arrest of wanted individuals across the globe*.").

7 Scott D. Hammond, *Charting New Waters in International Cartel Prosecutions*, The Twentieth Annual National Institute on White Collar Crime (March 2, 2006), https://www.justice.gov/atr/speech/charting-new-waters-international-cartel-prosecutions. As the then-Deputy Assistant Attorney General for Criminal Enforcement at the Antitrust Division explained: "*Thus, due to the use of the Interpol Red Notice, even if a fugitive resides in a country that would not extradite the defendant to the United States for an antitrust offense, the fugitive still runs the risk of being extradited if he travels outside of his home country. … Thus, a fugitive is not only restricted from traveling to the United States, but also runs the risk of detainment and extradition every time he crosses an international border. Of course, the changing attitudes abroad toward holding individuals accountable for cartel offenses make predicting which countries will extradite for cartel activity and which will not a dicey and precarious task for the international fugitive*." Id.

8 Fed. R. Crim. P. 9(a); *See* Joshua Dressler & Alan C. Michaels, *Understanding Criminal Procedure: Investigation*, § 9.02 (4th ed. 2006).

9 This is not a trivial matter in the case of suspects in international cartel investigations. In cases where the suspect did not engage in criminal behavior in the United States and did not direct criminal conduct here, there is a significant question as to whether that conduct falls within the jurisdiction of U.S. courts or otherwise constitutes a criminal offense under U.S. law. *See infra*, Section III.

10 Targets of arrest warrants in the United States can seek a hearing to challenge the evidence upon which the warrant was issued and motions to quash an arrest warrant can be heard prior to arrest or arraignment. For example, an individual may challenge an arrest warrant that relies on a false statement. *See*, e.g., *United States v. Holmes*, No. 13-20240-SHM-DKV, 2014 WL 29597, at *3 (W.D. Tenn. Jan. 3, 2014), *aff'd*, 603 F. App'x 383 (6th Cir. 2015) ("*To successfully challenge an arrest warrant for relying on a false statement, a defendant must (1) establish perjury or reckless disregard for the truth by a preponderance of the evidence and (2) prove that, absent the false testimony, the affidavit's remaining content is insufficient to establish probable cause*.").

11 *See* Michelle A. Estlund, *INTERPOL Red Notice request for removal– how long will it take?*, Red Notice L.J. (2013), http://www.rednoticelawjournal.com/2013/09/interpol-red-notice-request-for-removal-how-long-will-it-take/; Marino, *supra* note 6, at 6 ("*Removal of a red notice may be based on the Interpol Constitution or may be made under Interpol's RPD. Under Articles 2 and 3 of the Constitution, challenge to a red notice may be made if it can be shown that the red notice was issued for an offense that involved 'activities of a political, military, religious or racial character,' or if the red notice fails to comply with the 'spirit of the Universal Declaration of Human Rights.' (The Constitution, supra, art. 2.) Article 77 of the RPD further provides that Interpol 'may not publish a notice … if … the data provided [does] not meet the conditions for publishing a notice' or if the 'publication of the notice could prejudice the Organization's or its Members' interests.' (INTERPOL's Rules on the Processing of Data, supra, art. 77.) Perhaps most often used in challenging a red notice, Article 83 of the RPD requires that, prior to publication, the General Secretariat determine that the offense is an ordinary-law crime not involving controversial issues relating to cultural norms, that the offense meets the penalty threshold of two years (six months if a sentence has already been handed down), and that the minimum judicial data was provided to support the issuance of the red notice. Lastly, challenge to a red notice may be made under Article 12 of the RPD, which provides that information processed by Interpol be 'accurate, relevant, [and] not excessive in relation to their purpose.' (Id. art. 12.) Ultimately, after reviewing an individual's request to remove a red notice, the CCF will notify the requesting party and the decision will become final. (See What Are Your Rights?, supra.)*.").

12 Shaeffer, *supra* note 5 ("*Even when Red Notices do not result in arrest, they seriously impact a person's freedom of movement, creating immigration and employment problems as well as damaging the individual's reputation and causing financial harm*."); Marino, *supra* note 6, at 4 ("*The consequences of having a red notice or diffusion issued against an individual can be devastating. Beyond the likely arrest, detention, and possible extradition of a targeted individual, additional collateral consequences often attend the issuance of a red notice or diffusion, including the loss of ability to travel and the damage to reputation that accompanies the public positing of an individual's information online*.").

9. The deprivation of liberty and property are no less serious in the corporate arena. Yet some courts have questioned whether constitutional due process rights extend to foreign nationals who are under U.S. indictment but remain abroad.[13] The constitutional question turns on whether the foreign national is considered to be a fugitive.

II. Fugitives under U.S. law

10. Fugitives enjoy few rights under U.S. law. Pursuant to what has become known as the fugitive disentitlement doctrine, courts have refused to hear criminal appeals,[14] appeals from judgments in favor of the government in civil forfeiture proceedings,[15] petitions for review of deportation orders,[16] and, most relevantly here, pre-trial motions in criminal cases.[17] The origin of the fugitive disentitlement doctrine dates back to 1876, when the United States Supreme Court refused to hear a writ of error to review a criminal conviction because the convicted party had escaped and was not within the control of the court.[18] The Court later suggested a legal basis for the doctrine in *Allen v. Georgia*,[19] when it treated the defendant's flight post-conviction as a distinct criminal offense and refused to allow the defendant to dictate the terms upon which he would surrender to the court's custody.[20] Similarly, in *Molinaro v. New Jersey*,[21] the Court declined to adjudicate the appeal of a defendant who failed to surrender to state authorities after being freed on bail, finding that "[n]*o persuasive* reason *exist*[ed] *why* [the] *Court should* [have] *proceed*[ed] *to adjudicate the merits of a criminal case after the convicted defendant who ha*[d] *sought review escape*[d] *from the restraints placed upon him pursuant to the conviction*" and thus, the defendant was "*disentitle*[d] (…) *to call upon the resources of the Court for determination of his claims.*"[22] In recent decades, the fugitive disentitlement doctrine has become a signal of "*the unwillingness of courts to waste time and resources exercising jurisdiction over litigants who will only comply with favorable rulings of the court.*"[23]

11. In determining whether the fugitive disentitlement doctrine applies, a court must answer two questions: (1) is the defendant a fugitive; and (2) if so, considering the reasons underlying the doctrine, should the court refrain from addressing the defendant's motion.[24] Under its current construct, courts have articulated four rationales to justify the application of the fugitive disentitlement doctrine: (i) to ensure the enforceability of any decision that may be rendered against the fugitive; (ii) to impose a penalty for flouting the judicial process; (iii) to discourage flights from justice and to promote the efficient operation of the courts; and (iv) to avoid prejudice to the prosecution caused by the defendant's escape.[25] Courts have applied this doctrine in a variety of settings, including in the context of pre-trial motions in criminal cases.[26]

1. Defining fugitive status

12. No consistent standard exists to determine whether a defendant should be deemed to be a "fugitive" from U.S. justice. The traditional concept of a fugitive requires flight, that is, the affirmative departure of a suspect from the jurisdiction of the relevant court: "*A fugitive from justice has been defined as* '[a] *person who, having committed a crime, flees from* [the] *jurisdiction of* [the] *court where* [a] *crime was committed or departs from his usual place of abode and conceals himself within the district.*'"[27]

13. For purposes of the fugitive disentitlement doctrine, however, defining "fugitive status" is decidedly more

13 The Honorable Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. Rev., 801, 823-45 (2013), http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-88-3-Moore.pdf.

14 *See*, e.g., *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970); *Allen v. Georgia*, 166 U.S. 138, 141 (1987).

15 *See*, e.g., *United States v. $129,374 in U.S. Currency*, 769 F.2d 583, 586 (9th Cir. 1985); *United States v. Forty-Five Thousand Nine Hundred Forty Dollars ($45,940) in United States Currency*, 739 F.2d 792, 798 (2d Cir. 1984); *Conforte v. Commissioner*, 692 F.2d 587, 590 (9th Cir. 1982).

16 *See*, e.g., *Bar-Levy v. U.S. Dep't of Justice, I.N.S.*, 990 F.2d 33, 35 (2d Cir. 1993); *Arana v. U.S. Immigration & Naturalization Serv.*, 673 F.2d 75, 77 (3d Cir. 1982).

17 *See*, e.g., *United States v. Oliveri*, 190 F. Supp. 2d 933, 936 (S.D. Tex. 2001); *United States v. Stanzione*, 391 F. Supp. 1201, 1202 (S.D.N.Y. 1975).

18 *Smith v. United States*, 94 U.S. 97, 97 (1876) ("*It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render.*").

19 166 U.S. 138 (1987).

20 Id. at 141 ("*By escaping from legal custody, he has, by the laws of most, if not all, of the states, committed a distinct criminal offense; and it seems but a light punishment for such offense to hold that he has thereby abandoned his right to prosecute a writ of error, sued out to review his conviction…*").

21 396 U.S. 365 (1970).

22 Id. at 365-66.

23 *United States v. Bokhari*, 993 F. Supp. 2d 936, 938 (E.D. Wis. 2014), *aff'd on other grounds*, 757 F.3d 664 (7th Cir. 2014) (quoting *Oliveri*, 190 F. Supp. 2d at 935).

24 *United States v. Hayes*, 99 F. Supp. 3d 409, 415 (S.D.N.Y. 2015), *aff'd on other grounds*, 118 F. Supp. 3d 620 (S.D.N.Y. 2015).

25 *Bano v. Union Carbide Corp.*, 273 F.3d 120, 125-26 (2d Cir. 2001); *see also Parretti v. United States*, 143 F.3d 508, 510-11 (9th Cir. 1998); *United States v. Chung Cheng Yeh*, No. CR 10-00231 WHA, 2013 WL 2146572, at *2 (N.D. Cal. May 15, 2013); *State v. Hentges*, 844 N.W.2d 500, 505 (Minn. 2014), *review denied* (June 25, 2014); *United States v. Barnette*, 129 F.3d 1179, 1183 (11th Cir. 1997); *State v. Raiburn*, 289 Kan. 319, 325 (Kan. 2009).

26 *See, e.g., Oliveri*, 190 F. Supp. 2d at 936 ("Although the fugitive disentitlement doctrine is often invoked during the appellate process, it also applies to pretrial motions made by fugitives in the district courts").

27 *Barnette*, 129 F.3d at 1183 (citing *Empire Blue Cross and Blue Shield v. Finkelstein*, 111 F.3d 278, 281 (2d Cir. 1997) (citing *Black's Law Dictionary* 604 (5th ed. 1979))); *see Black's Law Dictionary* (10th ed. 2014) ("A criminal suspect or a witness in a criminal case who flees, evades, or escapes arrest, prosecution, imprisonment, service of process, or the giving of testimony, esp. by fleeing the jurisdiction or by hiding.").

difficult.[28] While some courts support the concept of "*constructive flight*,"[29] finding that "[f]*leeing from justice does not, as the words literally connote, mean a person 'on the run,*'"[30] other courts reject this analysis, finding that a person is not a fugitive unless he or she has *physically* fled the jurisdiction.[31] The rights of foreign nationals turn on this fine distinction.

2. *In re Hijazi*

14. The question of how to define a "fugitive" was central to the Seventh Circuit's 2009 opinion in *In re Hijazi*, the most recent appellate decision regarding the application of the fugitive disentitlement doctrine. The facts of the *Hijazi* case are similar to those facing our hypothetical Mr. X. In 2005, a federal grand jury sitting in Illinois indicted Mr. Hijazi, a citizen of Lebanon and a resident of Kuwait, on fraud-related charges.[32] Mr. Hijazi had never been to Illinois and had only visited the United States once, on matters unrelated to the subject of the indictment. While Mr. Hijazi remained in Kuwait, his U.S. counsel moved to dismiss the indictment.[33] The district court declined to hear Mr. Hijazi's motion prior to arraignment, reasoning that if he lost, Mr. Hijazi could elect to remain in Kuwait and avoid trial in the U.S., thereby rendering the court's decision a meaningless advisory opinion.[34] Thus, in order to challenge the indictment, Mr. Hijazi would have had to travel to the United States, surrender to federal authorities, and commit to spending an indefinite period of time in Illinois as the court considered his motion. Mr. Hijazi appealed the district court's refusal to hear his motion to the court of appeals. The primary question on appeal was whether Mr. Hijazi was entitled to have his motion decided in his absence, notwithstanding the fugitive disentitlement doctrine.[35]

15. The Seventh Circuit held that the fugitive disentitlement doctrine should not apply to Mr. Hijazi, and that the district court erred in refusing to decide Mr. Hijazi's motion to dismiss.[36] In finding that Mr. Hijazi did not flee from the United States, the court emphasized that "[w]*ith the exception of one brief visit to the United States in 1993, which all agree was unrelated to this case,* [Mr.] *Hijazi has never been in the country, he has never set foot in Illinois, and he owns no property in the United States*."[37] The court continued, "[i]*n fact, when he learned of the indictment, he surrendered himself to the Kuwaiti authorities*," who could have chosen to turn him over to the United States or to prosecute him themselves.[38]

16. The Seventh Circuit disagreed with the district court as to whether "*the adverse consequences that Hijazi would suffer if he loses on his motion to dismiss*" were great enough to justify action by the court.[39] It emphasized that a decision denying Mr. Hijazi's motion to dismiss would "*make it very risky for him ever to leave Kuwait, which is not his native country*."[40] Furthermore, the court reasoned that even though no extradition treaty existed between Kuwait and the United States, a federal court

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28 *See United States v. Bokhari*, 757 F.3d 664, 672 (7th Cir. 2014) ("*Identifying fugitives for purposes of the disentitlement doctrine can present complicated legal and factual questions. As the United States has explained, the term 'fugitive' may take on subtly different meanings as it is used in a variety of legal contexts. Reasonable minds can disagree, and have disagreed, about how the term applies in the case at hand.*"); *Hayes*, 99 F. Supp. 3d at 415 ("*It is unclear, however, whether a 'fail*[ure] *to surrender' imposes fugitive status on a defendant who was not present in the United States during the alleged crime, at the time of charging, or at any time since he became aware of the charges.*") *In re Han Yong Kim*, 571 F. App'x 556, 557 (9th Cir. 2014) *cert. denied sub nom. Hang Yong Kim v. U.S. Dist. Court for Cent. Dist. of California*, 135 S. Ct. 426 (2014) ("*Our sister circuits appear to have taken different positions on the key question of whether fugitive disentitlement can be determined on the basis of 'constructive flight.' Compare United States v. Catino, 735 F.2d 718, 722 (2d Cir. 1984); In re Assets of Martin, 1 F.3d 1351, 1356–57 (3d Cir. 1993); United States v. Barnette, 129 F.3d 1179, 1184 (11th Cir. 1997), with In re Hijazi, 589 F.3d 401, 412–13 (7th Cir. 2009).*"); *see also Hayes*, 99 F. Supp. 3d at 415 ("*Compare In re Hijazi, 589 F.3d at 412–13 (non-resident alien not fugitive where only presence in United States was unrelated to case), and In re Grand Jury Subpoenas, 179 F. Supp. 2d at 287 ('One [who has "constructively fled"] cannot be a fugitive … unless (i) he was present in the jurisdiction at the time of the alleged crime, (ii) he learns, while he is outside the jurisdiction, that he is wanted by the authorities, and (iii) he then fails to return to the jurisdiction to face the charges.'), with 28 U.S.C. § 2466(a) (allowing application of disentitlement doctrine in civil forfeiture actions to persons who, after notice that process has been issued for apprehension, 'decline[ ] to enter or reenter the United States to submit to its jurisdiction' in order to avoid criminal prosecution), and United States v. Hernandez, No. 09 CR 625, 2010 WL 2652495, at *5 (S.D.N.Y. June 30, 2010) ('[H]ow the person became a "fugitive" is not necessarily relevant because the focus is on the intent to return and appear before the court.').*").

29 *In re Han Yong Kim*, 571 F. App'x at 557; *Catino*, 735 F.2d at 722; *In re Assets of Martin*, 1 F.3d at 1356–57; *Barnette*, 129 F.3d at 1184.

30 *Bokhari*, 993 F. Supp. 2d at 938; *see also Hayes*, 99 F. Supp. 3d at 415 ("[I]*t is unnecessary for a court to find that a defendant physically fled to decide he is a fugitive. Rather, … the intent to flee can be inferred when a person 'fail*[s] to surrender to authorities once he learns that charges against him are pending.'"); *United States v. Bakri*, No. 3:00-CR-76-TAV-CCS-2, 2014 WL 1745659, at *3 (E.D. Tenn. Apr. 30, 2014) ("*A fugitive is 'someone who seeks to evade prosecution by either actively avoiding the authorities, or remaining in a geographic location that is out of the authorities' reach.' In the Sixth Circuit, specifically, the defendant must 'conceal[ ] himself with the intent to avoid prosecution.' 'This intent can be inferred from the defendant's knowledge that he was wanted and his subsequent failure to submit to an arrest.*'") (citations omitted).

31 *See In re Hijazi*, 589 F.3d at 412 (7th Cir. 2009) (finding that Mr. Hijazi never fled the United States and therefore is not a fugitive, because "[w]*ith the exception of one brief visit to the United States in 1993, which all agree was unrelated to this case,* [he] *has never been in the country, he has never set foot in Illinois, and he owns no property in the United States*"); *See also United States v. Kashamu*, No. 94-CR-172, 2010 WL 2836727, at *2 (N.D. Ill. July 15, 2010) *aff'd*, 656 F.3d 679 (7th Cir. 2011) (comparing this case to *Hijazi* because like in the case of Mr. Hijazi, there is no indication that Mr. Kashamu fled the United States, and finding that the fugitive disentitlement doctrine does not apply to Mr. Kashamu).

32 *In re Hijazi*, 589 F.3d at 403.

33 Mr. Hijazi's arguments for dismissing the indictment against him included, "*(1) construing the major fraud statute, 18 U.S.C. § 1031(a), and the wire fraud statute, 18 U.S.C. § 1343, to cover his conduct, all of which took place in Kuwait in dealings with Kuwaiti entities, would violate international law; (2) the U.S. Kuwait defense Cooperation Agreement bars the United States district court from exercising criminal jurisdiction over him; (3) the long delay (now approaching five years) in bringing him to trial is the government's responsibility, and it violates his right to a speedy trial; (4) the exercise of jurisdiction over him would violate due process; and (5) the indictment should be dismissed for want of prosecution*." Id. at 403.

34 Id. at 404-06.

35 Id. at 406.

36 Id. at 412.

37 Id.

38 Id. at 412–413.

39 Id. at 413.

40 Id. ("*INTERPOL has a long arm, and any travel outside Kuwait's approximately 6,880 square miles (which makes it just a shade bigger than Connecticut, and smaller than Vermont) would risk apprehension and extradition. Naturally* [Mr. Hijazi] *could never travel to the United States, because the Department of Justice could place a border watch for him (if it has not already done so).*").

decision upholding the indictment might motivate Kuwait to extradite Mr. Hijazi voluntarily.[41] Given these potential consequences, the court concluded that, if Mr. Hijazi lost his motion to dismiss, "*he* [would face] *a significant enough threat of prosecution in the United States to satisfy any mutuality concerns that may exist*."[42] Therefore, the Seventh Circuit held that the district court had "a duty" to rule on Mr. Hijazi's motion.[43]

3. The mixed legacy of *Hijazi*

17. Since *Hijazi*, courts have begun to distinguish foreign defendants who have moderate connections with the United States from those who have little or no connection with the United States. Where courts have followed *Hijazi*, they have relied on four key factors: (1) that the defendant left the United States pre-indictment; (2) that the defendant was not avoiding travel to the United States solely because of the indictment, but rather because a change in position no longer required such travel; (3) that the defendant had reason to remain in his/her country because of pending proceedings there; and (4) that there was no indication that the defendant had physically fled the United States.

18. In *United States v. Siriwan*,[44] the United States District Court for the Central District of California declined to apply the fugitive disentitlement doctrine.[45] Citing *Hijazi*, the court emphasized that: (1) the defendants were neither U.S. citizens nor U.S. residents; (2) there was no assertion that Jittisopa Siriwan had ever traveled to the United States; (3) the defendants left the United States pre-indictment; (4) the defendants had no established reason to continue to visit the United States, because their positions had changed; and (5) pending proceedings in their home country concerned the same facts underlying the U.S. indictment.[46] The court concluded that "*there* [was] *clearly good reason for Defendants to remain in Thailand at this time*"[47] and that "[u]*nder these circumstances, it* [was] *not at all clear that* [it] *should play what role it can in attempting to dissuade foreign nationals from staying in their home country and to instead submit themselves to prosecution in a country where they have no other reason to visit*."[48] The court continued that even if the fugitive disentitlement doctrine ordinarily would apply to the defendants, there were reasons to make an exception in this case.[49] The court's reasons included, among other things, that: "*Plaintiff admits that Defendants* [were] *tagged with 'red notice' by INTERPOL, further restricting their freedom*."[50]

19. In *United States v. Kashamu*,[51] the United States District Court for the Northern District of Illinois declined to apply the fugitive disentitlement doctrine because, as in *Hijazi*, the defendant had not fled the United States. Mr. Kashamu was under U.S. indictment for his participation as a kingpin in a drug-smuggling operation.[52] Despite some differences between his case and *Hijazi*,[53] including, for example, the existence of an extradition treaty and the fact that Mr. Kashamu had not surrendered to local authorities,[54] the court declined to apply the fugitive disentitlement doctrine because "*there* [was] *no indication that Kashamu ha*[d] *fled the United States*."[55] In so ruling, the court relied on evidence "*indicat*[ing] *that Kashmu* [sic] *directed the smuggling operation from his residence in Benin, and there* [was] *no suggestion by any party that Kashamu ha*[d] *been in the United States since the government brought charges against him*."[56] As Kashamu was not a fugitive, the court proceeded to address his motion to dismiss on the merits.[57]

20. By comparison, in distinguishing *Hijazi*, courts have emphasized the following factors in choosing to apply the fugitive disentitlement doctrine: (1) the necessity of substantial factual development to be able to decide the motion; (2) the existence of an extradition treaty with the defendant's country; (3) the existence of substantial connections between the defendant and the United States, including, for example, having U.S. citizenship, marriage to a U.S. citizen, or attending school in the United States; (4) physical presence in the United States for a substantial period of time and the commission of illegal acts in the United States that led to the indictment; and (5) the departure of the defendant from the United States after he became aware of an investigation and/or criminal charges.

21. For example, in *United States v. Chung Cheng Yeh*,[58] Yeh, a resident and citizen of Taiwan who had never been to the United States, sought to challenge, pre-arraignment, his indictment for alleged criminal violation of U.S. antitrust law on grounds that the applicable statute of limitations had expired.[59] The district court refused to hear the motion, distinguishing *Hijazi*. First, the court reasoned that "[i]*n Hijazi, the Seventh Circuit faced primarily legal issues regarding the extraterritorial application of the statute in question and whether the court had personal jurisdiction over the defendant, who was*

41 Id.

42 Id. at 414.

43 Id. at 403.

44 No. CR 09-81-GW, 2011 WL 13057709 (C.D. Cal. July 28, 2011).

45 Id.

46 Id. at 1-2.

47 Id. at 1.

48 Id.

49 Id. at 2.

50 Id. at 2.

51 *United States v. Kashamu*, No. 94-CR-172, 2010 WL 2836727, at *1 (N.D. Ill. July 15, 2010) *aff'd*, 656 F.3d 679 (7th Cir. 2011).

52 Id. at *3.

53 Id. at *3 ("*This Court acknowledges that Kashamu's situation does not dovetail perfectly with Hijazi's*.").

54 Id.

55 Id.

56 Id.

57 Id.

58 No. CR 10-00231 WHA, 2013 WL 2146572 (N.D. Cal. May 15, 2013).

59 Id. at *1.

located in Kuwait. In contrast, here, factual development [would] *weigh heavily in determining the instant motion*."[60] Second, the court found that "unlike *Hijazi*, the Taiwanese government *ha*[d] *not indicated that it would not extradite defendant, were the United States to* [apply for extradition] *(at least as far as this Court* [was] *currently aware). As such, this case ha*[d] *not reached a similar deadlock requiring the determination of fundamental jurisdiction matters, as was the case in Hijazi*."[61] Finding that "*if* [Mr. Yeh]*'s motion were to be denied on the merits, 'defendant would remain a fugitive from justice, making it impossible to bring his case to final resolution*,'" the court proclaimed that "[u]*ntil he is willing to submit his case for complete adjudication … he should not be permitted to utilize the resources of the court to determine isolated issues, or to obtain further discovery*."[62]

22. In *United States v. Hayes*,[63] Roger Darin, a foreign national residing in Switzerland, sought to dismiss, through counsel, a criminal complaint charging him with conspiring to commit wire fraud by manipulating the Japanese Yen London Interbank Offered Rate ("LIBOR").[64] At the time the motion was heard, Darin had not been arraigned and, indeed, had not even entered the United States. Darin's counsel noted in argument to the magistrate judge that the government's complaint sought to charge "*a foreign national with conspiring to manipulate a foreign financial benchmark, for a foreign currency, while working for a foreign bank, in a foreign country*."[65] Largely on the basis that Darin had not fled the United States, the magistrate declined to apply the fugitive disentitlement doctrine.[66] The district court, however, reviewed the magistrate's ruling and reversed, stating that it had "*no hesitation in applying the fugitive disentitlement doctrine*" because the fact that Darin had not fled the United States did not preclude him from being labeled as a fugitive as a matter of law.[67] The court further stated that even if the doctrine were not applied, Darin's motion should be dismissed on the merits because (i) Darin's co-conspirator had used U.S. wires in the perpetration of the alleged crimes; and (ii) Darin "*was likely aware*" that his conduct would affect financial markets in the United States.[68] The question of whether a defendant must flee the jurisdiction to be considered a "fugitive" will be central to the Second Circuit's review of the *Darin* case, scheduled for later this year.

III. The third way: A sensible approach to fugitive status

23. As U.S. courts debate the boundaries of the fugitive disentitlement doctrine, foreign nationals remain in limbo. Faced with the prohibitively high cost of defending a criminal case in the United States, foreign nationals are likely to accept either a plea agreement or listing on INTERPOL's Red Notice list. That result is incompatible with a fundamental understanding of constitutional due process. We suggest a middle ground. In determining fugitive status of foreign nationals, courts should distinguish between (i) defendants who have never been to the United States (or otherwise have been in the United States only on matters unrelated to the subject matter of the case) and (ii) defendants who fled the United States after learning either that an indictment had been issued against them, that they were the target of a criminal investigation, or after committing a relevant criminal act here. The fugitive disentitlement doctrine should apply to the latter group of defendants only, thereby allowing the former group of defendants to move pre-arraignment to dismiss criminal charges pending against them. Our proposed limitation of fugitive status complies with each of the rationales that have been cited to support the doctrine in the first instance.

24. While the fugitive disentitlement doctrine applies where "*a decision in favor of* [a defendant] *would benefit him, but a decision against him would not be enforceable or would not operate to his disadvantage*,"[69] absence of mutuality is not at issue when a foreign national challenges, prior to his arraignment, the legal sufficiency of an indictment. Foreign nationals have much to lose if a court upholds an indictment against them. As noted above, foreign nationals who appear on INTERPOL's Red Notice list face detention and extradition if they travel outside of their home jurisdiction, closure of their bank accounts, denial of loan applications, the loss of employment, and damage to their reputation. Moreover, by hearing and ruling on a defendant's motion to dismiss, the court affords that defendant meaningful due process protections, undermining a potentially powerful defense against extradition. While a defendant's win may be

60 Id. at *3. It is worth noting that the factual development required to contest a motion to dismiss on statute of limitations grounds is not significant. In effect, the court ruled that any material disputed issue of fact would be sufficient to require a foreign national to travel to the United States in order to contest whether the crimes he was accused of were even actionable under U.S. law.

61 Id.

62 Id.

63 99 F. Supp. 3d 409 (S.D.N.Y. Mar. 20, 2015).

64 Id. at 411.

65 Id. at 412.

66 Id. at 415-17.

67 *Hayes*, 118 F. Supp. 3d at 626. In so ruling, the Court squarely disagreed with our position, writing that "[t]*he Court cannot be bound by the semantics that limit fugitive status to fleeing or failing to return when dealing with an international criminal defendant who allegedly violated United States law from abroad*." Id. This is the very essence of the universal theory of jurisdiction that federal courts have long sought to avoid.

68 Id. at 628-29. The Court did not address Darin's argument that the alleged conspiracy did not target the United States, a finding recognized by the two judges hearing the related civil cases in the same courthouse.

69 *Hayes*, 99 F. Supp. 3d at 416.

binding and result in the dismissal of an indictment, so too is a defendant's loss, as it reinforces the sufficiency of the indictment, allowing it to stand.[70]

25. Likewise, merely refusing to travel to the United States after learning of one's indictment does not constitute "*flouting the judicial process*."[71] There is a clear distinction between defendants who leave the United States after learning of an investigation or indictment, and defendants who are not alleged to have committed any crime within the territorial borders of the United States. The time and expense of defending criminal charges is exponentially greater for foreign nationals than for U.S. citizens and residents, and courts should recognize both as effective barriers to justice and due process of law.

26. Refusing to apply the fugitive disentitlement doctrine to foreign nationals who have never been to the United States and are not accused of committing a crime within its borders would also clearly not encourage defendants to flee the United States after learning of an investigation or indictment against them, because the fugitive disentitlement doctrine would continue to be applied in their case.[72] Lastly, the purpose of "*avoiding prejudice to the other side caused by the defendant's escape*" is not applicable in cases where the defendant did not "escape" and prejudice, in a broader sense, to the government would be minimal.[73] Without question, the rule we propose would encourage more foreign nationals to challenge criminal charges prior to arraignment, but that prejudice is, in our view, substantially outweighed by discouraging overreaching by U.S. prosecutors when deciding whether to indict a foreign national, because of the disproportionate burdens foreign nationals face when challenging criminal charges.

27. Applying the above analysis to our hypothetical Mr. X, a U.S. court would allow Mr. X to move to dismiss the indictment pending against him through counsel, without requiring Mr. X to surrender to U.S. jurisdiction in the first instance. This is not a trivial matter, as Mr. X's motion has a real chance of success.

28. As the DOJ has increasingly sought to extend the reach of U.S. antitrust laws to conduct occurring overseas,[74] courts have attempted to define the boundaries of Sherman Act jurisdiction. In doing so, courts have interpreted the language of the Federal Trade Antitrust Improvements Act of 1982 ("FTAIA"), which restricts the extraterritorial reach of the Sherman Act to import commerce and foreign sales that directly affect U.S. commerce.[75] For years, there was uncertainty over the interpretation of the FTAIA.[76] In 2004, the U.S. Supreme Court addressed the interpretation of the FTAIA for the first time in *F. Hoffman-LaRoche v. Empagran S.A., Ltd.*,[77] an international price-fixing cartel case that involved the sale of vitamins. The Court, largely for reasons of international comity, interpreted the FTAIA as limiting the subject matter jurisdiction of federal courts over foreign defendants in antitrust litigation.[78] Subsequent courts have held, instead, that the FTAIA imposes a new substantive element of a Sherman Act

70 *See* id. at 416-17 (The court in *Hayes* reasoned that "[t]*he effect of a decision upholding the validity of the complaint will be to allow the charges, and the arrest warrant issued pursuant to those charges, to stand*," and therefore, "[t] *here is no merit to the argument that a decision denying Mr. Darin's motion is not binding upon him*." The court, furthermore, found that upholding the sufficiency of the complaint would result in serious consequences for Mr. Darin, including that "*he is effectively confined (…) to Switzerland, unable to visit family even in neighboring Austria*," and "*he is unable to find any job in the Swiss financial sector—the line of work for which he is professionally qualified*.").

71 Id. at 417. The court in *Hayes* found that merely "*refusing to appear in this Court*" does not constitute "*flouting the judicial process*." Id. It reasoned, "[i] *f mere absence from court constituted 'flouting the judicial process,' this factor would always favor the prosecution, and no further analysis would be necessary*." Id. Without showing any other circumstances, such as Mr. Darin leaving the United States after he discovered he had been or was going to be charged, the court could not find that Mr. Darin flouted the judicial process. Id.

72 Id. The *Hayes* court could not "*see how addressing Mr. Darin's application, in particular, would make other defendants more likely*" to remain in their home countries to avoid prosecution. Id.

73 Id. The *Hayes* court found that the last reason for the doctrine "*seems to assume that the applicant was once in custody and has now absconded*," which the court concluded was not the case here. Id.

74 *See* Freshfields Bruckhaus Deringer, *US criminal liability for non-US corporations and financial institutions*, 3 (2009), http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/US%20criminal%20liability%20for%20non-US%20corporations%20and%20financial%20institutions%20The%20long%20arm%20of%20US%20law.pdf (the FTAIA "*has done little to shield cartels with even minimal US contacts*"); *David M. Goldstein, Robert Reznick & Shannon Leong, Recent Developments in the Extraterritorial Application of the U.S. Antitrust Laws*, Orrick (June 4, 2015), https://www.orrick.com/Events-and-Publications/Documents/Recent-Developments-in-the-Extraterritorial-Application-of-the-US-Antitrust-Laws.pdf ("*The DOJ aggressively prosecutes price-fixing conduct against both U.S. and non-U.S. companies and individuals, and the penalties can be severe*.").

75 Abbott B Lipsky, Jr. & Kory Wilmot, *The Foreign Trade Antitrust Improvements Act: Did Arbaugh Erase Decades of Consensus Building?*, The Antitrust Source (2013), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug13_lipsky_7_30f.authcheckdam.pdf; *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161 ("*The FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets. See H.R. Rep. No. 97–686, at 1–3, 9–10 (1982), U.S. Code Cong. & Admin. News 1982, 2487, 2487–2488, 2494–2495 (hereinafter House Report). It does so by removing from the Sherman Act's reach, (1) export activities and (2) other commercial activities taking place abroad, unless those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States*.").

76 Howard W. Fogt, Scott L. Fredericksen, Melinda F. Levitt & Alan D. Rutenberg, *Clarity Put on Hold as FTAIA Conflict/Confusion Continues*, *Legal News: Antitrust* (June 22, 2015), https://www.foley.com/clarity-put-on-hold-as-ftaia-conflictconfusion-continues-06-22-2015/.

77 542 U.S. 155 (2004).

78 Id. at 167-69; *See also* id. at 155. The Court cited two principal reasons to justify its holding. First, the Court construed the "*ambiguous statute*[] *to avoid unreasonable interference with the sovereign authority of other nations*." The Court found it unreasonable to apply U.S. antitrust laws to foreign conduct that causes independent foreign harm that alone gives rise to a plaintiff's claim. Second, the Court found that "*the FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce*." Id. at 164-69.

claim.[79] In the criminal context, the indictment pending against Mr. X is questionable, as the U.S. court may lack subject matter jurisdiction to hear the case or the DOJ may have failed to plead a substantive violation of the Sherman Act.

29. Following our proposed approach, Mr. X would, at a relatively low cost, be able to ask the court to determine either (i) that it had subject matter jurisdiction over the case or (ii) that there was probable cause to believe that Mr. X's purely foreign conduct directly affected U.S. commerce. This is the minimum that due process requires: allowing foreign nationals accused of committing criminal acts outside the United States to challenge the legal sufficiency of the allegations against them via a motion to dismiss without first requiring physical surrender to the United States. If Mr. X were denied the opportunity to challenge his indictment pre-arraignment, the personal consequences to him would be severe. And, if the court were eventually to determine that it lacked subject matter jurisdiction over the case, Mr. X would have suffered an unusual penalty, having been kept captive in the United States, his life, his work and his family far away, for at least a year, possibly longer.

Conclusion

30. In light of the DOJ's increasingly expansive approach to enforcing U.S. criminal laws against foreign nationals, it is crucial that courts consider the implications of the growing use of the fugitive disentitlement doctrine to deny foreign defendants the ability to challenge the sufficiency of an indictment or a criminal complaint pending against them. Case law, public policy, and due process concerns support our position that a foreign national who was not in the United States at the time of an indictment or investigation, and who did not commit a crime within territorial borders of the United States, should not be considered a fugitive. Forcing foreign nationals who have little or no connection to the United States to surrender to the United States before the sufficiency of an indictment or complaint can be challenged, or, in cases where an INTERPOL Red Notice has been imposed, be confined to one country for an indefinite period, amounts to a fundamental violation of due process of law. Courts should have the obligation to determine the legal sufficiency of an indictment or complaint without requiring a foreign national to voluntarily surrender to the United States for arraignment. ■

79 In 2006, in a case unrelated to the FTAIA, the Supreme Court held that if Congress did not explicitly state that a statutory limitation is jurisdictional, the limitation should be treated as substantive. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 502, 515-16 (2006) ("*If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character*."). Since then, courts and commentators have generally interpreted the FTAIA as a substantive element of the plaintiff's antitrust case. *See*, e.g., *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 468-69 (3d Cir. 2011), *as amended* (Oct. 7, 2011) (holding that the FTAIA creates a new substantive element of a Sherman Act claim because "*the statutory text* [of the FTAIA] *is wholly silent in regard to the jurisdiction of the federal courts*"); *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 852 (7th Cir. 2012) (en banc) (same); *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 398, 404-05 (2d Cir. 2014).

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