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FEAR OF FLYING—THE FUGITIVE'S FLEETING RIGHT TO A FEDERAL APPEAL

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INTRODUCTION

In *Molinaro v. New Jersey*[1] the Supreme Court for the first time dismissed immediately and with prejudice[2] an appeal by a criminal defend-

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1. 396 U.S. 365 (1970) (per curiam).

2. *Molinaro* marked a significant departure from the Court's prior practice. Before *Molinaro*, the Court conditioned dismissal on the appellant's failure to return to custody within a specified time and, if the appellant failed to return, the Court ordered that the fugitive's appeal be "left off the docket *until directions to the contrary*," Bonahan v. Nebraska, 125 U.S. 692, 692 (1887) (emphasis added). By comparison, the *Molinaro* Court expressly stated that the dismissal would be effective immediately (not conditioned on the appellant's failure to return), and although it did not specifically state that the dismissal was with prejudice, the opinion contained no qualifying language that would indicate that any "directions to the contrary" would be forthcoming. Accordingly, *Molinaro* has uniformly been interpreted to authorize immediate dismissal with prejudice of fugitives' and former fugitives' appeals. *See, e.g.*, United States v. $129,374 in United States Currency, 769 F.2d 583, 588 (9th Cir. 1985) ("in *Molinaro*, the Court did not hold the appeal in abeyance; it dismissed the appeal entirely"), *cert. denied*, 106 S. Ct. 863 (1986); United States v. Amado, 754 F.2d 31, 32 (1st Cir. 1985) (relying on *Molinaro* to state that "[t]here can be no doubt of our authority to dismiss the [fugitive's] appeal with prejudice"); United States v. Tunnell, 650 F.2d 1124, 1126 (9th Cir. 1981) (citing *Molinaro* for the proposition that an "appellate court may dismiss an appeal, with final prejudice, if the defendant flees after filing a notice of appeal"). One court has even questioned the extent to which appellate courts have discretion to order anything but an immediate dismissal with prejudice. *See* United States v. Shelton, 508 F.2d 797, 799 (5th Cir.) (indirectly questioning whether "a court retains any discretion after *Molinaro*"), *cert. denied*, 423 U.S. 828 (1975). Most courts, however, have exercised such discretion and have entered a variety of orders, including unconditional dismissal with prejudice, *see, e.g.*, United States v. Gordon, 538 F.2d 914, 915 (1st Cir. 1976) (per curiam) (granting government's motion to dismiss with prejudice without giving "some additional opportunity for the absent appellant to appear"), *cert. denied*, 441 U.S. 936 (1979), unconditional dismissal without prejudice, *see, e.g.*, United States v. Davis, 625 F.2d 79, 79 (5th Cir. 1980) (per curiam), conditional dismissal with prejudice, *see, e.g.*, United States v. Sotomayor, 592 F.2d 1219, 1220 n.1 (2d Cir. 1979) (appellant's failure to comply with court's order to return to custody results in dismissal with prejudice), *cert. denied*, 442 U.S. 919 (1980); United States v. Sperling, 506 F.2d 1323, 1345 n.33 (2d Cir. 1974) (same), *cert. denied*, 420 U.S. 962 (1975), and conditional dismissal without prejudice, *see, e.g.*, United States v. Shelton, 482 F.2d 848, 849 (5th Cir.) (per curiam) (appellant's failure to return to custody results in dismissal without prejudice), *cert. denied*, 414 U.S. 1075 (1973).

Furthermore, since *Molinaro*, the difference between a dismissal with prejudice and dismissal without prejudice may, as a practical matter, be purely semantic. Fugitives who have attempted to reinstate their appeals on returning to custody have had little success, and case law indicates that they face formidable barriers to reinstatement. *See, e.g.*, Estrada v. United States, 585 F.2d 742, 742 (5th Cir. 1978) (per curiam) (denying request for reinstatement "without at least a showing of good cause"); United States v. Smith, 544 F.2d 832, 834 (5th Cir. 1977) (per curiam) (citing *Molinaro* in denying request for reinstatement and remarking that the "reinstatement of an abandoned appeal is an

ant who had escaped from custody during the pendency of his appeal. Unfortunately, the Court did not clearly articulate the basis for dismissal, stating only that a defendant's escape "from the restraints placed upon him pursuant to the conviction . . . . disentitles the defendant to call upon the resources of the Court for determination of his claims."[3] The federal courts have struggled ever since to divine the decision's true rationale. The courts still have not been able to agree on the basis for *Molinaro* and have failed to consider the principles that limit its application. Nonetheless, based on *Molinaro*, nearly every federal court of appeals has expressly recognized its power to dismiss the appeals of escaped appellants.[4]

The confusion caused by *Molinaro* did not present serious problems until, in response to increasing numbers of fleeing federal offenders,[5] the courts of appeals began to extend the holding in *Molinaro*. In 1982, the Eleventh Circuit extended *Molinaro* to dismiss with prejudice the appeal of a recaptured fugitive who escaped from custody after conviction but before sentencing and who, unlike the appellant in *Molinaro*, was not a fugitive at any time during the pendency of his appeal.[6] In 1984, the same court further extended *Molinaro* to dismiss with prejudice the appeal of a recaptured fugitive who fled during trial—before conviction and sentencing—and who was convicted in absentia.[7] Neither these decisions, nor other cases that have expanded the rationale of *Molinaro*,[8] sat-

extraordinary request"); United States v. Shelton, 508 F.2d 797, 798-99 (5th Cir.) (relying on *Molinaro* to deny request for reinstatement), *cert. denied*, 423 U.S. 828 (1975).

3. Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (per curiam). The Supreme Court's latest explanation is equally cryptic. *See* United States v. Sharpe, 105 S. Ct. 1568, 1573 n.2 (1985) ("dismissal . . . is based on the equitable principle that a fugitive from justice is 'disentitled' to call upon this Court for a review of his conviction").

4. Lewis v. Delaware State Hosp., 490 F. Supp. 177, 181-82 (D. Del. 1980); *see* United States v. Amado, 754 F.2d 31, 32 (1st Cir. 1985); United States v. Holmes, 680 F.2d 1372, 1373-74 (11th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1015 (1983); Arana v. United States Immigration & Naturalization Serv., 673 F.2d 75, 77 (3d Cir. 1982) (per curiam); United States v. Sperling, 506 F.2d 1323, 1345 n.33 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); United States v. Swigart, 490 F.2d 914, 915 (10th Cir. 1973); Brinlee v. United States, 483 F.2d 925, 926-27 (8th Cir. 1973) (per curiam); United States v. Shelton, 482 F.2d 848, 849 (5th Cir.), *cert. denied*, 414 U.S. 1075 (1973); Dawkins v. Mitchell, 437 F.2d 646, 647-48 (D.C. Cir. 1970) (per curiam); *see also* United States v. Snow, 748 F.2d 928, 930 (4th Cir. 1984) (although court allowed appeal to continue as escapee was recaptured within 30 days of escape, it recognized its power to dismiss the appeal); United States v. Dawson, 350 F.2d 396, 397 (6th Cir. 1965) (per curiam) (predating *Molinaro*).

5. *See* United States v. Sharpe, 105 S. Ct. 1568, 1594 (1985) (Stevens, J., dissenting) ("The procedural question [of whether a fugitive's appeal should be dismissed] is important because escapes . . . [by drug smugglers] are apparently not uncommon.").

6. *See* United States v. Holmes, 680 F.2d 1372, 1373 (11th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1015 (1983). See *infra* notes 33-46 and accompanying text.

7. *See* United States v. London, 723 F.2d 1538, 1538-39 (11th Cir.), *cert. denied*, 104 S. Ct. 2684 (1984). See *infra* notes 47-57 and accompanying text.

8. *Molinaro* has been expanded not only to justify dismissal of an appeal for flight occurring prior to the filing of a notice of appeal, see *supra* notes 6-7 and accompanying text, but for flight occurring outside the context of direct criminal appeals altogether.

isfactorily examine the competing principles that must be considered in deciding whether to extend *Molinaro*.

This Article identifies the principles that limit the federal courts' power to expand *Molinaro* and suggests an approach the federal circuit courts should apply in deciding whether to dismiss the appeal of a criminal defendant based on status as a fugitive or former fugitive. Part I examines the principal cases that have shaped the law. Part II identifies and explains constraints on the federal courts' power to decline to exercise jurisdiction over a fugitive or former fugitive's criminal appeal. It then explores the nature and source of the judicial power that permits courts, under proper circumstances, to decline to exercise jurisdiction based on the appellant's flight. Finally, the Article suggests an approach to the problem that balances the interests favoring dismissal against the competing principles requiring courts to entertain the appeal.

See, e.g., United States v. $129,374 in United States Currency, 769 F.2d 583, 587 (9th Cir. 1985) (applying *Molinaro* to bar petition to intervene by fugitive's successor), *cert. denied*, 106 S. Ct. 863 (1986); Conforte v. Commissioner, 692 F.2d 587, 589-90 (9th Cir. 1982) (taxpayer, fugitive after his conviction for tax evasion, not entitled to prosecute appeal from civil judgment sustaining tax deficiencies and penalties), *stay denied*, 459 U.S. 1309, 1312 (Rehnquist, Circuit Justice 1983) (acknowledging that although the Supreme Court has not extended *Molinaro* beyond its facts, courts of appeals have frequently done so); Arana v. United States Immigration & Naturalization Serv., 673 F.2d 75, 77 n.2 (3d Cir. 1982) (per curiam) (acknowledging that *Molinaro* involved a criminal appeal but noting that "nothing in the Supreme Court's opinion suggests that the rule announced there is applicable only in the criminal-law context" and thus applying *Molinaro* to administrative deportation proceedings); Doyle v. United States Dep't of Justice, 668 F.2d 1365, 1365-66 (D.C. Cir. 1981) (per curiam) (fugitive "may not demand that a federal court service his complaint" under the Freedom of Information Act), *cert. denied*, 455 U.S. 1002 (1982); Broadway v. City of Montgomery, 530 F.2d 657, 658-59 (5th Cir. 1976) (dismissal of fugitive's appeal in action for damages and injunctive relief from allegedly illegal wiretap); Brin v. Marsh, 596 F. Supp. 1007, 1008-09 (D.D.C. 1984) (dismissing mandamus action of fugitive service member); Beckett v. Cuyler, 523 F. Supp. 104, 105-06 (E.D. Pa. 1981) (dismissal of prisoner's civil rights suit after his flight from work release program); Seibert v. Johnston, 381 F. Supp. 277, 278-80 (E.D. Okla. 1974) (dismissing fugitive's civil rights action). Courts have split on the question whether *Molinaro* should be applied to dismiss claims in prisoners' habeas corpus petitions. *Compare* Hall v. Alabama, 700 F.2d 1333, 1338-39 (11th Cir.) (petitioner by escaping from custody of state court waived right to pursue state remedies, thereby foreclosing his right to federal review of habeas claims), *cert. denied*, 464 U.S. 859 (1983); Gonzales v. Stover, 575 F.2d 827, 827-28 (10th Cir. 1978) (per curiam) (district court properly declined to entertain a § 2254 petition where petitioner was a fugitive) *and* Fowler v. Leeke, 509 F. Supp. 544, 546 n.3 (D.S.C. 1979) ("There is no readily apparent reason to apply the rule [established in *Molinaro*] less stringently to collateral attacks at the trial court level than to direct appeals at an appellate level."), *appeal dismissed mem.*, 644 F.2d 878 (4th Cir. 1981) *with* Williams v. Holbrook, 691 F.2d 3, 13 (1st Cir. 1982) (district court erred in applying *Molinaro* to dismiss former fugitive's habeas petition filed after her return to custody) *and* Brinlee v. Crisp, 608 F.2d 839, 857 (10th Cir. 1979) (prisoner's prior escapes were not such a deliberate bypass of state procedures as to constitute a waiver of federal habeas claims), *cert. denied*, 444 U.S. 1047 (1980).

I. DEVELOPMENT OF THE LAW ALLOWING DISMISSAL OF FUGITIVES' APPEALS

The earliest case in which the Supreme Court conditionally dismissed an appeal of an escaped convict based on his fugitive status was *Smith v. United States*.[9] In *Smith*, a criminal defendant appealed from an adverse ruling of a state supreme court. At a hearing on defense counsel's motion to set the case for argument, counsel admitted to the Court that the defendant had escaped and was not within the control of the court below either actually, by being in custody, or constructively, by being out on bail.[10] In light of the defendant's absence, the Court deemed hearing the defendant's appeal a useless act:

> If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case.[11]

The Court explained that it had the "discretion to refuse to hear a criminal case in error, unless the convicted party . . . is where he can be made to respond to any judgment we may render."[12] Therefore, the Court ordered that, "unless the [defendant] . . . submit himself to the jurisdiction of the court below on or before the first day of our next term," the appeal would be removed from the docket.[13]

Soon after deciding *Smith*, the Supreme Court faced a similar situation in *Bonahan v. Nebraska*.[14] In *Bonahan*, the defendant challenged his state conviction for murder as a violation of the double jeopardy clause.[15] The state supreme court denied him relief, and he appealed to the United States Supreme Court. As in *Smith*, the appellant in *Bonahan* fled during the pendency of his appeal.[16] Relying on *Smith*, the Court ordered that, unless the defendant surrendered or was recaptured before the last day of the term, the appeal would be removed from the docket "until directions to the contrary."[17]

Several important points emerged from the *Smith* and *Bonahan* decisions. The *Smith* decision was based on two factors, both stemming from the appellant's absence. First, because he was a fugitive, the defendant could not be made to respond to the Court's judgment. Second, because

9. 94 U.S. 97 (1876).
10. *Id.* at 97.
11. *Id.*
12. *Id.*
13. *Id.* at 98.
14. 125 U.S. 692 (1887).
15. *See* Bohanan v. Nebraska, 118 U.S. 231, 233 (1886) (in ruling on a prior motion to dismiss, the Court noted that the defendant had set out as a defense "immunity from a second trial for the same offence, by reason of Article V. of the amendments of the Constitution of the United States").
16. Bonahan v. Nebraska, 125 U.S. 692, 692 (1887).
17. *See id.*

he could not be made to respond, the Court would be performing a useless act in hearing the appeal.[18] This latter point stems entirely from the nature of the relief sought in the appeal—a new trial.[19] The Court presumed that if the defendant would not return for his appeal, he would not return for a retrial if, in his absence, the Court heard his appeal and granted the relief sought.[20] Thus, in *Smith*, hearing the appeal would have been pointless.

In contrast to *Smith*, the *Bonahan* decision rests on a single rationale. This conclusion can only be deduced from the circumstances, because the Court relied on *Smith* without providing independent reasons for dismissing the appeal. However, the deduction is made easily in light of the nature of the relief sought by the appellant in *Bonahan*—a judgment of acquittal.[21] The defendant challenged his conviction as a violation of double jeopardy principles. Therefore, if his appeal were successful, retrial would have been impossible, and a judgment of acquittal would have been entered.[22] In these circumstances, any defendant, whether a fugitive or incarcerated, would obviously abide by the Court's favorable judgment, and entertaining the appeal would not be useless. Accordingly, the "useless act" rationale of the *Smith* decision was inapplicable in *Bonahan*. Because the *Bonahan* Court relied on *Smith*, however, it must therefore be presumed that the Court relied entirely on the other rationale articulated in *Smith*: the defendant must be "where he can be made to respond to *any* judgment," including an adverse judgment.[23] Thus, *Bonahan* made clear that hearing an appeal need not be pointless before the court has discretion to dismiss the case based on the appellant's fugitive status. Rather, the court need only be unable to enforce an adverse decree.[24]

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18. Smith v. United States, 94 U.S. 97, 97 (1876).

19. The Court indicated that reversal would result in an order of a new trial. *See id.*

20. *See id.*

21. See *supra* note 15 and accompanying text.

22. *See, e.g.*, Burks v. United States, 437 U.S. 1 (1978). In *Burks*, the Court held that a retrial after reversal of conviction for insufficiency of the evidence would violate the double jeopardy clause. "Since we hold today that the Double Jeopardy Clause precludes a second trial . . . the only . . . remedy available . . . is the direction of a judgment of acquittal." *Id.* at 18.

23. Smith v. United States, 94 U.S. 97, 97 (1876) (emphasis added).

24. In Allen v. Georgia, 166 U.S. 138 (1897), the Court made it clear that the basis for dismissal of a fugitive's appeal was the Court's inability to enforce an adverse judgment. In *Allen*, the defendant, after being convicted of murder and sentenced to death, filed a writ of error to the state supreme court. Thereafter, the defendant escaped from custody, and the state supreme court dismissed his appeal. The defendant was subsequently recaptured, and resentenced to death. *Id.* at 138-39. He then filed an application for writ of error to the United States Supreme Court, urging that the state court's dismissal of the appeal based on his flight was a denial of due process. *Id.* at 139.

The Supreme Court affirmed the state supreme court's dismissal and made explicit the rationale it had earlier implied in *Smith* and *Bonahan*:

> By escaping from legal custody he has, by the laws of most, if not all, of the States, committed a distinct criminal offence; and it seems but a light punishment for such offence to hold that he has thereby abandoned his right to prose-

An appreciation of the effect *Bonahan* had on the *Smith* decision is helpful in understanding the Supreme Court's holding in *Molinaro v. New Jersey*.[25] In *Molinaro*, the defendant appealed his state court conviction and, like the defendants in *Smith* and *Bonahan*, was considered a fugitive during the pendency of his appeal. Under these circumstances, the Court, in oft-quoted language, "decline[d] to adjudicate" the defendant's appeal:

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims. In the absence of specific provision to the contrary in the statute under which Molinaro appeals, 28 U.S.C. § 1257(2), we conclude, in light of the *Smith* and *Bonahan* decisions, that the Court has the authority to dismiss the appeal on this ground.[26]

This critical language from *Molinaro* reveals the full extent of the Court's holding. First, it identifies the crucial facts under which dismissal is warranted: a "convicted defendant" 1) "has sought review" and 2) "escapes" from custody after conviction. The key language here is "has sought review." This language limits the Court's holding to a defendant who files a notice of appeal, thereby availing himself of the appellate process, and subsequently escapes.[27] Second, the Court's express reliance on *Smith* and *Bonahan* demonstrates its continued recognition of the discretionary power to dismiss an appeal where the defendant is not "where he can be made to respond to any judgment"—including an adverse judgment—the court might enter.[28]

> cute a writ of error, sued out to review his conviction. *Otherwise he is put in a position of saying to the court: "Sustain my writ and I will surrender myself, and take my chances upon a second trial; deny me a new trial and I will leave the State, or forever remain in hiding."* We consider this as practically a declaration of the terms upon which he is willing to surrender, and a contempt of its authority, to which no court is bound to submit. It is much more becoming to its dignity that the court should prescribe the conditions upon which an escaped convict should be permitted to appear and prosecute his writ, than that the latter should dictate the terms upon which he will consent to surrender himself to its custody.

Id. at 141 (emphasis added). See cases cited in *infra* note 28.

25. 396 U.S. 365 (1970) (per curiam).

26. *Id.* at 366.

27. *See* United States v. London, 723 F.2d 1538, 1540 (11th Cir.) (Johnson, J., dissenting), *cert. denied*, 104 S. Ct. 2684 (1984).

28. This conclusion is buttressed by the *Molinaro* Court's citation of Allen v. Georgia, 166 U.S. 138 (1897), in which the defendant was a fugitive at the time of his state court appeal, *id.* at 139, and Eisler v. United States, 338 U.S. 189 (1949) (per curiam), in which the petitioner's flight from the country was held to justify removal of his case from the Supreme Court's docket, *see id.* at 190. Furthermore, when applying *Molinaro*, numerous federal circuit court decisions have stressed the fact that the defendant cannot be

Although *Molinaro*'s effect is somewhat subtle, it expanded *Smith* and *Bonahan* significantly. The Court in *Smith* and *Bonahan* made dismissal contingent on the defendant's failure to return to the jurisdiction of the lower court by a certain future date, and both opinions intimated that the appeal could be reinstated.[29] In *Molinaro*, however, dismissal was effective immediately, and the Court gave no indication that the appeal could be reinstated under any circumstances.[30] Thus, with the Court's decision in *Molinaro*, the discretionary doctrine developed in *Smith* had evolved to allow immediate, unconditional dismissal with prejudice,[31] provided

made to respond to an adverse judgment. *See, e.g.*, Arana v. United States Immigration & Naturalization Serv., 673 F.2d 75, 77 (3d Cir. 1982) (per curiam) (dismissal appropriate because "[t]here is nothing in the record, nor in the presentation by counsel for [appellant], to indicate that [appellant] would . . . [return] were we to entertain his appeal and affirm the district court's denial of habeas relief"); Wayne v. Wyrick, 646 F.2d 1268, 1270-71 (8th Cir. 1981) ("By his escape [appellant] showed his . . . unwillingness to abide by decisions adverse to him."); United States v. Wood, 550 F.2d 435, 437-38 (9th Cir. 1976) (dismissal appropriate where "[t]here is no indication that [appellant] would . . . [surrender] upon a decision adverse to him"); United States v. Gordon, 538 F.2d 914, 915 (1st Cir. 1976) (noting that courts frequently base dismissal on the "inherent power to refuse to hear a case when it is unlikely that a convicted party will respond to an unfavorable decision"), *cert. denied*, 441 U.S. 936 (1979); United States v. Swigart, 490 F.2d 914, 915 (10th Cir. 1973) ("any court has the inherent discretion to refuse to hear the claim of a litigant who is willing to comply with that court's decree only if it is favorable"); Brinlee v. United States, 483 F.2d 925, 926-27 (8th Cir. 1973) (per curiam) ("the Supreme Court's decision in *Smith* . . . rests upon the inherent discretion of *any* court to refuse to hear the claim of a litigant who indicates that he will comply with that court's decree only if it is favorable") (emphasis in original) (quoting Johnson v. Laird, 432 F.2d 77, 79 (9th Cir. 1970)); United States v. Shelton, 482 F.2d 848, 849 (5th Cir.) (per curiam) (the rationale underlying *Molinaro* is the "discretion of the court to refuse to consider the claim of a litigant who indicates that he will comply with the court's decree only if it is favorable"), *cert. denied*, 414 U.S. 1075 (1973); United States v. Tremont, 438 F.2d 1202, 1203 (1st Cir. 1971) (per curiam) (that defendant "can abscond, to return only if it should develop that his conviction is vacated, does not sit well"); Dawkins v. Mitchell, 437 F.2d 646, 648 (D.C. Cir. 1970) (per curiam) (appellants "have appeared by counsel only, and are willing to enjoy the fruits of any legal victory, but it is not apparent that they are willing to accept an adverse decree, and there is certainly no guarantee that they can be compelled to do so"); *see also* Barker v. Jones, 668 F.2d 154, 155 (2d Cir. 1982) (rationale of cases holding that state court's dismissal of a fugitive's appeal is not violative of due process "is that the order and judgment are unenforceable because the appellant has placed himself beyond the control of the court"); Ruetz v. Lash, 500 F.2d 1225, 1229-30 (7th Cir. 1974) (Supreme Court has determined that there is no denial of due process when a state dismisses a fugitive's appeal, since "appellant . . . has placed himself beyond the control of the court"); Lewis v. Delaware State Hosp., 490 F. Supp. 177, 182 (D. Del. 1980) ("By escaping from confinement, [habeas corpus petitioner] has indicated that he will only submit himself to this Court's jurisdiction if it is favorable.").

29. See *supra* text accompanying notes 13 and 17.

30. *Molinaro*, 396 U.S. at 366 ("The dismissal need not await the end of the Term or the expiration of a fixed period of time, but should take place at this time.").

31. *See* United States v. Shelton, 508 F.2d 797, 798 (5th Cir.) ("In Molinaro v. New Jersey, the Supreme Court shifted its own practice and unconditionally dismissed the appeal of a fugitive without waiting to see if he might return or be captured."), *cert. denied*, 423 U.S. 828 (1975) (citation omitted); *see also* United States v. Amado, 754 F.2d 31, 32 (1st Cir. 1985) (relying on *Molinaro* the court noted, "[t]here can be no doubt of our authority to dismiss the appeal with prejudice"); Shaw v. Estelle, 542 F.2d 954, 955 (5th Cir. 1976) (per curiam) (dictum) ("[h]ad Shaw escaped while appealing to this court,

that the defendant escaped after having sought appellate review and, due to his absence, could not be forced to comply with an unfavorable decree.[32]

Since *Molinaro*, the most significant expansion of this unconditional dismissal doctrine has been the Eleventh Circuit's decision in *United States v. Holmes*.[33] In *Holmes*, the defendant was convicted by a jury for violations of federal narcotics laws, and soon afterward entered a guilty plea on a charge of possession of a firearm by a convicted felon.[34] The district court set the same sentencing date for both charges. When the defendant failed to appear for sentencing, the district court issued a bench warrant for his arrest and declared his bail bond forfeited.[35]

The defendant was recaptured after almost two years and was returned to the jurisdiction of the trial court for sentencing. The court imposed a sentence and entered final judgment. The defendant then brought an appeal from this conviction on all counts.[36]

Relying on *Molinaro* and its progeny, the government moved to dismiss the defendant's appeal based on his *former* fugitive status. The government candidly admitted,[37] and the court acknowledged, that the cases it cited were all distinguishable because the defendants in each of the cases did not flee until after filing a notice of appeal, whereas Holmes fled after conviction but before sentencing and, thus, before filing a notice of appeal.[38] Nonetheless, the government argued that the policy considerations justifying dismissal in the *Molinaro* line of cases applied regardless of whether the defendant fled before or after filing a notice of appeal.[39] The court agreed and dismissed the appeal, holding that "a defendant who flees after conviction, but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control."[40]

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he would have been subject to unconditional dismissal"); *cf.* Joensen v. Wainwright, 615 F.2d 1077, 1079 (5th Cir. 1980) ("If the Supreme Court can summarily and unconditionally dismiss an escapee's appeal . . . there is no reason why a state court may not do likewise."). See also *supra* note 2.

32. See *supra* notes 27-28 and accompanying text.

33. 680 F.2d 1372 (11th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1015 (1983).

34. *See id.* at 1373.

35. *See id.*

36. *See id.*

37. *See* Brief of Appellee at 13, United States v. Holmes, 680 F.2d 1372 (11th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1015 (1983).

38. *See Holmes*, 680 F.2d at 1373.

39. *See* Brief of Appellee at 13-14, United States v. Holmes, 680 F.2d 1372 (11th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1015 (1983).

40. *Holmes*, 680 F.2d at 1373. The court expressly excepted from the scope of the waiver the former fugitive's right to appeal from errors in sentencing. *See id.* In a later case the court further limited the scope of the waiver by holding that escape does not effect a waiver of the defendant's right to counsel at the deferred sentencing hearing. *See* Golden v. Newsome, 755 F.2d 1478, 1481-84 (11th Cir. 1985).

Although the *Holmes* court purported to rely on *Molinaro*,[41] neither of the two reasons it offered in support of its holding were articulated by the Supreme Court in *Molinaro*. First, the *Holmes* court emphasized that the right of appeal is purely statutory and it therefore can be waived "through flight which may postpone filing a notice of appeal for years after conviction."[42] Thus, delay caused by the defendant's flight is a basis for dismissing an appeal filed after recapture. Second, the court declared that it "would fly in the face of common sense and sound reason" to allow former fugitives "to seek relief from the very legal system that they previously had seen fit only to defy."[43] Therefore, the defendant's defiance of the "legal system" is another suggested basis for dismissal. The *Holmes* court, however, cited no cases sanctioning dismissal of an appeal based on delay or defendant's defiance.[44] Further, although the court quoted *Molinaro*,[45] it failed to observe that the defendant, who was now incarcerated, was "where he [could] be made to respond to any judgment" the court might render.[46] Consequently, *Holmes* established a new set of criteria to justify dismissal of an appeal by a former fugitive who files an appeal after recapture.

Following *Holmes*, the Eleventh Circuit further extended its discretionary power to dismiss unconditionally the appeals of former fugitives. In *United States v. London*,[47] the defendant fled during a six-month jury trial in which he and eleven other defendants faced charges related to an alleged marijuana smuggling organization.[48] Following the defendant's escape, the trial court exercised its discretion to proceed with the defendant's trial in absentia,[49] which resulted in conviction of all of the defend-

41. *See Holmes*, 680 F.2d at 1374 (quoting Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (per curiam)).

42. *Id.* at 1373-74.

43. *Id.* at 1374.

44. Some cases had mentioned "defiance" as a basis for dismissal, *see, e.g.*, United States v. O'Neal, 453 F.2d 344, 345 (10th Cir. 1972) (per curiam), but in cases such as *O'Neal* the appellant remained a fugitive at the time of dismissal. Prior to *Holmes*, the only cases decided on similar facts that considered the effect of "delay" held that dismissal was inappropriate. *See* United States v. Tunnell, 650 F.2d 1124, 1126 (9th Cir. 1981) (12-year hiatus between conviction and sentencing created by defendant's flight gave government justifiable concern about the potential difficulty in retrying case but did not warrant dismissal); United States v. Tapia-Lopez, 521 F.2d 582 (9th Cir. 1975) (per curiam) (five-year delay not commented on by the court).

45. *See Holmes*, 680 F.2d at 1374.

46. Smith v. United States, 94 U.S. 97, 97 (1876). See *supra* notes 26-29 and accompanying text.

47. 723 F.2d 1538 (11th Cir.), *cert. denied*, 467 U.S. 1228 (1984).

48. *Id.* at 1538.

49. Under Rule 43(b) of the Federal Rules of Criminal Procedure, a defendant may be tried in absentia when he "voluntarily absents himself after the trial has commenced." Fed. R. Crim. P. 43(b)(1). *See* Taylor v. United States, 414 U.S. 17, 18-20 (1973) (per curiam). The trial court's discretion to proceed in absentia under Rule 43, however, is "very narrow." United States v. London, 723 F.2d 1538, 1539 (11th Cir.), *cert. denied*, 467 U.S. 1228 (1984); *see* United States v. Benavides, 596 F.2d 137, 139 (5th Cir. 1979).

Aside from becoming a fugitive, a defendant can also waive his right to be present at trial by obtaining the court's permission to be absent, *see* United States v. Jones, 514 F.2d

ants on various counts of the indictment. Six of the defendant's codefendants, who had not fled, sought appellate review and had their convictions affirmed.[50]

Nearly three years after trial, the defendant was apprehended and returned to the jurisdiction of the district court for sentencing.[51] He then filed a notice of appeal, and the government moved to dismiss because the defendant became a fugitive during trial.[52] Relying on *Molinaro* and *Holmes*, the court granted the motion and dismissed the appeal.[53] In light of the decision in *Holmes*, the court's holding in *London* is not surprising. As the *London* court observed, flight during trial is, in relation to the appellate process, no different from flight after conviction but before sentencing; "[i]n neither situation has a final, appealable judgment been entered from which an appeal could be taken."[54] *London* is significant, however, because it narrows and explains the rationale of *Holmes*. The court's comparison of escape during trial to the situation faced in *Holmes* is particularly instructive:

> In *Holmes* the escape disrupted the sentencing process and appellate review; in the present case the defendant disrupted a prolonged trial and flaunted his disregard for the orderly court procedures for the determination of whether he was guilty or not guilty.[55]

As explained earlier, *Holmes* relied on both delay caused by the defendant's flight and the defendant's defiance of the legal system to dismiss the appeal.[56] The *London* court, however, focused only on the defendant's

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1331, 1332-33 (D.C. Cir. 1975), or by failing to make a timely objection to the holding of proceedings in his absence, *see* United States v. Brown, 571 F.2d 980, 987 (6th Cir. 1978); *see also* United States v. Gallo, 763 F.2d 1504, 1529 (6th Cir. 1985) (defendant can waive right to be present by failing to make timely objection, by voluntary absence or through court permission), *cert. denied*, 106 S. Ct. 826 (1986).

50. *See* United States v. Phillips, 664 F.2d 971, 985-86 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982).

51. United States v. London, 723 F.2d 1538, 1539 (11th Cir.), *cert. denied*, 467 U.S. 1228 (1984).

52. *Id.*

53. *Id.* Curiously, the *London* court made no mention of the court's previous dismissal of the appeal of one of London's codefendants who, like London, had absconded during trial. *See* United States v. Phillips, 664 F.2d 971, 985 n.1 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982). Nor did the court in *Holmes* note the dismissal in *Phillips*. These oversights, however, may not have been significant. The notice of appeal for the absconded codefendant in *Phillips* was filed while he was a fugitive and he remained a fugitive at the time of dismissal. *See id.* In contrast, in both *Holmes* and *London*, the defendant was a fugitive neither at the time he sought appellate review nor at the time the government moved to dismiss the appeal. *See* United States v. London, 723 F.2d 1538, 1539 (11th Cir.) (defendant filed appeal after his recapture), *cert. denied*, 467 U.S. 1228 (1984); United States v. Holmes, 680 F.2d 1372, 1373 (11th Cir. 1982) (per curiam) (same), *cert. denied*, 460 U.S. 1015 (1983). Thus, *Phillips* is distinguishable from both *Holmes* and *London*. *See* Wayne v. Wyrick, 646 F.2d 1268, 1270 (8th Cir. 1981) ("Had Wayne's attorney attempted to perfect his appeal while he remained at large, the appeal would surely have been dismissed when the court learned of Wayne's fugitive status.").

54. *London*, 723 F.2d at 1539.

55. *Id.*

56. See *supra* notes 41-44 and accompanying text.

disruption of "a prolonged trial and . . . his disregard for . . . orderly court procedures."[57] The court ignored the fact that, due to the defendant's flight, the filing of the notice of appeal was delayed by almost three years. This shift in focus makes clear that, in the court's view, sustaining the integrity of the judicial process is an independently sufficient reason for dismissing the appeal of a former fugitive.

In *Smith*, *Bonahan* and *Molinaro*, the Supreme Court established a doctrine that allows dismissal of a criminal appeal based on a defendant's flight during the pendency of his appeal.[58] As *London* and *Holmes* demonstrate, the lower federal courts have expanded this discretionary doctrine apparently to allow dismissal of an appeal for flight occurring at any time during the defendant's custody and at any stage of the judicial process.[59] Despite this expansion, the courts have not yet identified the nature and source of the power permitting them to dismiss an appeal, nor have they recognized any principles that might limit the exercise of that power.[60] Before the legitimacy of the doctrine established in *Molinaro* and the courts' recent expansion of that doctrine, can be evaluated, it is essential to determine the nature and source of, and limitations on, the courts' dismissal power.

II. THE NATURE AND SOURCE OF THE JUDICIARY'S DISMISSAL POWER

A. *Constraints on the Federal Courts' Power to Dismiss Appeals*

Under the Constitution, Congress possesses plenary power to regulate appellate jurisdiction. Article III, section 1 leaves the establishment and regulation of inferior federal courts entirely to the prerogative of Congress. Thus, Congress, not the judiciary, establishes and defines the jurisdiction of the circuit courts.[61] Similarly, article III, section 2, makes the

57. *London*, 723 F.2d at 1539.

58. See *supra* notes 9-32 and accompanying text.

59. See *supra* notes 33-57 and accompanying text.

60. In United States v. Baccollo, 725 F.2d 170 (2d Cir. 1983), the court at least questioned "whether an appellate court has power to dismiss an appeal on account of appellant's conduct before judgment was entered." *Id.* at 171-72. The court refused to decide the case on that ground, however, as it felt that "the appeal [was] so plainly frivolous" on the merits that there was no need to "unnecessarily go out on a limb." *Id.* at 172.

61. U.S. Const. art. III, § 1; *see* Palmore v. United States, 411 U.S. 389, 400-01 (1973) ("decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress"); Glidden Co. v. Zdanok, 370 U.S. 530, 551 (1962) ("The great constitutional compromise that resulted in agreement upon Art. III, § 1, authorized but did not obligate Congress to create inferior federal courts."); Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe."); Redish & Woods, *Congressional Power to Control the Jurisdiction of the Lower Federal Courts: A Critical Review and A New Synthesis*, 124 U. Pa. L. Rev. 45, 46-47 (1975) (Congress possesses discretionary power to create or abolish lower federal courts); Rotunda, *Congressional Power to Restrict*

Supreme Court's appellate jurisdiction equally dependent on congressional action by providing that the Court shall have appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."[62] Thus, article III vests in Congress control over appellate juris-

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the Jurisdiction of the Lower Federal Courts and the Problem of School Busing, 64 Geo. L.J. 839, 839-44 (1976) (same).

62. U.S. Const. art. III, § 2. Early decisions under the Judiciary Act of 1789, ch. 20, §§ 1, 13, 22, 25, 1 Stat. 73, 80, 84-86 (codified as amended in scattered sections of 28 U.S.C.) made clear Congress' power to establish and control the Supreme Court's appellate jurisdiction under the "exceptions clause." *See* Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313-14 (1810); Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 327 (1796). These decisions established the principle that, under the "exceptions clause," Congress affirmatively grants jurisdiction, rather than makes exceptions to constitutional grants of jurisdiction. As stated in *Durousseau*:

> When the first legislature of the Union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court. They have not, indeed, made these exceptions in express terms. They have not declared, that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

10 U.S. (6 Cranch) at 314; *see* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 620 (1875); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513-14 (1868). *See generally* Van Alstyne, *A Critical Guide to Ex parte* McCardle, 15 Ariz. L. Rev. 229 (1973) (*Ex parte McCardle* appears to settle the question of Congress' authority to make exceptions to the Supreme Court's appellate jurisdiction). To this day, the orthodox view remains that Congress possesses plenary power to confer or withhold the Supreme Court's appellate jurisdiction. *See* E. Corwin, The Constitution and What it Means Today 178 (13th ed. 1973); J. Peltason, Corwin & Peltason's Understanding the Constitution 114-15 (10th ed. 1985); Anderson, *The Government of Courts: The Power of Congress Under Article III*, 68 A.B.A. J. 686, 688 (1982); Anderson, *The Power of Congress to Limit the Appellate Jurisdiction of the Supreme Court*, 1981 Det. C.L. Rev. 753, 753-70; Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 Vill. L. Rev. 1030, 1038-41 (1982); Berger, *Congressional Contraction of Federal Jurisdiction*, 1980 Wis. L. Rev. 801, 805-10; Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction under the Exceptions Clause: An Internal and External Examination*, 27 Vill. L. Rev. 900, 901-03 (1982); Roberts, *Now is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A. J. 1, 3-4 (1949); Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 Wm. & Mary L. Rev. 385, 386-98 (1983); Van Alstyne, *supra*, at 254-69; Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1005 (1965). Congress' power is limited only by the due process clause and other constitutional provisions. Van Alstyne, *supra*, at 263-64; *see* Sager, *The Supreme Court 1980 Term—Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 70 (1981). *But see* Redish, *supra*, at 915-23, 927 (due process and equal protection limitations on Congress' power are at best uncertain and may be limited to Congress' power to restrict the Supreme Court's jurisdiction in regard to claims of racial equality). A considerable school of thought, however, seriously disputes Congress' power to control the Supreme Court's appellate jurisdiction. *See, e.g.*, S. Rep. No. 1097, 90th Cong., 2d Sess. 155-57 (1968), *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, 2218-20; J. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court 53-54 (1980); O. Stephens & G. Rathjen, The Supreme Court and the Allocation of Constitutional Power 40 (1980); Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 Or. L. Rev. 3, 6-28 (1973); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in*

diction at all levels of the federal judiciary:

> Congress need not establish inferior courts; Congress need not grant the full scope of jurisdiction which it is empowered to vest in them; Congress need not give this [Supreme] Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*.[63]

By statute, Congress has expressly conferred jurisdiction on the Supreme Court over certain appeals of criminal defendants from state court convictions.[64] Likewise, Congress has invested the circuit courts with jurisdiction over the appeals of criminal defendants from final judgments of conviction entered by federal district courts.[65] Congress, how-

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Dialectic, 66 Harv. L. Rev. 1362, 1364-66 (1953); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 Minn. L. Rev. 53, 68-69 (1962); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 168-73, 201-02 (1960); *see also* Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 Vill. L. Rev. 929, 932-36, 939-40, 956-58 (1982) (Congress could not totally withdraw appellate jurisdiction from Supreme Court; it would impair essential functions of the Court).

63. National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting) (emphasis in original). *But see generally* Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741 (1984) (in-depth historical analysis of article III suggesting that Congress' power over the jurisdiction of the Supreme Court and inferior federal courts can be understood only by studying the ratification process and article III as a whole, and that Congress' power may not be plenary).

64. *See, e.g.*, 28 U.S.C. § 1257(2) (1982) (conferring appellate jurisdiction over decisions that uphold the validity of a state statute by the highest court of a state).

65. *See id.* § 1291 (conferring appellate jurisdiction over "all final decisions of the district courts"). Although the right to a criminal appeal is not of constitutional dimension, United States v. Holmes, 680 F.2d 1372, 1373 (11th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1015 (1983); *see* McKane v. Durston, 153 U.S. 684, 687 (1894), its significance should not be overlooked:

> Every federal criminal defendant has a statutory right to have his or her conviction reviewed by a court of appeals. The statutory right to appeal is deemed so important that a district court judge is required to inform a defendant specifically of that right after trial and sentencing. The right to appeal is from the judgment of conviction and not from the sentence. *See* Coppedge, [369 U.S. 438, 441 (1962)] ("Present federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right.").

United States v. De Bright, 730 F.2d 1255, 1259 (9th Cir. 1984) (emphasis deleted) (citations omitted) (rejecting the concurrent sentence doctrine); *see* Brewen v. United States, 375 F.2d 285, 286 (5th Cir. 1967) ("It is settled that an appeal from the judgment of a federal District Court is a matter of right."). *See generally* Lobsenz, *A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction*, 8 U. Puget Sound L. Rev. 375, 375-77 (1985) (although right to criminal appeal not of constitutional dimensions, many states have added such provisions to their state constitutions). Several courts have recognized that, because an individual's liberty is at stake in a criminal appeal, the *Molinaro* rationale should apply with equal or greater force in civil, rather than criminal, cases. *See* Conforte v. Commissioner, 692 F.2d 587, 589-90 (9th Cir. 1982) ("the rule [established in *Molinaro*] should apply with greater force in civil cases where an individual's liberty is not at stake"), *stay denied*, 459 U.S. 1309 (Rehnquist, Circuit Justice 1983); Doyle v. United States Dep't of Justice, 494 F. Supp. 842, 845 (D.D.C. 1980) ("If the courts may invoke their inherent equitable powers to refuse to

ever, has enacted no statute permitting the courts to dismiss those appeals based on the defendant's flight, whether it occurs before or after filing a notice of appeal. Nor does the Constitution contain any other provision that would inhibit judicial action to determine the validity of a criminal conviction.[66] Further, the Supreme Court in *Molinaro* stated unequivocally that the defendant's "escape does not strip the case of its character as an adjudicable case or controversy."[67]

The federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them."[68] The courts' failure or refusal to exercise that jurisdiction—including jurisdiction over appeals by fugitives and former fugitives—would impinge on Congress' constitutional power to establish and define appellate jurisdiction.[69] The judiciary, therefore, must exercise that jurisdiction to maintain the balance of power pre-

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entertain appeals from fugitives who are seeking to overturn criminal convictions, they surely may do so likewise with respect to those fugitives who merely seek relief under the Freedom of Information Act."), *aff'd per curiam*, 668 F.2d 1365 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1002 (1982); *see also* Arana v. United States Immigration & Naturalization Serv., 673 F.2d 75, 77 n.2 (3d Cir. 1982) (per curiam) ("given the plethora of constitutional and statutory procedural protections that are afforded to criminal defendants but not made available to individuals subjected to administrative deportation proceedings, a court might exercise greater caution in dismissing the appeal of a convicted party who has escaped than of a potential deportee who has absconded") (citation omitted). Thus, in light of the criminal defendant's significant, albeit not constitutional, right to an appeal, and in view of the federal courts' "unflagging obligation" to exercise their jurisdiction, see *infra* note 68 and accompanying text, courts should dismiss fugitives' appeals only if a reason so compelling as to overcome these countervailing factors exists.

66. *See, e.g.*, United States v. Lockwood, 382 F. Supp. 1111, 1117 (E.D.N.Y. 1974) ("No constitutional inhibition against court action to determine the validity of a criminal charge absent a defendant was inserted into our Constitution."). As explained in *Lockwood*, the drafters did not insert such a provision into the Constitution because contemporary English common law made it unnecessary to consider the issue; fugitives were condemned through the process of outlawry. *See id.*; 4 W. Blackstone, Commentaries *319-20; 1 J. Chitty, A Practical Treatise on the Criminal Law 347, 353, 365-68 (1816); *see also* United States v. Weinstein, 511 F.2d 622, 628 (2d Cir.) ("at one time the penalty for failure to appear could be an order outlawing the defendant"), *cert. denied*, 422 U.S. 1042 (1975).

67. Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (per curiam).

68. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976); *see* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.") (quoting Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909)); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (dictum) ("It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."); *see also* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 124-25 (1981) (Brennan, J., concurring) ("Where Congress has granted the federal courts jurisdiction, we are not free to repudiate that authority. . . . The power to control the jurisdiction of the lower federal courts is assigned by the Constitution to Congress, not to this Court."); United States v. City of Pittsburgh, 757 F.2d 43, 45 (3d Cir. 1985) (federal court should have "reluctance" to relinquish "its clearly established jurisdiction").

69. See *supra* notes 61-62 and accompanying text.

scribed by the separation of powers inherent in the Constitution's tripartite division of government,[70] unless one of the court's inherent powers allows it to refuse jurisdiction.

B. *Inherent Powers of the Courts*

The Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[71] Because dismissal of a fugitive's or former fugitive's appeal is not in keeping with courts' "virtually unflagging obligation" to exercise their jurisdiction,[72] dismissal must be pursuant to some authority inherent in the constitutional concept of "judicial power" with which the Constitution and the Congress have entrusted the courts by virtue of creating them.[73] The inherent powers of federal courts are those that "are necessary to the exercise of all others."[74] The courts in *Holmes* and *London* implicated at

70. The tripartite structure established by the Constitution reflects the conferral of separate and distinct powers on the President, the Congress and the Judiciary. The framers of our Constitution embraced "Montesquieu's view that the maintenance of independence as between the legislative, the executive and the judicial branches," was essential to the preservation of liberty.

In re Application of President's Comm'n on Organized Crime, 763 F.2d 1191, 1195 (11th Cir. 1985) (quoting Myers v. United States, 272 U.S. 52, 116 (1926)). The need for independence stands on the principle that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 960 (1983) (Powell, J., concurring) (quoting The Federalist No. 47, at 324 (J. Madison) (J. Cooke ed. 1961)). Traditionally, the courts have construed the separation of powers doctrine to prohibit "those arrogations of power to one branch of government which 'disrupt[ ] the proper balance between the coordinate branches' . . . or 'prevent[ ] [one of those branches] from accomplishing its constitutionally assigned functions.' " *In re President's Comm'n*, 763 F.2d at 1195 (quoting Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977)); *see* Eash v. Riggins Trucking Inc., 757 F.2d 557, 573 (3d Cir. 1985) (en banc) (Sloviter, J., dissenting) ("the separation of powers doctrine is violated when one branch of government assumes a function that more properly is entrusted to another"). Furthermore, "[t]he danger of intrusion by one branch of the government on the powers of another is no less when it is the judiciary that is the usurper." *Id.* at 575 (Sloviter, J., dissenting). Indeed, the framers explicitly identified the dangers of judicial encroachment on the powers of the other branches:

> Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.

The Federalist No. 47, at 322 (J. Madison) (P. Ford ed. 1898) (quoting Montesquieu) (emphasis omitted).

71. U.S. Const. art. III, § 1.

72. See *supra* notes 61-70 and accompanying text.

73. *See* Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1016-17 (1924).

74. United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812). The powers of the federal courts that are "necessary to the exercise of all others" are actually only one category of the federal courts' inherent powers. One recent decision has concluded that

least two of these inherent judicial powers in dismissing the appeals of former fugitives.

1. The Inherent Power to Punish Criminal Contempt

The most prominent inherent judicial power is the power to punish criminal contempt.[75] Jurists have long regarded criminal contempt sanctions as indispensable to the judiciary's ability to protect the "orderly administration of justice" and maintain the "authority and dignity of the court."[76] Hence, a criminal contempt sanction aims to vindicate the

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there are three types of inherent powers. *See* Eash v. Riggins Trucking Inc., 757 F.2d 557, 562 (3d Cir. 1985) (en banc). The first is "irreducible inherent authority," which "encompasses an extremely narrow range of authority involving activity so fundamental to the essence of a court as a constitutional tribunal that . . . to deny this power 'and yet to conceive of courts is a self-contradiction.' " *Id.* at 562 (quoting Frankfurter & Landis, *supra* note 73, at 1023); *see* Levin & Amsterdam, *Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. Pa. L. Rev. 1, 30-33 (1958). Congress does not have the authority to infringe this type of power. *See Eash*, 757 F.2d at 562. For example, Congress could not pass a statute forbidding the courts to engage in any textual interpretation, since that is the basic function of a court. *See* Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 28 n.118 (1985) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); *see also* United States v. Klein, 80 U.S. (13 Wall.) 128, 146-47 (1872) (Congress cannot require the Court to decide a case in a particular way).

The second use of the term inherent powers encompasses those powers " 'necessary to the exercise of all others.' " Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)), *superseded on other grounds by* Pub. L. No. 96-349, 94 Stat. 1156 (1980) (codified as amended at 28 U.S.C. § 1927 (1982)). These powers "arise from the nature of the court," *Eash*, 757 F.2d at 562; *see Ex parte* Terry, 128 U.S. 289, 303 (1888), *Hudson*, 11 U.S. (7 Cranch) at 34, and are "implied from strict functional necessity." *Eash*, 757 F.2d at 562. The most prominent power among this second category of inherent power is the contempt sanction. *See id.* at 562-63; *see also* Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1468-69 (1984) (contempt power is an important inherent power). See *infra* note 75 and accompanying text.

The third and final form of inherent power is, in reality, grounded in utility rather than necessity. These powers are "said to be 'rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion.' " *Eash*, 757 F.2d at 563 (quoting ITT Community Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978)). While some courts have referred to this common law equity power as necessary or "essential," *see, e.g.*, *Ex parte* Peterson, 253 U.S. 300, 312-13 (1920), "it is clear that such power is necessary only in the sense of being highly useful in the pursuit of a just result." *Eash*, 757 F.2d at 563; *see* Note, *Compulsory Reference in Actions at Law*, 34 Harv. L. Rev. 321, 324 (1921).

75. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980), *superseded on other grounds by* Pub. L. No. 96-349, 94 Stat. 1156 (1980) (codified as amended at 28 U.S.C. § 1927 (1982)); *see also Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873) ("The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings . . . and consequently to the due administration of justice.").

76. Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) (quoting Cooke v. United States, 267 U.S. 517, 539 (1925)), *superseded on other grounds by* Pub. L. No. 96-349, 94 Stat. 1156 (1980) (codified as amended at 28 U.S.C. § 1927 (1982)); *see* Levine v.

court's power and integrity and to deter similar derelictions.[77]

The courts' dismissal of the appeals in *Holmes* and *London* resembles a criminal contempt sanction in at least one important respect. As *Holmes* indicates,[78] and as is made very explicit in *London*,[79] the basis for unconditional dismissal is the defendant's defiance of the legal system and disruption of the judicial process. Dismissal, therefore, seems designed to sustain the authority and integrity of the court. As such, unconditional dismissal serves the same purpose in the context of an appeal by a former fugitive as a sanction for criminal contempt serves in any other setting.[80]

Despite this common purpose, several significant aspects of the traditional power to punish contumacious conduct suggest that criminal contempt is not the basis for dismissal of former fugitives' appeals. Although courts have inherent power to punish contempt,[81] the Supreme Court long ago acknowledged that the power is nonetheless subject to congressional regulation.[82] With respect to the power to punish flight as contempt of court, Congress arguably has exercised its regulatory power

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United States, 362 U.S. 610, 615 (1960); Michaelson v. United States *ex rel.* Chi., St. P., M. & O. Ry., 266 U.S. 42, 65 (1924); Myers v. United States, 264 U.S. 95, 103 (1924).

77. *See Ex parte* Grossman, 267 U.S. 87, 111 (1925); 3 C. Wright, Federal Practice & Procedure § 702, at 809 (2d ed. 1982); *see also* United States v. United Mine Workers of Am., 330 U.S. 258, 302 (1947) (sentences for criminal contempt "are imposed for the purpose of vindicating the authority of the court").

78. See *supra* notes 42-44 and accompanying text.

79. See *supra* notes 55-57 and accompanying text.

80. See *supra* notes 76-77 and accompanying text. The analogy to criminal contempt is strengthened by the Supreme Court's shift from the conditional dismissal ordered in *Smith* and *Bonahan*, see *supra* notes 13, 17 and accompanying text, to the unconditional dismissal in *Molinaro*. See *supra* notes 29-32 and accompanying text. Conditional dismissal is more analogous to civil contempt because it is designed to coerce the fugitive's return. *See, e.g.*, Shillitani v. United States, 384 U.S. 364, 368 (1966) (conditional prison sentence that could be avoided if witness would answer questions put to him was designed to coerce compliance and, therefore, was a form of civil contempt); Van Blaricom v. Forscht, 490 F.2d 461, 462 (5th Cir. 1974) (en banc) (per curiam) (dismissing appeal "without prejudice to appellant's right to have the appeal reinstated" if appellant returned to custody within 30 days), *cert. denied*, 423 U.S. 915 (1975); *cf.* Doyle v. United States Dep't of Justice, 494 F. Supp. 842, 845-46 (D.D.C. 1980) (a convicted defendant who became a fugitive after filing suit under the Freedom of Information Act had his hands "sullied with his contempt for the tribunals whose assistance he is seeking to invoke. Unless and until he presents himself for service of the sentence lawfully imposed upon him, this Court will . . . refus[e] to assist him with his demands."), *aff'd per curiam*, 668 F.2d 1365 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1002 (1982). See Comment, *The Coercive Function of Civil Contempt*, 33 U. Chi. L. Rev. 120 (1965) for a discussion of the differences between civil and criminal contempt.

The purpose of an unconditional dismissal with prejudice, however, is to punish for past acts, not to coerce future conduct. *See* Allen v. Georgia, 166 U.S. 138, 141 (1897) (dismissal of a fugitive's writ of error "seems but a light punishment" for his escape); *see also In re* Kave, 760 F.2d 343, 351 (1st Cir. 1985) ("The purpose of a criminal contempt proceeding is the vindication of the court's authority by *punishing for a past violation* of a court order.") (emphasis in original).

81. *See* Levine v. United States, 362 U.S. 610, 615 (1960); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873); Eash v. Riggins Trucking Inc., 757 F.2d 557, 562 n.8 (3d Cir. 1985) (en banc).

82. *See* Michaelson v. United States *ex rel.* Chi., St. P., M. & O. Ry., 266 U.S. 42, 65-

so as to remove dismissal of an appeal from the permissible range of contempt sanctions that courts may impose.

Historically, the only available penalties for failure to appear at a judicial proceeding were forfeiture of money and criminal contempt proceedings.[83] Because Congress deemed these penalties inadequate to deter flight and to punish those who did flee, the first federal bail jumping statute was enacted in 1954, and was later revised as part of the Bail Reform Act of 1966.[84] The 1966 Act prescribed specific penalties for failure to appear, but expressly reserved the courts' power to punish for contempt.[85] Subsequently, Congress passed the Comprehensive Crime Control Act of 1984,[86] which "basically continues the current law offense of bail jumping."[87] Thus, Congress appears to have affirmed the notion that flight may be punished through the courts' contempt power.[88]

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67 (1924); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510-11 (1874); 3 C. Wright, *supra* note 77, § 701, at 808; Frankfurter & Landis, *supra* note 73, at 1028-29.

83. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 30 (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3213 [hereinafter cited as Senate Report].

84. Pub. L. No. 89-465, 80 Stat. 214 (codified as amended at 18 U.S.C. §§ 3141-3152 (1982)), *repealed by* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

85. *See* 18 U.S.C. § 3151 (1982) ("Nothing in this chapter shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt.") *repealed by* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

86. Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C.A. §§ 3141-3151 (West Supp. 1985)).

87. Senate Report, *supra* note 83, at 31, *reprinted in* 1984 U.S. Code Cong. & Ad. News at 3214.

88. Based on the 1984 Act's changes to the 1966 Act, one could argue that Congress abrogated the courts' power to punish flight as contempt. Before the 1984 Act, the relevant provisions on release after conviction were contained in Title 18 of the United States Code. Section 3151 of chapter 207 provided that "[n]othing in this chapter shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt." Pub. L. No. 89-465, § 3(a), 80 Stat. 214, 216 (codified at 18 U.S.C. § 3151 (1982)), *repealed by* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976. See *supra* note 85 and accompanying text.

The Crime Control Act of 1984 changed chapter 207 in several significant respects. First, § 3151, which recognized the court's general power to punish for contempt in connection with a violation of chapter 207, was repealed. Further, new § 3148, which identifies the sanctions for violation of a condition of release pending trial, was added. *See* 18 U.S.C.A. § 3148 (West Supp. 1985). The section specifies explicitly that violation of a condition of release pending trial may be punished by contempt. *See id.* § 3148(a), (c). Significantly, unlike new § 3148, new § 3146, which governs release after conviction, makes no mention of the power to punish through contempt. *See id.* § 3146. Likewise, the legislative history discusses punishment through contempt only in relation to § 3148, *see* Senate Report, *supra* note 83, at 34, *reprinted in* 1984 U.S. Code Cong. & Ad. News at 3217, and mentions *only* the statutory penalties of fine, imprisonment and forfeiture in relation to § 3146. *See id.*, *reprinted in* 1984 U.S. Code Cong. & Ad. News at 3217. Arguably, the 1984 changes to chapter 207 showed that Congress intended that the only punishments to be imposed for failure to appear for sentencing following conviction were those explicitly mentioned in § 3146. One could argue that to assume otherwise would render Congress' elimination of former § 3151 and restructuring of sections 3146 and 3148 pointless—an improper assumption under well established canons of statutory construction. *See, e.g.*, Uptagrafft v. United States, 315 F.2d 200, 204 (4th Cir.) (per curiam)

Although the Crime Control Act broadly affirmed the courts' power to punish flight as criminal contempt, Congress elsewhere has carefully defined and limited the courts' power to punish criminal contempt. Specifically, Congress has clearly identified the available contempt sanctions. The contempt statute provides that a federal court "shall have power to punish *by fine or imprisonment*, at its discretion, . . . contempt of its authority."[89]

The courts have taken a literal approach to the contempt statute's "fine or imprisonment" language. The history of the contempt statute provides the basis for these narrow interpretations. Congress originally sanctioned the federal courts' authority to punish for contempt in section 17 of the Judiciary Act of 1789.[90] The language of the 1789 statute was expansive.[91] To curb perceived abuses under the 1789 Act,[92] Congress in

(Congress does not intend to enact "unnecessary statutory amendments"), *cert. denied*, 375 U.S. 818 (1963). Indeed, the 1984 changes give rise to a presumption that Congress intended to change prior law. *See, e.g.*, Klein v. Republic Steel Corp., 435 F.2d 762, 765-66 (3d Cir. 1970) (where "words of a later statute differ from those of a previous one on the same or a related subject, the legislature must have intended them to have a different meaning"); United States v. Crocker-Anglo Nat'l Bank, 277 F. Supp. 133, 155 (N.D. Cal. 1967) (if change occurs in legislative language, it is presumed that change was intended in legislative result). If one were to accept these premises, the 1984 Act could be construed to prohibit the judiciary from punishing a defendant for flight except in the manner prescribed by statute after successful prosecution by the government. Thus, punishment of a fugitive through contempt proceedings would be improper.

Construing the 1984 Act to preclude the courts' exercise of their contempt power, however, seems both unreasonable and unlikely. The contempt power is rooted principally in the judiciary's inherent power and is regarded as indispensable to the administration of justice. See *supra* notes 75-76 and accompanying text. The Supreme Court has stated that while the contempt power "may be regulated within limits not precisely defined," it can "neither be abrogated nor rendered practically inoperative." Michaelson v. United States *ex rel.* Chi., St. P., M. & O. Ry., 266 U.S. 42, 66 (1924). In light of these principles, only a strained construction of the 1984 Act could support an implied abrogation of the courts' contempt power. *Cf.* United States v. Dickerson, 310 U.S. 554, 561 (1940) (where other persuasive evidence present, rule of statutory construction not infallible); *see also* McElroy v. United States, 455 U.S. 642, 651 n.14 (1982) (although a change of statutory language is some indication of a change of purpose, "the inference of a change of intent is only 'a workable rule of construction, not an infallible guide to legislative intent, and cannot overcome more persuasive evidence' ") (quoting United States v. Dickerson, 310 U.S. 554, 561 (1940)).

Moreover, this conclusion is supported by decisions under the previous statutes expressly mentioning the contempt power. In United States v. Green, 241 F.2d 631 (2d Cir. 1957), *aff'd*, 356 U.S. 165 (1958), the court noted the 1954 bail statute's express reservation of the contempt power and observed that this clause merely acknowledged the court's recognized power to punish. *Id.* at 633-34. It seems highly unlikely that Congress, by deleting express reference to the contempt power in the current statute, could be deemed to impliedly eliminate that which it did not create.

89. 18 U.S.C. § 401 (1982) (emphasis added).

90. Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

91. The statute provided that the federal courts "shall have power to . . . punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same . . . ." *Id.*

92. In 1826 Judge James Peck punished for contempt an attorney who had published a critical article about the judge's conduct in a case then on appeal. *See* Bloom v. Illinois, 391 U.S. 194, 203 (1968); Nelles & King, *Contempt by Publication in the United States—*

1831 enacted the forerunner of the present contempt statute.[93] The Act of 1831, which closely resembles the modern statute,[94] "substantially curtailed" the previously undefined power of federal courts in matters of criminal contempt.[95]

In *Ex parte Robinson*,[96] the Supreme Court upheld the Act of 1831, concluding that although the power to punish for contempt is inherent in the federal courts, this power may be and was limited by Congress.[97] Significantly, the Supreme Court vacated the sanction of disbarment imposed by the trial court for contempt, because that sanction was neither a "fine" nor "imprisonment" under the contempt statute and could not be added to the punishments available for contempt.[98] The Court explained that the contempt statute limits "the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment."[99]

Modern courts have continued to adhere to the restrictive interpretation of the contempt statute's "fine or imprisonment" language. For example, the Supreme Court has held that the statute forbids imposing both fine *and* imprisonment because, under the statute, "the sentence could only be a fine *or* imprisonment."[100] A subsequent court of appeals decision held that a fine and probation is likewise improper.[101]

If, as the case law makes clear, courts do not even have the power to impose fine and imprisonment or fine and probation—mere variations of the statutory punishment—they certainly lack the power to dismiss an appeal and thereby substitute an entirely different form of punishment from the one prescribed by Congress.[102] Arguably, courts need some degree of flexibility in punishing contempt, and the contempt statute should therefore be construed liberally to permit the imposition of fine and imprisonment or fine and probation.[103] Construing the statute to

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To the Federal Contempt Statute, 28 Colum. L. Rev. 401, 423-30 (1928). This action "triggered the beginining of a long struggle to confine the contempt power." Eash v. Riggins Trucking Inc., 757 F.2d 557, 578 (3d Cir. 1985) (en banc) (Sloviter, J., dissenting).

93. Act of March 2, 1831, ch. 99, 4 Stat. 487 (current version at 18 U.S.C. § 401 (1982)).

94. Eash v. Riggins Trucking Inc., 757 F.2d 557, 578 (3d Cir. 1985) (en banc) (Sloviter, J., dissenting).

95. Bloom v. Illinois, 391 U.S. 194, 203 (1968); Nye v. United States, 313 U.S. 33, 47-48 (1941); *see* Frankfurter & Landis, *supra* note 73, at 1026-29.

96. 86 U.S. (19 Wall.) 505 (1874).

97. *See id.* at 510-11.

98. *See id.* at 512.

99. *Id.*

100. *In re* Bradley, 318 U.S. 50, 51 (1943) (emphasis in original).

101. *See* United States v. Temple, 372 F.2d 795, 799 (4th Cir. 1966), *cert. denied*, 386 U.S. 961 (1967).

102. *See Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 512 (1874) (the statute "must be held to be a negation of all other modes of punishment").

103. *See, e.g.*, United States v. Temple, 372 F.2d 795, 800-01 (4th Cir. 1966) (Craven, J., dissenting), *cert. denied*, 386 U.S. 961 (1967).

permit dismissal of an appeal as punishment for contempt, however, would not be a liberal interpretation; it would be a radical reinterpretation in complete disregard of the statutory language. The statute expressly mentions fine or imprisonment as the available sanctions and, as the Supreme Court made clear in *Robinson*, other forms of punishment not expressly mentioned are excluded.[104] Exclusion is further buttressed by the practice of construing criminal statutes narrowly.[105] Because the courts have refused to permit even slight variations from the "fine or imprisonment" language,[106] and because dismissal of an appeal radically departs from the statutorily prescribed punishment,[107] dismissal is not an appropriate sanction for contempt. Therefore, the inherent power to punish contempt cannot form the basis for dismissal of fugitives' appeals.

An additional reason compels the conclusion that the inherent power to punish contempt is not the basis for dismissal in fugitive cases. Assuming that dismissal were an exercise of the contempt power, it would be a punishment "summarily" imposed—without notice and hearing. The courts' power to punish summarily is governed by Federal Rule of Criminal Procedure 42(a), which specifies the limited circumstances in which notice and a hearing may be eliminated:

> A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.[108]

In all other instances, criminal contempt can be punished only on the issuance of a notice, stating the time and place for a hearing and describing the facts constituting the criminal contempt. The notice must allow

104. *See Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 512 (1874).

105. *See In re* Osborne, 344 F.2d 611, 616 (9th Cir. 1965).

106. See *supra* notes 100-01 and accompanying text. The narrow interpretation of the contempt statute's penalty provisions conforms with decisions on the judiciary's sentencing power in general. *See* Affronti v. United States, 350 U.S. 79, 83 (1955) (federal courts have no authority to grant probation unless authorized to do so by Congress); *Ex parte* United States, 242 U.S. 27, 41-42 (1916) (the authority to define and fix punishment for crime is legislative and the authority to relieve from the punishment fixed by law belongs to the executive; thus, federal courts have no inherent power to suspend execution of a sentence); United States v. Cannon, 778 F.2d 747, 749 (11th Cir. 1985) (per curiam) (where statute conditions granting of probation on entry of judgment of conviction, district court had no authority to withhold adjudication and impose probation or any other sentence); United States v. Elkin, 731 F.2d 1005, 1010-11 (2d Cir.) (absent statutory authority, a court may not decline to impose a sentence), *cert. denied*, 105 S. Ct. 97 (1984).

107. *See, e.g., Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 512 (1873) (courts have power to punish contempt by fine or imprisonment; all other forms of punishment are prohibited).

108. Fed. R. Crim. P. 42(a). Rule 42(a) is "no more than a restatement of the law existing when the Rule was adopted." United States v. Wilson, 421 U.S. 309, 317 (1975); *see* Fed. R. Crim. P. 42 advisory committee note to subdivision (a) ("[t]his rule is substantially a restatement of existing law").

the defendant a reasonable time to prepare a defense.[109] At the hearing, the prosecution bears the burden of establishing every element of the offense beyond a reasonable doubt.[110] The party charged with contempt is afforded a right to be heard by way of defense or explanation,[111] a right to counsel,[112] a right to be confronted with and to cross-examine the witnesses against him,[113] and the right to produce evidence.[114] Further, where the contumacious conduct is also a criminal offense—as is escape from custody[115]— the right to trial by jury attaches.[116]

Because of the importance of the procedural protections normally afforded defendants in contempt proceedings, summary procedures under Rule 42(a) are "reserved 'for exceptional circumstances.' "[117] Hence, courts have identified two "absolute prerequisites" to summary treatment of contempt: the judge invoking Rule 42(a) must actually see or hear the contumacious behavior, and the defendant must commit the contempt in the actual presence of the court.[118] In addition to satisfying these absolute prerequisites, the summary treatment must also comport with the twofold justification of Rule 42(a)'s existence. Thus, unless the defendant's conduct obstructs ongoing proceedings or threatens a judge and so requires immediate and swift vindication of the court's authority,[119] and unless the judge is personally aware of the contumacious con-

109. Fed. R. Crim. P. 42(b); *see* Flight Eng'rs Int'l Ass'n v. Eastern Air Lines, 301 F.2d 756, 759 (5th Cir. 1962).

110. *See In re* Kave, 760 F.2d 343, 351 (1st Cir. 1985); United States v. Rylander, 714 F.2d 996, 1002 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2398 (1984); United States v. Spectro Foods Corp., 544 F.2d 1175, 1183 (3d Cir. 1976).

111. *See In re* Oliver, 333 U.S. 257, 275 (1948).

112. *See id.*; Johnson v. United States, 344 F.2d 401, 411 (5th Cir. 1965).

113. *In re* Oliver, 333 U.S. 257, 275 (1948); *see* Matusow v. United States, 229 F.2d 335, 347 (5th Cir. 1956).

114. Offutt v. United States, 232 F.2d 69, 71 (D.C. Cir.), *cert. denied*, 351 U.S. 988 (1956); Hooley v. United States, 209 F.2d 219, 222-23 (1st Cir.), *cert. denied*, 347 U.S. 953 (1954).

115. *See, e.g.*, 18 U.S.C. § 1073 (1982) (imposing penalty on any person who "moves or travels in interstate or foreign commerce with intent . . . to avoid . . . custody or confinement after conviction"); 18 U.S.C.A. § 3146 (West Supp. 1985) (imposing penalty on any person who fails to appear for sentencing following conviction).

116. 18 U.S.C. § 3691 (1982); *see* United States v. Pyle, 518 F. Supp. 139, 146 (E.D. Pa. 1981), *aff'd mem.*, 722 F.2d 736 (3d Cir. 1983). The right to a jury trial also attaches where the contempt is considered "serious"—subject to a sentence of more than six months imprisonment. *See* Codispoti v. Pennsylvania, 418 U.S. 506, 511-12 (1974).

117. Harris v. United States, 382 U.S. 162, 164 (1965) (quoting Brown v. United States, 359 U.S. 41, 54 (1959) (Warren, C.J., dissenting), *overruled*, Harris v. United States, 382 U.S. 162 (1965)); *see, e.g.*, United States v. Baldwin, 770 F.2d 1550, 1554 (11th Cir. 1985); United States v. Flynt, 756 F.2d 1352, 1363 (9th Cir. 1985); Vaughn v. City of Flint, 752 F.2d 1160, 1169 (6th Cir. 1985).

118. United States v. Flynt, 756 F.2d 1352, 1363 (9th Cir. 1985); *In re* Gustafson, 650 F.2d 1017, 1021 (9th Cir. 1981) (en banc); *see* United States v. Wilson, 421 U.S. 309, 315 (1975); United States v. Martin-Trigona, 759 F.2d 1017, 1024 (2d Cir. 1985).

119. United States v. Wilson, 421 U.S. 309, 315-16 (1975); Harris v. United States, 382 U.S. 162, 164 (1965); *see Ex parte* Terry, 128 U.S. 289, 306-07 (1888).

duct thereby eliminating the need for a hearing,[120] summary procedure is improper.[121]

Dismissing the appeals of fugitives, or former fugitives, as punishment for contempt neither satisfies the absolute prerequisites of, nor comports with the underlying justifications for, summary contempt proceedings. When defendants flee after filing a notice of appeal, the contumacious conduct could be viewed as occurring in the presence of the court,[122] but it is not conduct of which the judge is personally aware. Indeed, in *Molinaro* the Court did not become aware of the appellant's flight until counsel for the defendant and the state so informed the court.[123] Regarding defendants who flee before filing a notice of appeal, neither the "actual presence" nor "personal awareness" requirements are met. The conduct is not in the court's presence because the appellate court has no jurisdiction until a notice of appeal has been filed,[124] and an act committed before the court even acquired jurisdiction could hardly be classified as occurring within the court's presence.[125] For the same reason, the court lacks personal knowledge of the defendant's conduct. Therefore,

120. United States v. Flynt, 756 F.2d 1352, 1363 (9th Cir. 1985); United States v. Marshall, 451 F.2d 372, 374-75, 377 (9th Cir. 1971) (per curiam).

121. *See* United States v. Baldwin, 770 F.2d 1550, 1553-54 (11th Cir. 1985); United States v. Flynt, 756 F.2d 1352, 1363 (9th Cir. 1985).

122. *Cf. In re* Gates, 478 F.2d 998, 1000 (D.C. Cir. 1973) (per curiam) (failure to appear in court at time set for trial was within the rule permitting summary punishment for direct contempt "in the actual presence of the court"); *In re* Niblack, 476 F.2d 930, 931-33 (D.C. Cir.) (per curiam) (failure of lawyer to appear in court at the time set was contempt in presence of the court), *cert. denied*, 414 U.S. 909 (1973). *But see* United States v. Onu, 730 F.2d 253, 254 (5th Cir.) (failure of a lawyer to appear for a trial is not contempt committed in the presence of the court), *cert. denied*, 105 S. Ct. 182 (1984); *In re* Allis, 531 F.2d 1391, 1392 (9th Cir. 1976) (tardiness of counsel in appearing at scheduled hearing is not necessarily punishable summarily as conduct committed in court's presence; the reasons for the absence must be examined), *cert. denied*, 429 U.S. 900 (1976).

123. *See Molinaro*, 396 U.S. at 365.

124. *See* Elfman Motors, Inc. v. Chrysler Corp., 567 F.2d 1252, 1253 (3d Cir. 1977) (per curiam); Martin v. United States, 263 F.2d 516, 517 (10th Cir. 1959) (per curiam); Donovan v. Esso Shipping Co., 259 F.2d 65, 68 (3d Cir. 1958), *cert. denied*, 359 U.S. 907 (1959).

125. *See Ex parte* Bradley, 74 U.S. (7 Wall.) 364, 371-72 (1869) (judges of the Supreme Court of the District of Columbia exceeded their authority in punishing lawyer for contempt committed before the criminal court of the district); *Ex parte* Tillinghast, 29 U.S. (4 Pet.) 108, 109 (1830) ("this Court does not consider itself authorised to punish here for contempts which may have been committed in [the District Court]"); Merchants' Stock & Grain Co. v. Board of Trade, 201 F. 20, 27 (8th Cir. 1912) (a court has exclusive jurisdiction to punish contempts of its authority; no change of venue can be allowed); *cf.* Letts v. Icarian Dev. Co., No. 74-C-2252, slip op. at 11, 16-19 (N.D. Ill. Sept. 15, 1980) (power to punish contempt "resides only in the court against which the contempt is committed;" however, by refiling false affidavits initially filed in another court, defendant was guilty of contempt in the second court) (available in the files of the *Fordham Law Review*); *In re* Steiner, 195 F. 299, 301 (S.D.N.Y. 1912) (district court noted that "only the court whose authority is contemned has the right to punish for the offense" but then said that given an act of Congress abolishing the circuit court, it must act in place of the circuit court).

whether dismissal is based on flight before or after filing a notice of appeal, the court's summary disposition of the matter would not comply with the requirements of summary contempt proceedings.

Because dismissing the defendant's appeal would be both procedurally improper and an improper sanction for contempt, the federal courts' inherent power to punish contempt cannot be the basis for dismissal of fugitives' or former fugitives' appeals. Dismissal must be pursuant to an inherent power on which Congress has imposed fewer restraints and over which the courts have greater latitude and control. The courts' inherent power to control their dockets and manage their own affairs is one such power.

2. The Courts' Inherent Power to Control Their Dockets and Manage Their Own Affairs

Federal courts have the inherent power to impose a variety of sanctions in order to regulate their dockets, promote judicial efficiency or deter frivolous filings.[126] This power is governed "by the control necessarily vested in courts to manage their own affairs."[127] In appropriate circumstances, dismissal of an action is a proper sanction to impose pursuant to this power.[128]

a. *Dismissal Based on Lack of "Mutuality"*

In *Smith*, *Bonahan* and *Molinaro*, the defendants' escape during the pendency of their appeals deprived the court of the ability to enforce an adverse judgment.[129] In *Smith* and *Bonahan*, dismissal was contingent on the defendant's failure to return to custody within a specified time.[130]

126. Moulton v. Commissioner, 733 F.2d 734, 735 (10th Cir. 1984) (per curiam); *see* Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962); Eash v. Riggins Trucking Inc., 757 F.2d 557, 563, 567 (3d Cir. 1985) (en banc); Barnd v. City of Tacoma, 664 F.2d 1339, 1342 (9th Cir. 1982); Penthouse Int'l, Ltd. v. Playboy Enter., Inc., 663 F.2d 371, 386 (2d Cir. 1981); *see also* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-65 (1980) (courts have inherent power to levy sanctions "in response to abusive litigation practices"), *superseded on other grounds by* Pub. L. No. 96-349, 94 Stat. 1156 (1980) (codified as amended at 28 U.S.C. § 1927 (1982)); Resnik, *Managerial Judges*, 96 Harv. L. Rev. 376, 396 n.80 (1982) ("Federal courts have inherent power to make rules for the orderly conduct of their business."); Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to be Submitted in Written Form Prior to Trial*, 72 Geo. L.J. 73, 75 (1983) ("In short, a court's inherent powers are those that it may call upon to aid in the exercise of its jurisdiction, the administration of justice, and the preservation of its independence and integrity.").

127. Link v. Wabash R.R., 370 U.S. 626, 630 (1962); *see* Eash v. Riggins Trucking Inc., 757 F.2d 557, 567 (3d Cir. 1985) (en banc).

128. *See* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam); Link v. Wabash R.R., 370 U.S. 626, 629-33 (1962); Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1338 (9th Cir. 1985); Wyle v. R.J. Reynolds Indus., 709 F.2d 585, 589 (9th Cir. 1983); *see also* Phoceene Sous-Marine, S.A. v. United States Phosmarine, Inc., 682 F.2d 802, 806 (9th Cir. 1982) (although courts have power to dismiss an action, the power is limited by requirements of due process).

129. See *supra* notes 9-32 and accompanying text.

130. See *supra* text accompanying notes 13 and 17.

Those decisions, therefore, stand on solid ground; the dismissal of an appeal for the appellant's failure to obey a direct order of the appellate court is firmly established.[131]

In contrast, dismissal in *Molinaro* was ordered immediately after the Court was notified of the appellant's flight.[132] Because the Court issued no order of return, dismissal was based on the appellant's fugitive status, rather than his disobedience of an appellate court order. Thus, the propriety of dismissal in *Molinaro* depends on whether promoting the principle of "mutuality"—the notion that the sovereign should benefit from a judgment in its favor as readily as the defendant should benefit from a successful appeal[133]—falls within the appellate courts' inherent judicial power to manage their own affairs.

Under the facts in *Molinaro*, dismissal seems justified. Although courts have been rather imprecise in articulating the exact rationale, the justifiability of dismissal seems completely unquestionable in light of the utter reasonableness of the rule *Molinaro* established: a defendant invoking the resources of the appellate court must not, by escaping from custody, deprive the court of its ability to enforce an adverse judgment.[134] A contrary rule would make a mockery of the appellate process and would encourage defendants to flee so as to enjoy the benefits of both a successful escape and, if the appeal were allowed to proceed in absentia, a successful appeal.[135] Thus, preventing flight by appellants is necessary to preserve the court's ability to enforce adverse judgments and to maintain orderly appellate procedures.[136]

b. *Dismissal Based on Flight Before Seeking Appellate Review*

Although the justifiability of dismissing the appeal of a defendant who flees after seeking appellate review seems clear, the reasons for dismissing the appeal of one who flees before invoking the resources of the appellate court and who is no longer a fugitive at the time of initiating appellate review are less obvious. Because the defendant has returned to custody, the mutuality principle is satisfied.[137] Further, because the defendant

131. *See* Annot., 49 A.L.R.2d 1425, 1428 (1956) ("with respect to the question whether an appeal may be dismissed where the appellant has failed to obey an order issued by the appellate court, the courts in all jurisdictions in which the issue has arisen have been virtually unanimous in holding that dismissal is warranted, even if not mandatory") (footnotes omitted).

132. See *supra* note 30 and accompanying text.

133. See *supra* notes 24 and 28.

134. See *supra* notes 25-32 and accompanying text.

135. See *supra* notes 24 and 28.

136. *Cf.* United States v. Hall, 472 F.2d 261, 265 (5th Cir. 1972) (district court has inherent power to punish for criminal contempt a nonparty to a school desegregation case who violates a court order; the "disruptive conduct would not only jeopardize the effect of the court's judgment already entered but would also undercut its power to enter binding desegregation orders in the future").

137. *See, e.g.*, United States v. Shapiro, 391 F. Supp. 689, 693 (S.D.N.Y. 1975) (where counsel represented to the court that the defendant would surrender even if a threshold

fled before invoking appellate jurisdiction, the integrity of the appellate process is not necessarily implicated.[138] Finally, the appellate court has issued no order that the defendant has disobeyed.[139]

Under these circumstances, even the amorphous notion of the courts' inherent power to manage their own affairs does not readily justify dismissal.[140] The uncertainty arises because activities occurring before the filing of the notice of appeal may not qualify as the appellate court's "own affairs."[141] This doubt can only be removed by determining the extent to which the courts' power to manage their *own* affairs can be construed to extend to managing the affairs of the judicial system as a whole. With this broad view of the courts' inherent power in mind, several possible justifications for dismissal of former fugitives' appeals emerge.

i. Disobedience of a Trial Court Order

While the law is well established that dismissal of an appeal is permissible for disobedience of an appellate court order,[142] courts disagree on whether dismissal is proper for disobedience of a trial court order.[143] Many courts have authorized dismissal in these circumstances, however,

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jurisdictional issue were decided against him, the court was convinced there was mutuality and therefore agreed to hear the defendant's claim); *see also* Barker v. Jones, 668 F.2d 154, 155 (2d Cir. 1982) ("When an appellant has been *returned* to the jurisdiction of the court before the appeal is dismissed . . . he has not necessarily lost his rights" to an appeal) (emphasis in original); Ruetz v. Lash, 500 F.2d 1225, 1230 (7th Cir. 1974) (when appellant had been returned to jurisdiction of the court before dismissal of his appeal, request for appeal should not have been dismissed); *cf.* Williams v. Holbrook, 691 F.2d 3, 13 (1st Cir. 1982) ("We believe the district court erred in applying these holdings, without qualification, to the question of petitioner's right in a successive petition to seek habeas corpus relief, *after her return to custody*.") (emphasis added).

138. *See, e.g.*, United States v. London, 723 F.2d 1538, 1540-41 (11th Cir.) (Johnson, J., dissenting), *cert. denied*, 104 S. Ct. 2684 (1984). See also *supra* notes 124-25.

139. *Cf.* United States v. Snow, 748 F.2d 928, 930 (4th Cir. 1984) (appellant's return to custody before court issued order requiring his surrender militated against dismissal).

140. The notion of inherent power has been described as "nebulous," and its bounds "shadowy," *see* R. Rodes, K. Ripple & C. Mooney, Sanctions Imposable for Violation of the Federal Rules of Civil Procedure, at 179 n.466 (Fed. Judicial Center 1981); Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Colum. L. Rev. 480, 485 (1958) (quoting Committee on Administration of Justice of the State Bar of Cal., Report on Discovery, 31 Cal. State B.J. 204, 206 (1956)); *see also* Levin & Amsterdam, *supra* note 74, at 33 ("We recognize that the outer boundaries of this sphere of total judicial autonomy have been difficult to locate with precision."). One recent case explained that this confusion stems, first, from the virtual dearth of federal decisions discussing the topic in any detail and, second, from the failure of the decisions that have discussed inherent powers to distinguish between different types of court powers. *See* Eash v. Riggins Trucking Inc., 757 F.2d 557, 561-62 (3d Cir. 1985) (en banc). See *supra* note 74.

141. The appellate court has no jurisdiction until the notice of appeal is filed. See *supra* note 124 and accompanying text.

142. *See, e.g.*, Commonwealth *ex rel.* Beemer v. Beemer, 200 Pa. Super. 103, 106-07, 188 A.2d 475, 477 (1962) (quoting Annot., *supra* note 131, at 1428). See *supra* note 131 and accompanying text.

143. *See, e.g.*, Stewart v. Stewart, 91 Ariz. 356, 358, 372 P.2d 697, 699 (1962) (en banc); Gazil v. Gazil, 343 So. 2d 595, 596 (Fla. 1977) (quoting Annot., *supra* note 131, at

on the ground that permitting one who has flouted the orders of the courts to seek judicial assistance conflicts with the principles of justice.[144]

By the very act of becoming a fugitive, the former fugitive has normally disobeyed a trial court order to appear at sentencing,[145] at trial,[146] or at some other proceeding at the trial level. Thus, under the rationale that disobedience of any judicial order, including that of the trial court, should disentitle the defendant to appellate review, dismissal would be proper. Such a result, however, seems too broad. The district court can impose contempt sanctions on defendants who disobey its orders[147] and does not require the assistance of the appellate court to vindicate its authority.[148] Further, the appellate process is not necessarily harmed by the failure to obey a trial court order.[149] Thus, the appellate court lacks a compelling reason to dismiss the appeal, and only if the court's inherent power to manage its *own* affairs is read most broadly to include the affairs of the entire judicial branch does the appellate court have the power to dismiss. In the absence of any impact on the appellate process, this broad reading probably overstates the courts' inherent power of dismissal, since exercise of the dismissal power is not "necessary" to the exercise of any other power.[150]

Given the apparent lack of necessity for appellate court action, and in light of the appellate courts' questionable authority to dismiss for violation of a trial court order, dismissing an appeal based on disobedience of

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1429); Shannon v. Shannon, 680 S.W.2d 367, 372 n.1 (Mo. Ct. App. 1984) (dictum); Annot., *supra* note 131, at 1429.

144. *See* Keidaish v. Smith, 400 So. 2d 90, 91 (Fla. Dist. Ct. App. 1981) (per curiam); Commonwealth *ex rel.* Beemer v. Beemer, 200 Pa. Super. 103, 106-07, 188 A.2d 475, 477-78 (1962); Annot., *supra* note 131, at 1430 & n.19. *But see* State v. Ralph Williams' N. W. Chrysler Plymouth, Inc., 87 Wash. 2d 298, 310-11, 553 P.2d 423, 433 (1976) (en banc) (court refused to dismiss appeal "because of the nature and significance of the action"), *appeal dismissed*, 430 U.S. 952 (1977).

145. *See, e.g.*, United States v. Holmes, 680 F.2d 1372, 1373 (11th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1015 (1983).

146. *See, e.g.*, United States v. London, 723 F.2d 1538, 1538 (11th Cir.), *cert. denied*, 104 S. Ct. 2684 (1984).

147. *See, e.g.*, United States v. Green, 241 F.2d 631, 632, 635 (2d Cir. 1957) (upholding a sentence of three years' imprisonment for criminal contempt imposed by district court to punish the defendants for their failure to surrender in accordance with the district court's post-conviction order).

148. *See* United States v. Baccollo, 725 F.2d 170, 172 (2d Cir. 1983) ("We are aware that the defendant's deliberate defiance of the district court [by absconding during trial] deserves punishment. We are also mindful that there are or were available other customary remedies (such as punishment for contempt), and that they may be more suitable than is the loss of the right to appeal on the ground of pre-judgment conduct."); *cf.* Annot., 99 A.L.R.2d 1100, 1104 (1965) ("Since most American courts have adequate power to deal with their own contempts, there is no American doctrine permitting a higher court to punish for contempts against an inferior court . . . ."); *id.* at 1139 (under American practice, most courts have power to punish for contempt and no supervisory court need be involved). See *supra* notes 124-25.

149. *See* United States v. London, 723 F.2d 1538, 1540 (11th Cir.) (Johnson, J., dissenting), *cert. denied*, 467 U.S. 1228 (1984).

150. See *supra* note 74 and accompanying text.

a trial court order alone is an insufficient basis on which courts can disregard their "virtually unflagging obligation . . . to exercise the jurisdiction given them."[151] Therefore, some other rationale justifying the dismissal of former fugitives' appeals must be found.

ii. Disruption of Judicial Proceedings

In *London*, the court stated that dismissal was justified because, by fleeing in the midst of trial, "the defendant disrupted a prolonged trial and flaunted his disregard for . . . orderly court procedures."[152] Dismissal, therefore, was not based solely on the defendant's violation of a trial court order. Rather, the court also relied on the actual disruption of a judicial proceeding caused by the defendant's flight.

While the *London* court's reliance on actual disruption of court proceedings in addition to disobedience of a trial court order provides some added support for dismissal, this rationale still seems inadequate. The same reasons that warrant against dismissal based solely on disobedience of a trial court order also militate against dismissal here. The trial court still has the contempt power at its disposal,[153] and the appellate process is not necessarily harmed by a disturbance at the trial level.[154] Thus, the appellate courts' obligation to exercise their jurisdiction[155] should also prevent dismissal of an appeal based on disruption of judicial proceedings that have no apparent impact on the appellate process.

iii. Delay in Appellate Review

A careful reading of *Holmes* reveals that the true basis for its holding was the court's concern over the delay in the administration of justice caused by a defendant's escape from custody.[156] In *Holmes*, the defend-

151. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). See *supra* notes 61-70 and accompanying text.

152. *See London*, 723 F.2d at 1539.

153. See *supra* notes 147-48 and accompanying text.

154. *See London*, 723 F.2d at 1540 (Johnson, J., dissenting).

155. See *supra* notes 61-70 and accompanying text.

156. The government's argument further demonstrates that the length of the delay was the basis for the *Holmes* court's decision to extend *Molinaro* to cases involving flight before the filing of the appeal. The government argued that the reasons for dismissal of an appeal for flight after conviction but before sentencing were just as compelling as those justifying dismissal for flight during the pendency of the appeal. This argument, however, was predicated on the length of the delay caused by the defendant's flight:

> The Government contends that just as the defendants in [United States v. Shelton, 508 F.2d 787 (5th Cir.), *cert. denied*, 423 U.S. 828 (1975)] and [United States v. Smith, 544 F.2d 832 (5th Cir. 1977) (per curiam)], who were not permitted to appeal when they had been fugitives for eighteen months following conviction, this defendant, who was a fugitive for two years, should likewise be held to have abandoned his appeal.

Brief of Appellee at 14, United States v. Holmes, 680 F.2d 1372 (11th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1015 (1983).

Further support for the position that delay is the principal concern in cases such as *Holmes* is provided by the 1984 amendments to the provisions on penalties for flight. The

ant's flight caused a delay of two years in sentencing and in the commencement of appellate review. Accordingly, the court held that the right to appeal a criminal conviction may be waived "through flight which may postpone filing a notice of appeal for years after conviction. Such untimeliness would make a meaningful appeal impossible in many cases. In case of a reversal, the government would obviously be prejudiced in locating witnesses and retrying the case."[157]

Holmes makes clear that concern over delay is a legitimate basis for dismissing a former fugitive's appeal in two instances. First, dismissal is appropriate where the delay is so long—several years—that a "meaningful appeal" is "impossible."[158] Second, dismissal is proper where the delay would prejudice the government's efforts in retrying the case if the appellant achieves a reversal and retrial becomes necessary.[159] If either of these situations exists, the defendant has waived the right to an appeal.

Dismissal based on the first detrimental effect of delay—preventing a meaningful appeal—has serious limits. The very fact that the court qualified its statement by noting that delay precludes a meaningful appeal "in many cases,"[160] rather than all cases, demonstrates that the court did not lay down a blanket rule of dismissal. Such equivocation suggests that careful review of the circumstances is necessary to ascertain whether a meaningful appeal really is impossible to achieve.[161] Furthermore,

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revised flight sanctions nearly parallel the penalties for the underlying offense for which the defendant was released. The amendments were motivated by Congress' concern over the damaging effect delay could have on the successful prosecution of cases. *See* Senate Report, *supra* note 83, at 31, *reprinted in* 1984 U.S. Code Cong. & Ad. News at 3214.

157. *Holmes*, 680 F.2d at 1374.

158. *Id.*; *cf.* Estrada v. United States, 585 F.2d 742, 742-43 (5th Cir. 1978) (per curiam) (after filing appeal defendant became a fugitive for three and one-half years; court denied request to reinstate appeal); United States v. Smith, 544 F.2d 832, 833-34 (5th Cir. 1977) (per curiam) (defendant remained a fugitive for 18 months; court denied request to reinstate appeal); United States v. Shelton, 508 F.2d 797, 798-99 (5th Cir.) (defendant rearrested 18 months after flight; appeal dismissed), *cert. denied*, 423 U.S. 828 (1975). *See generally* United States v. Snow, 748 F.2d 928, 930 (4th Cir. 1984) (citing *Holmes* for the proposition that "[d]ismissals have occurred when the fugitive has failed to return to custody . . . within two years of an escape").

159. *See* United States v. Holmes, 680 F.2d 1372, 1374 (11th Cir. 1982) (per curiam) ("In case of a reversal, the government would obviously be prejudiced in locating witnesses and retrying the case."), *cert. denied*, 460 U.S. 1015 (1983); *see also* United States v. Baccollo, 725 F.2d 170, 172 (2d Cir. 1983) (observing that "the two-year deliberate flight and absence of defendant . . . would gravely prejudice the government were the defendant successful on his appeal. . . . During the lost two years witnesses, through death or other cause, and other evidence may have become unavailable to the government") (emphasis deleted).

160. *See* United States v. Holmes, 680 F.2d 1372, 1374 (11th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1015 (1983).

161. The language of the *Holmes* court is, in some parts of the opinion, sufficiently absolute to suggest that the court intended to establish an automatic rule of dismissal for fugitives' appeals. *See id.* at 1373 ("We hold that a defendant who flees after conviction, but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control."); *id.* at 1374 ("We hold that Holmes, by becoming a fugitive following his convictions, abandoned his

viewed from the defendant's perspective, any appeal would be meaningful when compared with the alternative of dismissal. For example, federal habeas corpus relief, when granted, frequently is obtained many years after conviction.[162] Despite the delay, the court would surely be hard pressed to find any successful petitioner who would describe the long awaited relief as meaningless.

In view of these limitations, the *Holmes* court's suggestion that delay may render a meaningful appeal impossible seems to be focused more on the systemic concern over the disruption of appellate review than on the defendant's concern with obtaining relief. The *London* case supports this interpretation by explaining that the basis for dismissal in *Holmes* was the fugitive's disruption of "the sentencing process and appellate review."[163] Thus, the meaningfulness of an appeal is apparently undermined by a lengthy delay that creates a disruptive hiatus between conviction and appellate review. In some cases the delay itself may be the disruptive force;[164] in other cases, the disruption may be exacerbated by other factors, such as the prevention of a consolidation of the fugitive's appeal with the appeals of codefendants who did not flee.[165] In any

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right to pursue this appeal."). The interpretation of *Holmes* in the text of this Article, however, comports with the federal courts' well established view that dismissal under *Molinaro*, on which *Holmes* relied, is discretionary, not mandatory. *See, e.g.*, United States v. Snow, 748 F.2d 928, 930 (4th Cir. 1984); United States v. Shelton, 482 F.2d 848, 849 (5th Cir.) (per curiam), *cert. denied*, 414 U.S. 1075 (1973); United States v. Swigart, 490 F.2d 914, 915 (10th Cir. 1973); *see also* United States v. Veliotis, 586 F. Supp. 1512, 1514 (S.D.N.Y. 1984) ("Both parties concede that this matter resides within the sound discretion of the Court."); Lewis v. Delaware State Hosp., 490 F. Supp. 177, 182 (D. Del. 1980) ("federal appeals courts in almost every circuit have recognized . . . [a] policy of discretionary as opposed to jurisdictional, *i.e.*, mandatory, determination of the status of appeals of fugitives") (citations omitted); United States v. Lockwood, 382 F. Supp. 1111, 1117 (E.D.N.Y. 1974) ("*Molinaro* represents the well known proposition that an appellate court may, *in its discretion*, refuse to hear a case in which a defendant has fled the jurisdiction.") (emphasis in original); *cf.* Hitchcock v. Laird, 456 F.2d 1064, 1065 (4th Cir. 1972) (per curiam) (although not citing *Molinaro*, court noted it was dismissing appeal of army deserter "with leave . . . to reinstate").

162. *See, e.g.*, Alexander v. Maryland, 719 F.2d 1241, 1246-47 (4th Cir. 1983) (granting writ more than 20 years after conviction); Lewellyn v. Wainwright, 593 F.2d 15, 16-17 (5th Cir. 1979) (per curiam) (granting writ nine years after conviction); United States *ex rel.* Craig v. Myers, 220 F. Supp. 762, 763 (E.D. Pa. 1963) (granting writ more than 30 years after conviction), *aff'd*, 329 F.2d 856 (3d Cir. 1964); *cf.* McDonnell v. Estelle, 666 F.2d 246, 249, 253-55 (5th Cir. 1982) (defendant filing writ 26 years after conviction would not necessarily be barred; state must prove prejudice resulting from delay).

163. *London*, 723 F.2d at 1539.

164. *See, e.g.*, *Holmes*, 680 F.2d at 1374; *see also London*, 723 F.2d at 1539 (explaining *Holmes*); United States v. Baccollo, 725 F.2d 170, 171 (2d Cir. 1983) (government's argument is that allowing appeal of defendant who fled during jury deliberations would place "an unfair burden on the government because it would be forced to retry a complicated and lengthy case largely dependent on the testimony of . . . witnesses who might not be available").

165. Although the court in *London* failed to consider this point, the defendant's flight in that case prevented consolidation of his appeal with those of six of his codefendants. *See* United States v. Phillips, 664 F.2d 971, 985 & n.1 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982). See *supra* note 53.

event, the totality of the circumstances should be examined.[166]

The second detrimental effect of delay—prejudice to the government—also has its limits. As the *Holmes* court explained, delay would prejudice the government because, on reversal, the government would have to retry an old case and relocate witnesses.[167] Reversal, however, does not always result in a new trial. For example, if the appellate court determines that the evidence was insufficient to support the conviction, a judgment of acquittal is entered and double jeopardy principles bar retrial.[168] Therefore, in evaluating the prejudice to the government, the court must consider the nature of the claims raised and relief sought by the appellant.[169]

Despite these limits, the delay caused by the defendant's flight appears to be a much more formidable basis for dismissal than mere disobedience of a trial court order or disruption of trial court proceedings. Only the appellate court can evaluate the effect delay will have on appellate review and the prejudice it may cause to the government. Further, delay implicates the integrity of the appellate process because the court's focus is on the disruption of appellate review, rather than trial proceedings, and because the prejudice to the government, if any, flows directly from the relief ordered by the appellate court—a new trial. Given this link between the defendant's flight and the interests of the appellate system, under proper circumstances dismissal based on delay appears to be within the appellate courts' inherent power to "manage their own affairs," despite the courts' failure to exercise their congressionally conferred jurisdiction.

III. RECOMMENDED APPROACH TO FUGITIVES' AND FORMER FUGITIVES' APPEALS

Because federal courts have a "virtually unflagging obligation" to exercise their appellate jurisdiction,[170] and because the exercise of an inherent power is proper only if necessary to the exercise of all others,[171] courts should be more circumspect in dismissing criminal appeals based on the defendant's flight. In particular, courts should distinguish between defendants who flee after filing a notice of appeal and are not in custody at the time the government moves for dismissal—fugitives—and defendants who flee before seeking appellate review and are within custody at all times during the pendency of their appeal—former fugitives.[172] As to

166. See *infra* notes 175-97 and accompanying text.

167. *See* United States v. Baccollo, 725 F.2d 170, 171-72 (2d Cir. 1983); *Holmes*, 680 F.2d at 1374.

168. *See* Burks v. United States, 437 U.S. 1, 18 (1978). See also *supra* note 22 and accompanying text.

169. See *infra* text accompanying note 196.

170. See *supra* notes 61-70 and accompanying text.

171. See *supra* note 74 and accompanying text.

172. *Cf.* Barker v. Jones, 668 F.2d 154, 155 (2d Cir. 1982) (per se dismissal rule applies to fugitives, but not to former fugitives).

fugitives, a bright line rule of unconditional dismissal with prejudice is appropriate, since the appellant's flight is a direct affront to the appellate court and jeopardizes the viability of the appellate system.[173] As to former fugitives, however, the integrity and viability of the appellate court are not necessarily implicated.[174] Therefore, courts should adopt a more flexible balancing test in considering whether to dismiss a former fugitive's appeal, taking into consideration the following factors.

A. *Voluntary Versus Involuntary Return*

To the extent that delay is the basis for dismissing a former fugitive's appeal, the voluntariness or involuntariness of a former fugitive's return to custody is, arguably, irrelevant.[175] Whether the defendant surrenders or is recaptured, the length and effect of the delay caused by flight is the same. Surrender, however, is relevant as a matter of public policy. One stated purpose of dismissing appeals of fugitives and former fugitives is to deter others from similarly fleeing.[176] By the same token, the law should encourage—or at least not discourage—fugitives' voluntary return to custody.[177] Therefore, a former fugitive's voluntary surrender should weigh in favor of entertaining his appeal.

B. *The Nature of the Error Asserted*

In any criminal appeal, the nature of the error asserted affects both the standard of review and, occasionally, the reviewability of the appellant's claims. For example, many alleged errors will not warrant reversal unless the appellant can show that the trial court abused its discretion.[178] Further, in many cases the absence of a contemporaneous objection will

173. See *supra* notes 129-36 and accompanying text.

174. See *supra* notes 138, 147-48, 153-54 and accompanying text.

175. *See, e.g.*, Bonahan v. Nebraska, 125 U.S. 692, 692 (1887) (indicating that defendant's surrender *or* recapture would prevent dismissal of his appeal). *But see* United States v. Snow, 748 F.2d 928, 930 (4th Cir. 1984) (defendant's recapture might be a factor against him in his request for appeal).

176. *See* Estelle v. Dorrough, 420 U.S. 534, 537 (1975) (per curiam); *see also* United States v. Snow, 748 F.2d 928, 930 (4th Cir. 1984) (fact that defendant "did not voluntarily surrender" and was "recaptured against his will . . . militates against granting [appellant] a judicial forum where he can contest the terms and conditions of his sentence").

177. *See* Gonzales v. Stover, 575 F.2d 827, 827-28 (10th Cir. 1978) (per curiam) ("For over 100 years the Supreme Court has consistently refused to grant post-conviction review for escaped prisoners. These decisions make it clear that the Court's informal policy is grounded on considerations which favor voluntary surrender and discourage escape.") (citations omitted).

178. *See, e.g.*, United States v. Pruitt, 763 F.2d 1256, 1263 (11th Cir. 1985) ("grant or denial of a motion for severance lies within the discretion of the trial court and is reviewable only for abuse of discretion"), *cert. denied*, 106 S. Ct. 856 (1986); United States v. Rasmussen, 642 F.2d 165, 167 (5th Cir. 1981) (refusal to allow defendant's withdrawal of guilty pleas within discretion of court); United States v. Kelly, 569 F.2d 928, 937 (5th Cir.) (denial of motion for continuance does not constitute abuse of discretion), *cert. denied*, 439 U.S. 829 (1978).

limit the court's review only to claims constituting "plain error."[179]

The nature of the error asserted should also influence the court's decision to dismiss a former fugitive's appeal. In a situation analogous to the question of dismissal of former fugitive's appeals, the District Court for the Southern District of New York in *United States v. Veliotis*[180] gave some weight to this factor. In *Veliotis*, the defendant fled the jurisdiction before the government filed an indictment charging him with various offenses in an alleged kick-back scheme. The government claimed that, if convicted, the defendant would have to forfeit all stock he owned in a corporation implicated in the scheme.[181] Therefore, the government obtained a restraining order preventing the defendant from disposing of his stock in the corporation. Appearing through his attorney, the fugitive defendant sought removal of the restraining order on the ground that the due process clause required a prompt post-seizure hearing.[182]

Relying on the *Molinaro* line of cases, the government urged the court to refuse to hear the defendant's motion because he was a fugitive.[183] After careful analysis of the rationale of *Molinaro* and its progeny, the court rejected the government's argument and entertained the defendant's motion.[184] Among the factors the court considered was the constitutional nature of the defendant's claim. Having noted at the outset of its opinion that hearing a fugitive's motion was discretionary,[185] the court found that "where a fugitive defendant seeks to vindicate a right vouchsafed by the United States Constitution, the Court should give weight to this factor in determining how to exercise its discretion."[186]

The appellate courts should likewise give weight to the constitutional nature of a former fugitive's claims in deciding whether to dismiss an appeal.[187] In this regard, the plain error standard may prove useful. The

179. The "plain error" standard was laid down in United States v. Atkinson, 297 U.S. 157 (1936):

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.

Id. at 160. It was later codified in Fed. R. Crim. P. 52(b). *See* United States v. Young, 105 S. Ct. 1038, 1042 (1985). The basis for Rule 52(b), however, extends back to law established since the last century. *See* Fed. R. Crim. P. 52(b) advisory committee note (indicating that the rule restated existing law as set forth by the Supreme Court in Wiborg v. United States, 163 U.S. 632, 658-59 (1896)).

180. 586 F. Supp. 1512 (S.D.N.Y. 1984).

181. The Government contended that the stock would be subject to forfeiture as a penalty under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1963(a)(2) (1982). *See* United States v. Veliotis, 586 F. Supp. 1512, 1513 (S.D.N.Y. 1984).

182. United States v. Veliotis, 586 F. Supp. 1512, 1514 (S.D.N.Y. 1984).

183. *Id.*

184. *See id.* at 1517.

185. *See id.* at 1514.

186. *Id.* at 1515; *see also id.* at 1517 ("In light of the constitutional nature of [defendant's] claim . . . it [is] appropriate to entertain the motion.").

187. *See, e.g.*, United States v. Tunnell, 650 F.2d 1124, 1126-27 (9th Cir. 1981) (fact

plain error doctrine creates an exception to the contemporaneous objection rule that permits the appellate courts to correct egregious errors occurring at trial even though they were not brought to the attention of the trial court.[188] The plain error doctrine is inherently a balancing test intended to encourage defendants to permit the trial judge to correct any errors in the first instance, while at the same time permitting appellate courts to redress "errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' "[189]

Similar factors are implicated in the decision to dismiss a former fugitive's appeal. On one hand, the appellate court should adopt an approach that will discourage defendants from fleeing.[190] On the other hand, a strict application of the dismissal doctrine could result in a gross miscarriage of justice.[191] The constitutional nature of a former fugitive's claim, therefore, should be a factor in a court's decision on dismissal, and a claimed error that satisfies the "plain error" standard should weigh strongly in favor of review.[192]

C. *The Length and Effect of Delay*

Because the delay in the administration of justice caused by the de-

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that defendant absconded after conviction and did not reappear for sentencing until 12 years later did not justify dismissal of his appeal where convictions may have been based on unconstitutional presumption); United States v. Tapia-Lopez, 521 F.2d 582, 583-84 (9th Cir. 1975) (per curiam) (reversing conviction where unconstitutional jury instruction was given despite fact that appellant escaped after conviction and was not sentenced until after she reappeared five years later); *see also* United States v. Gordon, 538 F.2d 914, 915 (1st Cir. 1976) (per curiam) (dictum) (reviewing defendant's claims despite his flight and noting that "no manifest injustice occurred in appellant's conviction"), *cert. denied*, 441 U.S. 936 (1979).

188. United States v. Young, 105 S. Ct. 1038, 1046-47 (1985). See *supra* note 179 and accompanying text.

189. United States v. Young, 105 S. Ct. 1038, 1047 (1985) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

190. See *supra* note 176 and accompanying text.

191. See cases cited at *supra* note 187.

192. See cases cited at *supra* note 187. See also United States v. Lockwood, 382 F. Supp. 1111 (E.D.N.Y. 1974), in which Judge Weinstein cautioned that courts should not always express their displeasure with fugitive parties by refusing to adjudicate their claims:

> Law is at its loftiest when it examines claimed injustice even at the instance of one to whom the public is bitterly hostile. . . . Our country takes pride in requiring of its institutions the examination and correction of alleged injustice whenever it occurs. We should not permit an affront of this sort to distract us from the performance of our constitutional duties.

Id. at 1117 (quoting Eisler v. United States, 338 U.S. 189, 194-95 (1949) (Murphy, J., dissenting)). *But cf.* United States v. Sharpe, 105 S. Ct. 1568, 1596 & n.16 (1985) (Stevens, J., dissenting) (chastizing majority for not dismissing fugitive's appeal because dismissal "would make it unnecessary for this Court to decide the constitutional question that is presented," and courts should not decide constitutional questions unless absolutely necessary). Justice Stevens' position in *Sharpe* seems a bit extreme, since his rationale could be applied to abrogate such well established doctrines as the "plain error" rule. See *supra* note 179.

fendant's flight is the strongest justification for dismissal of a former fugitive's appeal,[193] courts should carefully analyze this factor to determine whether, under the circumstances, the delay warrants dismissal. The two primary factors courts should consider in determining whether the circumstances warrant dismissal are the length and effect of the delay.

The length of the delay is a readily quantifiable and, therefore, very objective criterion. Nonetheless, this objective quality should not result in an inflexible approach to lengthy delays. The courts' dismissal power is predicated on their inherent power to manage their own affairs.[194] Logically, if a delay, however lengthy, does not disrupt the courts' affairs, dismissal is beyond the courts' inherent power.[195] Therefore, the length of the delay is, in reality, relevant only to the extent that it produces or exacerbates an adverse effect on the courts' affairs.

The courts' primary focus should be on the effect of the delay. As discussed earlier, delay can justify dismissal for a variety of reasons. First, depending on the nature of the relief sought by the appellant, delay could prejudice the government after a successful appeal. The nature of the relief sought is relevant because if the appellant seeks a new trial, the government could be prejudiced in retrying a stale case; however, if the appellant seeks a judgment of acquittal, the possibility of prejudice is eliminated, since retrial is impossible.[196] Second, delay could disrupt appellate review. For example, flight by a defendant in a multi-defendant case could prevent consolidation of his appeal with his codefendants who did not flee. Thus, by delaying his appeal, the former fugitive would require the court to perform duplicative actions, which impedes efficient and orderly appellate review.[197]

Courts, however, should not assume that delay necessarily disrupts appellate review. Just as the prejudice to the government depends on the nature of the relief sought, the disruption of appellate review depends on the circumstances. In *United States v. Snow*,[198] for example, the Fourth Circuit expressly considered the effect of delay on appellate review in finding that an inconsequential delay rendered dismissal inappropriate. The defendant in *Snow* had escaped from custody within days of filing his notice of appeal and was recaptured within thirty days. Because the defendant was recaptured so quickly, oral argument was able to proceed as planned and, therefore, the escape and subsequent recapture did not inconvenience the court's schedule. Under these circumstances, the court concluded that dismissal would be inequitable.[199]

193. See *supra* notes 156-69 and accompanying text.
194. See *supra* notes 71-169 and accompanying text.
195. See *supra* notes 137-55 and accompanying text.
196. See *supra* notes 167-69 and accompanying text.
197. See *supra* notes 53, 163-66 and accompanying text.
198. 748 F.2d 928 (4th Cir. 1984).
199. *See id.* at 930; *see also* Ruetz v. Lash, 500 F.2d 1225, 1230 (7th Cir. 1974) (dismissal of appeal was without "any rational basis" where no action had been taken on the appeal until after defendant had been returned to the jurisdiction).

In one respect, the *Snow* decision represents a keen sensitivity to the propriety of dismissing former fugitives' appeals. In another respect, however, it was an easy decision, since the defendant's escape had absolutely no effect on the appellate process.[200] For this reason, *Snow* should not be limited to its facts. Rather, courts faced with an appeal by a former fugitive whose delay-causing flight had *some* effect on the appellate process should carefully consider the factors outlined here—voluntary versus involuntary return, the nature of the claim, and the effect of the delay—and other factors peculiar to the case at hand, to determine whether dismissal is appropriate.[201] By maintaining a flexible approach, the courts will ensure that dismissal is within their inherent power to manage their own affairs,[202] rather than in contravention of their "virtually unflagging obligation" to exercise the appellate jurisdiction that Congress has conferred on them.[203]

CONCLUSION

The Supreme Court has firmly established the power of the federal courts to dismiss immediately and with prejudice the appeal of a defendant who flees after filing a notice of appeal.[204] Lower federal courts have recently expanded this doctrine to permit dismissal of the appeals of defendants who flee before seeking appellate review and who are not fugitives at any time during the pendency of their appeal.[205] This expansion, however, does not rest on any demonstrated appreciation of the underlying rationale of the decisions which authorize dismissal based on flight. Therefore, these recent decisions raise serious questions about the approach courts should take to appeals by former fugitives.

Significantly, no decision has yet recognized that dismissal based on flight is in derogation of the federal courts' obligation to exercise the appellate jurisdiction Congress has conferred on them.[206] This obligation must temper any decision to dismiss a former fugitive's appeal. On the other hand, courts have the inherent power to manage their own affairs.

200. *See* United States v. Snow, 748 F.2d 928, 930 (4th Cir. 1984) (Appellant's "escape and subsequent recapture did not inconvenience the court's schedule. Oral argument was able to proceed as planned.").

201. *See, e.g.*, United States v. Tunnell, 650 F.2d 1124, 1126-27 (9th Cir. 1981) ("[t]he government is justifiably concerned about [its] potential difficulty in retrying a case after twelve years; however, such does not suffice to warrant sustaining a conviction which might have been based on an unconstitutional presumption").

202. See *supra* notes 126-69.

203. See *supra* notes 61-70 and accompanying text.

204. *See supra* notes 9-32 and accompanying text.

205. See *supra* notes 33-58 and accompanying text. See also *supra* note 8.

206. Indeed, only a few decisions have even recognized that dismissal based on flight has jurisdictional implications of any kind. *See, e.g.*, United States v. Lockwood, 382 F. Supp. 1111, 1117 (E.D.N.Y. 1974) (finding that *Molinaro* does not warrant "abnegation of this court's jurisdiction to control its calendar"); *cf.* United States v. Macklin, 671 F.2d 60, 67 n.9 (2d Cir. 1982) (characterizing dismissal based on flight as "declin[ing] to exercise . . . jurisdiction").

In those cases in which a defendant's flight disrupts the appellate court's affairs, therefore, the court must carefully measure the effect of the disruption to determine whether dismissal of an appeal within its congressionally conferred jurisdiction is permissible. Even if the balance tips in favor of dismissal, however, the court should not dismiss an appeal without considering other factors—such as the appellant's surrender as opposed to recapture, or the constitutional nature of the appellant's claims—that might weigh in favor of review. This flexible approach will help ensure that courts act within the scope of their inherent powers in dismissing the appeals of former fugitives.