COMMENTS

Fugitives in Immigration: A Call for Legislative Guidelines on Disentitlement

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I. INTRODUCTION

The fugitive disentitlement doctrine, which arose as a common law doctrine out of criminal appeals, provides an appellate court with the discretion to dismiss the appeal of, or "disentitle," a fugitive appellant when such fugitivity occurs during the appellate process or is sufficiently connected to that process to justify dismissal as a reasonable sanction.[1] The Supreme Court of the United States formally established the doctrine's application in criminal appeals in the late 1800s,[2] and the Court has since accumulated four main rationales in support of its application: enforceability, disentitlement, efficiency and dignity of the appellate process, and deterrence.[3] While the Court has given much consideration to the doc-

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1. *See* Ortega-Rodriguez v. United States, 507 U.S. 234, 239–42, 249 (1993) (finding that precedent has consistently and unequivocally approved dismissal as an appropriate sanction when a prisoner is a fugitive during the "ongoing appellate process," and imposing a nexus requirement to justify dismissal in cases of former fugitivity). The typical scenario where "fugitivity" is at play is where a criminal defendant escapes custody during or after his or her criminal trial. But, as this Comment will demonstrate, many circuit courts of appeal struggle with whether the concept of fugitivity should include the failure of an alien petitioner (one who seeks judicial review of the Board of Immigration Appeals' decision) to appear before the Department of Homeland Security pursuant to an executive order.

2. Smith v. United States, 94 U.S. 97, 97–98 (1876) (holding that it is clearly within a court's discretion to refuse to hear a criminal appeal when the convicted party fled custody after filing the appeal, unless he or she submits to the court's jurisdiction within a specified period of time); *see also* Bonahan v. Nebraska, 125 U.S. 692 (1887).

3. *Ortega-Rodriguez*, 507 U.S. at 240–42.

trine's application,[4] it has significantly curbed the doctrine's use in only two instances: in cases where a fugitive defendant is recaptured prior to filing a criminal appeal;[5] and in civil forfeiture actions[6] where the civil claimant is a fugitive defendant in a related criminal matter.[7] Furthermore, although its review of the doctrine has largely occurred in the context of criminal appeals, the Court has not explicitly restricted the doctrine's use to criminal law. Instead, the Court has indicated that the doctrine's use rests within a federal appellate court's inherent powers to set reasonable procedural rules in its management of litigation.[8]

In light of Supreme Court jurisprudence regarding the fugitive disentitlement doctrine, the circuit courts of appeal have readily expanded the doctrine's use to civil matters, as well as immigration.[9] But the Su-

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4. Estelle v. Dorrough, 420 U.S. 534, 541–42 (1975) (upholding a Texas disentitlement statute pertaining to criminal appeals and finding the state free to adopt policy to deter escapes and to impose more severe sanctions on convicted individuals whose escapes were reasonably calculated to disrupt the appellate process that they had invoked); Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (holding that a criminal defendant's fugitivity after filing an appeal disentitles him or her from calling upon judicial resources such that the court has authority to dismiss the appeal pursuant to *Smith* and *Bonahan*); Allen v. Georgia, 166 U.S. 138, 141 (1897) (holding that disentitlement is "but a light punishment" for fugitivity after a criminal defendant had filed an appeal); *Bonahan*, 125 U.S. 692; *Smith*, 94 U.S. 97.

5. *Ortega-Rodriguez*, 507 U.S. at 249 (reversing the dismissal of an appeal that a criminal defendant filed after recapture and finding a no connection between former fugitivity and the appellate process that would justify disentitlement sanction).

6. A civil forfeiture action is an "in rem proceeding brought by the government against property that either facilitated a crime or was acquired as a result of criminal activity." BLACK'S LAW DICTIONARY (9th ed. 2009).

7. Degen v. United States, 517 U.S. 820, 824–29 (1996) (reversing the district court's imposition of a disentitlement sanction against the claimant in a civil forfeiture action on the grounds that the U.S.–Swiss dual citizen claimant refused to return to the United States to face related criminal prosecution, and finding such sanction unnecessary, blunt, and arbitrary in light of lesser alternative means available to the district court).

8. *Ortega-Rodriguez*, 507 U.S. at 251 n.24 (citing Fed. R. App. P. 47; Thomas v. Arn, 474 U.S. 140, 155 (1985)).

9. Many scholars argue that the fugitive disentitlement doctrine should be restricted to criminal law. *See, e.g.*, Martha B. Stolley, *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine*, 87 J. CRIM. L. & CRIMINOLOGY 751 (1997) (arguing that the *Degen* Court avoided the essential issue of whether the government and federal judiciary should wield such unlimited power on mere grounds of efficient and dignified judicial operations). But other scholars argue that the rationales of the doctrine support its use in civil matters involving fugitivity. *See, e.g.*, Henry Tashman et al., *Flight or Fight: Originally Invoked in Criminal Cases, the Fugitive Disentitlement Doctrine is Equally Applicable in Civil Disputes*, L.A. LAW., Oct. 29, 2006, at 44.

While the appropriateness of the doctrine's application outside of criminal law may still be in dispute, the fact remains that the federal courts have regularly used the doctrine in civil actions. *See, e.g.*, Pesin v. Rodriguez, 244 F.3d 1250 (11th Cir. 2001) (fugitive in international custody battle); Parretti v. United States, 143 F.3d 508 (9th Cir. 1998) (foreign citizen extradition); Empire Blue Cross & Blue Shield v. Finkelstein, 111 F.3d 278 (2d Cir. 1997) (civil defendant fugitive); Conforte v. Comm'r, 692 F.2d 587 (9th Cir. 1982) (tax evasion). Moreover, the federal courts have used the doctrine in immigration, including in cases that predated *Ortega-Rodriguez* and *Degen*. *See, e.g.*, Giri v. Keisler, 507 F.3d 833 (5th Cir. 2007); Gao v. Gonzales, 481 F.3d 173 (2d Cir. 2007); Garcia-

preme Court's nuanced treatment of the rationales underlying this doctrine, specifically in *Ortega-Rodriguez v. United States* and *Degen v. United States*,[10] has led to inconsistent application across the circuits.[11] Specifically, a split has arisen among the Second, Fifth, Seventh, and Ninth Circuits as to whether these rationales support invocation of the fugitive disentitlement doctrine to find fugitivity and dismiss an alien's petition for review when an alien[12] fails to report as ordered to the Department of Homeland Security (DHS) but his or her whereabouts are known to court, counsel, and federal authorities.[13]

As a result of this circuit split, the question of whether an alien is a fugitive due to a failure to appear before the DHS when the alien is otherwise locatable by court, counsel, and federal authorities—regardless of

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Flores v. Gonzales, 477 F.3d 439 (6th Cir. 2007); Sapoundjiev v. Ashcroft, 376 F.3d 727 (7th Cir. 2004); Antonio-Martinez v. INS, 317 F.3d 1089 (9th Cir. 2003); Ofosu v. McElroy, 98 F.3d 694 (2d Cir. 1996); Zapon v. U.S. Dep't of Justice, 53 F.3d 283 (9th Cir. 1995); Bar-Levy v. U.S. Dep't of Justice, INS, 990 F.2d 33 (2d Cir. 1993); Arana v. INS, 673 F.2d 75 (3d Cir. 1982).

Given that the federal courts do not limit use of the doctrine to criminal law, and the Supreme Court has not explicitly required such, this Comment will not debate whether the doctrine should be used in immigration; rather, this Comment will determine the best resolution to the current circuit split regarding whether an alien is a fugitive when he or she fails to appear before the DHS but his or her whereabouts are otherwise known to court, counsel, and federal authorities.

10. For a discussion of the issues remaining in the aftermath of *Ortega-Rodriguez* and *Degen*, see *infra* Parts II.B.2–B.3.

11. In *Ortega-Rodriguez*, the Supreme Court states in a footnote that uniformity in application is not required so long as the circuit courts adhere to the reasonableness requirements of *Thomas v. Arn*, 507 U.S. at 251 n.24. But this Comment will argue that inconsistent application resulting in deportation, without review of a petition's merits, in one circuit and the opposite result in another is intolerable in immigration, where Congress may enact disentitlement guidelines in its plenary authority to regulate immigration.

12. "The term 'alien' means any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2012).

13. Bright v. Holder, 649 F.3d 397, 400 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 2681 (2012). The Fifth Circuit notes that the Second and Seventh Circuits apply the doctrine to find fugitivity, citing *Gao* and *Sapoundjiev* respectively, and it identifies the Ninth Circuit as representing the opposing side, citing *Wenqin Sun v. Mukasey*. *Bright*, 649 F.3d at 400 (citing *Gao*, 481 F.3d at 176; *Sapoundjiev*, 376 F.3d at 729; Wenqin Sun v. Mukasey, 555 F.3d 802, 805 (9th Cir. 2009)). But less than a month before *Bright*, the Second Circuit distinguished *Gao* to find no fugitivity in a case where the alien's whereabouts were known. Nen Di Wu v. Holder, 646 F.3d 133 (2d Cir. 2011). See *infra* Part III.B for an in-depth discussion of the split.

While the circumstances surrounding an alien's failure to report to immigration officials after an immigration judge has ordered removal differ from case to case, the typical scenarios include (1) an alien's complete disappearance from authorities and counsel, *see, e.g.*, *Antonio-Martinez*, 317 F.3d at 1091; *Gao*, 481 F.3d at 175; (2) an alien's willful refusal to surrender, *see, e.g.*, *Arana*, 673 F.2d at 76–77; *Bar-Levy*, 990 F.2d at 34; and (3) an alien's nonappearance due to confusion or fear while contesting the immigration judge's removal order, *see, e.g.*, *Zapon*, 53 F.3d at 284; *Nen Di Wu*, 646 F.3d at 134–35. While some circuit courts discuss or at least mention whether the alien had an explanation for his or her nonappearance, the circuit courts' rationales place little importance on the reason for nonappearance—focusing instead on the end result to determine whether dismissal of the petition is supported by the policy underlying the fugitive disentitlement doctrine. For a discussion of the main policy arguments represented by each side of the current circuit split, see *infra* Part III.B.

whether the failure to report occurred before or after a petition is filed—seems to turn less on facts and more on the circuits' differences in weighing relevant policy concerns. Such an alien is not a fugitive in the Ninth Circuit,[14] is likely not a fugitive in the Second Circuit,[15] but is a fugitive in the Fifth and Seventh Circuits.[16] This circuit split causes inconsistency and unpredictability for alien petitioners across the United States. Given that the Supreme Court treats the fugitive disentitlement doctrine as resting largely in a federal court's inherent powers to manage litigation, and given its acknowledgment that uniformity in application among the circuits is not required, definitive resolution of this circuit split in immigration can more likely be found in Congressional action.[17] Moreover, the Supreme Court has denied certiorari in the most recent circuit court case on this matter: *Bright v. Holder*.[18] Congress may, with its plenary authority to regulate immigration, enact guidelines on disentitlement of immigration petitions, and Congress should do so in this matter by amending the Immigration and Nationality Act to include a disentitlement provision.[19]

Part II of this Comment will outline how the fugitive disentitlement doctrine has evolved since its birth in criminal appeals. Part II will also highlight how the Supreme Court's treatment of the doctrine has set the stage for the current circuit split on its application to immigration. Part III will explore the current circuit split in immigration, focusing on the rationale used by each circuit in support of its decision to find, or not find, fugitivity when an alien failed to appear before the DHS but is otherwise locatable by court, counsel, and federal authorities. This Part will establish that, while the facts vary from case to case, the circuit courts struggle not with the facts but with the application of the doctrinal rationales in the context of immigration. Part IV will discuss potential judicial intervention but, in the end, conclude that the unique realm of immi-

14. *Wenqin Sun*, 555 F.3d 802; *see also infra* Part III.B.2.

15. *Nen Di Wu*, 646 F.3d 133. *But see Gao*, 481 F.3d 173; *see also infra* Part III.B.

16. *Bright*, 649 F.3d 397; Giri v. Keisler, 507 F.3d 833 (5th Cir. 2007); *Sapoundjiev*, 376 F.3d 727; *see also infra* Part III.B.1.

17. *See supra* note 11; s*ee also infra* Part IV.A (discussing in depth a potential Supreme Court resolution to the circuit split).

18. 132 S. Ct. 2681 (2012).

19. Landon v. Plasencia, 459 U.S. 21, 34 (1982) (holding that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and legislative branches); Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976) (holding that regulation of immigration is vested solely in the federal government and is of a political character subject only to narrow judicial review); Harisiades v. Shaugnessy, 342 U.S. 580, 588–89 (1952) (holding that immigration policy is "vitally and intricately interwoven" with foreign affairs and national security policies such that it is "exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"); Lapina v. Williams, 232 U.S. 78, 88 (1914) (citing Nishimura Ekiu v. United States, 142 U.S. 651 (1892)).

gration justifies action by Congress. This Part will thus advocate for Congress to enact a disentitlement provision, consistent with prior similar legislation in a civil context[20] but unique to the concerns of immigration, including policies on national security and foreign relations. Part V will provide a brief conclusion.

II. SUPREME COURT JURISPRUDENCE ON FUGITIVE DISENTITLEMENT: FROM CRIMINAL APPEALS TO CIVIL FORFEITURE AND BEYOND

Over the course of a century, since the Supreme Court first established in the late 1800s that fugitive disentitlement was appropriate in criminal appeals, the Court has articulated four rationales justifying an appellate court's invocation of the doctrine to dismiss an appeal pending before the court: enforceability, disentitlement, efficiency and dignity of the appellate process, and deterrence.[21] While the Court has twice curbed the expansion of the doctrine's use, it has not explicitly confined the doctrine to criminal matters. And federal courts have used the doctrinal rationales to justify dismissal in matters beyond criminal appeals—in civil matters such as civil forfeiture,[22] but also, more importantly, in the realm of immigration.[23] Congress has also taken a signal from Supreme Court jurisprudence, codifying disentitlement in federal legislation pertaining to civil forfeiture.[24] To properly identify the source of the circuits' current struggle with respect to the doctrine's application in immigration, Supreme Court jurisprudence on the fugitive disentitlement doctrine, including what the Court left unanswered, must be carefully reviewed.

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20. *See* Civil Asset Forfeiture Reform Act of 2000, 28 U.S.C. § 2466 (2006).

21. Ortega-Rodriguez v. United States, 507 U.S. 234, 240–42 (1993).

22. *See supra* note 6 (defining "civil forfeiture action").

23. *See supra* note 9. This Comment will not debate whether the doctrine is appropriately applied beyond criminal appeals, but it will analyze the current split in immigration taking into account that federal courts have applied the doctrine beyond criminal matters without direct Supreme Court guidance.

24. Pursuant to the Civil Asset Forfeiture Reform Act, a judicial officer may disentitle an individual from a claim in civil forfeiture or third-party proceedings where such claim is related to a criminal forfeiture action, upon a finding that such individual knowingly avoided criminal prosecution by (a) purposefully leaving United States jurisdiction; (b) declining to submit to the jurisdiction of the United States; or (c) otherwise evading the jurisdiction of the court in which a criminal case is pending against the individual. 28 U.S.C. § 2466; *see also* Gary P. Naftalis & Alan R. Friedman, *Fugitive Disentitlement in Civil Forfeiture Proceedings*, 228 N.Y. L.J. 117, *2 (Dec. 19, 2002) (arguing that, in codifying disentitlement into civil forfeiture legislation, Congress responded to the "statutory reply" that *Degen* had invited). Part IV.B of this Comment will engage in a deeper discussion regarding this civil forfeiture disentitlement provision as it relates to the proposal of an immigration disentitlement provision.

A. The Four Rationales of the Fugitive Disentitlement Doctrine

1. Establishing the Doctrine with the Rationale of Enforceability

In 1876, the Supreme Court in *Smith v. United States* held that a court has discretion to refuse to hear the criminal appeal of a convicted defendant who had fled custody after filing that appeal, unless the defendant submits to the court's jurisdiction on or before the first day of its next term.[25] Enforceability concerns drove the Court's decision to conditionally dismiss an appeal under such circumstances.[26] It found that a court lacks actual or constructive control over a criminal appellant who is neither in police custody nor on bail, and this lack of control has bearing on the court's ability to enforce its judgment.[27] If the court affirms the judgment, the criminal appellant would likely refuse to submit to the sentence; moreover, even if the court reverses and orders a new trial on the matter, the criminal appellant may not appear if he or she finds continued fugitivity to be in his or her best interest.[28] The Court held that, under such circumstances, it is not inclined to hear and decide "what may prove to be only a moot case."[29]

Although *Smith* clearly approved of federal appellate courts conditionally dismissing the appeal of a fugitive criminal appellant on grounds of enforceability,[30] the Supreme Court broached the possibility of other rationales for dismissal in *Allen v. Georgia*.[31] While often viewed as affirming the enforceability rationale established by *Smith*, *Allen* set the stage for current policy considerations in the fugitive disentitlement doctrine, including concerns about adjudicability,[32] abandonment,[33] sanc-

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25. Smith v. United States, 94 U.S. 97, 97–98 (1876); *see also* Bonahan v. Nebraska, 125 U.S. 692 (1887).

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

27. *Id.*; *see also Bonahan*, 125 U.S. at 692 (quoting *Smith* regarding the lack of actual or constructive custody over criminal appellant as justification for dismissing the appeal).

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

29. *Id. Smith* is a short opinion, the holding of which focused less on the facts than on the policy concerns that arise due to fugitivity after a criminal defendant has filed an appeal.

30. *See* Anthony M. Altman, Comment, *The Fugitive Dismissal Rule:* Ortega-Rodriguez *Takes the Bite Out of Flight*, 22 PEPP. L. REV. 1047, 1051–52 (1995); *see also* Clyde O. Westbrook, III, Case Note, *Dismissal of Former Fugitive's Appeals Not an Appropriate Sanction Unless Fugitive Status Sufficiently Affects Appellate Process*, 24 CUMB. L. REV. 177, 181–82 (1994).

31. Allen v. Georgia, 166 U.S. 138 (1897). *Allen* essentially reaffirmed the enforceability rationale in upholding the dismissal of a criminal defendant's appeal after he became a fugitive subsequent to its filing, although the defendant was later recaptured and resentenced to death.

32. The *Allen* Court viewed the case at bar through the lens of the case or controversy requirement of Article III, finding no reason not to apply the same practice as in civil cases of dismissing a case that clearly lacks any real dispute. *Id.* at 140. Interestingly, it cited *Smith* and *Bonahan* in this discussion. *Id.* Not until 1970 did the Supreme Court readdress whether fugitivity indeed strips an appeal of its adjudicability. *See* Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (conceding that escape does not strip a case of its character as an adjudicable case or controversy but rather disenti-

tions and judicial integrity,[34] and constitutionality.[35] Thus, despite the clear authorization at the end of the nineteenth century for the federal judiciary to dismiss an appeal due to fugitivity, *Allen* marked a significant shift toward increased complexity and lack of clarity as the Supreme Court added rationales and nuance to the fugitive disentitlement doctrine throughout the twentieth century.

2. Establishing the Rationale of Disentitlement as Penalty

In *Molinaro v. New Jersey*, the Supreme Court affirmed the principle of enforceability, established almost one century earlier in *Smith*, and upheld the dismissal of a criminal appeal of an appellant who, free on bail, refused to surrender to state authorities.[36] But *Molinaro* established two key advancements in the use of the fugitive disentitlement doctrine:

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tles a defendant to call upon the resources of the court). *Molinaro* is discussed in more detail in the following subsection.

33. *Allen* suggested that dismissal of an appeal may be justified by the criminal appellant's abandonment of his or her case. *Allen*, 166 U.S. at 141. But *Allen* did not place additional weight, beyond a sentence, on abandonment as a principle for dismissal, and it instead focused on the enforceability principle clearly established in *Smith*. And this principle did not receive significant treatment until 1993, when the Supreme Court rejected an "abandonment principle" used by some circuits to justify the dismissal of a criminal defendant's appeal due to fugitivity at some time prior to the appeal's filing. Ortega-Rodriguez v. United States, 507 U.S. 234, 246–47, 249 (1993); *see also infra* Part II.B.2.

34. *Allen* briefly noted a fourth principle, disentitlement as penalty, and a fifth principle, dignity of the court in the face of fugitivity. *Allen*, 166 U.S. at 141. With respect to a punitive rationale, the *Allen* Court noted that disentitlement is "but a light punishment" given the "distinct criminal offense" of escaping legal custody. *Id.* Such a statement starkly contrasts with the Court's present view that disentitlement is the "most severe" sanction that should be imposed only when justified by its rationale in a matter in which alternative sanctions are insufficient or unavailable. Degen v. United States, 517 U.S. 820, 827–29 (1996); *see also infra* Part II.B.3. With respect to judicial dignity, the Supreme Court specifically established this as a distinct rationale in 1975 in *Estelle v. Dorrough*, 420 U.S. 534 (1975), which is currently cited as the primary authority for this doctrinal rationale. *See Ortega-Rodriguez*, 507 U.S. at 242; *see also infra* Part II.A.3.

35. The *Allen* Court refused to address due process concerns with dismissing the appeal of a defendant who is recaptured and resentenced after dismissal pursuant to state procedural rules. *Allen*, 166 U.S. at 141. "[I]f the supreme court of a state has acted in consonance with the constitutional laws of a state and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process." *Id.* at 140. The *Allen* Court also stated that an appellate court had discretion to set the conditions of its dismissal, such as whether the fugitive should be given sixty days or to the term's end to surrender. *Id.* at 141. *Allen* foreshadowed the Supreme Court's recognition of a state's authority to stipulate disentitlement procedures by its state courts, as well as its recognition of disentitlement as a procedural rule inherent in a federal court's power to manage litigation. *See Estelle*, 420 U.S. at 541–42; *Ortega-Rodriguez*, 507 U.S. at 251 n.24. The question remains whether disentitlement, at least in some circumstances, poses constitutional due process concerns. The Court declined to directly address this question in *Allen*; it declined the opportunity once again, a century later, in *Degen*, 517 U.S. 820. *See infra* Part II.B.3.

36. *Molinaro*, 396 U.S. 365.

(1) it confirmed a distinct rationale of disentitlement as penalty; and (2) it authorized immediate dismissal of an appeal, with prejudice.[37]

First, while the *Molinaro* Court found no persuasive reason to adjudicate the merits of a criminal case when the defendant who sought appellate review had since escaped, its decision to dismiss was based on a theory that disentitlement served as a sanction for appellant noncompliance rather than a theory that fugitivity had stripped the matter of its adjudicability.[38] Second, the *Molinaro* Court stated that dismissal need not wait until a term's end or the expiration of a fixed time period.[39] Such a statement differs from the conditional dismissals authorized in *Smith* and *Allen*.[40] The statement has had a resounding effect in scholarship and the federal judiciary: *Molinaro* authorizes immediate dismissal with prejudice.[41] While such authorization appears to be tied to *Molinaro*'s establishment of a distinct, punitive rationale for the fugitive disentitlement doctrine,[42] and while it also represents a marked shift from *Smith* and *Allen*, the fugitive disentitlement doctrine currently includes a federal appellate court's discretionary power to immediately dismiss an appeal with prejudice.[43]

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37. *Id.* at 365–66.

38. *Id.* at 366. The *Molinaro* opinion differs from the *Allen* opinion with respect to adjudicability because the *Allen* Court had suggested that fugitivity might prevent a matter from meeting the case or controversy requirement. *See supra* note 32. While it did not directly address *Allen*, the *Molinaro* Court clearly established that fugitivity does not strip an appeal of its adjudicability. *Molinaro*, 396 U.S. at 366. Rather, fugitivity may justify an appellate court sanctioning the criminal appellant by denying the opportunity to be heard. *Id.*

39. *Molinaro*, 396 U.S. at 366.

40. *See* Smith v. United States, 94 U.S. 97, 97–98 (1876) (denying a writ of error to review a criminal conviction unless the defendant surrendered to the court's jurisdiction on or before the first day of the next term—otherwise the case would be removed from the docket); *Allen*, 166 U.S. at 142 (holding that conditions on dismissal, such as how long the defendant had to surrender to reinstate appeal, were within the court's discretion). Neither *Smith* nor *Allen* addressed whether immediate dismissal with prejudice was appropriate.

41. *See, e.g.*, Stolley, *supra* note 9, at 754–55; Altman, *supra* note 30, at 1054; Westbrook, *supra* note 30, at 182–83.

42. Stolley, *supra* note 9, at 754–55; Westbrook, *supra* note 30, at 182–83.

43. *Molinaro* is viewed as the first case since *Smith* to establish a distinct rationale for the fugitive disentitlement doctrine. For a clear example, *Ortega-Rodriguez*, in mapping the doctrine's history, cites *Molinaro* as establishing the punitive disentitlement rationale. Ortega-Rodriguez v. United States, 507 U.S. 234, 240 (1993). *But see supra* note 34 (punitive principle was suggested as early as *Allen*).

Molinaro was consistent with Supreme Court jurisprudence thus far in its clear, concise, and almost emphatic treatment of the doctrine. Nonetheless, *Molinaro* left unanswered questions. For example, it is unclear whether the punitive rationale could, on its own, justify immediate dismissal with prejudice of a criminal appeal or if it must be accompanied by enforceability concerns. Scholars are inconsistent in their characterization of *Molinaro*. *See, e.g.*, Westbrook, *supra* note 30, at 182–83 (characterizing *Molinaro* as justifying dismissal on grounds of disentitlement as an alternative to the using the enforceability rationale). *But see* Altman, *supra* note 30, at 1054 (characterizing *Molinaro*

3. Establishing the Final Rationales: Deterrence, and Efficient and Dignified Operations of Appellate Courts

Five years after *Molinaro*, the Supreme Court again examined the fugitive disentitlement doctrine in the context of criminal appeals, upholding the dismissal of an appeal pursuant to a Texas statute stipulating disentitlement in criminal appeals.[44] In upholding the statute, *Estelle v. Dorrough* established the final rationales of the fugitive disentitlement doctrine: deterrence and the protection of the dignified and efficient operations of the appellate process.[45] First, the state's disentitlement statute deterred prisoner escapes and encouraged voluntary surrenders by imposing stricter sanctions on prisoners who had escaped in an attempt to disrupt the appellate process that they had invoked.[46] Second, the statute, in furthering these legitimate deterrence goals, promoted efficient and dignified operation of the state's criminal appellate courts.[47]

Justice Stewart dissented in *Estelle*, arguing that *Smith*, *Bonahan*, and *Molinaro* did not authorize the dismissal of an appeal once the es-

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as affirming *Smith* while expanding it to allow immediate dismissal with prejudice "if [appellant] cannot be made to comply with court's decision").

Another key question left unanswered was whether the doctrine was restricted to criminal matters. *See, e.g.*, Stolley, *supra* note 9, at 755. The Supreme Court did not address the doctrine's application outside the context of criminal law for another twenty-five years. *See infra* Part II.B.3 for a detailed discussion of *Degen*.

44. Estelle v. Dorrough, 420 U.S. 534, 535 (1975). The Supreme Court quoted article 44.09 of the Texas Code of Criminal Procedure:

> If the defendant, pending an appeal in the felony case, makes his escape from custody, the jurisdiction of the Court of Criminal Appeals shall no longer attach in the case. Upon the fact of such escape being made to appear, the court shall, on motion of the State's attorney, dismiss the appeal; but the order dismissing the appeal shall be set aside if it is made to appear that the defendant has voluntarily returned within ten days to the custody of the officer from whom he escaped; and in cases where the punishment inflicted by the jury is death or confinement in an institution operated by the Department of Corrections for life, the court may in its discretion reinstate the appeal if the defendant is recaptured or voluntarily surrenders within thirty days after such escape.

Id. at 535 n.1.

Estelle involved a criminal defendant, who had been convicted of robbery and sentenced to twenty-five years but escaped after filing his appeal—only to be recaptured two days later. *Id.* at 534–35. The state appellate court dismissed his appeal pursuant to the Texas statute. The defendant was subsequently convicted of federal charges and sentenced to twenty-five years. *Id.* at 535. The defendant had filed a writ of habeas corpus, which the district court denied but the Fifth Circuit Court of Appeals granted on the grounds that the Texas disentitlement statute violated the Equal Protection Clause. *Id.* at 536. In its disposition, the Supreme Court also held that Texas's decision to impose harsher disentitlement sanctions on fugitive criminal appellants did not violate the Equal Protection Clause. *Id.* at 536–41.

45. *Id.* at 537; *see also Ortega-Rodriguez*, 507 U.S. at 241–42 (citing *Estelle* for the rationales of deterrence and efficient, dignified operations of the appellate courts).

46. *Estelle*, 420 U.S. at 537, 541.

47. *Id.* at 537.

caped convict is back in custody.[48] Justice Stewart's dissent foreshadowed a key concern that the Supreme Court did not directly address for another twenty years: whether dismissal is warranted due to *any* instance of prior fugitivity.[49] Justice Stewart argued that a state statutory requirement of dismissal on the grounds of any prior fugitivity results in a "random pattern of punishment" and a miscarriage of justice.[50]

B. Modern Supreme Court Jurisprudence Reins in the Doctrine But Leaves Unanswered Questions

1. Disentitlement as a Procedural Rule Inherent in the Federal Judiciary's Power to Manage Litigation

To understand the rationale behind the most recent Supreme Court cases on the fugitive disentitlement doctrine, one must first address *Thomas v. Arn*, which established the inherent powers of the federal judiciary to manage litigation.[51] In *Thomas*, the Supreme Court held that, to efficiently manage litigation, the courts of appeal possess the power to promulgate procedural rules that place reasonable conditions on the exercise of appellate jurisdiction and that do not conflict with the Constitution or a statute.[52] Viewing *Thomas* in the context of *Estelle* and

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48. *Id.* at 543 (Stewart, J., dissenting). Justice Stewart criticized the Texas statute for resulting in the imposition of "totally irrational punishments" that undermined the state's goals to deter and punish fugitivity:

> If an escaped felon has been convicted in violation of the law, the loss of his right to appeal results in his serving a sentence that under law was erroneously imposed. If, on the other hand, his trial was free of reversible error, the loss of his right to appeal results in no punishment at all. And those whose convictions would have been reversed if their appeals had not been dismissed serve totally disparate sentences, dependent not on the circumstances of their escape, but upon whatever sentences may have been meted out under their invalid convictions.

Id. at 544.

49. *Ortega-Rodriguez*, 507 U.S. at 249 ("[W]hile dismissal of an appeal pending while the defendant is a fugitive may serve substantial interests, the same interests do not support a rule of dismissal for all appeals filed by former fugitives, returned to custody before invocation of the appellate system."). Still, *Ortega-Rodriguez* is not viewed as abrogating or overruling *Estelle*.

50. *Estelle*, 420 U.S. at 544. The current circuit split in immigration could similarly involve such randomized punishment: an alien's ability to retain his or her petition turns on where the petition is filed, and the policies held to be important by that circuit court, rather than the facts surrounding his or her fugitivity.

51. Thomas v. Arn, 474 U.S. 140, 155 (1985); *see also* Fed. R. App. P. 47.

52. *Thomas*, 474 U.S. at 155. The Court upheld an appellate court's adoption of a rule that conditioned appeal upon the filing of objections with the district court. *Id.* So long as the rule incorporated clear notice to litigants, it was a valid exercise of the appellate court's supervisory power and did not violate the Constitution or any statute. *Id.* The Court found that the procedural rule, imposed by the Sixth Circuit in a criminal case, was supported by sound consideration of judicial economy: it prevented sandbagging, the result of which would impede efficiency of the appellate

Molinaro, failure to abide by appellate procedural rules, whether such rules are stipulated by a state or a circuit court of appeals, may result in the loss of one's right to appeal.[53] Such noncompliance gives the appellate court the authority to dismiss a litigant's appeal, so long as that procedural rule is not in conflict with the Constitution or statute and that rule is reasonable in light of the judicial interest it was promulgated to achieve.[54]

2. Imposition of a Nexus Requirement

In 1993, the Supreme Court took its first action to limit use of the fugitive disentitlement doctrine in criminal appeals, holding that the "abandonment principle," used by some circuits[55] to dismiss the appeal of a criminal defendant who fled custody but was recaptured prior to filing an appeal, inappropriately expanded the doctrine because the fugitivity lacked a requisite connection to the appellate process.[56] In *Ortega-Rodriguez v. United States*,[57] the Court confirmed the four doctrinal

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process. *Id.* at 147–48; *see also* Altman, *supra* note 30, at 1049–50 (interpreting *Thomas* as creating a twofold reasonableness standard).

53. Altman, *supra* note 30, at 1049–50.

54. *Id*.

55. The Court specifically addressed this principle as used by the Eleventh Circuit in *United States v. Holmes*, 680 F.2d 1372 (11th Cir. 1982). Many scholars view *Holmes* as introducing the abandonment rationale. *See, e.g.*, Altman, *supra* note 30, at 1056–57; Westbrook, *supra* note 30, at 189–90. *But see supra* note 33 (noting that *Allen v. Georgia* first used the term "abandonment" and perhaps first indicated that this principle might be a potential justification for disentitlement in criminal appeals). Regardless, *Holmes* is viewed as a significant case that sought to establish the appellate court's authority to dismiss the appeal of a criminal defendant due to former fugitivity. Altman, *supra* note 30, at 1056–57. Interestingly, *Holmes* relied on *Molinaro* to hold that, when a criminal defendant flees after conviction but prior to sentencing, the defendant waives his or her right to appeal from the conviction (but not the sentencing) unless the defendant shows that the absence was due to matters beyond his or her control. *Holmes*, 680 F.2d at 1373. In *Ortega-Rodriguez*, the Supreme Court rejects the *Holmes* rationale, holding that *Molinaro* does not support such a conclusion. Ortega-Rodriguez v. United States, 507 U.S. 234, 243–45 (1993).

56. *Ortega-Rodriguez*, 507 U.S. at 249. *Ortega-Rodriguez* involved a convicted criminal defendant who, having escaped prior to sentencing, was sentenced *in absentia*. *Id.* at 237. Almost a year later, the defendant was recaptured and the court imposed a sentence enhancement due to his fugitivity. *Id.* at 237–38. The defendant subsequently moved to vacate the sentencing, which the district court granted. *Id.* at 238–39. As a result, the defendant was resentenced—and it was this judgment that he appealed. *Id.* The Eleventh Circuit granted the government's motion to dismiss the appeal of his resentencing, on grounds that the defendant had waived his right to appeal due to prior fugitivity. *Id.* at 239. In its review, the Supreme Court noted the unique circumstances of the defendant's case: had the district court not resentenced the defendant, he would not have timely filed an appeal. *Id.* at 239 n.9. But it declined to comment on the unusual circumstances surrounding the district court's resentencing decision, focusing instead on whether the Eleventh Circuit had incorrectly extended the fugitive disentitlement doctrine to dismiss the appeal of a criminal defendant who had been recaptured prior to filing the appeal. *Id.* at 242.

57. *Id.* at 239–42 (citing *Smith* for the enforceability rationale, *Molinaro* for disentitlement, and *Estelle* for deterrence and efficient, dignified operations of the appellate process).

rationales and stated that the history of cases "consistently and unequivocally approve[d] dismissal as an appropriate sanction when a prisoner is a fugitive *during* 'the ongoing appellate process.'"[58] But the Court then identified a nexus principle: "[T]he justifications we have advanced for allowing appellate courts to dismiss pending fugitive appeals all assume some connection between a defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response."[59]

In *Ortega-Rodriguez*, the Supreme Court found no risk of unenforceability because the defendant remained in custody throughout the appellate process and resulting judgment.[60] The Court also found that, in many cases, the dismissal of appeals filed after former fugitives are recaptured would not advance efficient, dignified operations of the appellate process because the fact that the defendant's fugitivity had delayed and disrespected the district court had no impact on the appellate court.[61] For similar reasons, the deterrence rationale does not support an appellate court's dismissal of a case when the district court was capable of responding to judicial noncompliance by imposing a sanction more narrowly tailored to the circumstances.[62]

In its stipulation of a nexus requirement on the use of the fugitive disentitlement doctrine, the *Ortega-Rodriguez* Court clearly curbed expansion of the doctrine that would have allowed an appellate 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 appellate proceedings."[63] But this clarity is muddied by

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58. *Id.* at 242 (emphasis added).

59. *Id.* at 244 (citing Thomas v. Arn, 474 U.S. 140, 146–48 (1985)) ("Our review of rules adopted by the courts of appeals in their supervisory capacity is limited in scope, but it does demand that such rules represent reasoned exercises of the court's authority.").

60. *Id.*

61. *Id.* at 245–46.

62. *Id.* at 247. In his dissent, Chief Justice Rehnquist argues that the requisite nexus has been met to justify the dismissal of the appeal in this case. *Id.* at 253–54 (Rehnquist, C.J., dissenting). "When a defendant escapes, whether before or after lodging an appeal, he flouts the authority of the *judicial process*, of which the court of appeals is an integral part." *Id.* at 256. Rehnquist also argues that the Court's opinion undermines the doctrinal rationale of deterrence because the holding will encourage flight and discourage voluntary surrenders—so long as the defendant returns in time to file a timely appeal. *Id.*

63. *Id.* at 246. Specifically, the *Ortega-Rodriguez* Court stated as follows:

> [W]hile the dismissal of an appeal pending while the defendant is a fugitive may serve substantial interests, the same interests do not support a rule of dismissal for *all* appeals filed by former fugitives, returned to custody before invocation of the appellate system. Absent some connection between a defendant's fugitive status and his appeal, as provided when a defendant is at large during "the ongoing appellate process," . . . the justifications advanced for dismissal of fugitives' pending appeals generally will not apply.

Id. at 249.

the Court's acknowledgment that uniformity in applying the fugitive disentitlement doctrine is not required.[64] Moreover, the Court was silent on whether the doctrine's use is limited to criminal appeals—despite the fact that the circuit courts had already applied the doctrine in immigration cases.[65] This lack of clarity accounts for conflicting interpretations regarding the parameters that *Ortega-Rodriguez* has placed on the doctrine, leaving room for additional circuit splits such as the one that is the subject of this Comment.[66]

Furthermore, scholars and lower courts inconsistently interpret the *Ortega-Rodriguez* holding.[67] The interpretation most consistent with the Court's nuanced treatment of the doctrine is that *Ortega-Rodriguez* rejected a federal appellate court's automatic dismissal of a former fugitive's appeal when such dismissal lacks reasonable consideration of whether the fugitivity impacted the appellate process.[68] Such an interpre-

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The Court notes that the *Holmes* rule is problematic not because it mandates automatic dismissal—without use of the court's discretion to consider the circumstances surrounding the fugitivity—but because it reaches too many appeals, including those of defendants whose former fugitivity in no way affects the appellate process. *Id.* at 250 n.23. This footnote sheds light on why *Ortega-Rodriguez* does not abrogate or overrule *Estelle*, which upheld automatic dismissal pursuant to a Texas statute that had stipulated the grounds on which disentitlement is to be invoked. *See supra* notes 49, 57.

64. *Ortega-Rodriguez*, 507 U.S. at 251 n.24.

65. *See, e.g.*, Arana v. INS, 673 F.2d 75 (3d Cir. 1982).

66. Part IV will discuss why a lack of uniformity among the circuit courts, which may be tolerable in criminal appeals, is not tolerable in the unique realm of immigration, where the circuit courts' application of the doctrine is largely driven by policy rather than a factual nexus and where Congress has the power to legislate a disentitlement provision in its plenary authority to regulate immigration.

67. For example, many state courts declined to apply *Ortega-Rodriguez*, determining that the Supreme Court had acted in its supervisory authority over the federal judiciary and not on the basis of any federal constitutional principle. *See, e.g.*, State v. Troupe, 891 S.W.2d 808 (Mo. 1995). Other state courts have found *Ortega-Rodriguez* to represent a balancing test of equities, the four doctrinal justifications, to determine when fugitivity has appropriately affected the appellate process to justify dismissal. *See, e.g.*, Reid v. Virginia, 698 S.E.2d 269 (Va. 2010). A review of some circuit court decisions issued after *Ortega-Rodriguez* suggests that the circuit courts struggle with what constitutes significant interference with the appellate process. *See, e.g.*, U.S. v. Delagarza-Villarreal, 141 F.3d 133 (5th Cir. 1997) (declining to hold that a criminal defendant's fugitivity, which has potential to interfere with consolidation process of co-defendants' cases, constitutes significant interference that justifies dismissal of appeal). *But see* United States v. Reese, 993 F.2d 254 (D.C. Cir. 1993) (finding that a criminal defendant's fugitivity prevents courts of appeal from consolidating cases of co-defendants where such consolidation is the court's regular practice, constituting significant interference that justifies dismissal of appeal).

Additionally, some legal scholars posit that *Ortega-Rodriguez* rendered disentitlement improper if the party is in custody. *See, e.g.*, Altman, *supra* note 30, at 1069; Tashman et al., *supra* note 9, at 46. At least one scholar has posited that the Court prohibited any expansion of the doctrine that allowed any appellate court to impose a dismissal sanction for any conduct that exhibited disrespect for any aspect of the judicial system. Stolley, *supra* note 9, at 761.

68. In *Degen*, the Supreme Court interpreted its holding in *Ortega-Rodriguez* as not foreclosing the possibility that appellate disentitlement may be necessary to prevent actual prejudice to the gov-

tation leaves room for the scenarios, identified in *Ortega-Rodriguez*, in which prior fugitivity, where the defendant is recaptured prior to filing an appeal, may warrant dismissal by the appellate court—for example, if prolonged fugitivity prejudiced the government's case.[69] It is also consistent with the Court's acknowledgment that disentitlement under the doctrine is a procedural rule that need not be uniformly applied, so long as it meets the *Thomas* reasonableness standard.[70] Finally, such an interpretation accounts for the current circuit split in immigration, where disentitlement rests on each circuit court's interpretation of the doctrinal rationales to support its determination of whether a nexus exists between the alien's failure to appear before the DHS and the pending petition.

3. A Signal for Congressional Action

The Supreme Court again limited an expansion of the fugitive disentitlement doctrine in *Degen v. United States*, addressing a circuit split in its application in civil forfeiture cases, but the Court did not restrict the doctrine's application to criminal matters.[71] In a unanimous decision, the Court found in *Degen* that a district court inappropriately extended the doctrine when it entered judgment against a claimant in a civil forfeiture suit because he was deemed a fugitive with respect to his prosecution in a related criminal matter.[72] The Court determined that the use of disentitlement, a "most severe sanction"[73] in light of the circumstances of the case at bar, was unnecessary, "blunt," and arbitrary due to the availability

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ernment due to a criminal defendant's prolonged, former fugitivity. Degen v. United States, 517 U.S. 820, 825 (1996).

69. "We do not ignore . . . that some actions by a defendant, though they occur while his case is before the district court, might have an impact on the appellate process sufficient to warrant an appellate sanction." *Ortega-Rodriguez*, 507 U.S. at 249. For this reason, the Court notes that it does not entirely deprive the appellate court of dismissing an appeal because fugitivity predated the filing of the appeal. *Id.* The circuit courts, in the current split on the doctrine's application in immigration, identify potential prejudice to the government's case as a relevant concern to finding fugitivity. *See infra* Part III.B.

70. *Ortega-Rodriguez*, 507 U.S. at 251 n.24.

71. *Degen*, 517 U.S. 820; *see also* Naftalis, *supra* note 24, at *2 (identifying *Degen* as addressing a circuit split on the doctrine's application in civil forfeiture).

72. *Degen*, 517 U.S. at 823, 829. *Degen* involved a U.S.–Swiss dual citizen who moved to Switzerland with his family a year before the government unsealed a criminal indictment against him and brought a related civil forfeiture action. *Id.* at 821–22. Degen refused to return to face criminal prosecution, and he attempted to respond to the civil forfeiture action from abroad. *Id.* at 822. The district court granted the government's motion to strike his civil forfeiture claims, entering summary judgment against Degen on the grounds that he was a fugitive in the related criminal case. *Id.* The Ninth Circuit affirmed. *Id.* The Supreme Court reversed. *Id.* at 829.

73. *Id.* at 823–28. *But see supra* note 34 (explaining that *Allen* found disentitlement "but a light punishment" in light of the "distinct criminal offense" of escaping legal custody).

of sufficient alternatives.[74] The Court found that, in such circumstances, the severe sanction of disentitlement would undermine the policy it is intended to serve.[75]

The *Degen* Court noted that *Ortega-Rodriguez* did not foreclose the possibility of appellate disentitlement where such a sanction is necessary to prevent actual prejudice to the government due to a criminal defendant's prolonged fugitivity.[76] The Court found that the government's civil forfeiture case may be prejudiced if the civil matter were subordinated to the criminal prosecution for which Degen remained a fugitive, but the Court was satisfied that the district court had other means to resolve the dilemma.[77] However, by listing alternative steps the district court could have taken, the Court illustrated "the lack of necessity for the harsh sanction of absolute disentitlement."[78] While the doctrinal rationales of dignified judicial operations and deterrence are substantial, disentitlement is "too blunt an instrument" to advance them.[79] The Court cautioned that, while courts have inherent authority to protect their proceedings and judgments, such powers must have limits, "for 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."[80]

It is clear that, in *Degen*, the Supreme Court was uncomfortable with absolute disentitlement in civil forfeiture where the claimant is a fugitive in a separate but related criminal matter and the civil court had other means to address the situation. However, given its continued acknowledgment of the *Thomas* reasonableness standard,[81] it is unclear if the Court would be similarly uncomfortable with absolute dismissal of a petition for review when an alien fails to appear before the DHS.[82] Additionally, while *Degen* involved disentitlement in a civil matter, the civil

74. *Id.* at 826–28 (noting that the district court could have used its authority to impose restrictions on discovery, to ensure that the civil litigation did not interfere with the criminal matter, and to impose typical sanctions on Degen for noncompliance with evidentiary, discovery, and other procedural rules).

75. *Id.* at 828. "The dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits." *Id.*

76. *Id.* at 825.

77. *Id.* at 826; *see supra* note 63.

78. *Degen*, 517 U.S. at 827–28.

79. *Id.* at 828.

80. *Id.* at 823.

81. *Id.* at 823–24.

82. *See infra* Part III.B (discussing how policy stemming from the circuit appellate courts' roles in the immigration system can be used to support findings of both fugitivity and non-fugitivity in the current split on the doctrine's application where an alien fails to appear before the DHS but is otherwise locatable by court, counsel, and federal authorities).

forfeiture action was tied to a criminal prosecution. Yet again, the Court was silent on whether the fugitive disentitlement doctrine should be restricted to fugitivity in criminal matters—although key immigration cases applied the doctrine years prior to *Degen*.[83]

Additionally, *Degen* does not provide clear guidance regarding constitutionality concerns with disentitlement.[84] Specifically, *Degen* declined to present a view on whether enforcement of disentitlement "under proper authority" would violate due process.[85] While scholars contend that there are clear due process concerns with disentitlement in civil forfeiture,[86] *Degen* invited a statutory reply from Congress.[87] Congress passed the Civil Asset Forfeiture Reform Act (CAFRA), which includes a disentitlement provision that has yet to be successfully challenged on constitutional grounds.[88] Despite the unanswered questions left by *Degen*, perhaps one bit of clarity exists in its aftermath: Congress may legislate disentitlement.

III. DISENTITLEMENT IN IMMIGRATION AND THE CIRCUIT SPLIT

The circuit courts applied the fugitive disentitlement doctrine in immigration prior to *Ortega-Rodriguez* and *Degen*, but the Supreme Court has not addressed whether the doctrine should be limited to criminal matters.[89] Therefore, Part III will discuss whether a circuit court may in its discretion dismiss the petition of an alien who failed to appear before the DHS but is otherwise locatable by court, counsel, and federal authorities, recognizing that the doctrine has been used in immigration cases without challenge.[90] An analysis of the circuits' reasoning for finding, or not finding, fugitivity under such immigration circumstances will uncover the incongruity between the doctrinal rationales, born out of criminal appellate common law, and the policy concerns inherent in immigration law. The rationales that support the fugitive disentitlement doctrine are compelling but they fall short in the context of immigration—and the circuit courts are struggling to fill in the gaps.

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83. *See, e.g.*, Zapon v. U.S. Dep't of Justice, 53 F.3d 283 (9th Cir. 1995); Bar-Levy v. U.S. Dep't of Justice, INS, 990 F.2d 33 (2d Cir. 1993).

84. *Degen*, 517 U.S. at 828.

85. *Id.*

86. *See, e.g.*, Stolley, *supra* note 9; Naftalis, *supra* note 24.

87. Naftalis, *supra* note 24, at *2.

88. 28 U.S.C. § 2466. Part IV.B will discuss congressional legislation of disentitlement, including potential due process concerns.

89. *See, e.g.*, *supra* note 9.

90. *See supra* note 9.

A. Establishing the Doctrine's Place in Immigration

Prior to *Ortega-Rodriguez*, the Third Circuit in *Arana v. INS* invoked the fugitive disentitlement doctrine to dismiss the petition of an alien who defied a court order by failing to report to the Immigration and Naturalization Service (INS).[91] Arana remained at large, and federal authorities had not located Arana at the time of the Third Circuit's decision.[92] Invoking *Molinaro*[93] to support dismissal of his petition, the Third Circuit cited the doctrinal rationales of enforceability and disentitlement.[94] Furthermore, "given the plethora of constitutional and statutory procedural protections that are afforded to criminal defendants but not made available to individuals subjected to administrative deportation proceedings—a court might exercise greater caution in dismissing the appeal of a convicted party who has escaped than of a potential deportee who has absconded."[95]

Prior to *Degen*, in *Bar-Levy v. U.S. Department of Justice*, the Second Circuit invoked the fugitive disentitlement doctrine to dismiss the petition of a permanent resident who failed to report for deportation pursuant to an INS order issued after his conviction on a narcotics offense.[96] The Second Circuit cited *Estelle*, *Ortega-Rodriguez*, and the Third Circuit's decision in *Arana* to support its dismissal of Bar-Levy's petition for review of the Board of Immigration Appeals' (BIA) judgment:

> Although an alien who fails to surrender to the INS despite a lawful order of deportation is not, strictly speaking, a fugitive in a criminal matter, . . . he is nonetheless a fugitive from justice. Like the fugitive in a criminal matter, the alien who is a fugitive from a deporta-

91. Arana v. INS, 673 F.2d 75, 76–77 (3d Cir. 1982). After an immigration judge found Arana deportable, the INS issued a deportation order. *Id.* at 76. But it was unclear whether Arana received this notice because he had moved without informing the INS of his whereabouts—in contravention of law. *Id.* After denying Arana's petition for habeas corpus, the district court ordered him to report for deportation. *Id.* When Arana failed to report, the district court issued a bench warrant for his arrest due to his failure to comply with the court order. *Id.*

92. *Id.* at 76–77.

93. *Id.* at 77 (citing *Molinaro* as supporting circuit court dismissal of appeals by criminal defendants who had fled and remained at large, such as in *Government of Virgin Islands v. James*, 621 F.2d 588 (3d Cir. 1980), and in *United States v. Swigart*, 490 F.2d 914 (10th Cir. 1973)).

94. *Id.* at 77. The court found nothing in the record or in the representations of Arana's counsel demonstrating that Arana would surrender to immigration officials if the court considered his petition and affirmed judgment against him. *Id.* It held that such behavior disentitled Arana from calling upon the resources of the court, as was found in *Molinaro*. *Id.*

95. *Id.* at 77 n.2.

96. Bar-Levy v. U.S. Dep't of Justice, 990 F.2d 33, 34–36 (2d Cir. 1993).

> tion order should ordinarily be barred by his fugitive status from calling upon the resources of the court to determine his claims.[97]

After *Degen*, the Ninth Circuit invoked the fugitive disentitlement doctrine in *Antonio-Martinez v. INS*, dismissing the petition for review of the BIA's denial of asylum, filed by a Guatemalan national who remained missing from federal authorities and counsel for two years.[98] The Ninth Circuit held that the rationales of disentitlement, deterrence, and enforceability supported dismissal under such circumstances.[99] "Those who disregard their legal and common-sense obligation to stay in touch while their lawyers appeal an outstanding deportation order should be sanctioned."[100] The Ninth Circuit found that disentitlement would serve as a strong incentive for aliens to maintain contact with the INS and counsel.[101] Its language, "heads I win, tails you'll never find me," is often cited to represent the enforceability rationale.[102]

Each of these cases builds upon those preceding it to confirm that the fugitive disentitlement doctrine has an appropriate place in immigration. This confirmation rests in part on the courts' determination that fugitivity in immigration, which manifests as one's failure to report to immigration officials, is analogous to fugitivity in criminal law, where the defendant flees police custody—in either case, the individual is a fugitive from justice. But *Arana* also distinguished the criminal defendant, who is afforded certain legal protections, from the immigration petitioner, for whom such protections are not available.[103] This key distinction promotes the attitude that the legal framework of immigration may not require greater caution and the sparing use of disentitlement that may be

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97. *Id.* at 35. The Second Circuit quoted the footnote in *Arana* that differentiated fugitivity in immigration from that in criminal law, where the criminal defendant is afforded legal protections. *Id.* The Second Circuit suggested that a convicted criminal defendant who has been ordered to surrender might be in a better position because he could still pursue his appeal while serving his sentence. But it identified a circuit split with respect to whether deportation actually barred judicial review of the deportation order under 8 U.S.C. § 1105a(c). *Id.* at 35–36.

98. Antonio-Martinez v. INS, 317 F.3d 1089, 1090–91 (9th Cir. 2003); *see also* Zapon v. U.S. Dep't of Justice, 53 F.3d 283, 284–85 (9th Cir. 1995) (citing *Bar-Levy*, 990 F.2d 33 at 35) (invoking the fugitive disentitlement doctrine in part to affirm judgment against an alien family who sought attorneys' fees following determination that BIA had abused its discretion in refusing to grant a stay of deportation due to a wrongfully issued deportation order).

99. *Antonio-Martinez*, 317 F.3d. at 1091–92.

100. *Id.* at 1093. Among the case authority in support of its decision to dismiss, the Ninth Circuit cites *Bar-Levy*, *Zapon*, and *Arana*. *Id*. at 1092.

101. *Id.* at 1093.

102. *Id.*; *see, e.g.*, Giri v. Keisler, 507 F.3d 833, 836 (5th Cir. 2007); Gao v. Gonzales, 481 F.3d 173, 177 (2d Cir. 2007); Garcia-Flores v. Gonzales, 477 F.3d 439, 441 (6th Cir. 2007); Sapoundjiev v. Ashcroft, 376 F.3d 727, 729 (7th Cir. 2004).

103. *Arana*, 673 F.2d at 77 n.2.

needed in criminal law.[104] It is not clear whether a circuit court's application of the doctrine under such a principle is consistent with the *Thomas* reasonableness standard. But no such challenge has yet been made, and this principle underlies the finding of fugitivity by one side of the current circuit split in immigration.

B. The Current Split in Immigration: Whether an Alien is a Fugitive, Warranting Dismissal of Petition For Failure to Appear Before the DHS

1. The *Sapoundjiev* Camp: Finding Fugitivity Because Failure to Appear Before the DHS Flouts the Entire Immigration System, in Which Circuit Courts Play an Integral Role

This side of the circuit split, primarily represented by *Sapoundjiev v. Ashcroft,*[105] *Gao v. Gonzales*,[106] and *Bright v. Holder*,[107] presents two key principles for finding fugitivity where an alien fails to appear before the DHS but is otherwise locatable by court, counsel, and immigration authorities. First, the ability to locate an alien does not ameliorate enforceability concerns because the DHS must expend resources to apprehend the alien, who would likely be even less willing to surrender once his or her litigation options have been exhausted.[108] Second, an alien's failure to appear before the DHS constitutes fugitivity that impacts the appellate process—meeting the *Ortega-Rodriguez* nexus requirement—because the alien has flouted the entire immigration system from which he or she seeks relief, which necessarily includes the integral role played by the circuit courts of appeal.[109] Thus, the circuit courts are best equipped to deter fugitivity and encourage voluntary surrenders, to the

104. Although such a discussion falls outside the scope of this Comment, legal scholars continue to debate whether immigration falls under civil law or criminal, with implications as to procedural and constitutional safeguards that are available in such proceedings. *See, e.g.*, Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010); Geoffrey A. Hoffman & Susham M. Modi, *The War on Terror as a Metaphor for Immigration Regulation: A Critical View of a Distorted Debate*, 15 J. GENDER RACE & JUST. 449, 479–87 (2012); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010); Won Kidane, *Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons from the Department of Labor Rules of Evidence*, 57 CATH. U. L. REV. 93 (2007); Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299 (2011); Diana R. Podgorny, *Rethinking the Increased Focus on Penal Measures in Immigration Law as Reflected in the Expansion of the "Aggravated Felony" Concept*, 99 J. CRIM. L. & CRIMINOLOGY 287 (2009); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

105. 376 F.3d 727 (7th Cir. 2004).

106. 481 F.3d 173 (2d. Cir. 2007).

107. 649 F.3d 397 (5th Cir. 2011), *cert. denied*, 132 S.Ct. 2681 (2012).

108. *Bright*, 649 F.3d at 400.

109. *Id*.

benefit of the entire immigration system (including efficient and dignified review of petitions), by imposing a dismissal sanction.

In *Sapoundjiev*, the Seventh Circuit invoked the fugitive disentitlement doctrine to dismiss the petition for review by a Bulgarian citizen because he failed to report pursuant to an order issued by immigration officials after the BIA affirmed his removability.[110] The court stated, "Every circuit that has considered the issue has concluded that the fugitive-disentitlement doctrine applies to immigration cases, and that aliens who avoid lawful custody forfeit judicial review."[111] The Seventh Circuit further explained that litigation entails "reciprocal obligations" such that an immigration petitioner who seeks a favorable result from the appellate court must ensure that adverse decisions would be equally enforceable.[112] Importantly, the Seventh Circuit called upon the concerns of prejudice identified by the Supreme Court in *Degen*: "Someone who cannot be bound by a loss has warped the outcome in a way prejudicial to the other side; the best solution is to dismiss the proceeding."[113]

Relying heavily on enforceability concerns, the Seventh Circuit found known whereabouts largely irrelevant to a finding of fugitivity.[114] "The point of custody is to end the guessing game. That's why anyone who is told to surrender, and does not, is a fugitive. . . . That agents may be able to locate an absconder does not make him less a fugitive."[115] The Seventh Circuit was not convinced that officials' ability to locate an alien would positively impact his or her willingness to either be at home when officials arrive for the arrest or surrender should the case be adversely

110. *Sapoundjiev*, 376 F.3d at 728. The BIA affirmed the immigration judge's decision that Sapoundjiev was not entitled to asylum or withholding of removal. *Id.* Pursuant to the BIA judgment, immigration officials sent Sapoundjiev notice to report for custody and removal. *Id.* Less than a week before the date he and his family had been ordered to report, Sapoundjiev filed and received a temporary stay of removal pending a response by the Attorney General. *Id.* But this temporary stay did not relieve the Sapoundjievs of their obligation to surrender. *Id.* When the family failed to report as directed, the Attorney General asked the Seventh Circuit to vacate the temporary stay and dismiss the petition pending before the court on grounds of fugitivity. *Id.*

111. *Id.* (citing Antonio-Martinez v. INS, 317 F.3d 1089 (9th Cir. 2003); Zapon v. U.S. Dep't of Justice, 53 F.3d 283 (9th Cir. 1995); Bar-Levy v. U.S. Dep't of Justice, 990 F.2d 33 (2d Cir. 1993); Arana v. INS, 673 F.2d 75 (3d Cir. 1982)).

112. *Id.* at 728–29 (citing Ortega-Rodriguez v. United States, 507 U.S. 234 (1993); Smith v. United States, 94 U.S. 97 (1876)). The Seventh Circuit also quoted the "heads I win, tails you'll never find me" language from *Antonio-Martinez*. *Id.* at 729. And it cited *Degen* in support of the principle that a litigant whose disappearance makes an adverse judgment difficult or impossible to enforce cannot expect favorable action. *Id.* (citing Degen v. United States, 517 U.S. 820 (1996)).

113. *Id.* (citing *Degen*, 517 U.S. 820). The Seventh Circuit found that the proposition for dismissal is as applicable to a fugitive alien as it is to the fugitive criminal defendant or fugitive civil plaintiff.

114. *Id.* at 729.

115. *Id.*

decided.[116] Furthermore, the Seventh Circuit held that dismissal in Sapoundjiev's case was consistent with what it found to be the principle of *Ortega-Rodriguez*—that the fugitive disentitlement doctrine applies "only while the criminal remains at large."[117]

Gao v. Gonzales, decided by the Second Circuit, invoked the doctrine to dismiss the petition filed by a Chinese citizen who had failed to report for removal, absconded for about a decade, and reappeared to request that his case be reopened.[118] The Second Circuit found that Gao, in neglecting to contact immigration authorities for at least seven years—during which time he married and had two children—had "complete disregard" of the outstanding orders to report.[119] According to the Second Circuit in *Gao*, all that must occur for an alien to become a fugitive is noncompliance with an order to report for deportation or removal because all doctrinal rationales were implicated.[120] With respect to enforceability, the court found the case to be a classic scenario of "heads I win, tails you'll never find me."[121] The court then held disentitlement to be appropriate because such noncompliance undermined the authority of the

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116. *Id.*

117. *Id.* at 730 (citing *Ortega-Rodriguez*, 507 U.S. 234); *see also supra* Part II.B.2 and note 67 (discussing conflicting interpretations of the *Ortega-Rodriguez* holding). Sapoundjiev and his family refused to surrender so as to preserve their legal claims, even though months had passed since the government invoked the doctrine to dismiss their pending petition. *Sapoundjiev*, 376 F.3d at 730.
The Seventh Circuit's analysis of the doctrinal rationales and policy supporting the finding of fugitivity under such circumstances has been quoted by all subsequent circuit court opinions that fall on this side of the split. *See, e.g.*, Bright v. Holder, 649 F.3d 397, 400 (5th Cir. 2011); Gao v. Gonzales, 481 F.3d 173, 176 (2d. Cir. 2007); *see also* Giri v. Keisler, 507 F.3d 833, 835–36 (5th Cir. 2007); Garcia-Flores v. Gonzales, 477 F.3d 439, 441 (6th Cir. 2007).

In *Giri*, the Fifth Circuit invoked the doctrine to dismiss the petition filed by a Nepali family who had overstayed their visas but failed to report for deportation during the pendency of their petition before the Fifth Circuit with respect to their application for withholding of removal. 507 F.3d at 834–35. The family conceded their removability and their fugitive status. *Id.* The Fifth Circuit found "no reason to indulge" the family's conduct and, relying in large part on *Sapoundjiev*, it found that the doctrinal rationales supported dismissal of the petition. *Id.* at 836.

In *Garcia-Flores*, the Sixth Circuit invoked the doctrine to dismiss the petition for review, filed by a Mexican national, of the BIA's denial to reopen removal proceedings that were held *in absentia*. 477 F.3d at 440. The Sixth Circuit relied heavily on *Sapoundjiev*, which it found to have "aptly explained" the application of the doctrine in the context of immigration. *Id.* at 441.

118. *Gao*, 481 F.3d 173. The BIA denied Gao's motion to reopen his removal proceedings before the immigration judge on grounds that he had failed to timely file the motion. *Id.* at 174. Gao had been granted thirty days from the date of the BIA's removal order to voluntarily depart, but he failed to do so. *Id.* at 175. He also ignored an order to surrender for deportation. *Id.* He lived in the United States illegally for about a decade, failing to comply with the order to surrender. *Id.* Approximately ten years after the BIA's initial judgment, Gao requested to reopen his asylum application, alleging changed country circumstances and the existence of material evidence that was previously unavailable. *Id.* The BIA denied the motion. *Id.* Gao filed a petition for review. *Id.*

119. *Id.*

120. *Id.* at 176–78.

121. *Id.* at 177 (quoting Antonio-Martinez v. INS, 317 F.3d 1089, 1093 (9th Cir. 2003)).

court in the very matter in which Gao sought relief.[122] Dismissal would promote efficient operation of the courts by preserving judicial resources and deterring similarly situated petitioners from fleeing justice as Gao had.[123] Finally, the court had no doubt that Gao's behavior had unduly prejudiced the government's case.[124]

In *Gao*, the Second Circuit solidified an important concept with respect to the circuit courts' role in immigration: "Everyone understands that the [government] is overwhelmed with petitioners and procedures, and that it heavily relies on the word and voluntary compliance of numerous aliens within our borders. It is easy to game this system, but we should not treat disregard of [government] directives as a norm."[125] According to *Gao*, the circuit courts are integral in responding to an alien's noncompliance with an executive order to appear before immigration officials, and such noncompliance is connected to the alien's pending petition.

In *Bright*, the most recent case in the current split, the Fifth Circuit relied heavily—yet briefly—on *Sapoundjiev* and *Gao* to support its dismissal of a petition for review after a permanent resident, ordered to surrender for deportation upon pleading guilty to second-degree murder, failed to appear before the DHS.[126] The Fifth Circuit found that Bright

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122. *Id.* The Second Circuit distinguished *Gao* from *Degen*, stating that deterrence and disentitlement are important when a litigant flees to escape judgment on the very matter on appeal—which it found to be the case in *Gao*. *Id.* Instead, the court relied on *Estelle* and *Ortega-Rodriguez* for the principle that disentitlement is appropriate for litigants whose flight is calculated to disrupt "the very appellate process" that they have set in motion. *Id.* Thus, in the context of the case at bar, the Second Circuit found that its decision to dismiss Gao's petition did not constitute arbitrary and unnecessary recourse to the most severe sanction that the *Degen* Court had voiced concerned about. *Id*.

123. *Id.*

124. *Id.* at 177–78. While the Second Circuit declined to reach the merits of Gao's argument as to why his case should be reopened, it found that his argument "rests largely on events of his own making that transpired while he was a fugitive," such that allowing his case to be reopened "would have the perverse effect of encouraging aliens to evade lawful deportation orders . . . [to] contrive through their own efforts a new basis for challenging deportation." *Id.*

125. *Id* at 176 (quoting Ofosu v. McElroy, 98 F.3d 694, 702–03 (2d Cir. 1996)) (considering a Ghana national's fugitivity and failure to appear before immigration officials as one of several factors that the court weighed in its decision to grant equitable relief in the form of a temporary stay—including whether the alien or INS would suffer irreparable injury due to adverse judgment, the merits of alien's case, and public policy concerns).

126. Bright v. Holder, 649 F.3d 397 (5th Cir. 2011). Bright was a Nigerian citizen who became a lawful permanent resident of the United States. *Id.* at 398–99. He was subject to removal because of his conviction for second-degree murder. *Id.* at 399. The immigration judge ordered Bright removed to Nigeria, and the BIA agreed—dismissing Bright's appeal. *Id.* Bright never filed a petition for review. *Id.* When he failed to appear pursuant to the DHS removal order, a warrant was issued for his arrest. *Id.* Bright then filed a motion to reopen his removal proceedings and requested a stay of removal. *Id.* The BIA denied his motion and request on grounds that his fugitivity rendered Bright ineligible for consideration of additional relief. *Id.* The BIA then denied Bright's motion for reconsideration, and Bright filed a petition for review of this judgment. *Id.*

was a fugitive despite the facts that he had maintained the same address throughout the proceedings, this address was known to the DHS, and the DHS had not attempted to locate him after his failure to report.[127] "Applying the fugitive disentitlement doctrine to those who evade removal despite their address being known by DHS will encourage voluntary surrenders, the efficient operation of the courts, and respect for the judiciary and the rule of law."[128]

2. The Other Side: Declining to Find Fugitivity Because an Alien's Noncompliance is Directed Toward Another Branch of Government

This side of the circuit split, primarily represented by *Wenqin Sun v. Mukasey*[129] and *Nen Di Wu v. Holder*,[130] presents two key principles for not finding fugitivity where an alien fails to appear before the DHS but is otherwise locatable by court, counsel, and federal authorities. First, true fugitivity has not occurred until an alien has intentionally caused his or her whereabouts to become unknown.[131] Second, an alien's failure to appear before the DHS, regardless of whether that occurs before or after a petition has been filed with the circuit court, is a distinct offense toward the executive branch, not the judiciary, such that the alien's nonappearance does not meet the *Ortega-Rodriguez* nexus.[132] Thus, a circuit court's invocation of the fugitive disentitlement doctrine in such circumstances is an inappropriate extension of its limited role in immigration (a system regulated and administered by the legislative and executive branches and largely consisting of administrative proceedings). Dismissal would not only lack support from the doctrinal rationales but would risk undermining the judiciary's dignity and respect—including its important goal of adjudicating cases on the merits.

In *Wenqin Sun*, the Ninth Circuit declined to hold that a Chinese citizen who had failed to report for removal at some time prior to filing her petition for review of the BIA's denial to reopen proceedings is a

127. *Id.* at 400. The Fifth Circuit held that that the underlying policy of the fugitive disentitlement doctrine, as specifically articulated by *Sapoundjiev* and *Gao*, supported dismissal of Bright's petition. *Id. Bright* reiterated the principle that enforceability concerns remain despite the fact that the alien is locatable by federal authorities, who must expend resources to apprehend him or her. *Id.* (citing *Gao*, 481 F.3d at 176; Sapoundjiev v. Ashcroft, 376 F.3d 727, 729 (7th Cir. 2004)). *Bright* also quoted the principle from *Gao* that, in the context of immigration, circuit courts of appeal serve an important role to address disregard of government directives. *Id.* (citing *Gao*, 481 F.3d at 176).

128. *Id.*

129. 555 F.3d 802 (9th Cir. 2009).

130. 646 F.3d 133 (2d Cir. 2011).

131. *Id.* at 136.

132. *Id*.

fugitive under the doctrine.[133] "Regardless of Sun's conduct at the time she was ordered to report for removal, she is not now a fugitive from justice, and there is, therefore, no reason for us to treat her as if she were by refusing to consider her petition for review. . . ."[134] It declined to dismiss Sun's petition because it found no nexus between her former fugitivity and subsequent petition for review:

> Although Sun did not report for removal . . . as ordered by the BIA, that failure does not make her a fugitive now, during the pendency of her petition to review the BIA's denial of reopening. Sun's whereabouts are known to her counsel, DHS, and this court. Because Sun is not currently a fugitive, and has not been a fugitive at least since the time she first filed a petition for review with this court, we hold it would be inappropriate to apply the fugitive disentitlement doctrine to dismiss Sun's case.[135]

In *Nen Di Wu*, the Second Circuit distinguished its circuit precedent, *Gao*, in refusing to dismiss the petition of a Chinese citizen who had failed to report to the DHS while his petition was pending before the circuit court.[136] The Second Circuit distinguished Wu's case from *Gao*

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133. *Wenqin Sun*, 555 F.3d at 802–04. Sun requested relief from removal on the grounds that she was a battered spouse. *Id.* at 803. The immigration judge denied asylum, withholding of removal, and relief under the Convention Against Torture. *Id.* The BIA subsequently denied, on timeliness grounds, Sun's motion to reopen removal proceedings on the basis of her approved application for status adjustment under the Violence Against Women Act. *Id.* She subsequently filed petition for review of the BIA's judgment in that matter. *Id.* The government contended that her petition should be dismissed because of her failure to appear on the date set for her removal, rendering her a fugitive. *Id.* at 803–04.

134. *Id.* at 804. In support of its conclusion, the Ninth Circuit noted that, in the immigration context, its circuit precedent involved the dismissal of petitions where the aliens could not be located when their petitions came before the court. *Id.* (citing Antonio-Martinez v. INS, 317 F.3d 1089 (9th Cir. 2003); Hussein v. INS, 817 F.2d 63 (9th Cir. 1987) (involving petitioner who had escaped custody of federal immigration detention facility and remained at large)). The Ninth Circuit included *Gao* and *Sapoundjiev* in its list of other circuit decisions that "applied the doctrine to fugitive aliens under similar circumstances." *Id.* (citing Martin v. Mukasey, 517 F.3d 1201 (10th Cir. 2008); Gao v. Gonzales, 481 F.3d 173 (2d Cir. 2007); Garcia-Flores v. Gonzales, 477 F.3d 439 (6th Cir. 2007); Sapoundjiev v. Ashcroft, 376 F.3d 727 (7th Cir. 2004); Arana v. INS, 673 F.2d 75 (3d Cir. 1982)). But *Gao* and *Sapoundjiev* involved aliens who were locatable at the time the circuit court reviewed their petition. *See supra* Part III.B.1 (discussion of the facts in *Gao* and *Sapoundjiev*). Nonetheless, the Ninth Circuit found no case authority supporting the finding of fugitivity with respect to an alien whose whereabouts are known. *Wenqin Sun*, 555 F.3d at 804.

135. *Id.* at 805 (citing the nexus requirement in *Ortega-Rodriguez v. United States*, 507 U.S. 234, 244 (1993)).

136. *Nen Di Wu*, 646 F.3d 133. Wu sought asylum and withholding of removal based on religious and political opinion as well as relief under the Convention Against Torture. *Id.* at 134. The immigration judge denied asylum, withholding, and claims under the Convention Against Torture. *Id.* The BIA dismissed Wu's appeal. *Id.* Wu filed a petition for review before the Second Circuit, requesting a stay of removal pending adjudication of his petition. *Id.*

Despite the Second Circuit's issuance of a temporary stay of removal, the DHS issued notice directing Wu to report to immigration officials for deportation. *Id.* (Temporary stays do not prevent the

on four grounds.[137] First, Wu's fugitivity of fourteen months was "a far cry" from the seven-year lapse in *Gao*.[138] And Wu remained in contact with authorities and counsel throughout the proceedings and never changed his permanent residence.[139] Thus, the court could not find that Wu's conduct disrespected its authority because Wu did not intentionally cause his whereabouts to become unknown or otherwise defy a court order.[140] Second, the court declined to invoke the doctrine to sanction Wu for his noncompliance with an obligation he owed to the DHS, lest it "conflate disobedience of an executive command with that of a court order."[141] Third, the court questioned whether disentitlement would advance the dignified operations of the court in a simple immigration case, clearly distinguishable from the paradigm case of *Gao*, when any deterrence effect is slight in light of "countervailing harm to the judicial process, which seeks to resolve cases on the merits whenever possible."[142] Finally, the Second Circuit found insufficient evidence to support the government's contentions that it had been unduly prejudiced due to Wu's fugitivity.[143]

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government from issuing notices to report, nor do they relieve the alien from compliance, but such stays do prevent the government from actually deporting the alien. *Id.* at 134 n.1.) Wu failed to report. *Id.* The DHS issued a second notice for Wu to report, after Wu's obligations were clarified, but Wu again failed to appear. *Id.* at 134–35. The government moved to dismiss his pending petition on grounds of fugitivity. *Id.*

137. *Id.* at 136–38. The Second Circuit's analysis in *Nen Di Wu* contributes to the key principles that support finding no fugitivity where an alien's whereabouts are known. But the case suggests that, in addition to the circuit courts' struggle to find justification in the doctrinal rationales, the courts also struggle with where to draw the line in a continuum of noncompliance. The line can clearly be drawn to find fugitivity where an alien's whereabouts are unknown to counsel and authorities when the appeal is before the court. And perhaps the line can easily be drawn in a case like *Gao*, to find fugitivity where an alien absconds for nearly a decade, during which time he has created a new life living illegally in the country. But the Second Circuit is uncomfortable drawing this line at fourteen months when the alien has not intentionally caused his whereabouts to become unknown.

138. *Id.* at 136.

139. *Id.*

140. *Id.*

141. *Id.* at 137. "Doing that ultimately weakens rather than protects the court's unique dignity, which is, after all, the doctrine's focus." *Id.*

142. *Id.* The goal to adjudicate cases on the merits wherever possible calls back to the concerns highlighted in *Degen* with respect to a court's too free recourse to the severe sanction of disentitlement. *See supra* Part II.B.3.

143. *Id.* at 137–38.

IV. RESOLUTION OF THE CIRCUIT SPLIT

A. The Supreme Court Likely Cannot Fully Resolve a Circuit Split that Implicates Policy Concerns Unique to Immigration

Much uncertainty lies in the aftermath of the Supreme Court's jurisprudence on the fugitive disentitlement doctrine. That uncertainty, specifically with respect to the holdings in *Ortega-Rodriguez* and *Degen*,[144] stems from the Supreme Court's nuanced treatment of the doctrine, its silence on whether the doctrine should be restricted to criminal appeals, and its placement of the doctrine within the federal judiciary's inherent powers to manage litigation[145]—including its acknowledgment that such procedural powers need not be uniformly applied, so long as they are reasonably applied, by the circuit courts.[146] But its jurisprudence has left the federal courts and legal scholars with two points of clarity: (1) the Supreme Court is willing to step in, when necessary, to curb what it views to be an inappropriate expansion of the doctrine;[147] and (2) a Supreme Court decision has previously triggered Congressional legislation on disentitlement.[148]

But the Supreme Court has denied the petition for certiorari in *Bright*,[149] declining to address whether *Bright* inappropriately applied the doctrine due to its extension of the *Ortega-Rodriguez* nexus to include executive immigration orders.[150] Given the two points of clarity from the

144. *See supra* Parts II.B.2–B.3.

145. *See* Degen v. United States, 517 U.S. 820, 823–24 (1996); Ortega-Rodriguez v. United States, 507 U.S. 234, 251 n.24 (1993) (citing Fed. R. App. P. 47; Thomas v. Arn, 474 U.S. 140, 155 (1985)).

146. *Ortega-Rodriguez*, 507 U.S. at 251 n.24. Furthermore, proposed resolutions to this circuit split that call for balancing or similar tests that require a court to weigh additional factors in its determination of fugitivity would face similar problems. For example, in *Nen Di Wu*, the Second Circuit had listed three other factors in addition to the doctrinal rationales. 646 F.3d at 136. The factors included whether the alien had provided an explanation for the fugitivity, the extent to which the alien had evaded the law, and the merits of the appeal. *Id.*; *see also* Altman, *supra* note 30 (proposing "discretionary dismissal rule for fugitives" based on a case-by-case analysis of three factors: (1) length and effect of fugitivity; (2) whether fugitivity was voluntary or involuntary; and (3) nature of claim); *supra* note 125 (demonstrating that similar factors had previously been used by the Second Circuit, in *Ofosu v. McElroy*). As shown in the preceding section, *Nen Di Wu* is clearly a part of the current circuit split—despite its consideration of additional factors, which were ultimately folded into its discussion of the doctrinal rationales. *See supra* Part III.B.2.

147. *Ortega-Rodriguez*, 507 U.S. 234; *Degen*, 517 U.S. 820.

148. *See supra* note 24 and accompanying text.

149. *Bright v. Holder*, 132 S. Ct. 2681 (2012).

150. *See* Petition for Writ of Certiorari at 25, Bright v. Holder, 649 F.3d 397 (5th Cir. 2011) (No. 11-890), 2012 WL 167020, at *25 ("[S]hould the Court grant Mr. Bright's petition, it must first consider whether a common law doctrine that arose in a purely criminal context applies equally, absent any statutory authority, to immigration proceedings. There are good reasons to conclude that it does not."); Brief for the Respondent in Opposition at 10, *Bright*, 649 F.3d 397 (No. 11-890), 2012 WL 1420485, at *10 ("As the court of appeals correctly recognized, applying the fugitive disentitle-

Court's jurisprudence on the fugitive disentitlement doctrine, this denial of certiorari could mean that the Court has determined—at least at this time—that *Bright* does not represent an inappropriate expansion of the doctrine. However, the denial of certiorari could just as easily reflect the Court's unwillingness to step into an area of law over which Congress has plenary authority to regulate via legislation. Regardless, as illustrated in the preceding Part, circuit courts on either side of the split have logically and thoughtfully invoked the doctrinal rationales to determine whether a finding of fugitivity, and a sanction of disentitlement, is appropriate in immigration when an alien failed to appear before the DHS.[151] It is just as unclear whether the *Sapoundjiev* camp, in finding fugitivity under such circumstances, represents an inappropriate expansion of the doctrine as it is unclear whether the other side's refusal to find fugitivity, despite enforceability concerns, represents an abuse of the courts' discretion.

Should the Supreme Court ever grant certiorari, the Court could uphold a case like *Bright* as an appropriate use of the fugitive disentitlement doctrine because there is a sufficient nexus, in the context of immigration, between an alien's noncompliance with the DHS and his or her pending petition before the circuit court of appeals. But such a holding may not clearly address whether a circuit court's finding of no fugitivity under the same circumstances was an abuse of discretion.[152] Further-

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ment doctrine against 'those who evade removal despite their address being known by DHS' furthers the purposes underlying the [fugitive disentitlement doctrine]."); Amicus Brief on Behalf of the American Immigration Lawyers Association in Support of the Petition for a Writ of Certiorari at 4, *Bright*, 649 F.3d 397 (No. 11-890), 2012 WL 598095, at *4 ("[N]oncitizens who fail to appear before immigration officials are not 'fugitives' as historically understood by the doctrine. Moreover, the application of the doctrine in the immigration context does not further the purposes of the doctrine."); Brief for Amici Curiae Criminal Law Professors in Support of Petition for a Writ of Certiorari, *Bright*, 649 F.3d 397 (No. 11-890), 2012 WL 598096; Brief for Former Federal Prosecutors and Former Department of Homeland Security Officials as Amici Curiae Supporting Petitioner at 3–4, *Bright*, 649 F.3d 397 (No. 11-890), 2012 WL 598094, at *3-4 ("In expanding the 'fugitive disentitlement' doctrine to reach non-absconding aliens, the Fifth Circuit shifted this doctrine away from its proper role of ensuring the enforceability of judgments and fair play, and instead applied it broadly to promote policies that this Court rejected as justifications for the doctrine in *Degen*."); Brief of Amici Curiae Law Professors in Support of Petitioner at 13, *Bright*, 649 F.3d 397 (No. 11-890), 2012 WL 566403, at *13 ("Absent a necessity to apply the fugitive disentitlement doctrine at either level, the Board's and the Fifth Circuit's application of the doctrine raise significant issues about Due Process limitations on the exercise of inherent judicial powers."); Brief Amici Curiae of the National Legal Aid & Defenders Association (NLADA) and Public Counsel in Support of Petitioner at 3, *Bright*, 649 F.3d 397 (No. 11-890), 2012 WL 598093, at *3 ("As attorneys for indigent defendants in the criminal and immigration systems, we believe that the 'fugitive disentitlement' doctrine should be applied only when the petitioner has fled or escaped and his whereabouts are unknown.").

151. *See supra* Part III.B. Each circuit court cites Supreme Court precedent in support of its finding, including but not limited to *Ortega-Rodriguez* and *Degen*.

152. The Supreme Court has treated the fugitive disentitlement doctrine as falling under procedural rules that an appellate court may, in its inherent power, utilize to manage litigation. So long as

more, such a holding may not address what the circuit courts would likely struggle with in its aftermath: where to draw the line with respect to an alien's noncompliance with an executive immigration order.[153] This was already seen in the Second Circuit's struggle to distinguish its own circuit precedent in *Nen Di Wu*, where the court determined that fourteen months of noncompliance with a DHS order does not give rise to the same need for disentitlement as the seven years of noncompliance in *Gao*.[154]

Alternatively, the Supreme Court could hold that a case like *Bright* represents an unreasonable expansion of the nexus concept to find fugitivity under such circumstances, which would provide some guidance on where a circuit court should draw the line with respect to fugitivity in immigration. But such a holding would risk further opening the door, left ajar by *Ortega-Rodriguez*,[155] to undermine deterrence concerns and encourage noncompliance from similarly situated alien petitioners. And such a deterrence concern would lead to graver consequences in immigration, which necessarily implicates national security.

The Supreme Court could, someday, provide guidance on the use of the fugitive disentitlement doctrine in immigration in an opinion that sufficiently addresses potential struggles that the circuit courts may have as a result of its holding. But such a decision would still fail to resolve the current circuit split because of its likely predication on the foundational concept that the doctrine exists within the federal judiciary's inherent, discretionary powers to manage litigation. The key concern implicated by the circuit split is whether disentitlement is reasonable because an alien's noncompliance with an executive order threatens the integrity of immigration regulation, which necessarily implicates national security and foreign relations, such that the circuit court of appeals should respond by dismissing the petition pending before it.[156] The doctrinal ra-

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the court's invocation of the rule adheres to the *Thomas* reasonableness requirement, in that it is not in conflict with the Constitution or a statute and it is a reasonable means to achieve the court's procedural goals, the court may apply the rule in its discretion. It is not clear whether, in finding a case like *Bright* to be a reasonable use of the doctrine, the Court would in turn reject a case like *Nen Di Wu* or *Wenqin Sun* as an abuse of the circuit court's discretion in refusing to invoke the doctrine.

153. *See supra* Part II.B (discussing what the Supreme Court has left unanswered or declined to address in its decisions on the fugitive disentitlement doctrine, as well as the conflicting interpretations in the wake of *Ortega-Rodriguez* and the remaining constitutional concerns in the wake of *Degen*).

154. *See supra* Part III.B.2 and note 138.

155. For a discussion of Chief Justice Rehnquist's dissent in *Ortega-Rodriguez*, see *supra* note 62.

156. None of the cases cited on this side of the circuit split (*Sapoundjiev*, *Gao*, or *Bright*), clearly note a concern about national security or foreign relations. This is likely because such policy concerns have historically been deemed to be under the purview of the other branches of government. *See supra* note 19.

tionales, important policy concerns in their own right, nonetheless fail to directly speak to the concerns specific to immigration. Issues of national security and foreign relations, however, have historically been relegated to the purview of other branches of government.[157] Specifically, concerns about national security and the integrity of the immigration system fall under the purview of Congress, which has plenary authority to regulate immigration policy.[158] Therefore, the fugitive disentitlement doctrine, despite its many important rationales, cannot address the question of disentitlement in immigration. And, for that reason, the Supreme Court's denial of certiorari in *Bright* seems appropriate.

B. Congress, with Plenary Authority to Regulate Immigration, is Best Equipped to Resolve the Circuit Split by Legislation

Per the second point of clarity established by Supreme Court jurisprudence on the fugitive disentitlement doctrine, Congress has previously legislated a civil disentitlement provision, found in the Civil Asset Forfeiture Reform Act (CAFRA).[159] It should do so again by amending the Immigration and Nationality Act (INA) to include a disentitlement provision specific to immigration. Congress should act when a circuit split has caused confusion and inconsistency regarding alien rights to have their petitions heard before the circuit courts of appeal in a realm of law, immigration, in which Congress's regulatory authority is plenary—due largely in part to national security and foreign relations concerns inherent in immigration policy.[160] While there may be constitutionality concerns with respect to disentitlement in civil forfeiture, a constitutional

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157. *See supra* note 19.

158. *See supra* note 19.

159. Civil Asset Forfeiture Reform Act of 2000, 28 U.S.C. § 2466 (2006).

160. Scholars have argued that Congress's power to regulate all that is immigration causes concerns of unchecked terms forced upon alien petitioners. *See, e.g.*, Hoffman & Modi, *supra* note 104, at 479–87; Won Kidane, *Immigration Law as Contract Law*, 34 SEATTLE U. L. REV. 889, 892–93 (2011) (discussing VICTOR C. ROMERO, EVERYDAY LAW FOR IMMIGRANTS (2009)) (analyzing Romero's discussion of immigration law and contract theory); Victor C. Romero, *Immigration Law, Contracts, and Due Process: A Response to Professor Won Kidane's Review of Everyday Law for Immigrants*, 34 SEATTLE U. L. REV. 903, 904 (2011) ("Because of the plenary power doctrine, the Supreme Court has largely ceded power to Congress to fashion what amounts to a one-sided contract, imposing upon noncitizens terms that our Constitution would not tolerate if applied to U.S. citizens."). But it remains the case that Congress has such authority to regulate immigration. Furthermore, as this Comment argues, without congressional action, the circuits will remain split on the use of the fugitive disentitlement doctrine in immigration—at least absent meaningful resolution by the Supreme Court, which denied certiorari of *Bright v. Holder*, 132 S. Ct. 2681 (2012). Given the law's complexity and Congress's historical purview over immigration regulation, compared with the Supreme Court's track record on the question of disentitlement outside of immigration law, this Comment advocates that Congress is the branch of government best equipped to provide a resolution.

challenge of CAFRA has not yet succeeded. Furthermore, it is unlikely that the Supreme Court would step in to address disentitlement in the unique realm of immigration regulation. Given the detail and complexity of the INA, this section will not propose specific statutory language, but it will instead discuss the key principles that such a disentitlement provision should reflect, drawn from the CAFRA disentitlement provision and key problems of the current circuit split in immigration.

1. Constitutionality of Congressional Disentitlement in Immigration

In *Degen*, the Supreme Court left unanswered the question of whether congressional legislation of disentitlement would violate due process.[161] In 2000, Congress acted on the matter, enacting a disentitlement provision for civil forfeiture in CAFRA.[162] Specifically, Section 2466 currently provides that a judicial officer may disallow a person from using resources of U.S. courts with respect to a civil forfeiture action upon a finding that such person, having notice or knowledge that a warrant or process has been issued for his or her apprehension, sought to avoid criminal prosecution by (1) purposely leaving the jurisdiction of the United States, (2) declining to enter or reenter the United States to submit to jurisdiction, or (3) otherwise evading jurisdiction of a court in which a criminal case is pending against such person.[163]

Many have argued that disentitlement in civil forfeiture violates due process, but a constitutional challenge has not yet succeeded.[164] While

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161. "We need not, and do not, intimate a view on whether enforcement of a disentitlement rule under proper authority would violate due process." Degen v. United States, 517 U.S. 820, 828 (1996); *see also* Naftalis, *supra* note 24, at *2 (noting that the Court "took explicit exception only to judicially based disentitlement in civil forfeiture proceedings," leaving unanswered the question of whether congressional legislation would violate due process).

162. Civil Asset Forfeiture Reform Act of 2000, 28 U.S.C. § 2466 (2006); *see also* United States v. $6,976,934.65 Plus Interest Deposited Into Royal Bank of Scotland International, Account Number 2029-56141070, 554 F.3d 123, 133 (D.C. Cir. 2009) (noting that Congress had seized the opportunity provided by *Degen* to legislate disentitlement in civil forfeiture).

163. 28 U.S.C. § 2466.

164. *See, e.g.*, *United States v. $6,976,934.65*, 554 F.3d at 133 (reversing summary judgment in government's favor, finding genuine issue of material fact as to whether CAFRA applies to claimant, and in doing so, declining to consider claimant's arguments that CAFRA violates due process); United States v. Contents of Account Number 68108021, 228 F.Supp.2d 436, (S.D.N.Y. 2002), *aff'd,* Collazos v. United States, 368 F.3d 190 (2d Cir. 2004) (finding that CAFRA did not violate due process based on Second Circuit precedent because hearing and notice were provided); United States v. $1,231,349,68 in Funds, 227 F.Supp.2d 130, 132–33 (D.D.C. 2002) (declining to directly address claimant's arguments that CAFRA violated due process, only noting that the *Degen* Court had "expressly reserved judgment" on the question, and determining CAFRA was applicable after tracking its statutory elements).

Some legal scholars have argued that CAFRA presents clear constitutional concerns, while others have predicted that the Supreme Court must eventually reconsider its silence on the constitutional

the Supreme Court has found disentitlement too "blunt" a sanction when applied in a civil forfeiture action,[165] and it could conclude the same with respect to a legislative provision for disentitlement in civil forfeiture, it has yet to do so. Furthermore, the Supreme Court is even less likely to step in and conclude that congressional legislation of disentitlement in the unique realm of immigration is inappropriate.

First, the Supreme Court has historically understood its role to be limited with respect to judicial review of Congress's regulation of immigration.[166] Second, while the Supreme Court retains authority to determine violations of the Constitution, the due process concerns that may be present with respect to disentitlement in civil forfeiture are largely missing in the immigration context. For example, disentitlement in civil forfeiture would likely occur at the trial stage of the civil claim, such that disentitlement prior to a full hearing on the merits could deprive a civil claimant of an opportunity to defend against property claims and of an opportunity to be heard at all.[167] Conversely, in an immigration case, the circuit court of appeals would determine whether disentitlement is appropriate only after a petitioner received notice to appear before an immigration judge, attended such proceedings, appealed to the BIA, received notice to report to immigration officials, and failed to appear. While what constitutes appropriate due process is a point of controversy in immigration, where the extent of constitutional protections depends upon an alien petitioner's ties to the United States,[168] the basic concept that one receive an opportunity to be heard—a hearing on the merits—should have been met before the question of disentitlement presents itself to the circuit court of appeals.[169]

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question in light of the lower courts' application of CAFRA. *See, e.g.*, Stolley, *supra* note 9; Naftalis, *supra* note 24. But that has yet to occur since CAFRA was enacted in 2000.

165. *Degen*, 517 U.S. at 828; *see also* Naftalis, *supra* note 24, at *3 (arguing that CAFRA achieves via legislation the same effect that the Court disallowed in *Degen*).

166. *See supra* note 16 and accompanying text.

167. *See, e.g.*, Naftalis, *supra* note 24, at *1 (contending that there are manifest due process concerns at work in civil forfeiture disentitlement, which deprives an absent civil claimant of the constitutional right to defend against property claims and also deprives a claimant of property without a hearing); Stolley, *supra* note 9, at 774–76 (arguing that disentitlement in criminal law deprives the defendant of appellate review of a conviction while in civil forfeiture, the claimant is completely deprived a hearing).

168. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.") (citing Plyer v. Doe, 457 U.S. 202, 211–12 (1982); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953); Bridges v. Wixon, 326 U.S. 135, 161 (1945); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

169. A discussion of whether administrative immigration proceedings afford aliens sufficient due process is beyond the scope of this article. However, at this time, the administrative proceedings stipulated by Congress in its regulation of immigration remain in force. And a constitutional challenge against disentitlement that is enacted by Congress as part of immigration regulation and ap-

2. Proposal for Disentitlement Immigration Legislation

Congressional resolution of the circuit split in immigration should take the form of a disentitlement provision amending the INA. Key principles can be drawn from the civil forfeiture disentitlement provision, as well as the circuit courts' current split regarding disentitlement in immigration, which should be represented in a disentitlement provision amendment to the INA. First, immigration disentitlement legislation should stipulate that grounds for disentitlement rest on a showing of an alien petitioner's intent to abscond or defect from immigration officials, the court, or both. Second, such legislation should, either by cross-reference or statutory language in a subsection, identify an expedited or alternate process for alien petitioners who pose terrorist or national security concerns.[170] A disentitlement provision in immigration that includes such principles would be analogous to the CAFRA disentitlement provision, would address key problems with which the circuit courts struggle in the current circuit split, and would mirror many of the INA provisions already in place.

A disentitlement provision in immigration should provide that the government's recommendation for disentitlement, or a court's decision to disentitle, rests upon a finding that the alien petitioner failed to appear before the DHS with the intention to abscond, defect, or otherwise refuse to surrender to authorities. Such a stipulation is analogous to that found in CAFRA's disentitlement provision, which provides for disentitlement upon a finding that the civil forfeiture claimant, having received notice or knowledge of the criminal prosecution, purposefully flees the United States' jurisdiction, declines to enter or reenter the United States, or otherwise evades jurisdiction of the court to avoid such criminal prosecu-

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plied by a circuit court after such proceedings have occurred likely must rest upon an assertion that the proceedings themselves do not afford an alien due process. For additional discussion of the due process debate, see Kidane, *supra* note 104, at 119–31.

170. Such legislation would likely also include other matters, such as the relevance of an alien petitioner's prior immigration violations and potential allowance of discretionary power in the Attorney General to recommend against disentitlement in certain cases. Current INA provisions that provide for such matters include 8 U.S.C. §§ 1182(9)(C), 1229(b), and 1231. However, this section will focus on the need for a finding of alien intent to evade authorities and the policy concerns that are inherent in immigration legislation to highlight why Congress is uniquely equipped to solve the present circuit split.

It is important to acknowledge that efforts to combat terrorism could conflict with, and perhaps undermine or recharacterize, the goals of an immigration system. *See, e.g.*, Kidane, *supra* note 160, at 898 (arguing that the breadth of the definition of terrorism has become "needless and unreasonable," to the detriment of asylum seekers and meritorious immigration applicants). The role of terrorism policy in immigration regulation is beyond the scope of this Comment, which advocates for congressional legislation to resolve the current circuit split on fugitivity, but must acknowledge that any such legislation—in a post-9/11 world—would account for terrorism and related national security concerns.

tion.[171] Furthermore, requiring the finding of alien intent to thwart authorities is supported by current INA provisions that provide for the consequences applicable to an alien's noncompliance with removal orders, supervision terms, or proceedings attendance. For example, the INA imposes a fine, imprisonment, or both, upon an alien who willfully fails or refuses to comply with a final order for removal or with the terms of release under supervision.[172]

Finally, a provision that allows for disentitlement in immigration upon a finding of alien intent to abscond, or intent to evade or defeat the authority of the DHS or the circuit court, would address a key line-drawing problem in the current circuit split. For example, in *Nen Di Wu*, the Second Circuit sought to differentiate the fourteen-month lapse in the case before it from the seven years that the alien petitioner in *Gao* had remained in hiding.[173] An immigration provision that draws the line for disentitlement based on an alien petitioner's intent, specifically the intent to willfully defy a court or immigration order, avoids engaging in a sliding scale comparison to determine how long is too long to fail to appear before the DHS or court.[174]

Immigration policy necessarily implicates national security and foreign policy concerns.[175] Therefore, immigration disentitlement legislation should specifically provide for alien petitioners who fail to report to the DHS and who present national security or terrorism concerns.[176] Such consideration would be in line with the current INA, which stipulates a separate set of provisions for removal procedures of "alien terrorists."[177]

Immigration disentitlement legislation that specifically accounts for national security concerns would address another key problem with the

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171. 28 U.S.C. § 2466; *see also supra* note 20 and accompanying text.

172. 8 U.S.C. § 1253(a)–(b); *see also* 8 U.S.C. § 1325(a) (providing a consequence of fine, imprisonment, or both, for an alien who, among other offenses, eludes examination or inspection by immigration officers or attempts to enter or obtains entry to the United States by willfully false or misleading representation or concealment of material fact); 8 U.S.C. § 1182(6)(B) ("Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.").

173. *See supra* Part III.B.2.

174. *See supra* note 13 (discussing the typical circumstances in which an alien petitioner might fail to appear before the DHS and the observation that the circuit courts' decisions rested largely on the rationales behind the fugitive disentitlement doctrine rather than on a finding of willful defection on the part of the alien).

175. *See supra* note 19.

176. While this Comment focuses on the issue of disentitlement where an alien petitioner is otherwise locatable by counsel, authorities, and the court, a disentitlement provision may, for example, also stipulate automatic disentitlement—or perhaps a rebuttable or unrebuttable presumption of intent—for alien petitioners who are deemed to pose a threat to national security.

177. *See, e.g.*, 8 U.S.C. §§ 1531–1537.

current circuit split. Specifically, at the heart of the split was whether the rationales for the fugitive disentitlement doctrine support a circuit court's decision to dismiss a pending petition because the alien petitioner's failure to appear before the DHS threatens the integrity of immigration law. Circuit courts struggle to define the appropriate role for the judiciary in addressing such noncompliance, but a definitive answer cannot be found in the doctrinal rationales—which developed out of common law and which do not account for what is ultimately at stake with noncompliance of immigration law. Only immigration disentitlement legislation can directly, and appropriately, account for the national security and foreign policy concerns that are implicated by an alien petitioner's fugitivity in the context of immigration.

V. CONCLUSION

The question of whether a circuit court of appeals should disentitle an alien of his or her pending petition due to the alien's failure to appear before the DHS involves concerns such as enforceability of the DHS order, deterrence of similar conduct by similarly situated aliens, imposition of a penalty in response to such noncompliance, and the protection of the integrity and efficiency of immigration regulation (and the judiciary's role in such regulation). But, as seen in the current circuit split, the rationales for the fugitive disentitlement doctrine fall short as guidance for when disentitlement is appropriate in certain cases of "fugitivity" in immigration law—specifically, when an alien fails to appear before the DHS but is otherwise locatable by counsel, court, and immigration officials.

The circuit split in immigration causes inconsistency and unpredictability in the review of immigration petitions because an alien's petition may be dismissed in one jurisdiction but retained in another—due not to the facts of the alien's failure to appear before the DHS but due to one circuit's independent analysis of the doctrinal rationales in the context of immigration. The fugitive disentitlement doctrine, which arose in the context of criminal appeals, rests largely on the federal judiciary's discretionary power to manage appellate litigation. Furthermore, its rationales, while perhaps workable in criminal appeals, are lacking in the immigration context. The Supreme Court has not provided clear guidance on the use of the doctrine outside of criminal appeals, and the Court signaled its unwillingness to address the question in its certiorari denial of *Bright*. Therefore, the best resolution to the circuit split is immigration disentitlement legislation that allows for disentitlement upon a finding of an alien's willful noncompliance with a court or DHS order and that specifically accounts for national security and foreign policy concerns. Con-

gress has legislated on the issue of disentitlement before, and it should do so again to address the unpredictability of disentitlement in immigration—an area of law that falls fully under its purview for good reason.