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Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine

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SWORD OR SHIELD: DUE PROCESS AND THE FUGITIVE DISENTITLEMENT DOCTRINE

Degen v. United States, 116 S. Ct. 1777 (1996)

I. INTRODUCTION

In *Degen v. United States*,[1] the United States Supreme Court addressed whether to expand the fugitive disentitlement doctrine[2] beyond its traditional criminal appeals setting to the context of civil forfeiture.[3] The Court unanimously ruled that a person who is a fugitive from justice on a criminal charge is not barred from defending against a civil action brought by the Government to confiscate his property.[4] In refusing to extend the doctrine to the civil forfeiture setting, the Court stated that the federal district courts' inherent powers to retain control and respect for the judicial branch do not justify imposition of the severe sanction of disentitlement.[5]

This Note reviews the concept of the "inherent powers" of the federal courts and examines the development and evolution of the fugitive disentitlement principle.[6] This Note argues that *Degen* correctly discounted the various justifications advanced by courts for invoking the disentitlement doctrine in the civil forfeiture context. Furthermore, the Court properly concluded that those objectives do not outweigh the harsh and arbitrary results that application of the rule in civil forfeiture effects. This Note also argues, however, that the Court minimized the due process implications of its decision, as well as notions of basic fairness. In so doing, the Court avoided the essential issue—namely, the need to check the unlimited power of the Government and the federal courts wielded under the ruse of efficient and dignified judicial operations. Consequently, this Note concludes, the Court's opinion in *Degen* is ultimately an unsatisfying and vague exigesis on the broad discretion afforded the federal courts in apply-

1 116 S. Ct. 1777 (1996).
2 *See infra* Part II.
3 *Degen*, 116 S. Ct. at 1780.
4 *Id.* at 1783.
5 *Id.* at 1782-83.
6 *See infra* notes 10-20 and accompanying text.

ing the fugitive disentitlement doctrine. The decision does not explicitly restrict the federal courts' authority to disentitle the fugitive in civil forfeiture proceedings. Nor does it confront the charge that such action violates the claimant's constitutional right to defend and procedural due process right to a meaningful pre-seizure hearing.

II. BACKGROUND

The fugitive disentitlement doctrine originated in the late 19th century as an equitable principle of criminal appellate procedure.[7] Traditionally, a convicted criminal defendant who flees from justice while his appeal is pending is "disentitled" from pursuing a criminal appeal.[8] Since its inception, the courts have developed and refined the doctrine. Today, it is invoked in both criminal and civil contexts.[9] The doctrine generally provides that the fugitive from justice may not seek relief from the judicial system whose authority he or she evades.[10]

A. THE INHERENT POWERS OF THE FEDERAL COURTS

It has long been recognized that the federal courts possess "[c]ertain implied powers . . . which cannot be dispensed with in a Court, because they are necessary to the exercise of all others."[11] These "inherent powers" are not governed by rule or statute but "by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[12] As such, "[c]ourts independently must be vested with 'power to impose silence, respect, and decorum . . . and submission to their lawful mandates, and . . . to preserve themselves and their officers from the approach and insults of pollution.'"[13] While the most prominent among these powers is the contempt sanction,[14] courts have other means available to penalize a party's disruption or disobedience of court proceedings, including striking pleadings, imposing sanctions or costs,

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7 United States v. $40,877.59 in United States Currency, 32 F.3d 1151, 1152 (7th Cir. 1994).

8 *See* Gary P. Naftalis & Alan R. Friedman, *Outside Counsel: Disentitlement of Criminal Fugitives in Civil Cases*, N.Y.L.J., Mar. 20, 1996, at 1.

9 "Notwithstanding the relatively narrow role in criminal appellate cases that disentitlement has played in the Supreme Court . . . certain circuits and district courts have in the last several years applied the doctrine expansively to disentitle criminal fugitives from seeking affirmative relief in, and even defending against, civil cases." *Id.* at 9.

10 *Id.*

11 Chambers v. Nasco, Inc., 501 U.S. 32, 43 (1991) (quoting United States v. Hudson, 11 U.S. 32, 34 (1812) (alteration in original)).

12 *Id.* (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962)).

13 International Union v. Bagwell, 114 S. Ct. 2552, 2559 (1994) (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821)).

14 *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

excluding evidence, or entering a default judgment.[15]

The exercise of these powers is not unlimited: courts are bound by the United States Constitution and by statutes, and must abide by a principle of reasonableness[16] in light of the interests they seek to promote.[17] Because inherent powers are not subject to direct democratic controls, they are particularly potent and courts must exercise them with restraint and discretion.[18] Nonetheless, appellate courts customarily exercise the authority to dismiss the appeals of defendants who have become fugitives.[19] This power does not conflict with constitutional guarantees, as there is no constitutional right to appeal a criminal conviction.[20] By contrast, dismissal of a criminal fugitive's civil claim or the exercise of the disentitlement power in a civil setting is inherently more complex and conceptually elusive. Hence, the federal courts of appeal have split on the issue, with a bare majority holding that the doctrine is applicable in civil forfeiture actions.[21]

B. THE EVOLUTION OF THE FUGITIVE DISENTITLEMENT DOCTRINE

The Supreme Court first established the fugitive disentitlement doctrine in *Smith v. United States*.[22] In *Smith*, the Court removed from its docket a criminal defendant's appeal of conviction because the defendant fled the Court's jurisdiction prior to resolution and thus was not under the control of the Court.[23] The Court expressed concern that the proceedings would have no effect on the fugitive, that any judgment adverse to the fugitive would be unenforceable.[24] Without power over the fugitive, any action the Court took would be useless: if the Court affirmed the criminal conviction, the defendant was unlikely to turn himself in; if it reversed and ordered a new trial, the defendant still might decide not to return.[25] The Court stated that "it is clearly within [the Court's] discretion to refuse to hear a criminal

15 *Bagwell*, 114 S. Ct. at 2560. *See also Chambers*, 501 U.S. at 44-45 (recognizing dismissal as appropriate sanction for conduct that abuses judicial process); *Link*, 370 U.S. at 632-33, 636 (upholding dismissal of action for failure to prosecute as valid exercise of court's inherent power to levy sanctions in response to abusive litigation practices).

16 *See* Thomas v. Arn, 474 U.S. 140, 148, 155 (1985). *See also* Anthony Michael Altman, Note, *The Fugitive Dismissal Rule: Ortega-Rodriguez Takes the Bite Out*, 22 PEPP. L. REV. 1047 (1995).

17 Altman, *supra* note 16, at 1050 (discussing supervisory power of appellate courts).

18 *Roadway Express*, 447 U.S. at 764. *See also Chambers*, 501 U.S. at 44.

19 Abney v. United States, 431 U.S. 651, 656 (1977).

20 *Id.*; McKane v. Durston, 153 U.S. 684, 687-88 (1894).

21 *See infra* notes 43-92 and accompanying text.

22 94 U.S. 97 (1876).

23 *Id.* at 97-98.

24 *Id.* at 97. *See also* Jason W. Joseph, Note, *The Fugitive Dismissal Rule Applied to Pre-Appeal Fugitivity*, 84 J. CRIM. L. & CRIMINOLOGY 1086, 1087 (1994).

25 *Smith*, 94 U.S. at 97.

case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render."[26]

Confronting this issue again in *Bonahan v. Nebraska*,[27] the Court followed *Smith* and refused to consider an appeal where the accused was not within the jurisdiction of the Court due to his escape from custody.[28] The Court ordered that the case be set aside and remain off the trial court's docket unless the accused was brought before the trial court before its term ended.[29]

In *Allen v. Georgia*,[30] the Court affirmed the rationale for dismissal of a criminal appeal conceived in *Smith* and further developed in *Bonahan*.[31] The Supreme Court upheld the dismissal of a defendant's appeal from a murder conviction and death sentence, thereby supporting the lower court's reasoning that his escape from justice essentially eliminated his right to prosecute a writ of error.[32] To do otherwise would enable the defendant to dictate to the court the terms of his surrender—"a contempt of [the court's] authority, to which no court is bound to submit."[33]

The Supreme Court continued to invoke the enforceability justification in support of disentitlement[34] while developing additional reasons for the doctrine. In *Molinaro v. New Jersey*,[35] the Court refused to adjudicate the appeal of a convicted abortionist who failed to surrender himself to authorities after he was released on bail.[36] The Court held that "[w]hile 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."[37] This decision simultaneously affirmed the principles

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26 *Id.*

27 125 U.S. 692 (1887).

28 *Id.*

29 *Id.*

30 166 U.S. 138 (1897).

31 *See id.* at 140.

32 *See id.* at 141 (rejecting defendant's contention that dismissal constituted denial of due process: "We cannot say that dismissal of a writ of error is not justified by the abandonment of his case by the plaintiff in the writ. By escaping from legal custody he has . . . thereby abandoned his right to prosecute a writ of error . . . .").

33 *Id.*

34 *See, e.g.*, Eisler v. United States, 338 U.S. 189, 190 (1949) (per curiam) (following *Smith* and *Bonahan* in ordering a petition for certiorari to be removed from docket after petitioner became a fugitive from justice).

35 396 U.S. 365 (1970) (per curiam).

36 *Id.* at 366. Dismissing the appeal, the Court stated, "[n]o 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." *Id.*

37 *Id.*

enumerated in *Smith* and *Bonahan* and expanded the role of disentitlement as a penalty for flouting the justice system.[38]

In *Estelle v. Dorrough*,[39] the Court voiced still other justifications for the fugitive disentitlement doctrine: promoting the dignified operation of the appellate courts and deterring felony escape.[40] In response to an equal protection claim,[41] the Court upheld a Texas statute[42] mandating automatic dismissal of an appeal where the defendant has escaped while the appeal is pending.[43] In so doing, the Court stated that the statute met its intended goals of discouraging escape and encouraging voluntary surrender to authorities.[44] Furthermore, the statute promoted "the efficient, dignified operation of the Texas Court of Criminal Appeals."[45]

C. DISENTITLEMENT IN THE CIVIL CONTEXT

The Supreme Court has not extended *Molinaro*[46] to civil matters relating to a criminal fugitive. However, the Court's decision in *Molinaro* did not indicate whether application of the disentitlement doctrine should be restricted to criminal cases. In fact, many federal appellate courts have claimed that the doctrine should apply with greater force in civil cases where an individual's liberty is not jeopard-

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38 *See* N. Brock Collins, Note, *Fugitives and Forfeiture-Flouting the System or Fundamental Right?*, 83 Ky. L.J. 631, 636 (1995).

39 420 U.S. 534 (1975) (per curiam).

40 *Id.* at 537. The dissent commented:

> Our decisions have universally been understood to mean only that a court may properly dismiss an appeal of a fugitive convict, *when, and because,* he is not within the custody and control of the court . . . . Until today, this Court has never intimated that under the rule of *Smith, Bonahan,* and *Molinaro* a court might dismiss an appeal of an escaped criminal defendant at a time when he has been returned to custody, and thus to the court's power and control . . . .

Id. at 543 (Stewart, J., dissenting) (emphasis added).

41 The statute only applies to those prisoners with appeals pending at the time of their escape, treating them differently from those who first escaped from custody, returned and then invoked the appellate process in a timely manner. *Id.* at 541.

42 The Texas statute provides for automatic dismissal of a pending appeal by an escaped felon upon escape. However, the court shall order reinstatement of the appeal if the defendant voluntarily surrenders within ten days of his escape. *See* TEX. CODE CRIM. P. ANN. art. 44.09 (West 1966).

43 *Estelle*, 420 U.S. at 541 (ruling that Texas was free to impose more severe sanctions upon "those who simultaneously invoked the appellate process and escaped from its custody . . . [and] whose escape is reasonably calculated to disrupt the very appellate process which they themselves have set in motion.").

44 *Id.* at 540.

45 *Id.* at 537.

46 396 U.S. 365 (1970) (per curiam). Many courts consider the *Molinaro* decision to mark the formal introduction of the disentitlement doctrine. *See, e.g.*, United States v. Timbers Preserve, 999 F.2d 452, 453 (10th Cir. 1993); United States v. 7707 S.W. 74th Lane, 868 F.2d 1214, 1216 (11th Cir. 1989); United States v. $129,374 in United States Currency, 769 F.2d 583, 586 (9th Cir. 1985).

ized.[47] Some Circuit Courts of Appeals have extended the doctrine to bar a fugitive in a separate but related criminal case from seeking affirmative relief from the court in a civil proceeding.[48] Still others have invoked the rule in civil in rem proceedings.[49]

1. Circuit Restrictions on the Disentitlement Doctrine

In *United States v. $83,320 in United States Currency*,[50] the Sixth Circuit became the first circuit to consider application of the fugitive disentitlement doctrine in a civil forfeiture action.[51] That court refused to extend the Supreme Court's reasoning in *Molinaro* to the civil forfeiture context, asserting that "the individual accused of the related criminal violation is not necessarily the only individual with a direct, litigable interest in the outcome of the forfeiture action."[52]

Likewise, in *United States v. Pole No. 3172*,[53] the First Circuit rejected the disentitlement concept that a fugitive is precluded from appealing a decision ordering forfeiture.[54] Reversing the lower court's decision, the First Circuit ruled that the civil case was not "closely related" to the criminal matter from which the claimant was a fugitive.[55] More importantly, the court stated that, although the defendant was technically a claimant, his action was "more in the nature of a re-

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47 *See, e.g.*, Conforte v. Commissioner, 692 F.2d 587, 589 (9th Cir. 1982).

48 *Id.* at 589-90 (barring taxpayer from contesting assessment of tax liabilities in civil proceeding where he was a fugitive from related criminal tax evasion conviction); Broadway v. City of Montgomery, 530 F.2d 657, 659 (5th Cir. 1976) (refusing to hear fugitive's appeal seeking damages and injunctive relief from allegedly illegal state wire tap); Doyle v. United States Dep't. of Justice, 494 F. Supp. 842, 845 (D.D.C. 1980) (per curiam), *aff'd*, 668 F.2d 1365 (D.C. Cir. 1981) ("[I]f the courts may invoke their inherent equitable powers to refuse to 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.").

49 *See, e.g.*, United States v. Eng, 951 F.2d 461 (2d Cir. 1991); *7707 S.W. 74th Lane*, 868 F.2d at 1214; United States v. Pole No. 3172, 852 F.2d 636 (1st Cir. 1988); United States v. $129,374 in United States Currency, 769 F.2d 583 (9th Cir. 1985); United States v. $83,320 in United States Currency, 682 F.2d 573 (6th Cir. 1982).

50 682 F.2d 573 (6th Cir. 1982).

51 *Id.* at 576 (rejecting Government's argument that claimant, who failed to appear for sentencing after pleading guilty to continuing criminal enterprise, was not entitled to appeal forfeiture to United States of currency seized from claimant's home, because he was a fugitive from justice).

52 *Id.* (ruling that escape of criminal defendant should not be raised as bar to those who may have legitimate, innocent interest in exonerating defendant property from its wrongdoing).

53 852 F.2d 636 (1st Cir. 1988).

54 *Id.* at 643.

55 *Id.* at 644 ("[W]e cannot conclude that [the claimant]'s status as a fugitive is sufficiently related to the civil forfeiture to deprive him of the right to process of any sort before his property is taken from him.").

sponse" to the Government's seizure.[56] As such, the claimant was not affirmatively employing the processes of the court.[57] Similarly, the First Circuit rejected the district court's characterization of the claimant as someone purposely flaunting court processes.[58]

2. *Circuit Applications of the Disentitlement Doctrine*

Despite the reluctance of the First[59] and Sixth Circuits, many courts have readily accepted the sufficiency of *Molinaro* and its progeny to bar claims in forfeiture cases where a claimant to the defendant property is a fugitive from justice in a related criminal proceeding.[60] These courts have held that such a claimant should not be permitted to defend against the forfeiture because he has flouted the authority of the court and thus has waived his right to due process.

In 1984, the Second Circuit confronted a situation involving a single claimant in which the Government sought to dismiss only the fugitive's claim, without prejudice to any other potential claimant.[61] Thus distinguishing *$45,940* from *$83,320*, the Second Circuit became the first court to extend the *Molinaro* disentitlement doctrine to a civil forfeiture proceeding.[62] In *$45,940*, McKay, a Canadian, was arrested, jailed and deported for illegally entering into the United States from Canada.[63] The $45,940 in U.S. currency he carried at the time of arrest was seized, and he was subsequently indicted for making a false statement to the U.S. Customs Service regarding the amount of

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56 *Id.* at 643.

57 *See id.* The court noted that one of the main considerations in the fugitive from justice cases is "the fact that the fugitive is trying . . . to reap the benefit of the judicial process without subjecting himself to an adverse determination." *Id.* In the case at bar, the claimant was not appealing a conviction; the Government seized his property and would hold it forfeit if he did not respond. The First Circuit explained, "'[P]etitioner's position is more analogous to that of a *defendant*, for it belatedly challenges the government's action by now protesting against a seizure and seeking the recovery of assets.'" *Id.* (alteration in original) (quoting Societe Internationale v. Rogers, 357 U.S. 197, 210 (1958)).

58 *Id.* at 644 (noting that the "core concept in . . . [this] doctrine seems to be that the courts need not act on behalf of an individual who has attempted to bring about the same result by 'self-help' method of escaping from justice").

59 Note that the First Circuit has extended the application of the fugitive disentitlement doctrine in a criminal appeal to a civil appeal. *See* United States *ex rel* Bailey v. United States Commanding Officer of the Office of the Provost Marshal, 496 F.2d 324, 326 (1st Cir. 1974) (affirming dismissal of action wherein petitioner seeking relief from Army regulation through writ of habeas corpus was absent without leave; petitioner could not "invoke the processes of the law while flouting them . . . [and] 'call upon the resources of the Court for determination of his claims'") (quoting Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (per curiam)).

60 *See infra* notes 61-86 and accompanying text.

61 United States v. $45,940 in United States Currency, 739 F.2d 792, 797 (2d Cir. 1984).

62 *See id.* at 797-98.

63 *Id.* at 793.

money he possessed when he crossed the border.[64] McKay later filed a claim to the money and answered the Government's complaint to enforce forfeiture of the $45,940; but, he refused to appear for his arraignment on the related criminal charge.[65] The Government contended that McKay's refusal to reenter the United States "classifie[d] him as a fugitive, resulting in a waiver of his rights to defend the related civil forfeiture proceeding."[66] The district court agreed and granted the Government's motion for judgment on the pleadings.[67] McKay appealed, arguing that he had been deprived of his property without due process of law and that he was not a fugitive because he had been involuntarily deported.[68] Citing a contemporaneous case,[69] the Second Circuit ruled that McKay was indeed a fugitive since he had not reported to the United States Consulate despite the fact that he had notice of the criminal proceeding.[70] Stating that McKay was properly notified of the seizure and that he was the only claimant to the property,[71] the court held that McKay had waived his right to due process in the civil forfeiture action by remaining a fugitive.[72]

Following on the heels of *$45,940*, the Ninth Circuit ruled that the disentitlement doctrine should bar intervention in a civil forfeiture action by a fugitive's successor in interest.[73] In doing so, the court rejected the Sixth Circuit's reasoning in *$83,320*.[74] The court stated that the defendant himself, because of his fugitive status, would have been disentitled of his right to defend the seizure action.[75] Therefore, the court reasoned, the conservator of his estate logically must suffer the same fate since his claim is wholly derivative of any

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64 *Id.*

65 *Id.* at 793-94.

66 *Id.* at 794.

67 *Id.*

68 *Id.*

69 United States v. Catino, 735 F.2d 718, 722 (2d Cir. 1984) (noting that a court may infer an intent to flee prosecution or arrest from a person's failure to surrender to officials or decision not to return to jurisdiction once he learns of pending charges against him).

70 *$45,940*, 739 F.2d at 796.

71 *Id.* at 798. The nature of the court's reasoning is consistent with that in *United States v. $83,320 in United States Currency*, 682 F.2d 573 (6th Cir. 1982). There, the Sixth Circuit based its refusal to disentitle the accused on the ground that he may not be the only person with a potential interest or claim in the forfeited property. *Id.* at 576.

72 *$45,940*, 739 F.2d at 798.

73 United States v. $129,374 in United States Currency, 769 F.2d 583, 587 (9th Cir. 1985) (concluding that extension of disentitlement doctrine to conservator of fugitive's estate is "compelled as a matter of sound policy").

74 *Id.* at 589 ("[m]ere speculation that innocent third parties might have an interest in the forfeited property" is inadequate to overcome application of the *Molinaro* disentitlement doctrine).

75 *Id.* at 587.

claim the fugitive may have had.[76]

The Eleventh Circuit followed suit in *United States v. 7707 S.W. 74th Lane*,[77] reiterating its recognition of the applicability of the disentitlement doctrine in the civil arena.[78] The court held that where the defendant property had allegedly been used to facilitate the commission of a crime (narcotics trafficking), and the property owner had fled justice after being indicted for that crime, the doctrine precluded the fugitive from raising objections to the forfeiture.[79]

In *United States v. Eng*,[80] the Second Circuit again applied the disentitlement doctrine to a civil forfeiture action.[81] Specifically, the court declared that it is irrelevant which party initiates the proceedings in question; regardless of a fugitive's procedural posture, his fugitive status bars any defense.[82] In response to the appellant's assertion of a violation of due process, the court ruled that "[t]he [disentitlement] doctrine operates as a waiver by a fugitive of [those] rights in related civil forfeiture proceedings."[83] The court explained further: "[a]ppellant is entitled to all of his due process rights once he returns to stand trial."[84]

Finally, the Tenth Circuit upheld the doctrine's use in a civil forfeiture action to bar a fugitive from defending against the seizure of property by the Federal Government.[85] Affirming the district court's decision to strike the appellant's answer to a forfeiture complaint, the

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76 *Id.* at 587-88 (noting that the district court's denial of intervention was limited to conservator who "stood in [the fugitive]'s shoes").

77 868 F.2d 1214 (11th Cir. 1989) (affirming dismissal of fugitive's claim in civil in rem forfeiture action since fugitive was simultaneously avoiding criminal prosecution).

78 *See* Schuster v. United States, 765 F.2d 1047 (11th Cir. 1985) (disentitling the fugitive from petitioning for review of a tax assessment related to the criminal prosecution from which she has fled).

79 *7707 S.W. 74th Lane*, 868 F.2d at 1216 (holding that the fugitive, by his own actions, had disentitled himself from invoking judicial process in a civil forfeiture action).

80 951 F.2d 461 (2d Cir. 1991).

81 Appellant's active opposition to extradition from Hong Kong to the United States to face indictment for alleged management of a continuing criminal heroin enterprise disentitled him from contesting a civil forfeiture action instituted by the Government. *Id.* at 466. "Plainly, appellant has not done all within his power to return to this country . . . . Consequently, [he] was correctly held to be a fugitive from justice." *Id.* at 465.

82 *Id.* at 466 ("[e]ven were appellant in a purely defensive posture procedurally, such is not a relevant consideration for purposes of the disentitlement doctrine.").

83 *Id.*

84 *Id.* at 467. Appellant's remedy as a fugitive "is to forego that status and promptly avail himself of his right to a speedy and public trial guaranteed him under the Constitution." *Id.*

85 United States v. Timbers Preserve, 999 F.2d 452, 456 (10th Cir. 1993) (upholding district court's entry of default judgment in forfeiture proceeding under disentitlement theory where appellant fled to Laos, but was unable to return to United States because he was incarcerated in Laos).

Tenth Circuit stated that "[appellant]'s fugitive status shows a willful disregard for the court . . . . His culpable conduct will not be excused or sanctioned."[86]

3. *The Circuit Split and Recent Supreme Court Rulings*

Against this backdrop, the Seventh Circuit resisted the progressive expansion of the fugitive disentitlement doctrine.[87] In *$40,877.59*, the court stated that allowing a district court to use the doctrine in civil forfeitures would "sweep far too broadly."[88] In a comparison between a fugitive-claimant where the disentitlement rule has been applied and a party in contempt of court, the Seventh Circuit remarked that both are "punished for 'flouting' the authority of a court in another proceeding."[89] The fugitive's punishment is preclusion from procedural self-defense, a penalty which may be a violation of due process.[90] The Seventh Circuit found this outcome unacceptable: "notwithstanding an individual's status, where he is vulnerable to being sued, he has the right to defend himself in the action brought against him . . . ."[91]

Prior to *$40,877.59*, the majority of circuit courts held that a fugitive claimant in a civil forfeiture action was flouting the judicial system and was not entitled to due process.[92] The ruling in *$40,877.59* created a split in authority regarding the right of the fugitive to defend confiscated property.

As discussed below, the Seventh Circuit's approach reflected the Supreme Court's changing attitude towards forfeiture and the fugitive disentitlement doctrine. Recent decisions indicate a retreat from the Supreme Court's prior expansive treatment of the lower courts' application of the rule in civil forfeiture proceedings.[93]

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86 *Id.* at 455.

87 *See* United States v. $40,877.59 in United States Currency, 32 F.3d 1151, 1157 (7th Cir. 1994) (holding that doctrine did not preclude alleged fugitive businessman from defending against civil forfeiture proceeding initiated by the Government).

88 *Id.* at 1156. Quoting the Supreme Court, the appellate court continued: "'The sanction of appellate dismissal should not be wielded indiscriminately as an all-purpose weapon against defendant misconduct.' Certainly, this is even more true at the district court level." *Id.* (quoting Ortega-Rodriguez v. United States, 507 U.S. 234, 247 n.17 (1993)).

89 *Id.* at 1154.

90 *Id.*

91 *Id.* at 1156 (recognizing that burden of hearing on Government was slight and due process required that claimant be given opportunity to be heard).

92 *See supra* notes 61-86 and accompanying text.

93 *See, e.g.*, Ortega-Rodriguez v. United States, 507 U.S. 234, 244 (1993) ("In our view, the rationales that supported dismissal in cases like *Molinaro* and *Estelle* should not be extended as far as the Eleventh Circuit has taken them."); United States v. James Daniel Good, 510 U.S. 43, 51, 62 (1993) (mandating that requirements of Fifth and Fourteenth Amendments relating to notice of seizure and proper hearing of any defenses be met in

For example, the Supreme Court recently held the disentitlement doctrine inapplicable where a defendant flees after conviction (while a criminal case is pending in the district court) but is recaptured before the filing of an appeal.[94] In its fullest discussion to date, the Court enumerated the underlying principles of the doctrine[95] and explained that these are necessarily attenuated where the defendant's fugitive status at no time coincides with the appeal.[96] The Court found that none of these rationales justified disentitling the defendant in *Ortega-Rodriguez*.[97] More importantly, the Court rejected any expansion of the doctrine "that would allow an appellate court to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system."[98]

III. *DEGEN V. UNITED STATES*: FACTS AND PROCEDURAL HISTORY

On October 24, 1989,[99] a federal grand jury in the District of Nevada indicted Brian J. Degen for distributing marijuana, organizing and running a massive marijuana trafficking operation, laundering money, and additional related crimes.[100] That same day, the United States District Court for the District of Nevada unsealed a complaint filed by the Government in a civil forfeiture action against Degen's real and personal property, bank accounts, property income, and business interests.[101] Invoking 21 U.S.C. §§ 881(a)(6) & (7),[102] the

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forfeiture actions).

94 *Ortega-Rodriguez*, 507 U.S. at 251.

95 The Court identified four justifications for disentitling a fugitive litigant on appeal: enforceability concerns; the "disentitlement" theory; deterrence; and advancement of interests in efficient, dignified appellate practice. *Id.* at 240-42.

96 *Id.* at 244.

97 *Id.*

98 *Id.* at 246.

99 United States v. Real Property Located at Incline Village, 755 F. Supp. 308, 309 (D. Nev. 1990); *see also* Degen v. United States, 116 S. Ct. 1777, 1779 (1996).

100 *Degen*, 116 S. Ct. at 1779.

101 *Id.*

102 The statute reads as follows:

§ 881. Forfeitures
(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
. . .
(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.
(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improve-

Government sought to seize property in California, Nevada, and Hawaii, estimated to be worth $5.5 million and allegedly purchased with or used to facilitate the proceeds of Degen's drug sales.[103]

The Government submitted the affidavit of Drug Enforcement Administration Special Agent Dennis A. Cameron in support of the forfeiture complaint.[104] The supporting affidavit asserted that the property was traceable to the criminal drug offenses.[105] It also described an extensive smuggling operation involving tens of thousands of pounds of marijuana from Mexico and Thailand and Degen's alleged involvement in the subsequent distribution of the drugs in California and Nevada from 1969 to 1986.[106] Cameron also alleged in the affidavit that Degen's total adjusted gross income for the period between 1979 and 1986 was less than $250,000, while accounting records showed a net worth of $2.1 million.[107] The affidavit relied heavily on information obtained from confidential informants.[108]

Degen's father was born in Switzerland, and, consequently, Brian maintained both Swiss and United States citizenship.[109] Before the grand jury returned its indictment of Degen, but after authorities arrested an alleged co-conspirator, Degen left the United States and moved to Switzerland with his family.[110] After his indictment, Degen failed to return to the United States to face the criminal charges in Nevada.[111] Additionally, the United States Government could not force Degen's return due to the extradition treaty between Switzerland and the United States, which does not mandate that either country extradite its own nationals.[112]

While Brian and his wife, Karyn, remained outside the United States, counsel representing them filed verified claims to their property and answers in the civil action.[113] In his sworn answer, Degen

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ments, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C.A. § 881(a)(6)-(7) (West 1981 & Supp. 1996).

103 *Degen*, 116 S. Ct. at 1779.

104 Respondent's Brief at 2, Degen v. United States, 116 S. Ct. 1777 (1996) (No. 95-173).

105 *Id.*

106 *See id.* at 2-3.

107 *Id.* at 3.

108 Petitioner's Brief at 3, Degen v. United States, 116 S. Ct. 1777 (1996) (No. 95-173).

109 *See Degen*, 116 S. Ct. at 1780.

110 Respondent's Brief at 3-4, *Degen* (No. 95-173).

111 Petitioner's Brief at 2, *Degen* (No. 95-173).

112 United States v. Real Property Located at Incline Village, 47 F.3d 1511, 1514 (9th Cir. 1995).

113 *See* Petitioner's Brief at 3, *Degen* (No. 95-173).

denied any connection between the property sought to be forfeited and activities of the charged criminal enterprise.[114] He contended that the Government's claims were barred by the statute of limitations and based on an unlawful retroactive application of the forfeiture laws.[115] Degen also challenged the legality of the ex parte seizure of his property, arguing that the complaint and affidavit did not establish probable cause.[116]

On May 2, 1990, the Government moved to strike the Degens' claims and answers, and moved for summary judgment.[117] The Government asserted that Degen was not entitled to be heard in the civil forfeiture action as long as he remained a fugitive from justice in the related criminal case.[118] In response, Degen's attorneys argued first that Degen was not a fugitive because he had not left the country with the intent to avoid prosecution; and second, that the properties seized by the Government had been purchased with income from the Degens' various real estate and construction ventures over the years, not with money from illegal drug transactions.[119]

The district court denied the Government's motion against Karyn Degen.[120] However, the court granted the Government summary judgment against Brian, stating that "an intent to avoid prosecution (conferring the 'fugitive status') may be inferred where the defendant knows that he is wanted by the police and fails to submit to arrest."[121] According to the district court, Brian Degen was aware that the police sought him and still refused to submit to arrest—therefore, he was a fugitive.[122]

Having designated Degen a fugitive, the court addressed whether the disentitlement doctrine precluded him from contesting the related civil forfeiture action.[123] The district court traced the background of the disentitlement doctrine from its emergence in the criminal context in *Molinaro v. New Jersey*[124] to its extension to civil

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114 *See id.*

115 *Degen*, 116 S. Ct. at 1780.

116 Petitioner's Brief at 4, *Degen* (No. 95-173).

117 *Id.*

118 Respondent's Brief at 4, *Degen* (No. 95-173). The Government also argued that Degen's wife's property interests were wholly derivative of her husband's. *Id.*

119 *See* Petitioner's Brief at 4, *Degen* (No. 95-173).

120 Respondent's Brief at 4, *Degen* (No. 95-173).

121 United States v. Real Property Located at Incline Village, 755 F. Supp. 308, 309-10 (D. Nev. 1990) (citing United States v. Gonsalves, 675 F.2d 1050, 1052 (9th Cir. 1982)). *See also* United States v. Ballesteros-Cordova, 586 F.2d 1321, 1323 (9th Cir. 1978); United States v. Wazney, 529 F.2d 1287, 1289 (9th Cir. 1976)).

122 *Incline Village*, 755 F. Supp. at 310.

123 *Id.*

124 396 U.S. 365, 366 (1970) (per curiam) (refusing to adjudicate the merits of an ap-

proceedings based on a prior criminal conviction in *Conforte v. Commissioner*.[125] The court also examined the Ninth Circuit's analysis in *United States v. $129,374 in United States Currency*[126] to determine whether the doctrine applied to a civil forfeiture proceeding.[127]

As part of its inquiry into whether the disentitlement doctrine applied, the court enumerated five guiding factors: (1) the underlying policy of the disentitlement doctrine; (2) the degree to which the property in the forfeiture action related to the criminal acts; (3) the claimant's control over his fugitive status; (4) whether the claimant is a defendant or a plaintiff; and (5) whether the Government obtained a prior criminal conviction against the claimant.[128] Considering all of these factors, the district court held that the disentitlement doctrine should extend beyond *$129,374* to apply to Degen's case.[129] Despite the fact that he had not been convicted, Degen was nonetheless barred from defending the civil forfeiture *in absentia*.[130]

Two years later, in December 1992, the Government moved again for summary judgment, this time against Karyn Degen alone.[131] The Government supported the motion with affidavits of three of Brian's former associates.[132] Their statements detailed illegal smuggling and distribution activities and attested to sizeable amounts of money Brian had made over the years from his illegal activities.[133] While Karyn received numerous filing extensions, she failed to file a response to the Government's motion.[134] Consequently, on June 23, 1993, the district court entered summary judgment against her.[135] On August 17, 1993, the district court entered a final order of forfeiture vesting title in the United States to the properties claimed by Brian and Karyn Degen.[136]

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peal from a criminal conviction because defendant was a fugitive from justice and was thereby "disentitle[d] to call upon the resources of the Court for determination of his claims"). *See supra* notes 35-38 for a full description of the case.

125 692 F.2d 587 (9th Cir. 1982) (dismissing a taxpayer's appeal from a civil judgment that sustained tax deficiencies and penalties because of his fugitive status in a federal tax evasion case).

126 769 F.2d 583, 587 (9th Cir. 1985) (concluding that the limited extension of the *Molinaro/Conforte* disentitlement doctrine to a civil forfeiture proceeding by a fugitive's successor in interest is "compelled as a matter of sound policy").

127 *Incline Village*, 755 F. Supp. at 310.

128 *Id.* at 311.

129 *Id.* at 313-14.

130 *Id.*

131 Petitioner's Brief at 6, Degen v. United States, 116 S. Ct. 1777 (1996) (No. 95-173).

132 Respondent's Brief at 6, Degen v. United States, 116 S. Ct. 1777 (1996) (No. 95-173).

133 United States v. Real Property Located at Incline Village, 47 F.3d 1511, 1515 (9th Cir. 1995).

134 Respondent's Brief at 6-7, *Degen* (No. 95-173).

135 *Id.* at 7.

136 *Id.*

Affirming the district court on appeal, the Ninth Circuit concluded that the criminal action and the civil forfeiture action were "closely enough connected to satisfy any relatedness test,"[137] and that the case necessitated an extension of the disentitlement doctrine.[138] Although Degen had not been convicted or even tried criminally,[139] the appellate court ruled that he had "'demonstrated disrespect' for the district court by refusing to submit to its jurisdiction in the criminal action."[140]

The Ninth Circuit found harmless error in the district court's failure to consider whether application of the disentitlement doctrine should be subject to judicial discretion.[141] Though Degen did not argue the issue on appeal,[142] the Ninth Circuit emphasized in its ruling that "the doctrine is discretionary, not mandatory."[143]

Degen petitioned for rehearing but the Ninth Circuit denied the petition.[144] Subsequently, the United States Supreme Court granted certiorari[145] to determine whether a United States District Court may strike a claimant's filings in a civil forfeiture suit and grant summary judgment against the claimant for failing to appear in a related criminal prosecution.[146]

IV. SUMMARY OF OPINION

The Supreme Court reversed the Ninth Circuit and remanded the case for further proceedings consistent with its opinion.[147] Writing for a unanimous court, Justice Kennedy concluded that the fugitive disentitlement doctrine does not permit a district court to enter judgment against a fugitive claimant in a civil forfeiture action on the ground that the claimant failed to return to the United States to defend against federal drug charges.[148] Specifically, Justice Kennedy stated that imposition of the doctrine in Degen's case was unjustified, notwithstanding the inherent power of the federal courts.[149] The doc-

137 *Incline Village*, 47 F.3d at 1516.
138 *Id.*
139 *Id.* This seemed inconsistent with previous Ninth Circuit disentitlement decisions, where the disentitled claimants had fled after being convicted in a related criminal proceeding. *Id.*
140 *Id.*
141 *Id.* at 1517.
142 *Id.* at 1518.
143 *Id.* at 1517.
144 *Id.* at 1522.
145 Degen v. United States, 116 S. Ct. 1777 (1996).
146 *Id.* at 1779.
147 *Id.* at 1783.
148 *See id.* at 1780-83.
149 *Id.* at 1781.

trine, as applied by the district court, constituted an "arbitrary response" to Degen's conduct that served to advance no substantial interest of the district court.[150]

Declining to extend the doctrine,[151] Justice Kennedy admonished that the "inherent authority" of the federal courts to protect their proceedings and uphold their judgments must be restricted.[152] Otherwise, "there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority."[153] Courts should exercise restraint when resorting to that inherent power and its use must be a "reasonable response to the problems and needs that provoke it."[154]

Turning to a discussion of the underlying rationales, Justice Kennedy explained the reasons the Court had provided in the past when applying the fugitive disentitlement doctrine.[155] First, when a fugitive cannot be located, there may be no means of enforcing a court's judgment on review.[156] According to Justice Kennedy, this was the operative philosophy of *Smith v. United States*,[157] the first case to recognize the doctrine.[158] Second, the fugitive is not entitled "to call upon the resources of the Court for determination of his claims"[159]—*i.e.*, his escape from justice disentitles him.[160] Other reasons for the disentitlement doctrine, recognized in state courts, include policy concerns such as "discourag[ing] . . . escape and encourag[ing] voluntary surrenders, and promot[ing] the efficient, dignified operation of the courts."[161]

After outlining these principles, Justice Kennedy illustrated their application in Supreme Court precedent in determining the validity of a court's imposition of the fugitive disentitlement doctrine.[162] He

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150 *Id.* at 1783.

151 *Id.* at 1780-81.

152 *Id.*

153 *Id.*

154 *Id.* at 1781. "In accord with these principles [of restraint], we have held federal courts do have authority to dismiss an appeal or writ of certiorari if the party seeking relief is a fugitive while [a related criminal] matter is pending." *Id.*

155 *Id.*

156 *Id.*

157 94 U.S. 97 (1876) (stating that "[i]t is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render.").

158 *Degen*, 116 S. Ct. at 1781.

159 *Id.* (citing Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (per curiam)).

160 *Id.*

161 *Id.* at 1781 (quoting Estelle v. Dorrough, 420 U.S. 534, 537 (1975) (per curiam)).

162 *Id.*

cited *Ortega-Rodriguez v. United States*,[163] in which the Supreme Court held that *Smith v. United States*[164] and other precedents did not support dismissal of a fugitive's appeal when the fugitive was recaptured before the appeal was filed.[165] According to Justice Kennedy, the Court in *Ortega-Rodriguez* gave considerable weight to the fact that the appellate court could enforce its judgment against the appellant regardless of his absence, and that the appellant's earlier absence from custody "did not threaten the dignity of the court imposing the sanction."[166] A similar examination of Degen's situation resulted in the Court's determination that disentitlement was unjustified.[167] Not only was there no risk of delay or frustration in analyzing the merits of the Government's forfeiture case against Degen, but there would have been no problems in enforcing the resulting judgment.[168]

Furthermore, while the Court acknowledged the Government's fear that Degen's participation in the civil case would compromise the criminal prosecution,[169] it determined that this fear failed to justify resorting to the disentitlement rule.[170] Justice Kennedy felt that the district court could employ less extreme methods of resolving this dilemma, such as entering protective orders limiting discovery or managing the civil litigation to avoid interference with the criminal case.[171] In addition, Justice Kennedy reasoned, if Degen's reluctance to appear resulted in non-compliance with a court order, the trial court could impose any of the sanctions reserved for uncooperative parties, including contempt or dismissal, if appropriate.[172] Without specifying which scheme the district court should adopt, Justice Kennedy stated that, "[t]he existence of these alternative means of protecting the Government's interests . . . shows the lack of necessity for

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163 507 U.S. 234 (1993).

164 94 U.S. 97 (1876).

165 *Degen*, 116 S. Ct. at 1781 (citing Ortega-Rodriguez v. United States, 507 U.S. 234, 247 (1993)).

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.* at 1782. The Government asserted that Degen might utilize the more liberal rules of civil discovery in the forfeiture suit to gain an improper advantage in the criminal action, where, as a criminal defendant, he is entitled to only limited discovery. This problem can normally be avoided by staying the civil proceeding until the prosecution is completed. Clearly, that avenue is foreclosed due to Degen's departure from the country and refusal to return. Moreover, it would be prejudicial to the Government to stay the forfeiture indefinitely, since if its forfeiture claims are valid, it is entitled to immediate possession of the properties. *Id.*

170 *Id.*

171 *Id.*

172 *Id.*

the harsh sanction of absolute disentitlement."[173]

Justice Kennedy then considered and rejected the other purposes advanced in support of the disentitlement doctrine.[174] According to Justice Kennedy, the need the need to redress the indignity suffered by the district court in the face of Degen's absence from the criminal proceeding and to deter similar flights from prosecution were insufficient to outweigh the severity of disentitlement.[175] In fact, resorting too quickly to a rule that essentially forecloses consideration of the merits of a claim may have the opposite effect of eroding the dignity a court derives from the respect accorded its judgments.[176]

Justice Kennedy admitted "disquiet at the spectacle of a criminal defendant reposing in Switzerland, beyond the reach of our criminal courts, while at the same time mailing papers to the court in a related civil action and expecting them to be honored."[177] He determined, however, that the sanction of disentitlement was arbitrary and excessive.[178] "A court's inherent power is limited by the necessity giving rise to its exercise," and Justice Kennedy concluded that Degen's case presented no such necessity to justify forbidding all participation by the absent claimant.[179]

V. ANALYSIS

This Note acknowledges that the outcome in *Degen* was proper. However, this Note asserts that the Supreme Court did not go far enough. The Court should have proscribed the extension of the fugitive disentitlement doctrine outside its traditional, equitable application in criminal appellate cases. Specifically, the doctrine should have no role in civil forfeiture actions initiated by the Government against a fugitive—*i.e.*, where the fugitive is the claimant. This Note argues that such an application is an affront to the Due Process Clause[180] because it denies the claimant the right to defend the litigation and it deprives him of property without any hearing whatsoever. In addition, as employed in civil forfeitures, disentitlement offends notions of basic fairness and has no valid countervailing considerations. In an irresolute opinion, the *Degen* Court overlooked the due process ramifi-

173 *Id.*
174 *Id.* at 1783.
175 *Id.*
176 *Id.*
177 *Id.*
178 *Id.*
179 *Id.*
180 The Due Process Clause of the Fifth Amendment reads: "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. V.

cations and the equity concerns arising from the doctrine's use in such actions. Consequently, the Court failed to rein in the Government's overreaching and random invocation of the doctrine, and, in the end, forfeited the opportunity to halt the invasive expansion of the doctrine by the federal courts.

A. DUE PROCESS

The Supreme Court devoted one sentence to the issue of due process and the fugitive disentitlement doctrine in *Degen*.[181] Perhaps this seemingly short analysis is a result of the curious absence in lower court fugitive disentitlement decisions of any due process analysis. Interestingly enough, though many of the lower courts have adopted the doctrine in civil forfeiture actions, only one has addressed its implications on due process rights.[182] Essentially, the courts that favor disentitlement in the forfeiture setting have based their rulings on the Second Circuit's decision in *United States v. $45,940*.[183] In that case, the Second Circuit chose to further extend the *Molinaro* principle from criminal appeals to civil forfeiture.[184] One commentator noted that the courts "rely heavily on each other's decisions in applying the disentitlement doctrine. After [the Second Circuit] applied the *Molinaro* standard, the others simply followed suit, without regard for constitutional issues such as whether due process requires a bipartisan hearing."[185]

1. The Due Process Right to Defend

Until *Degen*, the Supreme Court had not reviewed any civil forfei-

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[181] *Degen*, 116 S. Ct. at 1780. Justice Kennedy cited one of the Court's prior decisions for the basic proposition that the Due Process Clause of the Fifth Amendment guarantees a citizen the "right to a hearing to contest the forfeiture of his property." *Id.* (citing United States v. James Daniel Good, 510 U.S. 43, 51 (1993)). Beyond that mere mention, the Court effectively declined to discuss the matter: "We need not, and do not, intimate a view on whether enforcement of a disentitlement rule under proper authority would violate due process." *Id.* at 1783. It is difficult to fathom why the Court felt it unnecessary to address this question, particularly since the Court stopped short of declaring that a federal court's "proper authority" does not include barring a fugitive from defending himself in a related civil forfeiture action.

[182] *See* United States v. $40,877.59 in United States Currency, 32 F.3d 1151 (7th Cir. 1994) (holding that person's fugitive status is no bar to defending property confiscated by government).

[183] 739 F.2d 792, 797 (2d Cir. 1984).

[184] *Id.* The Second Circuit adopted *Molinaro* without explaning why it extended the case to civil cases. *Id.* The Ninth Circuit followed the Second Circuit's example. *See* United States v. $129,374 in United States Currency, 769 F.2d 583, 587 (9th Cir. 1985). Thereafter, other courts applied the same rationale for expanding the doctrine, namely the precedent of *Molinaro* and its extension by later cases.

[185] Collins, *supra* note 38, at 640.

ture case in which the district court disentitled a fugitive from asserting a claim to the property. Nonetheless, the Court has long recognized that the right to defend is fundamental, notwithstanding an individual's status.[186] Where a person can be sued, he is entitled to defend himself against that suit.[187] As the Court declared in 1870, "[t]he liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization."[188]

A quarter century later, in *Hovey v. Elliott*,[189] the Court identified the right to defend as an independent due process right:

> To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.[190]

The *Hovey* ruling declared that striking an answer and condemning by default as punishment for contempt of court was a denial of due process of law.[191]

In accordance with the foundations of due process, an individual "must be permitted to defend himself in any court where his antagonist can appear and prosecute."[192] This right of defense attaches in civil and criminal cases, and belongs to every person, whether he has violated the laws or not.[193] In light of this, "the right to answer a seizure of property is analogous to the right to answer charges as

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186 *See* McVeigh v. United States, 78 U.S. (1 Wall.) 259 (1870) (reversing district court's order to strike claim and answer in forfeiture action where respondent was an 'alien enemy' (a Confederate office holder); order effectively denied respondent a hearing). *See also* Windsor v. McVeigh, 93 U.S. 274, 277 (1876) ("This is a principal of natural justice .... A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.").

187 *McVeigh*, 78 U.S. at 267.

188 *Id.* ("Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence [sic]."). *See also Windsor*, 93 U.S. at 277 ("Wherever one is assailed in his person or property, there he may defend.").

189 167 U.S. 409 (1897) (involving British subject as defendant who refused to comply with order to pay into court registry money, right to which was at issue in case).

190 *Id.* at 414.

191 *Id.* That is not to deny that courts may render a default judgment on certain occasions, for example, for failure to answer or to produce evidence or similar significant infringements on judicial proceedings. In those instances, the preservation of due process is secured by the presumption that the refusal to respond or produce is an "admission of the want of merit in the asserted defense." Hammond Packing Co. v. Arkansas, 212 U.S. 322, 350-51 (1909).

192 National Union of Marine Cooks v. Arnold & Stewards, 348 U.S. 37, 47 (1954) (Black, J., dissenting).

193 *See id.*

granted by due process in criminal cases."[194] Likewise, "the denial of [a] fugitive's right to defend [against seizure is] equally as offensive to due process as the denial of that right to one in contempt of court."[195]

Where a court invokes disentitlement in a civil forfeiture suit, the claimant is haled into court only to be denied the opportunity to defend against the Government's demands for his property. As a result, the claimant's due process right to assert a defense is summarily extinguished. In *Degen*, the claimant was threatened with the loss of $5.5 million worth of property to the Government. When he attempted through counsel to challenge these Government advances, the lower courts denied him that right.

In such a setting, the disentitlement doctrine becomes but a thinly veiled excuse for punishment for an offense having no relation to the merits of the government's claims or the claimant's defense. The Court should draw a bright line at civil forfeiture. By failing to do so in *Degen*, the Court averted its eyes from the continuing erosion of basic constitutional rights, among which the due process right to defend is foremost.[196]

2. *Procedural Due Process*

Not only does disentitlement in civil forfeiture actions fatally restrict the right to defend, but it also strips the claimant of his constitutional right to a hearing on the matter.[197] The Supreme Court has interpreted the Fifth Amendment's Due Process Clause as imposing

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194 Collins, *supra* note 38, at 642.

195 *Id.* There is no significant procedural distinction between an individual found in contempt of court and a fugitive-claimant in a civil forfeiture case: both have allegedly defied the authority of a court in another proceeding and either "status" may act to bar a potential suit. *See* United States v. $40,877.59 in United States Currency, 32 F.3d 1151, 1154 (7th Cir. 1994).

196 As the Court noted in *Hovey*:

> If the power to violate the fundamental constitutional safeguards securing the property exists, and if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, why will they not also apply to proceedings against the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard, on the theory that he is in contempt, and sentence him to the full penalty of the law.

167 U.S. at 419.

197 It has long been established that "[a] sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." Windsor v. McVeigh, 93 U.S. 274, 277 (1876). As the Court emphasized in *Logan v. Zimmerman Brush Co.*, "the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus, it has become a truism that '*some* form of hearing' is required before the owner is finally deprived of a protected property interest." 455 U.S. 422, 433 (1982) (quoting Board of Regents v. Roth, 408 U.S. 564, 570-71 n.8 (1972)) (emphasis in original).

"constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."[198]

In a civil forfeiture suit where the fugitive claimant is disentitled, the court effectively transfers the claimant's property to the complainant (*i.e.*, the Government) by denying the claimant the right to be heard.[199] Those circuit courts that allow fugitive disentitlement rely on the relationship of the disputed property to the alleged crime.[200] However, relatedness is precisely what a hearing in a forfeiture action is intended to determine.[201] Without a hearing, the only evidence of relatedness is the Government's allegation.[202] Thus, "with artful pleading, the government could confiscate all of a fugitive's property . . . all on mere allegation."[203] Merely by asserting that the claimant is a fugitive and that the property is somehow associated with the suspected crime from which he has escaped, the Government can bar a claimant from defending his property.[204] When this happens, "the status quo is altered, property is redistributed, and all without any hearing whatsoever on the merits of the case."[205]

The Due Process Clause requires, at a minimum, that deprivation of life, liberty or property by adjudication be preceded by adequate notice and a *meaningful* hearing on the merits of the cause.[206] That hearing must be substantive, not simply an empty exercise in procedure.[207] To claim, as the Government did in *Degen*, that the constitu-

198 Societe Internationale v. Rogers, 357 U.S. 197, 209 (1958).

199 "A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer." Windsor v. McVeigh, 93 U.S. 274, 279 (1876). The fugitive disentitlement doctrine, as applied in the forfeiture context, violates procedural due process because it deprives the claimant of property without any opportunity to be heard. Naftalis & Friedman, *supra* note 8, at 9.

200 *See* United States v. $40,877.59 in United States Currency, 32 F.3d 1151, 1155 (7th Cir. 1994).

201 In issuing a seizure warrant, the magistrate judge determines if there is probable cause to believe that there is some connection between the real property and the suspected crime—*i.e.*, that the property was used, or intended to be used, to commit, or to facilitate the commission of, a crime. United States v. James Daniel Good, 510 U.S. 43, 55 (1993).

202 *Id.* (noting that "the Government is not required to offer any evidence on the question of innocent ownership or other potential defenses a claimant might have").

203 *$40,877.59*, 32 F.3d at 1155. The Seventh Circuit noted:

> The forfeiture act authorizes the forfeiture of property only when it has been illegally obtained or used. It does not authorize the forfeiture of property simply because the owner is a fugitive, but by using a combination of the forfeiture laws and the fugitive disentitlement doctrine, the [G]overnment is allowed to do just that.

Id. at 1155-56.

204 *Id.* at 1155.

205 *Id.* at 1156.

206 Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-29 (1982).

207 *Id.*

tional guarantee of due process of law affords nothing more than the *opportunity* to be heard is to belittle that right and to engage in a frivolous game of semantics.[208] Given that the essential purpose of the prior hearing requirement is "to prevent unfair and mistaken deprivations of property, . . . it is axiomatic that the hearing must provide a real test" of the merits of the claim.[209]

As recently as 1993,[210] the Supreme Court rejected the validity of *ex parte* pre-seizure hearings regarding temporary seizure of property pending a full forfeiture hearing.[211] The Court held that such a hearing failed to preserve the rights of the unrepresented party who risked losing his property because the Government was not required to present evidence or possible defenses.[212] If a probable cause warrant, issued *ex parte*, is not adequate to temporarily deprive an owner of the use of his property, then "clearly it is an insufficient basis on which to justify a *permanent* loss [of that property] by forfeiture."[213]

In Brian Degen's case, the district court permitted the Government to confiscate millions of dollars worth of his property without ever affording him any hearing on his defenses. Degen alleged that all of the property was lawfully acquired by him through legitimate labor,[214] but the lower court never allowed Degen to present these arguments.[215] There could be no plainer illustration of taking prop-

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208 *See* Respondent's Brief at 28, Degen v. United States, 116 S. Ct. 1777 (1996) (No. 95-173) ("[A]ll that the Constitution does require is 'an opportunity' for a hearing.").

209 Fuentes v. Shevin, 407 U.S. 67, 97 (1972) (reasoning that due process is only truly afforded by notice and a hearing that are aimed at establishing the validity of the underlying claim).

210 *See* United States v. James Daniel Good, 510 U.S. 43, 62 (1993) ("[T]he Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.").

211 "The neutrality afforded by an adversary hearing is of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceeding." *Id.* at 55-56.

212 The Court noted that the "*ex parte* preseizure proceeding affords little or no protection to the innocent owner. In issuing a warrant of seizure, the magistrate judge need determine only that there is probable cause to believe that the real property was [used, or intended to be used, in the commission of a crime]." *Id.* at 55.

213 United States v. $40,877.59 in United States Currency, 32 F.3d 1151, 1155 (7th Cir. 1994) (emphasis added).

214 In a joint opposition motion, Brian and Karyn Degen explained in detail that the properties seized by the Government had not been purchased with money from illegal drug trafficking. The Degens offered documentary evidence of several legitimate income sources: profits from real estate and construction ventures, rental income from real estate and business properties, profits from their storage business in Hawaii, Karyn's inheritance money, and capital contributions and investments from Brian's parents. Petitioner's Brief at 4, Degen v. United States, 116 S. Ct. 1777 (1996) (No. 95-173).

215 Having concluded that Brian Degen was disentitled, the district court "refused to consider petitioner's 'many pages' of detailed and well-documented 'assertions that he acquired the property in question with legitimate funds,' explaining that those claims 'may

erty without a hearing. The Supreme Court reversed the lower court's decision, so Brian Degen will eventually be heard on remand. However, because the Court did not issue an outright prohibition of fugitive disentitlement in civil forfeiture cases, lower courts are still able to deny a fugitive his due process right to be heard, simply by virtue of the disentitlement doctrine.

3. Disentitlement and Due Process in the Criminal and Civil Contexts

In a criminal case, the Government cannot obtain a conviction based solely on the absence of the defendant—i.e., a judgment of guilty by default solely because of the defendant's fugitive status.[216] The defendant may be tried *in absentia*, but there is a trial and the Government still must prove its case.[217] In addition, the fugitive's attorney may participate fully in the proceeding, by, for example, rebutting evidence, presenting additional exculpatory evidence and making arguments.[218] Likewise, the Government should not be permitted to foreclose representation of a civil claimant and to obtain a civil forfeiture based wholly on the failure of the claimant to appear in a distinct but related criminal case. Striking the defendant's answer in the civil case "would be as flagrant a violation of the rights of the citizen as [striking the defendant's answer in the criminal case]; the one as pointedly as the other would convert the judicial department of the government into an engine of oppression, and would make it destroy great constitutional safeguards."[219] The Government could hardly disentitle Brian Degen from defending the criminal case against him or demand that the trial court enter a default judgment. If a petitioner cannot be disentitled in the very case in which he is allegedly a fugitive, how can he reasonably be disentitled in a separate forfeiture action in which he is entirely prepared to participate?

The concerns at issue in examining disentitlement in civil versus criminal cases become even more troubling when comparing the doctrine's application to criminal appeals versus civil forfeitures. In the criminal context, the defendant is merely deprived of a right to review a criminal conviction, whereas, in the civil context, the government deprives a forfeiture claimant of any hearing at all.

Defending a claim against one's property is a fundamental due

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well be true' but could not be considered because Degen was barred from offering any defense." *Id.* at 5.

216 *See $40,877.59*, 32 F.3d at 1154.

217 *Id.*

218 *Id.* at 1154-55 (citing Diaz v. United States, 223 U.S. 442, 455 (1912)).

219 *Id.* at 1155 (quoting Hovey v. Elliott, 167 U.S. 409, 419 (1897) (citations omitted)).

process right.[220] By contrast, the convicted criminal has no constitutional right to an appeal.[221] When an appellate court applies the doctrine in a criminal case, it refuses to review the substance of the district court's judgment. Presumptively, that judgment was arrived at after a full and fair hearing: The fugitive defendant already was granted due process of law.[222] In most civil forfeiture actions, on the other hand, the fugitive has not been convicted of, or even arrested for, a crime.[223] Additionally, the forfeiture action is not the same proceeding as the one from which claimant has fled.[224]

For instance, when the district court ordered his claim stricken, Brian Degen had not been convicted of *any* crime, much less one related to the ownership of his property.[225] It was immaterial that the Government happened to file both the criminal charges and the civil forfeiture suit against Degen in the same judicial district. Degen was denied his day in court and his constitutional right to due process.

Denying the escaped defendant an opportunity to appeal after a full trial is entirely different from denying a civil claimant all rights to his seized property solely because of his voluntary absence from a criminal case. In the latter situation, not only does the claimant lose the presumption of innocence with regards to a crime for which he has not been tried, but the Government does not even have to prove its forfeiture case. The court essentially renders a judgment without consideration of the evidence.[226] This occurred in *Degen* and will con-

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220 *See supra* Section A.1. *See also* Hovey v. Elliott, 167 U.S. 409, 443-44 (1897) (holding that court violates due process by striking defendant's answer and entering default judgment as punishment for contempt of court and distinguishing *Allen v. Georgia*, 166 U.S. 138 (1897), on the ground that dismissal of fugitive's appeal results only in loss of "mere grace or favor" of taking appeal, not in denial of the "inherent right of defense secured by the due process clause of the Constitution"); Windsor v. McVeigh, 93 U.S. 274 (1876) (holding that confiscation of claimant's property in *McVeigh v. United States* was void because district court had not allowed claimant to defend against forfeiture).

221 "An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal." McKane v. Durston, 153 U.S. 684, 687-88 (1894). *See also* National Union of Marine Cooks v. Arnold & Stewards, 348 U.S. 37, 41-42 (1954) (differentiating, with regard to due process, between denying defendant right to answer forfeiture suit and dismissing petitioner's appeal from money judgment, which "cut off only a statutory right of review after a full trial by judge and jury").

222 *$40,877.59*, 32 F.3d at 1156 ("The fugitive has already had an opportunity for due process to safeguard the judgment which found him guilty.").

223 Collins, *supra* note 38, at 646. Indeed, Brian Degen left the United States before an indictment against him was even unsealed. The Government has not obtained a conviction against Degen in this related criminal case. *See* United States v. Real Property Located at Incline Village, 47 F.3d 1511, 1516 (9th Cir. 1995).

224 *Collins, supra* note 38, at 646-47.

225 United States v. Real Property Located at Incline Village, 755 F. Supp. 308, 313-14 (D. Nev. 1990).

226 *$40,877.59*, 32 F.3d at 1156.

tinue to occur until the Supreme Court disallows application of the disentitlement doctrine in any civil forfeiture action.

B. INAPPLICABILITY OF RATIONALES FOR THE DOCTRINE TO CIVIL FORFEITURE PROCEEDINGS

The Court in *Degen* correctly discounted various principles offered in support of Brian Degen's disentitlement, stating that disentitlement constituted an unreasonable response to Degen's absence from the country.[227] The traditional rationales for the doctrine as applied in the criminal appellate context[228] do not translate to the civil context. They are inapplicable, and indeed wholly inappropriate, in the civil forfeiture setting.

1. The Enforceability of the Court's Judgment

The criminal defendant who flees from justice during the pendency of his appeal cannot be forced to submit to the appellate court's judgment.[229] The fugitive—appellant effectively can reap the benefits from a favorable adjudication of his appeal, but can choose to avoid the consequences of an adverse adjudication.[230] By contrast, the civil claimant's fugitive status "does not threaten the integrity of the forfeiture proceeding."[231] Nor does it jeopardize the enforceability of the court's eventual decision.[232] Because the property is wholly within the court's control, a claimant's absence does not block the government's access to seizable assets.[233] In the event a judgment is rendered in favor of the Government, the fugitive suffers the effects of an adverse adjudication.[234]

For example, if Brian Degen were unable to prove through counsel that there is no connection between his alleged drug activities and

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227 The Court stated, "[These] interests are substantial, but disentitlement is too blunt an instrument for advancing them." *Degen*, 116 S. Ct. at 1783.

228 *See* discussion *infra* Part V.B.1-4.

229 "Under these circumstances . . . there could be no assurance that any judgment [the court] issued would prove enforceable." Ortega-Rodriguez v. United States, 507 U.S. 234, 239-40 (1993) (holding that appellate court may not dismiss appeal of defendant who becomes fugitive after his conviction but who is recaptured before filing his appeal, because defendant's fugitivity lacks sufficient connection to appellate process) (citing Smith v. United States, 94 U.S. 97 (1876)). In those circumstances, the "defendant returned to custody . . . presents no risk of unenforceability . . . ." *Id.* at 244.

230 *See* Smith v. United States, 94 U.S. 97 (1876).

231 *$40,877.59*, 32 F.3d at 1156.

232 *See* United States v. Pole No. 3172, 852 F.2d 636, 643 (1st Cir. 1988) (explaining that "[o]ne of the main considerations in the fugitive from justice cases, . . . the fact that the fugitive is trying . . . to reap the benefit of the judicial process without subjecting himself to an adverse determination, . . . does not arise [in forfeiture actions]").

233 *See $40,877.59*, 32 F.3d at 1156.

234 *See Pole No. 3172*, 852 F.2d at 643.

his property, his property would be forfeited to the Government. The civil forfeiture claimant fully feels the "rigors of an adverse determination" whether or not he is physically present at the adjudicative proceeding.[235]

2. *Flight Disentitles the Fugitive to Relief*[236]

Application of the disentitlement theory construes a defendant's flight from justice as "tantamount to [a] waiver or abandonment" of any appeal or claim.[237] The fugitive "has demonstrated such disrespect for the legal processes that he has no right to call upon the court to adjudicate his claim."[238] This premise does not hold true in civil forfeiture initiated by the Government: The fugitive claimant has neither scorned the court, nor summoned the court for relief.

The fugitive criminal appellant seeks affirmative relief from the court—reversal of a conviction. In effect, he uses the judicial system for his own benefit while simultaneously evading any authority the court may wield. By contrast, in a civil forfeiture suit, the fugitive claimant does not make demands for judicial action or use the resources of the courts.[239] The claimant is not the initiator of forfeiture proceedings; it is the Government that calls upon the district court to order seizure of the claimant's property. Therefore, Brian Degen, and forfeiture claimants generally, "cannot be deemed to be in the customary role of a party invoking the aid of a court to vindicate rights asserted against another."[240] The forfeiture claimant, though theoretically a plaintiff,[241] is in a purely defensive posture, striving to fend off Government confiscation of his property.[242]

In light of this fact, the Court should not permit application of the disentitlement doctrine where the fugitive is effectively defending against a suit by the Government to take his property.[243]

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235 *Id.*

236 *See* Molinaro v. New Jersey, 396 U.S. 365 (1970) (per curiam).

237 Ortega-Rodriguez v. United States, 507 U.S. 234, 240 (1993).

238 Ali v. Sims, 788 F.2d 954, 959 (3d Cir. 1986). *See also Molinaro*, 396 U.S. at 366.

239 *Pole No. 3172*, 852 F.2d at 643 (determining that where petitioner fights Government action seeking to forfeit real property he has not "invoked the processes of this court").

240 *Id.* (quoting Societe Internationale v. Rogers, 357 U.S. 197, 210 (1958)).

241 The claimant is a petitioner in the forfeiture proceeding and, thus, "cast in the role of *plaintiff*." *Id.* (emphasis in original).

242 The petitioner's position in a forfeiture action is "more analogous to that of a *defendant*, for it belatedly challenges the Government's action by now protesting against a seizure and seeking the recovery of assets . . . ." *Societe Internationale*, 357 U.S. at 210 (reversing imposition of sanctions on plaintiff by district court for failing to comply with discovery order where plaintiff was trying to recover assets previously seized by government).

243 *See* United States v. Sharpe, 470 U.S. 675, 681 (1985), wherein the Court determined that the disentitlement doctrine should not be invoked where the fugitive is responding to Government action. The Court refused to condone disentitlement against respondents

3. *Promoting the Efficient Operation of the Judicial Process and Protecting the Dignity of the Court*

The fugitive disentitlement doctrine was originally designed to ensure orderly and efficient judicial procedure.[244] In applying the doctrine, some courts focus on the fugitive's defiance of the legal system and on the delay caused by his escape. However, the supervisory capacity of the federal courts to apply the doctrine is necessarily limited in scope.[245] Because it is grounded in a court's power to control its docket and its proceedings,[246] when a court invokes the doctrine, the fugitive's status must be somehow related to the ongoing proceedings.[247] If the fugitive's status does not have the requisite "connection"—*i.e.*, it neither affects the court's ability to carry out its judicial business nor prejudices the government as a litigant—the claim may not be dismissed.[248]

The critical question is "what disruption, if any, the fugitive's absence has on the integrity of the sanctioning court's own processes."[249] When an individual appeals his criminal conviction while he is a fugitive, there is an obvious connection between his fugitive status and the appellate proceedings.[250] By contrast, a claimant's failure to appear in a civil forfeiture proceeding has no institutional effect on the court.[251] Nor does a claimant's alleged fugitive status in a separate criminal case against him "threaten the integrity of the forfeiture proceeding."[252] In a forfeiture proceeding, the claimant's

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who absconded after being granted certiorari to review their convictions. *Id.* The Court explained that its precedents involved situations where a fugitive defendant is the party seeking review:

> In those very different cases, dismissal of the petition or appeal is based on the equitable principle that a fugitive from justice is "disentitled" to call upon this Court for a review of his conviction. This equitable principle is wholly irrelevant when the defendant has had his conviction nullified and the government seeks review here.

Id. at 681-82 n.2 (citations omitted).

244 Estelle v. Dorrough, 420 U.S. 534, 537 (1975) (per curiam).

245 The Supreme Court qualified the judiciary's power to ensure respect and procedural efficiency in *Ortega-Rodriguez v. United States*: Rules adopted by the courts, including the fugitive disentitlement doctrine, must "represent reasoned exercises of the courts' authority." 507 U.S. 234, 244 (1993).

246 *Id.* at 242-46.

247 *Id.* at 244.

248 Daccarett-Ghia v. Commissioner, 70 F.3d 621, 626 (D.C. Cir. 1995). *See also Ortega-Rodriguez*, 507 U.S. at 249 ("Absent some connection between a defendant's fugitive status and his appeal, as provided when a defendant is at large during [the appellate process], the justifications advanced for dismissal of fugitives' pending appeals generally will not apply.").

249 Petitioner's Brief at 15, Degen v. United States, 116 S. Ct. 1777 (1996) (No. 95-173).

250 *Daccarett-Ghia*, 70 F.3d at 627.

251 *Id.*

252 United States v. $40,877.59 in United States Currency, 32 F.3d 1151, 1156 (7th Cir.

presence is not "needed to conduct an adversarial hearing, and it could not be compelled in a civil action even if he were not a fugitive."[253]

The forfeiture action against Brian Degen easily could have proceeded in his absence with virtually no impact on the district court's processes: The Government could have propounded interrogatories and depositions by telephone, or gone to Switzerland to do so; the Court could have heard argument for both parties without Degen being physically present; and Degen would have had to abide by whatever outcome resulted.[254]

Alternatively, constitutional considerations far outweigh the concern that the forfeiture claimant disrupts the judicial process merely by responding to the Government's attempts at seizure.[255] The Constitution recognizes "higher values than speed and efficiency . . . . [T]he Due Process Clause . . . [was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize . . . government officials . . . ."[256]

Another underlying rationale for the disentitlement doctrine consistently cited by the Court is the desire to protect the courts' dignity and to engender respect. When a criminal appellant disappears while his appeal is pending, he flouts the authority of both the trial court and the court adjudicating his appeal. In the civil forfeiture context, a property owner's fugitive status in a separate criminal case does not offend the dignity of the civil forfeiture court's proceedings.[257] The disentitlement doctrine operates to protect the dignity of the court with respect to a *particular* case.[258] The Supreme Court has made clear that a fugitive cannot be disentitled in one proceeding simply because his status may have affected a completely different proceeding.[259]

1994).

253 *Id.*

254 *See supra* Part V.B.1.

255 General adjudication of a case on its merits requires expenditure of time, effort and money, but these costs cannot be deemed to outweigh the constitutional right to a prior hearing. Fuentes v. Shevin, 407 U.S. 67, 90-91 n.22 (1972).

256 *Id.* ("Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.").

257 Ortega-Rodriguez v. United States, 507 U.S. 234, 246 (1993) (noting that the petitioner, who fled before sentencing and was recaptured before appeal, flouted the authority of the district court, *not* the court of appeals).

258 *See id.* (declining to disentitle defendant because his flight had no connection to course of appellate proceedings).

259 In *Ortega-Rodriguez*, the Court explained:

Even if one accepts the notion that the fugitive's conduct constitutes an affront to the forfeiture court, there remain less severe alternatives to disentitlement. Indiscriminate application of the doctrine as punishment for any misconduct is extreme: "[I]t is a greater stain on our jurisprudence for the court . . . to discard those procedures that safeguard right and fair decisions."[260] As Justice Kennedy noted in *Degen*, the judicial system earns respect and dignity not through oppressive implementation of its rules, but through fair and considered judgment on the merits of any claim.[261]

4. *The Threat of Dismissal Deters Escape From Justice*

Threatening disentitlement in criminal appeals may provide a disincentive to flee justice.[262] Under this theory, the criminal defendant is discouraged from escaping justice by the prospect of losing the privilege to challenge his conviction if and when he is recaptured. This deterrence principle does not hold true in the civil forfeiture context, where disentitlement is imposed for conduct in an entirely separate proceeding.[263] Granting a hearing on the validity of seizure to forfeiture claimants who are fugitives in a criminal proceeding does

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> The contemptuous disrespect manifested by [petitioner's] flight was directed at the District Court, before which his case was pending during the entirety of his fugitive period. Therefore, under the reasoning of the cases . . . it is the District Court that has the authority to defend its own dignity, by sanctioning an act of defiance that occurred solely within its domain.

Id. See also $40,877.59, 32 F.3d at 1156 ("[T]he fugitive's disrespectful conduct is to another court in another action."); United States v. Pole No. 3172, 852 F.2d 636, 644 (1st Cir. 1988). This Note asserts that it is immaterial whether the civil forfeiture action and the criminal indictment are both filed by the Government in the same judicial district (as in *Degen*). These are entirely separate and distinct proceedings and the fugitive's absence is an affront only to the criminal proceedings.

260 *$40,877.59*, 32 F.3d at 1157.

261 Degen v. United States, 116 S. Ct. 1777, 1783 (1996). The *Degen* decision reflected the Court's philosophy in *Ortega-Rodriguez*, where it rejected an expansion of the disentitlement doctrine that would allow a court "to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the course of [the sanctioning court's] proceedings." *Ortega-Rodriguez*, 507 U.S. at 246. In a recent decision, the Supreme Court noted that "'genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries.'" International Union v. Bagwell, 512 U.S. 821, 834 (1994) (quoting Bloom v. Illinois, 391 U.S. 194, 208 (1968)).

262 *See* Estelle v. Dorrough, 420 U.S. 534, 536 (1975) (per curiam). *See also Ortega-Rodriguez*, 507 U.S. at 241 (noting that dismissal by appellate court after defendant has fled its jurisdiction serves an important deterrent function).

263 Disentitlement in this setting is a "random pattern of punishment [that] cannot be considered a rational means of enforcing the State's interest in deterring and punishing escapes." *Estelle*, 420 U.S. at 544-45.

not encourage potential defendants to flee.[264]

The *Degen* Court's cursory overview of the concept indicates skepticism as to its import in a civil forfeiture action. A person who declines to come to the United States to face criminal charges has not committed an offense against the disentitling court. As such, there is no wrongful conduct to deter.

Assuming arguendo that the doctrine does influence a claimant's decision to flee, disentitlement is nevertheless a draconian deterrence method. Use of disentitlement is especially troubling given the wide range of alternatives available to the district court.[265] As the *Degen* Court acknowledged, "the need to deter flight from criminal prosecution by Degen and others . . . [is] substantial, but disentitlement is too blunt an instrument for advancing them."[266]

In conclusion, the justifications for the disentitlement doctrine in the criminal appeals setting do not apply in the civil forfeiture context. Admittedly, federal courts are vested with supervisory authority to formulate procedural rules not necessarily required by the Constitution or Congress.[267] However, "[e]ven a sensible and efficent use of the supervisory power . . . is invalid if it conflicts with constitutional . . . provisions."[268] As employed in civil forfeiture actions, the disentitlement doctrine violates a panoply of rights conferred by the Constitution. As such, none of the above rationales for the disentitlement doctrine—assuming for argument's sake that *any* is applicable—can justify its invocation in civil forfeiture proceedings. And, none can excuse deployment of the court's inherent powers in derogation of constitutional rights.

The *Degen* Court's equivocal stance on these issues signified acquiescence to the lower federal courts' overly broad application of the disentitlement doctrine where it does not belong. By avoiding outright proscription of disentitlement in civil forfeiture, the *Degen* Court gave credence to the expansion of the doctrine from the criminal appeal to the civil forfeiture context.

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264 Collins, *supra* note 38, at 649 ("As to the claim that more suspects will flee due to this approach, it simply does not follow that guaranteeing a defendant his due process rights will encourage his flight.").

265 The Court has noted that, while a case is pending before the district court, there are numerous penalties the threat of which would deter flight. *Ortega-Rodriguez*, 507 U.S. at 247. *See also* Katz v. United States, 920 F.2d 610, 613 (9th Cir. 1990) (stating that the "disentitlement doctrine does not stand alone as a deterrence to escape").

266 Degen v. United States, 116 S. Ct. 1777, 1783 (1996).

267 United States v. Hasting, 461 U.S. 499, 505 (1983).

268 Thomas v. Arn, 474 U.S. 140, 148 (1985). *See also* Societe Internationale v. Rogers, 357 U.S. 197 (1958) (rejecting argument that federal court has "inherent" power to dismiss complaint as discovery sanction).

C. BASIC CONCEPTS OF FAIRNESS

Application of the disentitlement doctrine in civil forfeiture actions, where the government already has a substantial advantage over claimants, is inherently unfair.[269] To seize a fugitive's property, the Government only has to show probable cause to believe that the property at issue is related to the alleged illegal activity.[270] The burden then shifts to the claimant who must prove by a preponderance of the evidence that the property is not thus connected.[271] The imbalance is magnified when courts invoke the fugitive disentitlement doctrine to bar any challenges to the Government's assertions.[272] This permits the Government to avoid even its slight burden and strips the claimant of an opportunity to defend against a possibly unfair seizure.

Preventing a claimant from asserting a defense allows the Government to confiscate property on the mere allegation that the claimant is a fugitive and the property is somehow related to criminal activity.[273] Under the doctrine as formulated by the lower courts, when a criminal indictment is filed and the defendant fails to appear, the floodgates open. The sole barrier to the Government's acquisition of unlimited power—a property owner's right to defend against unwarranted forfeiture—is eliminated. Where disentitlement occurs, no court examines whether the Government seized property to which it has no legal right. As such, the Government can easily abuse the doctrine to avoid judicial scrutiny of the soundness of its allegations and the merits of its case. The Government deprives the fugitive of property "not by establishing probable cause in a courtroom, not by overcoming petitioner's defenses, and not even in compliance with the due process standards for pre-deprivation seizures."[274]

The Supreme Court, however, has emphasized that fairness must

269 United States v. $40,877.59 in United States Currency, 32 F.3d 1151, 1156 (7th Cir.) (noting unfairness of applying doctrine to civil forfeitures since the Government "enjoys a tremendous procedural advantage under the forfeiture laws").

270 Brian Degen's property was seized on the basis of minimal evidence that it was illegally used or obtained. The Government's initial complaint was supported by only one affidavit of a Drug Enforcement Agency agent, which was filled with hearsay statements from unnamed confidential informants. *See* Petitioner's Brief at 3, Degen v. United States, 116 S. Ct. 1777 (1996) (No. 95-173). Courts have acknowledged that this low standard of proof increases the chance for governmental abuse in the "amount or type or property seized, the limited amount of evidence establishing that a crime has been committed, and the effect on innocent owners." Collins, *supra* note 38, at 634.

271 *$40,877.59*, 32 F.3d at 1156.

272 Collins, *supra* note 38, at 648.

273 *$40,877.59*, 32 F.3d at 1155 (noting that this is the "real injustice" when the doctrine is applied in civil forfeiture actions initiated by the Government).

274 Petitioner's Reply Brief at 20, Degen v. United States, 116 S. Ct. 1777 (1996) (No. 95-173).

be afforded to all, regardless of guilt or innocence, regardless of fugitive or non-fugitive status.[275] As the Court recently reiterated, "'[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'"[276] It is essential, therefore, to secure the forfeiture claimant's right to contest the validity of a proceeding against his property.[277] Only then can the courts guarantee all parties[278] the fairness and completeness that the Constitution promises. The Government is entitled to civil forfeiture only where the property at issue is used for or derived from illegal conduct.[279] Without the disentitlement doctrine, the Government still obtains what it deserves (all property illegally procured or used), while the claimants' right to defend against the possibly unfair seizure is preserved.[280]

D. THE CONSEQUENCES OF THE DECISION

By adopting a weak stance in *Degen*, the Supreme Court failed to remedy the confusion and inequity surrounding application of the fugitive disentitlement doctrine in civil forfeiture actions. Subsequent decisions citing *Degen* reflect the ambiguity that remains in the wake of that case.

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275 The idea that this one petitioner must lose because his conviction was known at the time of seizure "founders on a bedrock proposition: fair procedures are not confined to the innocent. The question before us is the legality of the seizure, not the strength of the Government's case." United States v. James Daniel Good, 510 U.S. 43, 62 (1993).

276 *Id.* at 55 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring)).

277 The right to prior notice and a hearing is central to the Constitution's command of due process. The Court has explained that "'[t]he purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment-to minimize substantively unfair or mistaken deprivations of property.'" *Id.* at 53 (quoting Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972)).

278 The Government has various means, besides outright seizure, to protect its interests in real property: It may delay further illegal activity by obtaining search and arrest warrants; it may prevent sale of the property by filing a notice of lis pendens, 28 U.S.C. § 1964 (1985); it may obtain an ex parte restraining order if there is evidence that the owner might destroy the property when warned of the pending action, FED. R. CIV. P. 65; *see also* United States v. 4492 South Livonia Road, 889 F.2d 1258, 1265 (2d Cir. 1989). To require the Government to postpone seizure until after an adversary hearing creates no substantial administrative burden. "And any harm that results from delay is minimal in comparison to the injury occasioned by erroneous seizure." *James Daniel Good*, 510 U.S. at 59.

279 21 U.S.C.A. § 881(a)(7) (West Supp. 1996). *See also supra* note 102.

280 As one author pointed out, "[W]hen a bipartisan hearing is held on the validity of a seizure, only that property which is proved by a preponderance of the evidence to not have been illegally obtained or used will be omitted from the seizure." Collins, *supra* note 38, at 649.

In *United States v. Lopez-Aguilar*,[281] a New York district court cited *Degen* for two propositions: 1) the disentitlement doctrine provides that a fugitive loses the right to call upon the resources of the courts for determination of his claim; and 2) the doctrine applies to more contexts than direct criminal appeals.[282]

The Iowa Supreme Court considered the disentitlement doctrine in *State v. Dyer*.[283] Citing *Degen*, the court dismissed a defendant's appeal from criminal charges of furnishing intoxicants to inmates of the Iowa Department of Corrections following the defendant's flight from jurisdiction.[284]

The *Degen* decision does not support the theories advanced by the New York and Iowa courts. The spirit of the *Degen* holding is that no necessity justifies the harsh sanction of disentitlement in civil forfeiture actions.[285] However, the Court's ambivalent articulation of this principle left open the possibility that striking a claimant's argument in a civil forfeiture suit for his fugitive status in a criminal prosecution would be acceptable in some circumstances.

VI. CONCLUSION

Before *Degen*, the Supreme Court had approved use of the fugitive disentitlement doctrine only as a shield to enable a court to deflect the affirmative claims of those who flout the court's processes in the same matter.[286] The doctrine was not intended by the Court to act as a sword, used offensively by the Government to bypass scrutiny of the merits of its case.

By invoking the doctrine in civil forfeiture proceedings, the Government essentially blackmails the claimant: he is forced to submit to arrest in exchange for the right to defend himself against litigation. The Court must not permit the disentitlement doctrine to be used (and abused) in such a way as to sweep away fundamental due process rights. These constitutional conflicts do not arise when the doctrine is confined to its traditional setting—*i.e.*, criminal appeals. Therefore, the *Degen* Court should have prohibited its application altogether in civil forfeiture proceedings. There is no legitimate basis for the doc-

281 1996 WL 370160 (E.D.N.Y. June 28, 1996), *vacated in part sub nom.* United States v. Londono, 100 F.3d 236 (2d Cir. 1996).

282 *Id.* at *2.

283 551 N.W.2d 320 (Iowa 1996).

284 Citing *Degen*, the Iowa Supreme Court attested that there was "ample authority supporting the State's position that Dyer's flight should serve as forfeiture of the right to appeal." *Id.* at 321.

285 Degen v. United States, 116 S. Ct. 1777 (1996).

286 *See supra* Part II, specifically in the criminal appellate context.

trine in civil forfeiture situations.

By remaining silent (or at least too quiet to be clearly heard), the Court compromised vital constitutional rights and overlooked basic notions of fairness. In the final analysis, the *Degen* opinion will have little impact on federal courts in their overzealous invocation of the fugitive disentitlement doctrine in civil forfeiture suits.

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