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Defending the Foreign "Fugitive" Against the Fugitive Disentitlement Doctrine (Part 2)

Robert E. Connolly (Law Office of Robert Connolly) · Thursday, March 30th, 2017

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[This is Part 2 of a multi-part article on ways a foreign fugitive may be able to get some issues heard by a US federal court without surrendering to the United States and personally appearing in court. Part 1 can be found here: http://cartelcapers.com/blog/defending-foreign-fugitive-fugitive-disentitlement-doctrine/]

A foreign defendant who presents any matter before a court such as a motion to dismiss the indictment for lack of jurisdiction, statute of limitations expiration or any other legal defect, will have to overcome the court's inclination to apply the fugitive disentitlement doctrine. The government will almost certainly assure the court that there is no need to decide the issues because the fugitive is disrespecting the court by his absence. Defense counsel must persuade the court that a foreign fugitive defendant is in a very different situation than an individual who has been convicted and fled. The court will need to be educated about all the penalties a mere indictment brings, especially the serious penalty of the defendant being put on a Red Notice without ever having been convicted.

The defense should first argue that a foreign located defendant is not a fugitive because he did not flee. This, however, is not likely to be a winning argument. As one judge stated: "[t]he Court cannot be bound by the semantics that limited fugitive status to fleeing or failing to return when dealing with an international criminal defendant who allegedly violated United States law from abroad."[3] Nonetheless, arguing that a foreign defendant is not a fugitive (assuming he did not flee the United States upon or in anticipation of indictment) is the first step in distinguishing the foreign defendant from the convicted defendant who flees but seeks an appeal.

Avoiding application of the fugitive disentitlement doctrine will require convincing the court to assess the rationales behind the doctrine [Mutuality, Respect for the Court, Discouraging Flight and Prejudice] with the circumstances of the foreign-based defendant in mind. The defendant can emphasize that due process is a mirage if the foreign defendant must first accept the penalty of an indefinite stay in the United States to gain access to the court. Experiences like those of fugitives who have been detained on a Red Notice, or lost careers because of their inability to travel, can show how serious punishment is inflicted by the indictment itself.

Here is a closer look at the four underpinnings of the fugitive disentitlement doctrine as applied to

a foreign fugitive:

Mutuality

At first glance, if a defendant files a motion to dismiss, or seeks to set conditions of bail, or some other pretrial issue without first coming to the United States and being arrested, it looks as if the defendant has not risked anything. He simply stays abroad if he loses. But, a foreign fugitive does have something to lose if a motion to dismiss an indictment is heard and lost. A foreign fugitive facing extradition can credibly argue that extradition should be denied because the fugitive disentitlement doctrine, as applied to him, affords no due process. The defendant is forced to endure a unique hardship [indefinite life in a foreign land] simply to get access to court. A foreign jurisdiction maybe sympathetic to the argument that it is not fair to extradite an individual to the Untied States if that individual is not permitted to even challenge the legality of the charges against him from outside the U.S. It is arguably a denial of due process if a foreign defendant must leave his country for an indefinite period of time, face possible imprisonment in the United States if denied bail, and leave his job/income and lose contact with his family merely to be allowed to argue that the United States has exceeded its legal authority in bringing the charges. The Seventh Circuit made this point in *In re Hijazi,**[4]* where a Lebanese citizen living in Kuwait moved, through counsel, to dismiss his indictment raising what the Seventh Circuit deemed to be significant legal issues about the extraterritorial application of U.S. laws. The district court refused to rule on the motions until Hijazi appeared in person. The Seventh Circuit held that "under the unusual circumstances of this case, the district court had a duty to rule on Hijazi's motions to dismiss."[5] The Seventh Circuit found mutuality in that Hijazi faced serious travel and negative employment consequences if his indictment was upheld stating "A federal court decision upholding the indictment,,,may make those governments more likely to exercise that discretion [to extradite] and less confident in resisting diplomatic pressure from the United States if they are no longer able to protest that the indictment is legally flawed as a matter of U.S. law."[6] Giving a foreign fugitive defendant some access to a U.S. court will strengthen the government's hand when trying to extradite that individual.

The defendant can also turn the "mutuality" argument on its head. An important and developing issue in antitrust cases, in fact, in many white-collar crime cases, is the extraterritorial application U.S. law. Currently, the government can adopt the broadest arguable jurisdiction knowing how unlikely it interpretation is to be challenged in court. In that sense, it is the government that lacks mutuality; it can indict with a reasonable assurance—[but certainly not a guarantee]—that the defendant will not be able/willing to pay the stiff price of appearing in the U.S. to challenge the indictment. The foreign defendant has to accept a stiff sentence—indefinite detention in the United States—in order to avail himself of any due process.

There are no hard numbers available to say how many foreign defendants have been indicted and remain fugitives—some for decades or until death. Virtually every international cartel case involves foreign citizens being indicted (some under seal) and remaining fugitives. In one unusual case, AU Optronics, six foreign-based defendants surrendered to the United States and went to trial. Three of the six were acquitted. But, the unusual factor in this case was that the company itself also went to trial and stood by its indicted employees. The individual defendants did not have to bear the cost of being unemployed, living in a foreign land and bearing all of the consequences of an "away" trial.

Disrespecting the Judicial Process

It should be clear that the failure of a foreign defendant to come to the United States and be arrested so he can appear before the court is not out of any disrespect, but rather a hope to avoid "punishment" before trial. There is an ocean of difference between a defendant who has gone to trial, lost, and fled, but wants his appeal decided. If the foreign-based defendant is flouting the justice system, surely it is the mildest of "flouts."

Discouraging Flights From Justice

With the foreign-based defendant, there are no flights from justice. It is true, however, that a decision to allow a foreign-based defendant to challenge his indictment while safely out of range may encourage others to do the same. But the possibility/probability of defending a decision in court can only sharpen a prosecutor's analysis of the issues when deciding whether to indict. It is not sound administration of justice if the prosecution's theories are rarely subject to judicial scrutiny. Litigating issues before a court provides an opportunity to test the limits of prosecutorial extraterritorial application of the laws and other issues that might arise pretrial.

Avoiding Prejudice to the Other Side

Finally, the government does suffer some *prejudice* if a foreign fugitive is allowed to stay out of harm's way while challenging the sufficiency of the indictment. This may encourage defendants to attack the government's exercise of power before seeking a plea agreement. It may also cause some delay in the investigation. But, this prejudice is minimal compared to the prejudice suffered by a foreign defendant on a Red Notice. As noted below, the degree of prejudice can change dramatically, however, based on the relief the defendant is seeking.

Case-by-Case Analysis Required

To be sure, there will be limits and rightly so, to the ability of a defendant to contest the charges without appearing in the United States. The balancing of factors will clearly change if the defendant seeks discovery that goes to guilt or innocence. The government will protest having to preview its case while the defendant stays safely out of range while considering whether he wants to engage in combat by trial. Discovery of guilt or innocence evidence may prejudice the government in other ways, especially if there are subjects remaining in the investigation. But, instead of activating the fugitive disentitlement shield to fend off all challenges to any legal defects in the indictment, each situation should be examined closely to determine if the rationales for the doctrine apply to the defendant and the issue presently before the court.

Part Three will examine some cases and situations that relate to the issues discussed above.

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[3] *United States v. Hayes*, 118 F. Supp. 3d 620, 626 (S.D.N.Y. 2015).

[4] *In re Hijazi*, 589 F. 3d 401 (7th Cir. 2009).

[5] Id. at 403.

[6] Id. *at* 412-13.

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