No. 95-173

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN J. DEGEN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a federal district court may, in the exercise of its "inherent" or "supervisory" powers, invoke the "fugitive disentitlement" doctrine to bar a citizen and resident of a foreign country from offering *any* defense against the government's confiscation of millions of dollars worth of his property, merely because the property owner has not traveled to the United States to confront a criminal indictment in a wholly separate case.

RULE 24.1(b) STATEMENT

Pursuant to Rule 24.1(b) of the Rules of this Court, petitioner hereby provides the following names of parties to this proceeding whose names do not appear in the caption:

Karyn Degen, claimant

Real Property Located at Incline Village, et al., defendants (for a complete list of the defendant properties, see Pet. App. 33a-36a)

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet App. 1a-16a) is reported at 47 F.3d 1511. The opinion of the United States District Court for the District of Nevada (Pet. App. 17a-26a) is reported at 755 F. Supp. 308.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1995. A petition for rehearing was denied on May 5, 1995. Pet. App. 38a-39a. The petition for a writ of certiorari was filed on July 28, 1995, and granted on January 12, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law." Pertinent provisions of 21 U.S.C. § 881(a) and of the Supplemental Rules for Certain Admiralty and Maritime Claims are set forth in the appendix to the petition for certiorari. Pet. App. 40a.

STATEMENT

In this civil forfeiture action, the United States government confiscated millions of dollars worth of petitioner's real and personal property without allowing him *any* opportunity to be heard in defense. This massive deprivation of petitioner's property was based solely on an unreviewed finding of probable cause made by a federal magistrate in an *ex parte* proceeding. The Ninth Circuit approved this unchecked assertion of prosecutorial authority by applying the "fugitive disentitlement" doctrine, according to which — in the Ninth Circuit and elsewhere — a federal court may invoke its "inherent" or "supervisory" powers to "disentitle" alleged fugitives from obtaining judicial assistance of any kind. Without requiring any showing that Brian Degen, a Swiss national, had fled from the United States or departed with an intent to avoid prosecution, the Ninth Circuit

reasoned that merely because he currently resides in Switzerland and has failed to travel to the United States to face criminal charges in a separate case, he is a fugitive from justice. And despite the fact that this sort of "fugitive status" violates no law and does not subject petitioner to any kind of *direct* penalty, the court of appeals sustained the decision striking petitioner's claim and ordering that his property be summarily forfeited to the government — without regard to petitioner's numerous (and quite substantial) defenses on the merits.

A. Proceedings In The District Court

1. On October 24, 1989, prosecutors in the United States Attorney's office in Reno, Nevada, commenced this civil forfeiture action against certain real and personal property owned by petitioner Brian Degen and his wife, Karyn Degen.[1] According to the government's skeletal complaint, the Degens' property — which includes real property in California, Nevada, and Hawaii estimated by the government then to be worth more than $5.5 million — is forfeitable under 21 U.S.C. § 881(a)(6) because it was "purchased or acquired" by petitioner between 1973 and 1989 "in part or in total" with funds that were "the proceeds of exchanges of controlled substances or funds traceable to" such exchanges. J.A. 5-6. The Reno prosecutors further asserted that the Degens' real property was "used or intended to be used to commit or to facilitate the commission of a controlled substances violation" and was therefore "subject to forfeiture pursuant to 21 U.S.C. § 881(a)(7)." J.A. 6.

In support of its complaint, the government filed an affidavit of a Drug Enforcement Agency (DEA) agent. J.A. 10-28. The

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[1] Approximately three months earlier, on July 13, 1989, a complaint had been filed under seal but was not served. J.A. 45. Both that earlier complaint and the amended complaint filed on October 24, 1989, bore the caption CV-89-397-ECR. J.A. 45. On March 22, 1990, the district court granted the government's unopposed motion to sever the property of Brian and Karen Degen from that of Ciro and Andrea Mancuso, and permitted the government to file a second amended complaint (captioned CV-N-90-130-ECR) against the Degens' property alone. J.A. 45. For simplicity's sake, we refer throughout this brief to the second amended complaint, which is identical in all relevant respects to the amended complaint.

affidavit alleged that Ciro Mancuso and petitioner were part of a marijuana smuggling operation that the government "ha[d] been investigat[ing] * * * off and on over the last twenty (20) years," and recounted various alleged instances of smuggling by Mancuso, petitioner, or both, beginning with their arrest in 1969 at the age of 21 for illegally "harvesting marijuana in the State of Kansas." J.A. 11, 13-14, 14-17, 23-25. The affidavit relied heavily on information obtained from unnamed confidential informants.

On the strength of the complaint and DEA affidavit, Reno prosecutors, in an *ex parte* proceeding before a federal magistrate on October 24, 1989, obtained a warrant authorizing the seizure of the Degens' property. On the same date a federal grand jury in Nevada returned an indictment charging petitioner, Mancuso, and sixteen others with distribution of marijuana, money laundering, and other violations of law. See *United States* v. *Mancuso, et al.*, No. 89-24-ECR (D. Nev. filed Oct. 24, 1989). See J.A. 44.[2]

Petitioner and his wife timely filed separate verified claims to their property and verified answers to the government's complaint. See J.A. 29-41 (Brian Degen's claim and answer). In his sworn answer, petitioner "denie[d] that he purchased or acquired the properties referenced in the Complaint * * * from 1973 through 1989 by paying for them in part or in total with the proceeds of exchanges of controlled substances or funds traceable to exchanges of controlled substances." J.A. 30. He also categorically denied the Reno prosecutors' claim that the property had been used to commit or to facilitate the commission of a controlled substances violation (and thus were forfeitable under 21 U.S.C. § 881(a)(7)). J.A. 30-31. See also J.A. 6. Petitioner raised eight affirmative defenses, including that the government's claims, which rested on allegations dating back to the late 1960s, were barred by the applicable five-year statute of limitations and were premised on an impermissible retroactive application of the forfeiture laws. See J.A. 31-32.

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[2] See generally Howard Mintz, *Fort Reno's Obsession*, The American Lawyer 54-61 (May 1995) (describing government's unsuccessful prosecution of Mancuso's lawyer, Patrick Hallinan, whom the jury acquitted after four hours of deliberation following a six-week trial).

Petitioner also challenged the legality of the *ex parte* seizure of his property, arguing that the complaint and affidavit failed to establish probable cause. J.A. 32.

2. On May 2, 1990, the government filed a motion to strike the claims and answers of both Brian and Karyn Degen, and in the alternative for summary judgment. J.A. 42-51. The government maintained that Brian Degen (a Swiss citizen) was "a federal fugitive" because he was "living in Switzerland and has no intention of returning to the United States" to face the pending criminal charges. J.A. 42, 45. Invoking the Ninth Circuit's decisions in *United States* v. *$129,374 in United States Currency*, 769 F.2d 583 (1985), cert. denied, 474 U.S. 1086 (1986), and *Conforte* v. *Commissioner*, 692 F.2d 587 (1982), the government argued that, as a fugitive, petitioner was precluded under the "fugitive disentitlement" doctrine from offering any defense to the government's efforts to take his property. J.A. 45-48.[3]

Brian and Karyn Degen filed a joint opposition to the government's motion. J.A. 57-87. In it, they explained in considerable detail (see J.A. 64-77) that the properties seized by the government had been purchased *not* with the proceeds of illegal drug trafficking but rather with profits from some twenty years of their work in a variety of real estate and construction ventures, with rental income from real estate and business properties, with profits from the Degens' storage business in Hawaii, with money inherited by Karyn Degen, and with capital contributions and investments from Brian Degen's affluent parents (who "own a building construction business in Sacramento and have been involved in real estate investment and building construction for many years" (J.A. 65-66)). The Degens

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[3] The government also sought to disentitle Karyn Degen on the theory that all but two of the properties that were the subject of the government's forfeiture action had been acquired by Brian Degen prior to the Degens' marriage on February 15, 1981. J.A. 48-49, 56. For that reason, the government explained, Karyn's property interests were "derivative of her husband['s]" and her claim should be stricken "on the basis that [it] is derived from the fugitive." J.A. 48-49. See also J.A. 90 (same); J.A. 49 (stating that property claimed by Karyn was Brian's "sole and separate property").

provided extensive documentary support for their claims, including copies of deeds, escrow statements, cancelled checks, maps, title reports, and bank account records. Claimant's Opposition to Motion to Strike and For Summary Judgment (Sept. 7, 1990) (exhs. B-Z, AA-AL).

On December 31, 1990, the district court granted the government's motion in relevant part and ordered petitioner's claim stricken. Pet App. 17a-26a. See also *id*. at 27a-29a. At the outset, it rejected petitioner's argument that he is not a fugitive.[4] "[W]hether Brian left before or after the indictment," the court explained, "is irrelevant": "to be a fugitive, a person need not flee the state or country with the intent of avoiding a prosecution or an anticipated prosecution." *Id*. at 18a. Rather, it was enough that petitioner is in a foreign country and has failed to travel to the United States to face charges of which he is aware. *Ibid*. See also *id*. at 23a ("In defining a fugitive, culpability lies in knowing that a prosecution is pending and refusing to return to the jurisdiction").

The court also rejected petitioner's contention that the disentitlement doctrine should not be applied to bar him from defending his property. Pet. App. 19a-26a. It explained that although the doctrine originated in the context of appeals from criminal convictions, its extension to civil cases (including those involving the forfeiture of property) had been approved by the Ninth Circuit. *Id*. at 19a. The court also rejected petitioner's claim that the disentitlement doctrine should not be applied to him because, unlike the persons disentitled in previous Ninth Circuit cases, he had never been convicted of any crime. *Id*. at 20a-26a. Having concluded that petitioner was disentitled, the court therefore refused to consider petitioner's "many pages" of detailed and well-documented "assertions that he acquired the property in question with legitimate funds," explaining that those claims "may well be true" but could not be considered because Degen was barred from offering any defense. *Id*. at 19a.

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[4] The record establishes that petitioner moved to Switzerland well before the October 1989 indictment. J.A. 54-55; Pet. App. 2a, 5a, 18a, 20a; Affidavit of Brian J. Degen in Support of Opposition to Government's Motion to Strike and For Summary Judgment, at 1-3 (Oct. 19, 1990).

3. On December 2, 1992, almost two years after the district court ordered petitioner disentitled and his claim stricken, the government filed its second motion for summary judgment, this time against Karyn Degen alone. Pet. App. 3a, 8a, 27a-29a; J.A. 119.[5] In support of that motion, the government submitted three new affidavits, including one obtained from Ciro Mancuso, whom the government previously had described (in the sworn DEA affidavit filed in support of the government's forfeiture complaint) as the head of the alleged drug smuggling operation. Pet. App. 3a; J.A. 14, 135-161. When Karyn failed to file a response as required by Nevada Local Rule 140-6, the district court on June 23, 1993, entered summary judgment in the government's favor. Pet. App. 3a, 9a-10a, 30a. The district court entered an amended final judgment on August 17, 1993. *Id*. at 32a-37a.

B. Proceedings In The Court Of Appeals

1. On February 10, 1995, the court of appeals affirmed the district court's grant of summary judgment against both Brian and Karyn Degen. Pet. App. 1a-16a. With respect to petitioner, it held that the disentitlement doctrine bars him from offering any defense to the government's confiscation of his property. *Id*. at 3a-8a. At the outset, the court acknowledged that the fugitive disentitlement doctrine was developed by this Court in the context of direct criminal appeals, where "a criminal defendant fled after being convicted, and the Court held that his escape `disentitle[d him] to call upon the resources of the Court for [the] determination of his' direct appeal." *Id*. at 3a (quoting *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (per curiam)). Despite these limited origins, the court of appeals explained, the doctrine "applies in more contexts than just direct criminal appeals" and has been "extended" by the circuit courts "to disentitle fugitives from participating in *civil proceedings* related to the criminal cases they have fled." Pet. App. 4a (emphasis added). "More specifically," the panel continued, the courts of appeals have

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[5] On November 19, 1992, Swiss authorities "arrived unannounced" at the Degens' home, arrested petitioner, and took him into custody (where they held him incommunicado for one month). Pet. App. 6a; J.A. 163.

applied the doctrine "on a regular basis * * * in the context of civil forfeiture claims." *Ibid*. (citing cases).

Like the district court, the Ninth Circuit acknowledged that this case required a further extension of the disentitlement doctrine, because in previous Ninth Circuit cases, "the claimants ha[d] fled after being convicted in a related criminal proceeding" whereas petitioner had not been convicted of the crimes charged in the indictment. Pet. App. 5a. The court nevertheless opted to disentitle petitioner (*ibid*. (emphasis added)):

> The [disentitlement] doctrine rests on the premise that "the fugitive from justice has demonstrated such disrespect for the legal processes that he has no right to call upon the court to adjudicate his claim." *Ortega-Rodriguez* [v. *United States*], 113 S. Ct. [1199,] 1206 [(1993)] (internal quotations and citation omitted). Although Brian has not been arrested or tried, he has certainly "demonstrated disrespect" for the district court *by refusing to submit to its jurisdiction in the criminal action*.

Having concluded that disentitlement could be applied with full vigor to this case, the panel went on to uphold the district court's conclusion that Brian Degen is a fugitive within the meaning of the doctrine. Pet. App. 5a. In the panel's view, the fact that petitioner knew "in December 1990" (when the district court ordered his claim stricken) that "he had been indicted in Nevada but refused to return" was sufficient to qualify him as a fugitive. *Ibid*. The court of appeals also rejected the argument that petitioner lost any fugitive status he might have had when he was taken into custody by Swiss authorities acting at the behest of U.S. prosecutors. *Id*. at 5a-7a. In rejecting that contention, the court stated that "the record contains no admissible evidence to support these claims." *Id*. at 6a (emphasis omitted). The court also observed that, even if Degen were currently "incarcerated in a foreign jurisdiction," that would "not preclude application of the fugitive disentitlement doctrine." *Id*. at 7a.

2. Degen's petition for rehearing with suggestion for rehearing en banc was thereafter denied. Pet. App. 38a-39a. The panel did, however, add a footnote to its opinion making clear that the disentitlement doctrine was being applied to bar petitioner from obtaining any remedy for the clear violation of his constitutional rights

under this Court's decision in *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993): "If not for Brian's fugitive status, the rule of *Good* would apply to this case" (Pet. App. 8a n.2, 39a). The panel held, however, that "the fugitive disentitlement doctrine precludes Brian from contesting the government's seizure of his property" under *Good*. *Ibid*.

SUMMARY OF ARGUMENT

Petitioner is a claimant to some $5.5 million in real and personal property. By statute, he is entitled to "answer" the government's forfeiture complaint. Under the Federal Rules of Civil Procedure, he is entitled to litigate the merits of the government's allegations. And under the Due Process Clause of the Fifth Amendment, he is entitled to a pre-seizure hearing as well as an opportunity to defend against the taking of his property.

By the lower courts' lights, however, all of those statutory and constitutional commands must go by the boards because petitioner is a "fugitive" who is therefore "disentitled" from defending this confiscation of his property. As we show below, that judgment is flawed at every turn. It extends this Court's disentitlement jurisprudence beyond any recognizable limits; it vitiates fundamental constitutional and statutory rights; and it arrogates to the Judiciary a law-making authority with no firmer boundary than the Chancellor's foot. Beyond that, the decision rests on a definition of "fugitivity" that confounds ordinary language and departs from the conventional meaning of the term in other, similar settings. The judgment of the court of appeals should be reversed.

I. The disentitlement doctrine should not be applied to prevent a person from defending in a proceeding — such as a civil forfeiture action — that seeks to deprive him of liberty or property. This Court's precedents have placed significant limitations on the disentitlement doctrine, and applying the doctrine in this setting violates all of them. It also violates the Due Process Clause of the Fifth Amendment, which entitles owners to a pre-deprivation hearing and a right to defend against the confiscation of their property. Moreover, simply invoking the labels "inherent" or "supervisory" powers cannot justify this naked taking of property, since such powers can never be applied (as here) in derogation of explicit

constitutional rights. And this case illustrates the dangers of such an untethered application of the disentitlement doctrine: By asserting disentitlement, the government has spared itself the burden of actually *proving* its allegations against petitioner — allegations that are almost assuredly time-barred, largely dependent upon an impermissible retroactive application of the forfeiture laws, and highly dubious on the merits.

II. If the "fugitive disentitlement doctrine" is *ever* to be applied in a forfeiture context, it should be limited to persons who have escaped actual or constructive custody following a criminal conviction (as was true in every one of this Court's disentitlement cases). If the Court decides to expand the definition of fugitivity beyond its precedents, it should *at least* require that the disentitled person's actions violate some criminal proscription so as to warrant the harsh sanction of disentitlement. And even if this Court accepts a more expansive definition, the category surely cannot extend beyond those who are actual "fugitives" — not simply persons, like petitioner, who have merely declined to travel to the United States to stand trial in a criminal case. In other relevant areas of law, and in any dictionary one might care to consult, the word "fugitive" means a person who has fled or otherwise evaded capture with the intent to avoid prosecution or sanction. Petitioner did no such thing; the government has not proven otherwise; and the lower courts said that actual flight to avoid prosecution was irrelevant, so long as petitioner knew of the pending indictment and declined to travel to the United States to face it.

III. Even if we are mistaken on these central submissions, the Court should nevertheless remand for further proceedings. There is strong reason to believe that the government comes to this Court with "unclean hands" and is therefore disabled from invoking the "equitable" doctrine of disentitlement. In particular, as the Solicitor General has candidly acknowledged, the United States Attorney misled the court of appeals (and, in fact, the district court as well) concerning the United States' role in securing petitioner's arrest and detention by the Swiss Government. Assuming, arguendo, that the disentitlement doctrine could ever be applied in this setting, the case

should be remanded for a determination of the government's right to invoke this doctrine in petitioner's case.

ARGUMENT

I. THE FUGITIVE DISENTITLEMENT DOCTRINE MAY NOT BE APPLIED IN A CIVIL FORFEITURE ACTION TO PREVENT SOMEONE FROM DEFENDING AGAINST A CLAIM FOR DEPRIVATION OF HIS LIBERTY OR PROPERTY

The disentitlement doctrine is an equitable doctrine of appellate procedure articulated originally by this Court. It holds, quite simply, that "an appellate court may dismiss the appeal of a [criminal] defendant who is a fugitive from justice during the pendency of his appeal." *Ortega-Rodriguez* v. *United States*, 113 S. Ct. 1199, 1203 (1993). Initially applied only to petitions seeking discretionary review in this Court, the doctrine was motivated by a concern about the enforceability of the Court's judgment: *i.e.*, if the Court affirmed the conviction, it would have no way of enforcing its judgment against the fugitive defendant. See *Smith* v. *United States*, 94 U.S. 97, 97 (1876) ("It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render."). Accord *Bonahan* v. *Nebraska*, 125 U.S. 692 (1887); *Allen* v. *Georgia*, 166 U.S. 138 (1897); *Eisler* v. *United States*, 338 U.S. 189 (1949). See generally *Ortega-Rodriguez*, 113 S. Ct. at 1203.

In a later case, *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970) (per curiam), the Court enunciated an additional rationale for the doctrine: the idea that a fugitive's "escape [from the restraints placed upon him] pursuant to the conviction * * * disentitles [him] to call upon the resources of the Court for determination of his claims." *Id.* at 366; see also *Ortega-Rodriguez*, 113 S. Ct. at 1203-1204. Finally, the Court has stated that "dismissal by an appellate court after a defendant has fled its jurisdiction serves an important deterrent function and advances an interest in efficient, dignified appellate practice." *Ortega-Rodriguez*, 113 S. Ct. at 1204-1205 (citing *Estelle* v. *Dorrough*, 420 U.S. 534, 537 (1975)).

This Court's disentitlement cases share four important features. *First*, in each case the doctrine was applied in the *very proceeding* in which the appellant had become a fugitive. *Second*, in each case the fugitive was seeking *affirmative relief* from the Court: reversal of a conviction. *Third*, in none of the cases was the doctrine applied in derogation of rights conferred by the Constitution. See *Goeke* v. *Branch*, 115 S. Ct. 1275, 1277 (1995) (per curiam); *Molinaro*, 396 U.S. at 366; *Ortega-Rodriguez*, 113 S. Ct. at 1210 (Rehnquist, C.J., joined by White, O'Connor & Thomas, JJ., dissenting). And *fourth*, each case involved a person who was a "fugitive" in the ordinary sense of the word: someone who, in violation of law, had either escaped from custody or jumped bail, not someone who merely had failed to travel to the United States from his country of residence. See *Ortega-Rodriguez*, 113 S. Ct. 1199; *Molinaro*, 396 U.S. 365; *Eisler*, 338 U.S. 189; *Bonahan*, 125 U.S. 692; *Smith*, 94 U.S. 97. See also *Goeke*, 115 S. Ct. 1275.

Despite the very limited context in which this Court has approved the use of the disentitlement doctrine, many federal appellate and trial courts have significantly expanded the doctrine, holding that a defendant who is a fugitive from justice in a criminal case may be disentitled from seeking affirmative relief in a *separate civil* action.[6] Some of these courts, moreover, have extended the doctrine even further, holding that a fugitive from a criminal conviction may be disentitled even from *defending* against the confiscation of his property in a separate forfeiture proceeding initiated by the government.[7] And even though the cases in which this Court has

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[6] See *Schuster* v. *United States*, 765 F.2d 1047 (11th Cir. 1985) (fugitive disentitled from petitioning for review of IRS tax ruling); *Conforte* v. *Commissioner*, 692 F.2d 587, 589 (9th Cir. 1982) (fugitive disentitled from appealing decision of tax court); *Doyle* v. *United States Dep't of Justice*, 668 F.2d 1365 (D.C. Cir. 1981) (fugitive disentitled from suing under FOIA), cert. denied, 455 U.S. 1002 (1982).

[7] See *United States* v. *Timbers Preserve, Routt County, Colorado*, 999 F.2d 452, 453-454, 456 (10th Cir. 1993); *United States* v. *One Parcel of Real Estate at 7707 S.W. 74th Lane, Miami, Dade County, Florida*, 868 F.2d 1214, 1215-

(continued...)

applied the disentitlement doctrine all have involved persons already convicted of crimes, the lower federal courts (including the Ninth Circuit in this case) have wielded the punitive sanction of disentitlement against persons who have never been arrested, tried or convicted, and whose innocence accordingly must be presumed.

This sweeping application of the fugitive disentitlement doctrine, moreover, has continued in the lower courts despite this Court's recent admonition, in *Ortega-Rodriguez*, that "the sanction * * * should not be wielded indiscriminately as an all-purpose weapon against defendant misconduct." 113 S. Ct. at 1207 n.17. This case presents the Court with an opportunity to halt this unwarranted expansion of the disentitlement doctrine to contexts where its use is indefensible.

A. Use Of The Disentitlement Doctrine In Civil Forfeiture Actions Is Inconsistent With This Court's Disentitlement Decisions

1. *Ortega-Rodriguez* contains this Court's most recent, and by far its most extensive, discussion of the fugitive disentitlement doctrine. The precise holding of the case, of course, is that an appellate court may not dismiss the appeal of a defendant who becomes a fugitive *after* his conviction but who is recaptured *before* the filing of his appeal, because the defendant's fugitivity lacks sufficient connection to the appellate process. 113 S. Ct. at 1205-1210.[8] The focus, therefore, is on the effect of the fugitivity *in the forum in which the party is to be disentitled*. The Court's

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(...continued)
1217 (11th Cir. 1989); *United States* v. *$45,940 in United States Currency*, 739 F.2d 792, 798 (2d Cir. 1984).

[8] The Court held open the possibility that there may be some cases in which a defendant's flight during district court proceedings could have such a disruptive impact on the appellate process that dismissal of an appeal might be warranted. *Ortega-Rodriguez*, 113 S. Ct. at 1208-1209. Absent proof of "*significant* interference with the operation of [the] appellate process," however, a defendant's former fugitivity lacks sufficient connection to the appellate process to justify dismissal. *Id*. at 1209 (emphasis added).

reasoning in *Ortega-Rodriguez* makes absolutely clear that disentitlement has no place in the civil forfeiture context.

As the Court explained in *Ortega-Rodriguez*, the rationales underlying the disentitlement doctrine are: (1) the inability of the disentitling court to enforce an unfavorable judgment against a fugitive; (2) the interest in efficient judicial practice; (3) the need to protect the "dignity" of the disentitling tribunal; and (4) the need to deter fugitives from taking flight in the first place. The enforceability concern, the Court explained, "cannot * * * justif[y]" the "dismissal of a former fugitive's appeal" because a "defendant returned to custody before he invokes the appellate process presents no risk of unenforceability: he is within the control of the appellate court throughout the period of appeal and issuance of the judgment." 113 S. Ct. at 1206. Because in these circumstances the appellate court's decision is fully enforceable, the recaptured fugitive is not seeking to obtain the benefits of appellate review while at the same time risking no disadvantage from an unfavorable outcome.

Similarly, the Court in *Ortega-Rodriguez* explained, "`efficient . . . operation' of the appellate process * * * will not be advanced by dismissal of appeals filed after former fugitives are recaptured." 113 S. Ct. at 1206 (first ellipsis in original). The Court reasoned that any delay occasioned by the fugitive's escape would affect only proceedings in the *district court*. Since the fugitive was recaptured before the filing of the appeal, the efficiency of the *appellate* process would not be affected. *Ibid*.

As for the need to protect the appellate court's "dignity," the Court reasoned that this concern did not justify dismissal of the recaptured fugitive's appeal. Assuming (but not holding) that a court "may employ dismissal as a sanction when a defendant's flight operates as an affront to the dignity of the court's proceedings," the Court pointed out that Ortega-Rodriguez's post-conviction escape had "flouted the authority of the *District Court*, not the *Court of Appeals*." 113 S. Ct. at 1206-1207 (emphasis added). Therefore, "it [wa]s the District Court" — not the appellate court — that under this rationale would have "the authority to defend its own dignity, by sanctioning an act of defiance that occurred solely within its domain." *Id*. at 1207. Significantly, the Court specifically rejected the

argument that one court has the power to sanction conduct that affects only another court (*ibid*.):

> We cannot accept an expansion of th[e disentitlement doctrine's] reasoning that would allow 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.

"[T]he sanction of appellate dismissal," the Court explained, "should not be wielded indiscriminately as an all-purpose weapon against defendant misconduct." *Id*. at 1207 n.17.

Finally, the *Ortega-Rodriguez* Court held that the interest in maintaining a sufficient "deterrent to escape" did not justify dismissal of Ortega-Rodriguez's appeal. 113 S. Ct. at 1207. The Court reasoned that the district court, in which the case was pending at the time of flight, was "quite capable of defending its own jurisdiction" and of deterring flight "with the threat of a wide range of penalties available to the district court judge." *Ibid*. The Court also noted that punishing flight through dismissal

> introduces an element of arbitrariness and irrationality into sentencing for escape. Use of the dismissal sanction as, in practical effect, a second punishment for a defendant's flight is almost certain to produce the kind of disparity in sentencing that the Sentencing Reform Act of 1984 and the Sentencing Guidelines were intended to eliminate.

Id. at 1208 (footnotes omitted).

2. If the concerns underlying the fugitive disentitlement doctrine — as articulated in *Ortega-Rodriguez* — do not apply to actual fugitives recaptured before appeal, they *surely* do not apply in civil forfeiture actions to property owners such as petitioner. To begin with, the enforceability concern is completely absent: Any judgment in this forfeiture action, whether for or against petitioner, would be "fully enforceable since the property is in the court's control." *United States* v. *$40,877.59 in United States Currency*, 32 F.3d 1151, 1156 (7th Cir. 1994); see also *ibid*. (noting that in a forfeiture action, "the fugitive would suffer the consequences of an adverse judgment"); *United States* v. *Pole No. 3172 Hopkinton*, 852 F.2d

636, 643 (1st Cir. 1988) (explaining that "one of the main considerations in the fugitive from justice cases" — "the fact that the fugitive is trying * * * to reap the benefit of the judicial process without subjecting himself to an adverse determination" — "does not arise" in forfeiture actions). If petitioner is given his day in court, he must obviously abide by whatever decision on the merits the forfeiture court will make — since the *property* is wholly within the trial court's jurisdiction.

Nor would disentitlement further the interest in efficient practice or procedure. As the Court in *Ortega-Rodriguez* made clear, the critical question in that regard is what disruption, if any, the fugitive's absence has on the integrity of the *sanctioning court*'s own processes. Petitioner's alleged fugitivity in the separate criminal case pending against him "does not threaten the integrity of the forfeiture proceeding"; and his presence in the forfeiture action is not "needed to conduct an adversarial hearing [nor could it be] compelled in a civil action even if he were not a fugitive." *$40,877.59*, 32 F.3d at 1156; *Pole No. 3172*, 852 F.2d at 644 (property owner "should be treated * * * like any other absent civil litigant"); Note, *Procedure — Disposition of Writ of Certiorari When Petitioner Flees Jurisdiction*, 18 Geo. Wash. L. Rev. 427, 429 (1950) (in civil cases, unlike criminal cases, parties need not be "in the power and under the control of the court" but "can be represented by attorney").[9]

As for the need to protect the district court's "dignity" or its "authority," that concern does not support disentitlement in civil

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[9] The government could easily have propounded interrogatories and deposed petitioner by telephone or in person in Switzerland. See, *e.g.*, *United States* v. *All Funds on Deposit in Any Accounts Maintained at Merrill Lynch, Pierce, Fenner & Smith*, 801 F. Supp. 984, 999 (E.D.N.Y. 1992). In any event, in view of the facial defects in the government's complaint and supporting affidavit, the strong documentary evidence supporting petitioner's claims to his property, and the availability of several dispositive defenses, this case likely would be resolved on a motion to dismiss or a motion for summary judgment, if petitioner were permitted to defend on the merits. For all of these reasons, petitioner's absence should have virtually no impact — much less a disruptive impact — on the district court's processes.

forfeiture cases. Simply put, a property owner's status as a fugitive in a separate *criminal* proceeding does not offend the dignity of the *civil forfeiture* court's proceedings. *Ortega-Rodriguez*, 113 S. Ct. at 1207. See *ibid.* (stating that Ortega-Rodriguez's post-conviction escape had "flouted the authority of the *District Court*, not the *Court of Appeals*"); *Friko Corp.* v. *Commissioner*, 26 F.3d 1139, 1143 (D.C. Cir. 1994) (Randolph, J.) ("The court whose `dignity' has been affronted * * * is * * * the New Jersey federal court"); *$40,877.59*, 32 F.3d at 1156 ("the fugitive's disrespectful conduct is to another court in another action"); *Pole No. 3172*, 852 F.2d at 644.[10] Moreover, in cases such as this, where a citizen and resident of a foreign country has not escaped or "fled" but has simply declined to travel to the United States from his home abroad, the foreign resident's absence cannot fairly be described as an "affront" to *any* court's processes or authority. See pages 35-39, *infra*.[11] Use of the

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[10] It makes no difference whether the civil forfeiture action and the criminal indictment are both filed by the government in the same judicial district (as here), or whether (as in other cases) they are filed in different federal districts — or, for that matter, whether the two proceedings are initiated by state and federal authorities, respectively, in different state and federal courts. See *$40,877.59*, 32 F.3d at 1152 (forfeiture action commenced in Southern District of Indiana; federal indictment returned in Eastern District of Virginia). Regardless of which variant is involved, the fugitive's absence is at most an affront only to the criminal proceedings. Nor would it make any sense to permit federal prosecutors to evade a prohibition on the use of disentitlement in civil forfeiture actions through the simple expedient of filing both the criminal and civil actions in the same court. The venue restrictions on civil forfeiture actions (see 28 U.S.C. § 1395) would in no way limit the risk of such manipulation, because a disentitled defendant would be precluded from objecting to improper venue (as to any other facial defect in the government's complaint). See also 21 U.S.C. § 881(j) (when forfeiture is sought under 21 U.S.C. § 881, authorizing venue wherever owner is located or "in the judicial district in which the criminal prosecution is brought"); 28 U.S.C. § 1355(b) (authorizing venue for forfeiture actions in district where acts or omissions giving rise to forfeiture occurred). See generally pages 31-34, *infra*.

[11] Notably, the government's lawyer conceded at oral argument in the Ninth Circuit that the district court lacked personal jurisdiction over Brian Degen

(continued...)

disentitlement doctrine in these circumstances would violate this Court's admonition, in *Ortega-Rodriguez*, that the doctrine is not a license for courts to "sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the course of [the sanctioning court's] proceedings." 113 S. Ct. at 1207.

Finally, the deterrence rationale does not support extending the disentitlement doctrine to civil forfeiture actions. Where, as here, a property owner whom the government seeks to disentitle has merely declined to travel to this country to face criminal charges, *there is simply no wrongful conduct to deter in the first place*. Compare *Allen* v. *Georgia*, 166 U.S. 138, 141 (1897) ("By escaping from legal custody he has, by the laws of most, if not all, of the States, committed a distinct criminal offence * * * ."). To the extent that a property owner is *truly* a fugitive — because he has escaped from custody, jumped bail, or engaged in some other form of criminally punishable flight — it is the function and responsibility of the court in which the criminal proceeding is pending to "defend its own jurisdiction" and to deter flight "with the threat of a wide range of penalties available to the district court judge." *Ortega-Rodriguez*, 113 S. Ct. at 1207. Adding the "sanction of * * * dismissal" (*id*. at 1207 n.17) to the penalties available for the fugitive's flight would only interject the same "element of arbitrariness and irrationality into sentencing for escape" that this Court decried in *Ortega-Rodriguez*. *Id*. at 1207-1208.

In sum, then, none of the rationales underlying the disentitlement doctrine justifies its use in the civil forfeiture context. *Ortega-Rodriguez* is controlling. Petitioner's alleged "fugitivity" from the criminal case — which, as we note below in Part II, is not real "fugitivity" at all — simply did not authorize the forfeiture tribunal to

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(...continued)
in the criminal action. (A copy of the tape of oral argument has been lodged with the Clerk by the government.) It is difficult to see how a court that lacks power over an absent foreign national could possibly suffer any "affront" to its "proceedings" as a consequence of the foreign property owner's failure to submit to the court's jurisdiction.

disable him from defending against the proposed deprivation of his property.

3. The Ninth Circuit's use of the disentitlement doctrine in this case not only is inconsistent with *Ortega-Rodriguez* but also runs afoul of the limits of the doctrine recognized by this Court in *United States* v. *Sharpe*, 470 U.S. 675 (1985). In *Sharpe*, the Court granted the government's certiorari petition to review a judgment reversing the respondents' criminal convictions. After certiorari had been granted, the respondents became fugitives. Two Members of the Court contended, in their separate opinions, that the Court should invoke the disentitlement doctrine against the respondents, vacate the judgment of the court of appeals, and remand with instructions to dismiss the respondents' appeals (thereby leaving their convictions intact). *Id*. at 688 (Blackmun, J., concurring); *id*. at 724-725 (Stevens, J., dissenting). The Court refused to do so, however, on the ground that such action was "not supported by our precedents." *Id*. at 681 n.2. The disentitlement doctrine, the Court explained,

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

Id. at 681-682 n.2 (emphasis added) (citations omitted).

Sharpe thus strongly suggests that the disentitlement doctrine applies *only* where the fugitive is the one affirmatively seeking judicial action. *$40,877.59*, 32 F.3d at 1154 (explaining that in *Sharpe*, this Court "determined that it will not apply the doctrine when the fugitive is responding to government action"). See also *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (per curiam) (stating that a fugitive's "escape[] from the restraints placed upon him pursuant to the conviction * * * disentitles [him] to *call upon the resources of the Court* for determination of his claims") (emphasis added). Accordingly, if the doctrine can be extended to parallel *civil* cases at all, it surely cannot be applied where, as here, the alleged fugitive is not making a demand for judicial action but merely is

defending against a suit by the government to take his property. See *$40,877.59*, 32 F.3d at 1154; *Pole No. 3172*, 852 F.2d at 643; *Friko Corp.*, 26 F.3d at 1142 (stating that appeal from order of Tax Court disentitling taxpayer from challenging jeopardy assessment "raises serious questions regarding * * * whether the doctrine applies when the fugitive is in effect defending against governmental action rather than using the courts affirmatively in an attempt to reap the benefit of the judicial process without subjecting himself to an adverse determination") (internal quotations omitted).

It is beyond dispute that petitioner, like any other owner seeking to fend off forfeiture of his property, is in a purely defensive posture. See *$40,877.59*, 32 F.3d at 1154. Brian Degen is not affirmatively "call[ing] upon the resources of the Court" to obtain relief. *Molinaro*, 396 U.S. at 366. On the contrary, he is *defending* against the government's suit to confiscate his property. It is the *government* that has called upon the district court to forfeit petitioner's property. This fact was not lost on the district court. Pet. App. 24a (stating that petitioner "is defending against the civil action," "is in effect involuntarily involved" in the case, and "clearly has the status of a defendant").[12] Indeed, "[t]o characterize it otherwise would be a mere legal fiction." *$40,877.59*, 32 F.3d at 1154. This Court should not permit such an unwarranted extension of the disentitlement doctrine.

B. The Due Process Clause Bars Application Of The Disentitlement Doctrine In Civil Forfeiture Actions

1. The Due Process Right To A Hearing

In addition to the limits that this Court has imposed on the disentitlement doctrine in *Ortega-Rodriguez* and *Sharpe*, the Due

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[12] It makes no difference to the analysis that, in a civil forfeiture action, the property itself is the "defendant" and the property owner is described as a "claimant." See *Societe Internationale* v. *Rogers*, 357 U.S. 197, 210 (1958) (explaining that foreign company seeking to recover assets seized by the United States, "though cast in the role of a plaintiff, cannot be deemed to be in the customary role of a party invoking the aid of a court to vindicate rights asserted against another. Rather [its] position is more analogous to that of a *defendant*, for [it] belatedly challenges the Government's action by now protesting against a seizure and seeking a recovery of assets.").

Process Clause of the Fifth Amendment bars the extension of that doctrine to this case. The Due Process Clause states, without equivocation, that "No person shall * * * be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. "The `right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)); *Hovey* v. *Elliott*, 167 U.S. 409, 418-419 (1897) (reversing order striking property owner's answer as punishment for contempt) ("[W]hat plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law[?]"). Accordingly, this Court has consistently held that due process requires "some form of hearing * * * before an individual is finally deprived of a property interest" and that "[t]he fundamental requirement of due process is the opportunity to be heard `at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333 (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)).

This case strikes at the very heart of that bedrock constitutional guarantee. The government has not forfeited merely some nebulous or contingent entitlement or some attenuated claim to property rights. On the contrary, by virtue of the disentitlement doctrine the government has confiscated several million dollars worth of real and personal property owned by Brian Degen. As petitioner hopes to prove if he is ever allowed to offer a defense to this action, *all* of the property forfeited in this action was lawfully acquired by him (and his wife) through decades of legitimate labors. Nor can there be any serious question that this case involves anything less than a "complete, physical, [and] permanent deprivation" of petitioner's property interest. *Connecticut* v. *Doehr*, 501 U.S. 1, 12 (1991).

It has been clear for at least 125 years that civil forfeiture actions like this one implicate the fundamental due process right to a hearing. In *McVeigh* v. *United States*, 78 U.S. (11 Wall.) 259 (1871), this Court unanimously reversed an order striking a property owner's answer in a forfeiture action under a statute authorizing the United States to forfeit the property of Confederate rebels engaged

in active rebellion. *Id*. at 265-267. The lower court's order, the Court explained, was invalid because it "in effect denied [McVeigh] a hearing." *Id*. at 267. A contrary result, the Court added, would be "a blot upon our jurisdiction" and "contrary to the first principles of the social compact and the right administration of justice." *Ibid.* See also *Societe Internationale* v. *Rogers*, 357 U.S. 197, 209 (1958) (the Due Process Clause places "limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause"). More recently, in *United States* v. *$8,850 in United States Currency*, 461 U.S. 555 (1983), this Court held that due process protects a property owner even from *unreasonable delay* in the filing of a forfeiture action. And only three years ago, in *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 498-505 (1993), this Court held that the Fifth Amendment's Due Process Clause confers on an owner of real property the right to a hearing before the property may be *seized* — even temporarily. Even if the principle had not been established in *McVeigh*, it would follow *a fortiori* from *James Daniel Good Real Property* that petitioner's property may not be *taken* by the United States in a civil forfeiture action without affording him an opportunity for a meaningful hearing.

In this case, the district court permitted the government to confiscate petitioner's property without allowing him *any* hearing whatsoever on his numerous (and quite substantial) defenses. Petitioner has never had such a hearing. If this Court affirms the judgment, he never will be heard. A more fundamental incursion on due process rights is difficult to imagine.[13]

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[13] Indeed, as applied in cases such as this, the disentitlement doctrine bears a striking resemblance to the "ancient [English] doctrine of outlawry, a practice whereby the defendant was summoned by proclamation in five successive county courts and, for failure to appear, was declared forfeited of all his goods and chattel." *Green* v. *United States*, 356 U.S. 165, 170 (1958). See 2 Sir Frederick Pollack & Frederick W. Maitland, *The History of the English Law* 449 (2d ed. 1968) ("[H]e who defied [the law] was outside its sphere; he was an outlaw. He who breaks the law has gone to war with

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Moreover, as is suggested above, the application of the disentitlement doctrine in this case also deprives petitioner of any remedy for a conceded constitutional violation of his right to a *pre-seizure* hearing to test the government's showing of probable cause. See *James Daniel Good Real Property*, 114 S. Ct. at 498-505. Notably, in denying rehearing the Ninth Circuit frankly acknowledged that "[i]f not for Brian's fugitive status, the rule of *Good* would apply to this case." Pet. App. 39a. It held, however, that "the fugitive disentitlement doctrine precludes Brian" from asserting his rights under *Good*. *Ibid*. But as the Seventh Circuit has explained in rejecting disentitlement in the forfeiture context, "[i]f a probable cause warrant, issued *ex parte*, is not sufficient to temporarily deprive an owner of the use of his property until a full hearing is held, then clearly it is an insufficient basis on which to justify a permanent loss by forfeiture." *$40,877.59*, 32 F.3d at 1155.

The grave due process concerns raised by applying the disentitlement doctrine here are exacerbated, moreover, because the government is not only taking petitioner's property but also punishing him. To be sure, in *Ortega-Rodriguez* the Court made clear that disentitlement is always a "*sanction* [in the form of] dismissal." 113 S. Ct. at 1207 (emphasis added). But when invoked in a civil forfeiture proceeding such as this, that sanction is especially punitive in nature because the underlying forfeiture action is itself punitive in

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the community; the community goes to war with him. It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him; for a wild beast he is; not merely is he a `friendless man,' he is a wolf."); *id*. at 450 ("A ready recourse to outlawry is * * * one of the tests by which the relative barbarousness of various bodies of ancient law may be measured."). "[T]he severe remedy of outlawry," however, "was never known to * * * federal law" (*Green*, 356 U.S. at 171), and is fundamentally at odds with the central command of the Due Process Clause. See *Hovey* v. *Elliott*, 167 U.S. 409, 444 (1897) (in rejecting notion that courts of equity "may suppress an answer and thereupon render a decree *pro confesso*," explaining that "if such power obtained, then the ancient common law doctrine of `outlawry' * * * would be a part of the chancery law, a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of citizens").

nature. See *Austin* v. *United States*, 113 S. Ct. 2801, 2810-2812 (1993) (forfeiture pursuant to 21 U.S.C. § 881(a)(7) constitutes punishment sufficient to trigger Excessive Fines Clause); J.A. 6 (alleging in complaint that the Degens' real property was forfeitable pursuant to 21 U.S.C. § 881(a)(7)). Thus, petitioner has not simply been *deprived of property* without any meaningful opportunity to be heard: He has been *assessed a multimillion-dollar punishment without ever getting his day in court*. This Court should not permit the disentitlement doctrine to be used to sweep away such fundamental due process rights.

Ironically enough, the government would never pretend that, under the Due Process Clause, it could "disentitle" petitioner from defending the criminal case against him and simply ask the trial court to enter a default judgment. But surely, if petitioner cannot be disentitled in the very case in which he is actually alleged to be a fugitive, he cannot be disentitled in a separate forfeiture case in which he is fully prepared to participate.

Finally, it must be added that these constitutional problems do not arise when the disentitlement doctrine is confined to its traditional context — to dismiss the appeal of a person who has been convicted of a crime but who escaped from custody. As this Court has taken pains to point out in several disentitlement cases, a criminal defendant has no constitutional right to an appeal *Goeke* v. *Branch*, 115 S. Ct. 1275, 1277 (1995) (per curiam); *Estelle* v. *Dorrough*, 420 U.S. 534, 536-537 (1975); *Ortega-Rodriguez*, 113 S. Ct. at 1210 (Rehnquist, C.J., dissenting). See also *Hovey* v. *Elliott*, 167 U.S. 409, 443 (1897) (in holding that it violates due process for a court to strike a defendant's answer and enter a default judgment as punishment for contempt of court, distinguishing *Allen* v. *Georgia*, 166 U.S. 138 (1897), a disentitlement case, on ground that dismissal of fugitive's appeal results only in loss of "mere grace or favor" of taking appeal, not in deprivation of "the inherent right of defense secured by the due process clause of the Constitution"). In addition, when the doctrine is

> applied at the appellate level, the court is refusing to upset the judgment of the district court, rendered after a fair hearing. The fugitive has already had an opportunity for due process to safeguard the judgment which found him guilty. However, when

> the *district court* applies the doctrine, it in fact renders a judgment without a consideration of the evidence. The status quo is altered, property is distributed, and all without any hearing whatsoever on the merits of the cause.

$40,877.59, 32 F.3d at 1156 (emphasis altered). As the Seventh Circuit correctly noted, when trial courts are permitted to invoke disentitlement in "government initiated civil forfeiture actions, the real injustice is that the government is allowed to confiscate property on mere allegation." *Id*. at 1155 (emphasis added). The courts that have extended the disentitlement doctrine to civil forfeiture actions have simply overlooked this critical distinction.

2. The Due Process Right To Defend

Closely related to the due process right to a pre-deprivation hearing is petitioner's due process right to defend against this forfeiture action. The right to defend, which long has been recognized by this Court in a variety of contexts, is firmly rooted in the Due Process Clause of the Fifth Amendment. See *Hovey* v. *Elliott*, 167 U.S. 409, 443 (1897) (referring to "the inherent right of defence secured by the due process of law clause of the Constitution"); *id*. at 444 (describing "the fundamental right of one summoned in a cause to be heard in his defence" as "an essential element of due process of law"). When the disentitlement doctrine is applied in a civil forfeiture action to bar a property owner's efforts to reclaim his property, the effect is to extinguish the owner's fundamental right to offer a defense. For that reason as well, the disentitlement doctrine cannot be applied here.

This Court's cases involving confiscation of the property of Confederate rebels illustrate this principle. As noted above, in *McVeigh* v. *United States*, 78 U.S. (11 Wall.) 259 (1871), the government sought to confiscate the land of a Confederate soldier under the authority of a statute authorizing forfeiture of the property of any rebel who refused to cease his participation in the rebellion within 60 days of a presidential proclamation. After the government commenced forfeiture proceedings in district court, the soldier, still engaged in the rebellion and fighting within Confederate lines, filed a claim through an attorney. *Id*. at 261, 263. The government moved to strike the claim, arguing that "[a]n enemy has no standing in court"

(*id*. at 263; see also *id*. at 267); and the district court granted the motion (*id*. at 261).

This Court unanimously reversed, holding that "the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files." 78 U.S. at 267. It categorically rejected the government's argument that the claimant was not entitled to file a claim and defend against the forfeiture because he was an "alien enemy" currently fighting against the United States. *Ibid*. Because the government was seeking to take his property, the Court held, the claimant's "legal status" was irrelevant: "Whatever may be the extent of the disability of an alien enemy *to sue* in the courts of the hostile country, it is clear that he is liable to *be* sued, *and this carries with it the right to use all the means and appliances of defence*." *Ibid*. (emphasis added; citation omitted). "The liability and the right," the Court succinctly added, "are inseparable." *Ibid*. See also *ibid*. ("If assailed there, he could defend there").

The Court reaffirmed this principle in *Windsor* v. *McVeigh*, 93 U.S. 274 (1876), holding that the original confiscation of the claimant's property in *McVeigh* v. *United States* was void because the district court had not permitted the claimant to defend against the forfeiture. The Court explained:

> The principle stated in [*McVeigh* v. *United States*] lies at the foundation of all well-ordered systems of jurisprudence. *Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable.* This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

Id. at 277 (emphasis added). The Court took the occasion to condemn, once again, the original order striking McVeigh's claim to his property, stating: "It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence." *Id* at 278. Forfeiture proceedings

conducted without allowing the claimant to defend, the Court added, would be "sham and deceptive proceeding[s]," *ibid*, "`mere mockeries, and as in no just sense judicial proceedings,'" *id*. at 281 (citation omitted). See also *id*. at 279 ("A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer.").

Twenty years later, in *Hovey* v. *Elliott*, this Court held that a defendant's answer could not be stricken and a default judgment entered as a punishment for contempt of court. On the basis of an extensive review of early English and American precedents (167 U.S. at 414-418, 420-444), the Court concluded that the trial court's action was a "flagrant" and unprecedented "violation of the rights of the citizen" that, if permitted, would "convert the judicial department of the government into an engine of oppression and would make it destroy great constitutional safeguards." *Id*. at 419. The Court continued:

> Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment could not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists[,] then in consequence of their establishment, to compel obedience to law and to enforce justice[,] courts possess the right to inflict the very wrongs they were created to prevent.

Id. at 417-418. That condemnation applies with equal force to the proceedings here.

Indeed, *Hovey* is particularly important because it expressly *rejected* the argument that the deprivation of property at issue there

could be justified by analogy to the *disentitlement doctrine*. In response to the claim that *Allen* v. *Georgia*, 166 U.S. 138 (1897), lent support to the trial court's order, this Court explained:

> In the *Allen* case the accused had been regularly tried and convicted, and the error complained of was that the Georgia Supreme Court had violated the Constitution of the United States in refusing to hear his appeal because he had fled from justice. In affirming the judgment of the Supreme Court of Georgia, the court called attention to the distinction between the inherent right of defence secured by the due process of law clause of the Constitution and the mere grace or favor giving authority to review a judgment by way of error or appeal.

167 U.S. at 443 (emphasis omitted). Because striking a property owner's answer as punishment for contempt "involve[s] an essential element of due process of law" (*id*. at 444), the Court reasoned, *Allen* and the disentitlement doctrine were inapposite. *Id*. at 443.

In sum, as the Seventh Circuit has correctly observed, *Hovey*, *McVeigh* v. *United States*, and *Windsor* v. *McVeigh* all stand for the proposition that "notwithstanding an individual's *status*, where he is vulnerable to being sued, he has the right to defend himself in the action brought against him; * * * the constitutional right to defend is inseparable from the liability to suit." *$40,877.59*, 32 F.3d at 1153 (emphasis added). Petitioner's "constitutional right to defend," however, was extinguished in this case when his claim was stricken on the strength of the disentitlement doctrine.

3. There Is No Plausible Basis For Inferring A Waiver Of Petitioner's Due Process Rights

Petitioner cannot be said to have "waived" his due process rights to a meaningful opportunity to be heard and to mount a defense of this lawsuit. Courts "do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co.* v. *Public Util. Comm'n*, 301 U.S. 292, 307 (1937). Exactly the opposite is true: "in the civil no less than the criminal area, courts indulge every reasonable presumption *against* waiver." *Fuentes* v. *Shevin*, 407 U.S. 67, 94 n.31 (1972) (internal quotation omitted) (emphasis added). Moreover, "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the

relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. 742, 748 (1970); *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938).

Petitioner's actions (or, more accurately, his inaction) with regard to the *criminal* case simply cannot be construed as an intentional relinquishment of his due process rights in *this* separate civil case.[14] Indeed, if the active rebellion by the claimant in *McVeigh* v. *United States* or the escape from custody by the defendant in *Ortega-Rodriguez* did not amount to a "waiver" of constitutional or statutory rights, surely petitioner's decision to remain in Switzerland after he was indicted in the United States cannot be construed as a waiver of his constitutional rights in the forfeiture proceeding.

C. The Application Of The Disentitlement Doctrine In This Context Is Not A Permissible Exercise Of "Inherent" Or "Supervisory" Powers

The fugitive disentitlement doctrine is an "equitable" doctrine of procedure developed by federal appellate courts in their "supervisory" capacity. See *Goeke*, 115 S. Ct. at 1277; *Ortega-Rodriguez*, 113 S. Ct. at 1205; *Sharpe*, 470 U.S. at 681 n.2; *In re Prevot*, 59 F.3d 556, 562 (6th Cir. 1995). Because the power to "disentitle" fugitives from justice has not been conferred on the federal courts by Congress, that power necessarily is founded on the Judiciary's "inherent" authority. As explained below, however, the district court's use of the "inherent" or "supervisory" powers to bar petitioner from offering any defense to the government's confiscation of his property was improper.

This Court has permitted the use of "inherent" judicial powers in a variety of contexts. See *Chambers* v. *Nasco*, 501 U.S. 32, 43-44 (1991) (collecting cases). At the same time, however, it has

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[14] It is difficult, moreover, to see how petitioner could be charged even with *constructive* knowledge that the "likely consequence[]" (*Brady*, 397 U.S. at 748) of remaining in Switzerland might be disentitlement in this separate civil action. As both lower courts acknowledged, before this case the Ninth Circuit had never applied the disentitlement doctrine in a forfeiture action against a property owner who had not "fled after being convicted in a related criminal proceeding." Pet. App. 5a.

repeatedly cautioned that "because of their very potency, inherent powers must be exercised with restraint and discretion." *Id*. at 44; see also *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764 (1980) (plurality opinion) (Powell, J.) ("Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion."). To address these concerns, this Court has placed clear limits on lower courts' invocation of their "inherent" or "supervisory" judicial powers. As the Court explained in *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988) (emphasis added):

> In the exercise of its supervisory authority, a federal court "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States* v. *Hasting*, 461 U.S. 499, 505 (1983). Nevertheless, it is well-established that "[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it *conflicts with constitutional or statutory provisions*." *Thomas* v. *Arn*, 474 U.S. 140, 148 (1985). To allow otherwise "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States* v. *Payner*, 447 U.S. 727, 737 (1980).

See also Br. of United States, No. 91-7749, *Ortega-Rodriguez* v. *United States*, at 6, 8-9 (conceding that application of fugitive disentitlement doctrine "must not conflict with the Constitution or any statute").

These limits on "supervisory" powers are transgressed when federal courts invoke the disentitlement doctrine in civil forfeiture actions. Applied in that context, disentitlement plainly "conflicts with constitutional * * * provisions." As explained in the preceding section, the district court's order disentitling petitioner from defending his property effectively extinguished his constitutional right to due process of law. It swept away his Fifth Amendment right to a hearing before his property could be taken by the government. It also nullified his related due process right to defend against the government's lawsuit. And, as the Ninth Circuit expressly recognized in denying rehearing (Pet. App. 39a), it even extinguished any remedy for the conceded violation of his due process right to a pre-*seizure* hearing. See *James Daniel Good Real Property*, 114 S. Ct.

at 498-505. A more wholesale destruction of constitutional rights through use of the "supervisory" power is difficult to imagine.

Indeed, in closely analogous settings this Court has expressly refused to allow use of "inherent" or "supervisory" judicial powers. In *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), for example, the Court rejected the argument that a federal court has the "inherent" power to dismiss a complaint as a discovery sanction even though such a sanction is not authorized by Rule 37(b) of the Federal Rules of Civil Procedure. "[T]here are constitutional limitations" the Court explained, "upon the power of courts, *even in aid of their own valid processes*, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id*. at 209 (emphasis added). Similarly, in *Hovey* v. *Elliott*, 167 U.S. 409 (1897), discussed above, this Court stated:

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

Id. at 413-414 (emphasis added). However else the Judiciary's "inherent" powers may be deployed, they may not be used in derogation of a panoply of rights conferred by the Constitution.[15]

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[15] The Ninth Circuit's extravagant application of the disentitlement doctrine, moreover, is symptomatic of the distortions that can arise when (as in the civil cases applying the disentitlement doctrine) the federal courts go about crafting a whole body of law pursuant to their "inherent" or "supervisory" powers. Indeed, the disentitlement doctrine has spawned a vast array of case law, as courts struggle to mold and shape (out of whole cloth) the new federal common law of disentitlement. See, *e.g., BCCI Holdings (Luxembourg), Society Anonyme* v. *Pharaon*, 1995 WL 231330, at *4 (S.D.N.Y. 1995) (in civil RICO action between private parties, disentitling fugitive defendant who "flouted the authority of other courts" from obtaining discovery but not from defending the lawsuit).

D. The Disentitlement Doctrine Permits The Government To Forfeit Property To Which It Has No Legitimate Claim

Adding the potent weapon of disentitlement to the government's already powerful arsenal in civil forfeiture cases will inevitably lead to prosecutorial abuses and to injustice. This case provides a vivid illustration. Petitioner's property was seized on the basis of only "minimal evidence that it was illegally used or obtained." *$40,877.59*, 32 F.3d at 1157. The government's conclusory complaint (J.A. 3-9) was supported by a single affidavit of a DEA agent (J.A. 10-28), which was largely devoted to describing the alleged misdeeds of Ciro Mancuso and which consisted of hearsay and multiple hearsay from unnamed confidential informants. See J.A. 10-28.[16] Although petitioner submitted extensive documentary support for his claim that all of the property that was subject to this action was obtained through legitimate funds, those submissions were not considered. And petitioner was "disentitled" from exercising his Fifth Amendment right to a hearing at which he could test the government's showing of probable cause. See *$40,877.59*, 32 F.3d at 1155 ("the real injustice is that the government is allowed to confiscate property on mere allegation").

In addition, the government's own submissions in the court below strongly suggest, if not conclusively establish, that this forfeiture action is barred by the applicable five-year statute of limitations (19 U.S.C. § 1621). This action was commenced in October 1989. Yet the government conceded below that all but two of the Degens' parcels of real property named in the complaint (and alleged to be forfeitable because purchased with drug proceeds) were acquired by petitioner *before* February 15, 1981. J.A. 48-49, 56. In view of this

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[16] More than a year after the trial court ordered petitioner's claims stricken, the government submitted three affidavits in support of its second motion for summary judgment against Karyn Degen. See J.A. 135-161 (Declarations of Michael McCreary, Catherine Bryant, and Ciro Mancuso). Because those affidavits were not before the district court when it ruled on the government's motion to strike Brian Degen's claims, they obviously cannot be considered for the purpose of assessing the government's case against Brian. In any event, the affidavits are of exceedingly dubious value. See note 17, *infra*.

dispositive defense and the extensive documentation submitted to the trial court by petitioner demonstrating his legitimate ownership of the subject property, it is most unlikely that the government could prevail on the merits of this forfeiture action.[17]

Equally troubling, the government's complaint is premised on a retroactive application of 21 U.S.C. § 881(a)(6) and (a)(7). Section 881(a)(6) was signed into law on November 10, 1978. See Pub. L. No. 95-633, Title III, § 301(a), 92 Stat. 3777 (1978). Section 881(a)(7) was signed into law on October 12, 1984. See Pub. L. No. 98-473, Title II, § 306(a), 98 Stat. 2050 (1984); see also *Austin*, 113 S. Ct. at 2811. Because of the government's concession that most of the properties that are involved in this action were acquired by petitioner before February 1981 (J.A. 48-49, 56; see note 3, *supra*), virtually any application of Section 881(a)(7) in this case necessarily would be retroactive. At least some of the property, moreover, was acquired by petitioner before the enactment of Section 881(a)(6). See J.A. 65-72. Neither of these forfeiture provisions, however, was intended by Congress to be retroactive. See *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1501-1508 (1994); 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 4.03 (Matthew Bender 1991 & Cum. Supp. June 1995) (explaining nonretroactive effect of § 881(a)(6)). And even if they were so intended, they could not be applied retroactively to petitioner without violating the Ex Post

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[17] As for the government's ability to prevail on the *criminal* charges against petitioner, suffice it to say that in the only case brought to trial against petitioner's numerous co-indictees, the government recently suffered a "stunning defeat" at the hands of a Nevada jury. 5 *The DOJ Alert* 14 (Apr. 3, 1995); see generally Howard Mintz, *Fort Reno's Obsession*, The American Lawyer 54-61 (May 1995). In acquitting Patrick Hallinan on all charges after only six hours of deliberations, see *S.F. Lawyer is Acquitted in Drug Ring Case*, Los Angeles Times, Mar. 8, 1995, at A3, the jury evidently rejected as incredible the central testimony of the government's star witness, Ciro Mancuso. See *Jury Acquits Hallinan of All Charges*, S.F. Chronicle, Mar. 8, 1995, at A1 ("Jury foreman John Tonner commented after the verdict that Mancuso `would make a good used-car salesman. He lies a lot.'").

Facto Clause of the Constitution. U.S. Const. art. I, § 9, cl. 3; see also J.A. 31.

The necessary consequence of the Ninth Circuit's holding is to free the government from virtually every restraint — whether based in the Constitution, the forfeiture statutes, or the procedural rules governing forfeiture actions — with respect to property owned by a claimant who is a "fugitive" (a term that itself knows almost no boundaries in the disentitlement context). See Dep't of Justice, Asset Forfeiture Manual, at 4-32 (1993) (describing disentitlement as a "powerful tool" that can be used to the government's advantage "even where a claimant [to property] might otherwise have a valid procedural or substantive objection to a forfeiture"). The government may prevail on the basis of a complaint that is for any number of reasons facially defective (see *Pole No. 3172*, 852 F.2d at 638-643) or on claims that are plainly time-barred (as here); may obtain the forfeiture of property that is beyond the district court's *in rem* jurisdiction; may secure a punishment for facilitation under § 881(a)(7) that violates the Eighth Amendment; may bring the action in an unlawful venue; and may even succeed in confiscating property that it asserts (but could never prove) is related to the criminal proceeding in which the "fugitive" has not appeared (*$40,877.59*, 32 F.3d at 1155).[18]

The government "already enjoys a tremendous procedural advantage under the forfeiture laws." *$40,877.59*, 32 F.3d at 1156. It need only show probable cause to believe that property was used to promote illegal activity; the claimant then bears the burden of proving that the property was not involved in any illegal activity. 19 U.S.C. § 1615. Not content with its existing advantage, however, the

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[18] See *$40,877.59*, 32 F.3d at 1155-1156 ("The forfeiture act * * * does not authorize the forfeiture of property simply because the owner is a fugitive, but by using a combination of the forfeiture laws and the fugitive disentitlement doctrine, the government is allowed to do just that."); *Pole No. 3172*, 852 F.2d at 643 ("We refuse to condone a rule that essentially allows the government to go through the missing persons list and seize all the property of everyone who fails to respond to a forfeiture complaint, without even showing the court that it reasonably believes the property is forfeitable as Congress intended it to do.").

government now seeks to remove the only obstacle remaining in the path of its forfeiture juggernaut: the right of a property owner to his day in court to defend against an unlawful forfeiture. The Court should not permit this unwarranted expansion of the government's forfeiture power.[19]

II. PETITIONER IS NOT A "FUGITIVE" WITHIN THE MEANING OF THE DISENTITLEMENT DOCTRINE

Even if this Court determines that the fugitive disentitlement doctrine may be applied in a civil forfeiture action, the Ninth Circuit's decision should be reversed because petitioner does not qualify as a "fugitive." This is so for two independent reasons. *First*, he has not fled from the custody of any court in which he was convicted of a crime; has not otherwise absconded or taken flight in violation of any criminal prohibition; and has not, for that matter, "fled" from the United States in any meaningful sense of that word. The government has never suggested that petitioner fled from a criminal conviction or that his movements violate any criminal proscription, and it did not (and could not) contend in the lower courts that it had proven that petitioner departed this county with an intent to avoid prosecution.

Second, even if the government had made such a showing, it is clear that petitioner ceased to be a "fugitive" before the judgment of forfeiture against his property had become final. As the government now concedes (Br. in Opp. 17 nn.10-11), petitioner was taken into custody in November 1992 by Swiss authorities who were acting at the behest of the United States government (which had repeatedly asked the Swiss to "transfer" petitioner's U.S. indictment to Switzerland, see Appendix ("App."), *infra*, 1a, 3a). It is also undisputed that since the time of his arrest, petitioner has been the subject of a Swiss prosecution that is premised on the very same conduct that is the subject of the United States indictment. Br. in

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[19] Placing such sweeping power in the hands of government prosecutors is especially troubling in view of the government's "direct pecuniary interest in the outcome" of forfeiture proceedings. *James Daniel Good Real Property*, 114 S. Ct. at 502 & n.2; see also *id*. at 515 (Thomas, J., concurring in part and dissenting in part) (expressing "distrust of the Government's aggressive use of broad civil forfeiture statutes").

Opp. 15-16 & n.10. Under these circumstances, it simply cannot be said that petitioner remains a "fugitive" from the United States.

A. Petitioner Is Not A Fugitive From Justice

Every one of this Court's disentitlement cases has involved "fugitives" who escaped from custody (actual or constructive) following a criminal trial and conviction. See *Ortega-Rodriguez*, 113 S. Ct. at 1202 (flight following conviction); *Sharpe*, 470 U.S. at 681 n.2; *id.* at 721 n.1 (Stevens, J., dissenting) (escape following sentencing); *Estelle* v. *Dorrough*, 420 U.S. at 534 (escape from jail following sentencing); *Molinaro*, 396 U.S. at 365 (jumped bail following conviction); *Eisler*, 338 U.S. at 191 (flight abroad following conviction); *Allen* v. *Georgia*, 166 U.S. at 138-139 (escape from jail following conviction); *Bonahan*, 125 U.S. at 692 (same); *Smith*, 94 U.S. at 97 (same). See also *Goeke* v. *Branch*, 115 S. Ct. 1275, 1275-1276 (1995) (per curiam) (jumped bail following conviction). Despite the fact that this Court has approved disentitlement *only* against persons who have already been convicted of crimes, and *only* in cases where there has been a deliberate and unlawful flouting of the convicting court's authority to execute its judgment, the lower courts have not limited their use of disentitlement to this context. On the contrary, they have applied the doctrine to disentitle persons who have never been tried and convicted, who have never been shown to have "fled" in any meaningful sense of that word, and even against persons who merely refused to travel to the United States to face criminal charges. In a handful of cases, moreover, the lower courts have disentitled persons who failed to travel to the United States even though those persons were *incarcerated in a foreign country and powerless to do so*. See, *e.g.*, *United States* v. *Timbers Preserve, Routt County, Colorado*, 999 F.2d 452, 456 (10th Cir. 1993) (property owner "remained a fugitive * * * even though he may have lost control of his own freedom in Laos").

This case represents a rather stark illustration of the problem. In the Ninth Circuit's view, the mere fact that petitioner knew "in December 1990" — when the district court ordered his claim stricken — that "he had been indicted in Nevada but refused to return" was sufficient to make him a fugitive. Pet. App. 5a. The court of appeals also observed that, even if petitioner were currently "incarcerated in a foreign jurisdiction" and thus incapable of returning to the United

States, this would "not preclude application of the fugitive disentitlement doctrine." *Id*. at 7a (citing *United States* v. *Eng*, 951 F.2d 461, 464 (2d Cir. 1991) ("One may flee though confined in prison in another jurisdiction.")). Similarly, the district court declared that "to be a fugitive, a person need not flee the state or country with the intent of avoiding a prosecution or an anticipated prosecution." Pet. App. 18a. See also *id*. at 23a ("In defining a fugitive, culpability lies in knowing that a prosecution is pending and refusing to return to the jurisdiction").

The Ninth Circuit's sweeping definition of "fugitive" thus represents a dramatic departure from the limited circumstances in which this Court has upheld the use of disentitlement. Because disentitlement plainly is a punitive "sanction" (*Ortega-Rodriguez*, 113 S. Ct. at 1207), this Court should limit its use to cases where the disentitled person has been convicted of a crime and has escaped from the custody (actual or constructive) of the convicting court. Such a rule would reserve disentitlement to the most troubling instances of defiance of judicial authority while at the same time ensuring that the "blunderbuss of dismissal" (*ibid*.) is deployed only against those who have been found guilty of criminal conduct beyond a reasonable doubt. It would also place salutary limits on the ability of the lower courts to expand the doctrine into situations where its application gives rise to serious constitutional concerns or is otherwise questionable.

But even if the Court declines to adopt such a bright-line rule, it should reject the broad definition of fugitive status endorsed by the Ninth Circuit in this case. The court of appeals' definition does not require a determination that the absent litigant has engaged in criminally proscribed flight, and it even extends well beyond the ordinary meaning of both the word "fugitive" and the conventional legal concept of "fugitive from justice" as developed in several analogous areas of the law.

The word "fugitive" is uniformly defined by dictionaries as "a person who *flees* or *has fled* from danger, justice, etc." *Webster's New World Dictionary of American English* 544 (3d College ed.

1989).[20] The concept of fleeing (or flight), in turn, not only suggests departure or evasive movement with an intent to avoid capture or detection, but it also logically presupposes knowledge of the thing that is being evaded. One cannot "flee" from a pursuer unless one knows that the pursuer exists.[21] By the same token, merely *declining to travel* to a jurisdiction one left without any intent to evade prosecution cannot accurately be termed "fleeing" or "flight." Purely as a matter of English usage, then, the Ninth Circuit's definition of "fugitive" is untenable.

What is more, in several parallel statutory contexts, Congress has defined the term "fugitive from justice" in a way that is consistent with the ordinary meaning of "fugitive" but inconsistent with the Ninth Circuit's sweeping definition. The federal firearms laws, for example, make it a crime for a "fugitive from justice" to transport or ship any firearm in interstate commerce. 18 U.S.C. § 922(g). The statute also includes the following definition: "The term `fugitive from justice' means any person who *has fled from any State to avoid prosecution for a crime* or to avoid giving testimony in any criminal proceeding." 18 U.S.C. § 921(a)(15) (emphasis added). Under that statutory definition, it plainly is not enough merely to decline to travel to the jurisdiction where charges are pending — to be a fugitive, one must flee the jurisdiction with the intent to avoid prosecution. As the Ninth Circuit itself has correctly observed in this context, "[t]he statute provides that *flight* * * * is the crime, *not* failure to surrender." *United States* v. *Durcan*, 539 F.2d 29, 32 (9th Cir. 1976) (emphasis in original).

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[20] See also *Webster's II New Riverside University Dictionary* 510 (1994) ("Fleeing, as from the law"; "One who flees <a *fugitive* from justice>"); *American Heritage Dictionary* 538 (2d College ed. 1991) ("Running away or fleeing, as from the law"); *The New Shorter Oxford English Dictionaries on Historical Principles of English* 1038 (1993) ("a person who flees or tries to escape from danger, an enemy, justice, a master, etc.").

[21] Of course, a person may be a "fugitive" without departing from a jurisdiction — for example, by concealing oneself or taking evasive action with an intent to avoid prosecution. *United States* v. *Singleton*, 702 F.2d 1159, 1169 (D.C. Cir. 1983).

Another analogous area of federal law is the Felony Fugitive Act, which provides in pertinent part:

> Whoever moves or travels in interstate or foreign commerce *with intent* either (1) to *avoid prosecution, or custody or confinement after conviction*, under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, * * * which is a felony under the laws of the place from which the fugitive flees, or (2) to avoid giving testimony * * * , or (3) to avoid service of * * * lawful process * * * shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1073 (emphasis added). The lower courts have confirmed what is evident from the face of the statute: that interstate travel with intent to avoid prosecution or custody is an essential prerequisite to being found to be a fugitive felon within the meaning of Section 1073(1). See, *e.g.*, *Hett* v. *United States*, 353 F.2d 761, 763 (9th Cir. 1965), cert. denied, 384 U.S. 905 (1966); *Lupino* v. *United States*, 268 F.2d 799, 801 (8th Cir.), cert. denied, 361 U.S. 834 (1959). Mere absence from a jurisdiction is insufficient to support a conviction for being a fugitive under Section 1073. See *Barrow* v. *Owen*, 89 F.2d 476, 478 (5th Cir. 1937) ("mere absence from the state of prosecution * * * is not sufficient proof of the federal crime"); *Reis* v. *United States Marshal*, 192 F. Supp. 79, 81 (E.D. Pa. 1961) (same); *State* v. *Miller*, 412 P.2d 240, 243 (N.M. 1966) (same).

Finally, Congress has enacted a provision that tolls the statute of limitations for crimes when the defendant is a fugitive. 18 U.S.C. § 3290. Entitled "Fugitives from justice," Section 3290 states: "No statute of limitations shall extend to any person *fleeing from justice*." *Ibid*. (emphasis added). In *Streep* v. *United States*, 160 U.S. 128 (1895), this Court suggested that a predecessor provision that was worded identically required a showing of "flight with the intention of avoiding being prosecuted." *Id*. at 133. A majority of the circuits have likewise interpreted Section 3290 as requiring a showing of flight, coupled with an intent to avoid prosecution. See, *e.g.*, *United States* v. *Marshall*, 856 F.2d 896, 900 (7th Cir. 1988) ("government must show that [the defendant] left Illinois with the intent to avoid arrest or prosecution"); *Donnell* v. *United States*, 229 F.2d 560, 562 (5th Cir. 1956) (Section 3290 tolls limitations period only with respect

to those who "absent[] themselves from the jurisdiction of the crime with the intent of escaping prosecution"); *Brouse* v. *United States*, 68 F.2d 294, 295 (1st Cir. 1933) ("The essential characteristic of fleeing from justice is leaving one's residence, or usual place of abode or resort, or concealing oneself, with the intent to avoid punishment.").

Requiring the government to prove, at a minimum, that an absent litigant departed the jurisdiction with an intent to avoid prosecution is also entirely consistent with the purposes of the disentitlement doctrine.[22] As this Court made clear in *Ortega-Rodriguez*, disentitlement is above all a "*sanction* [in the form of] dismissal" (113 S. Ct. at 1207 (emphasis added)), and it is therefore appropriate to confine that sanction to conduct — actual flight with intent to avoid prosecution — that is truly sanctionable. Bail-jumping, escape from custody, and flight to avoid prosecution are all independently unlawful acts; petitioner's refusal to leave his Swiss residence and come to the United States to stand trial, by contrast, is not a violation of any legal duty and may not be directly punished. Why, then, should it be indirectly punishable through the disentitlement doctrine?

Moreover, adoption of a broader definition (to include mere failure to travel) would *not* serve the objectives of the disentitlement doctrine. The purposes of deterrence and protecting the disentitling court's dignity, for example, would not be served by disentitling a person who has not been shown to have "fled" from the jurisdiction to avoid prosecution. And it would be odd indeed if conduct that is sufficiently innocent to escape proscription under the Felony Fugitive Act, 18 U.S.C. § 1073, or even to suspend the running of the statute of limitations for federal crimes, would nonetheless be a legally sufficient basis for the multimillion dollar punitive sanction imposed on petitioner in this case.

If (as we contend) fugitive status requires a demonstration by the government that the disentitled person unlawfully departed the jurisdiction with an intent to avoid prosecution, then the Ninth Circuit's decision must be reversed. The Ninth Circuit squarely rejected this

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[22] Accord *$40,877.59*, 32 F.3d at 1156; *Pecoraro* v. *Commissioner*, 69 T.C.M. (CCH) 2644, 2646 (1995).

definition, holding that the mere fact that petitioner knew "in December 1990" — when the district court ordered his claim stricken — that "he had been indicted in Nevada but refused to return" was sufficient to make him a fugitive. See Pet. App. 5a. See also *id*. at 18a (district court held that "to be a fugitive, a person need not flee the state or country with the intent of avoiding a prosecution or an anticipated prosecution"). There is no need, however, to remand for a determination of whether petitioner possessed the requisite intent to avoid prosecution when he departed the United States. The reason is simple: the government never actually argued that point, and its proffer of evidence utterly failed to prove any such intent.

In its motion to strike and supporting memorandum, the government did not contend that petitioner left the United States with an intent to avoid prosecution. In fact, the government's argument on the issue of petitioner's alleged fugitive status relied primarily on the mere existence of an outstanding arrest warrant against him issued on October 24, 1989 (the same date that petitioner's indictment was returned). See J.A. 45 (stating that petitioner "is a federal fugitive" and citing only the arrest warrant as support); *ibid*. (suggesting that petitioner's failure to return to face charges made him a fugitive). The government's responsive brief was equally silent on this point (J.A. 88-92), even though petitioner, in his opposition to the government's motion to strike, argued that he "did not leave the U.S. with knowledge of [a] pending criminal or forfeiture action." J.A. 59.

Even if the government had pressed this argument in the courts below, the evidence it submitted was woefully insufficient to satisfy the government's burden of proof. In support of its motion to strike, the government submitted (in addition to the arrest warrant) a brief declaration of prosecutor Dorothy Nash Holmes. J.A. 53-56. Holmes stated that a federal marshal had been told by petitioner's neighbors and an employee of petitioner that he had left Hawaii almost a year before the indictment, in either November or December of 1988. J.A. 54. Holmes also stated that petitioner's parents were subpoenaed to appear before a federal grand jury — but not until May 1989, almost six months after petitioner was said to

have left the United States.[23] Finally, Holmes cited a snippet from a handwritten letter that had been recovered from a search of Degen's home. J.A. 55 (quoting statement from letter that petitioner had gotten himself "in a position where I can't go back to Tahoe").

In response, petitioner filed an affidavit stating that he had "moved to Switzerland early in 1988." Affidavit of Brian J. Degen in Support of Opposition to Government's Motion to Strike and For Summary Judgment, at 3 (Oct. 19, 1990). He further explained that he was a Swiss citizen; that "[m]ore than 10 years ago [he had] decided to move to Switzerland and began spending more and more time" there; that he "ha[d] lived in Switzerland a substantial part of the time" and his son, Brian Jr., had attended school there for the past four years; that the principal obstacle to moving his family to Switzerland earlier had been his wife's desire to remain close to her family and to her physician; and that the letter quoted in the government's declaration had been written in late 1987 in an effort to convince his wife to move to Switzerland and have the child she was carrying born there. *Id*. at 1-3. Petitioner also attached the full text of the letter from which the government had quoted, which placed his statement in context and confirmed his explanation for it. See Exhibit A to Claimants' Opposition To Motion To Strike And For Summary Judgment (Sept. 7, 1990).

The government thus failed to prove (or even articulate) that petitioner departed the United States with any intent to avoid prosecution. Having failed to carry its burden, the government should not be permitted a second chance. Accordingly, the order of disentitlement should be reversed and the case remanded so that petitioner may offer a defense to the government's forfeiture claims.

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[23] Holmes also stated that she had subpoenaed records from petitioner's insurance carriers and accountants at some unspecified time before obtaining subpoenas for his parents in May 1989; that, in November 1988, government investigators had traveled to Kauai, Hawaii, as part of their investigation of petitioner; and that petitioner's business records had been discovered in one of his mini-storage units under a false name. J.A. 53-55.

B. Petitioner's Ongoing Prosecution In Switzerland At The Request And Insistence Of The United States Government Disqualifies Him For Fugitive Status

Even if petitioner at one time qualified as a "fugitive" for purposes of the disentitlement doctrine, he plainly ceased to be one prior to August 17, 1993, when the district court entered its amended final judgment. Pet. App. 32a-37a. It is undisputed that petitioner was arrested and taken into custody by Swiss officials in November 1992. See note 5, *supra*; Br. in Opp. 17 nn.10-11. In fact, the Solicitor General has now conceded that "the Swiss government has, in fact, undertaken a prosecution of petitioner, *at the request of the United States* and *based principally on the conduct that formed the basis for the U.S. indictment*." Br. in Opp. 16-17 (emphasis added). This statement is amply confirmed by the two Justice Department letters (whose authenticity the Solicitor General has also conceded, see *id*. at 16 n.9) that petitioner unsuccessfully sought to add to the record in the Ninth Circuit (and that are reproduced in full in an appendix to this brief). App., *infra*, 1a-4a. Those letters confirm the Solicitor General's acknowledgement that the United States is the moving force behind the Swiss prosecution of petitioner.

Under these circumstances, it simply makes no sense to say that petitioner was a "fugitive" from the United States government. Before the judgment was final, he was taken into custody by a foreign government acting at the behest of the United States. He is being prosecuted in Switzerland for the same conduct that forms the basis of the United States indictment. Indeed, as the DOJ letters make clear, the United States has asked the Swiss to prosecute petitioner for the very violations of *United States* law that are specified in his U.S. indictment. App., *infra*, 1a-4a. And as if all of that were not enough, the Swiss magistrate who is carrying out this request from United States prosecutors traveled to Nevada while petitioner's appeal was pending in the Ninth Circuit and took testimony with the assistance of the same Reno prosecutors who litigated this forfeiture action. J.A. 162-163. To say that petitioner "remained a fugitive from the United States" under these circumstances is simply untenable.

In *Ortega-Rodriguez*, this Court recognized that a fugitive's recapture might well be a proper basis for refusing to apply the

disentitlement doctrine. This is such a case. As explained above (at pages 12-17), the reasons underlying the disentitlement doctrine do not support the doctrine's use in civil forfeiture actions, even when a claimant *is* a fugitive from justice. But when the claimant is recaptured by a foreign government acting at the behest of United States prosecutors, there is no possible reason — even in theory — for precluding the claimant from defending his property. For this reason as well, the order striking petitioner's claim should be reversed.[24]

III. IF THE COURT IS OTHERWISE PREPARED TO APPLY THE DISENTITLEMENT DOCTRINE IN THIS CASE, IT SHOULD REMAND TO THE COURT OF APPEALS TO CONSIDER, IN THE FIRST INSTANCE, WHETHER THE GOVERNMENT LACKS THE REQUISITE "CLEAN HANDS" FOR INVOKING THIS EQUITABLE DOCTRINE

In the event that this Court concludes that the disentitlement doctrine can potentially be applied in this context, it should nevertheless remand this case to the court of appeals. By misleading the district court and by filing a knowingly and materially false brief in the court of appeals, the government comes to this Court with "unclean hands," and should accordingly be disabled from invoking the equitable principle of disentitlement. This, if this Court is not otherwise persuaded that the disentitlement doctrine is inappropriate

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[24] The court of appeals rejected the argument that petitioner lost any fugitive status he might have had when he was taken into the custody of Swiss authorities who were acting at the behest of U.S. prosecutors. Pet. App. 5a-7a. As we noted in our reply brief, in rejecting that argument the court stated that "the record contains no admissible evidence to support these claims." *Id.* at 6a (emphasis omitted). In our view, the Solicitor General's concession in his Brief in Opposition has cured whatever deficiency there might otherwise have been in the record. What is more, as we note in Part III below, the government is primarily responsible for the earlier gap in the record. If, however, in light of the court of appeals' decision, this Court declines to resolve the issue entirely (should it need to reach the issue at all), we ask that the case be remanded to the court of appeals with directions that the record be supplemented to enable that court to decide the issue on the merits.

in this setting, it should remand to the court below to resolve this issue.

A. The Government May Not Invoke The Equitable Doctrine Of Disentitlement When It Comes To Court With "Unclean Hands"

It is well settled that the disentitlement doctrine is an "equitable principle" (*United States* v. *Sharpe*, 470 U.S. 675, 681 n.2 (1985)) that is "to be applied at the discretion of the * * * court" (*United States* v. *$40,877.59 in United States Currency*, 32 F.3d 1151, 1152 (7th Cir. 1994)). "Disentitlement is not a matter of jurisdictional dimension; rather, it is a concept premised on principles of equity." *United Elec. Radio & Mach. Workers of Am.* v. *163 Pleasant St. Corp.*, 960 F.2d 1080, 1098 (1st Cir. 1992). Accord *In re Prevot*, 59 F.3d 556, 562 (6th Cir. 1995) ("The power of an American court to disentitle a fugitive from access to its power and authority is an equitable one.").

To invoke any such equitable doctrine, the government must of course come to court with "clean hands." Thus,

> [i]t is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into court with clean hands. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matters in controversy should be placed before the court.

Keystone Driller Co. v. *General Excavator Co.*, 290 U.S. 240, 244 (1933) (internal quotations omitted). As this Court explained nearly 150 years ago, "[t]he equitable powers of this court can never be exerted in behalf of one who has acted fraudulently[] or who by deceit or any unfair means has gained an advantage." *Bein* v. *Heath*, 47 U.S. (6 How.) 228, 246-247 (1848).

"This maxim is far more than a mere banality." *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945). Rather, "[i]t is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks

relief, however improper may have been the behavior of the [other party]." *Ibid.* Accord *ABF Freight System, Inc.* v. *NLRB*, 114 S. Ct. 835, 842 (1994) (Scalia, J., concurring in the judgment). And while "`equity does not demand that its suitors shall have led blameless lives,'" *Morton Salt Co.* v. *G.S. Suppiger Co.*, 314 U.S. 488, 493 (1942), nevertheless in the "ordinary case" a "federal court should not * * * lend its judicial power to a plaintiff who seeks to invoke that power for the purpose of [achieving its] ends in clear violation of law." *Johnson* v. *Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944). Applying this principle, the Court has not hesitated to withhold equitable relief from parties that came to court with unclean hands. See, *e.g.*, *Precision Instrument*, 324 U.S. at 816-820; *Morton Salt*, 314 U.S. at 493-494.

Because "[t]he general principles of equity are applicable in a suit by the United States," *Pan American Petroleum & Transport Co.* v. *United States*, 273 U.S. 506 (1927), it follows that the "clean hands" doctrine applies no less to the government than to any other party.[25] See *ABF Freight System*, 114 S. Ct. at 839 (where false testimony is "knowingly exploited by a criminal prosecutor, such wrongdoing is so `inconsistent with the rudimentary demands of justice' that it can vitiate a judgment even after it has become final"); *Olmstead* v. *United States*, 277 U.S. 438, 483-484 (1928) (Brandeis, J., dissenting). Indeed, the Court has emphasized that the "clean hands" doctrine applies with *greater* force where, as here, the case is affected with a public purpose (*Precision Instrument*, 324 U.S. at 815):

> [W]here a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case

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[25] "Certainly when seeking an equitable remedy the United States is no more immune to the general principles of equity than any other litigant." *United States* v. *Second Nat'l Bank*, 502 F.2d 535, 548 (5th Cir. 1974), cert. denied, 421 U.S. 912 (1975). Accord *United States* v. *Wilson*, 707 F.2d 304, 312 (8th Cir. 1982) (on denial of rehearing) ("It is well established that the United States is subject to general principles of equity when seeking an equitable remedy").

> it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public.

See generally *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 246 (1944) (in recognizing courts' power to vacate judgment procured by fraud, explaining that "tampering with the administration of justice" in this way "involves far more than an injury to a single litigant"; rather, "[i]t is a wrong against the institutions set up to protect and safeguard the public").

B. In Light Of Its Admitted Misrepresentations In The Courts Below, The Government Almost Assuredly Comes To Court With "Unclean Hands"

From its earliest submissions in the district court, the government has misrepresented the circumstances of petitioner's arrest and detention by the Swiss government. For example, in opposing the motion by Karyn Degen, petitioner's wife, for an extension of time to oppose a summary judgment motion, the government characterized her central contention — that the United States has secured petitioner's arrest and detention — as "little more than a literary flight of fancy constructed out of conjecture and panic." J.A. 167-168. Thereafter, at the close of a February 1, 1993 hearing, the government's lawyer insisted that Brian Degen's "unavailability should not in any way be blamed on the government in this case." App., *infra*, 7a (reprinting excerpts of 2/1/93 Transcript).[26]

Once the case arrived in the court of appeals — where one of petitioner's central claims was that the United States had instigated his arrest by the Swiss (J.A. 171-173) — the government's misrepresentations grew bolder. In its merits brief, the United States Attorney characterized that contention as "outlandish," "facially absurd," and "an imaginative attempt to blame the United States for [petitioner's] incarceration in Switzerland." J.A. 175, 177. The brief went on to note that, "[w]hile living in Switzerland, [petitioner] has *apparently* run afoul of Swiss law"; and it represented that petitioner's arrest was "in connection with a *purely* Swiss Prosecution." J.A. 176 (emphases added). "[T]he United States

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[26] For the Court's convenience, we have lodged with the Clerk copies of the entire transcript of the February 1, 1993 hearing before the district court.

was obliged" by treaty, the government conceded, "to respond to Swiss requests for information"; but according to the government's brief there was "no mechanism" by which the United States could transfer a prosecution to Switzerland. J.A. 177 (emphasis added).

Even at the time they were made, these denials by the government appeared highly dubious. Petitioner had attached as exhibits to his reply brief two letters from the United States Department of Justice to the Swiss Federal Office for Police Matters in Berne. See App., *infra*, 1a-4a. The first, dated February 27, 1990, formally "request[ed]," pursuant to "Article 6 of the Swiss Federal Criminal Code," the "transfer to Switzerland of the prosecution of Brian John Degen on the federal United States charges for which he was indicted in the District of Nevada." App., *infra*, 1a. The letter was accompanied by a certified copy of the U.S. indictment against petitioner as well as other materials. *Ibid*. The second letter, dated February 5, 1992, made reference to a previous letter (dated November 11, 1990) in which the United States "formally requested that the prosecution [of Brian Degen] be taken over by Switzerland." App., *infra*, 3a. It continued:

> Since that time, we have supplemented our evidence on two occasions at your request; however, we have seen no indication that the Swiss investigation is moving forward. Can you advise us when it can be expected that Degan [sic] will be arrested, what charges he will face and what timetable for trial may be anticipated?

Ibid. The letter "emphasize[d] the importance of this case to establishing that transfer of prosecution is a[] realistic method," noted that "a number of years ago" another United States criminal case "was successfully prosecuted in Switzerland," and expressed hope for "a comparable result in this case." *Id*. at 4a.[27]

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[27] On December 12, 1994, petitioner filed a motion to supplement the record in the Ninth Circuit. J.A. 181-182. Petitioner sought to add not only the two Justice Department letters that had been attached as exhibits to his reply brief, but also the transcript of the February 1, 1993 hearing on Karyn Degen's request for more time. The Ninth Circuit denied petitioner's motion.

When the case came into the more responsible hands of the Solicitor General, the government at long last acknowledged what it had steadfastly denied before — that petitioner's arrest and detention by the Swiss had indeed been procured by the United States. The Solicitor General conceded that "the Swiss government has, in fact, undertaken a prosecution of petitioner, at the request of the United States and based principally on the conduct that formed the basis for the U.S. indictment" (Br. in Opp. 16-17), and that the Justice Department letters attached to petitioner's reply brief in the court of appeals were, in fact, "authentic." *Id*. at 16 n.9. The Solicitor General also acknowledged that "[s]ome statements in the government's brief" in the court of appeals

> incorrectly suggested that the Department of Justice played no part at all in instigating the Swiss prosecution, when in fact the Department did request that Swiss authorities prosecute petitioner in Switzerland for the same conduct that underlay his indictment in the United States. For example, the government's brief characterized petitioner's arguments as "an imaginative attempt to blame the United States for [petitioner's] incarceration in Switzerland" (Gov't C.A. Br. 15 n.9), and stated that, "While living in Switzerland, Brian Degen has apparently run afoul of Swiss law. * * * He was arrested * * * in connection with a purely Swiss prosecution." Gov't C.A. Br. 16; see also *id*. at 17-18.
>
> The government's brief did not, in our judgment, appropriately acknowledge and set forth the full background of the government's involvement in urging Swiss authorities to prosecute petitioner.

Br. in Opp. 17 n.11 (ellipses added).

It can hardly be denied that the prosecutor's submissions in the lower courts constitute egregious ethical violations. *All* lawyers owe a duty of "candor toward the tribunal," and accordingly they may not "make a false statement of material fact or law." Model Rules of Professional Conduct 3.3(a)(1). Prosecutors, in turn, bear "special responsibilities" (*id*. Rule 3.8); "[i]t is as much [their] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Berger v. *United States*, 295 U.S. 78, 88 (1935). As the Court explained in *Giglio* v. *United States*, 405 U.S. 150, 153 (1972): "[D]eliberate deception of a court * * * by the presentation of known false evidence is incompatible with `rudimentary demands of justice.'"

In view of the government's misrepresentations to the courts below, this Court should, at a minimum, remand this case for consideration of the "unclean hands" issue.[28]

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[28] The court of appeals may also wish to consider, on such a remand, whether — in light of the government's misleading submissions — the "supervisory" power of the federal courts *forbids*, not permits, the application of the disentitlement doctrine. "[T]he supervisory power," this Court has noted, "serves the `twofold' purpose of deterring illegality and protecting judicial integrity." *United States* v. *Payner*, 447 U.S. 727, 736 n.8 (1980). See, *e.g.*, *Elkins* v. *United States*, 364 U.S. 206 (1960); *Mallory* v. *United States*, 354 U.S. 449 (1957); *Mesarosh* v. *United States*, 352 U.S. 1 (1956); *Upshaw* v. *United States*, 335 U.S. 410 (1948); *McNabb* v. *United States*, 318 U.S. 332 (1943). By filing a knowingly and materially false brief in the court of appeals, the government critically undermined the integrity of the judicial system. Moreover, "a result which leaves intact a [judgment] obtained through a [submission] tainted by bad faith may encourage repetition of the impropriety disclosed by the record in this case." *Rinaldi* v. *United States*, 434 U.S. 22, 31 n.17 (1977). See also *id*. at 34 (Rehnquist, J., dissenting) ("`the Government's attempt to manipulate the use of judicial time and resources through its capricious, inconsistent application of its own policy clearly constitutes bad faith and a violation of the public interest; our sanction of such conduct would invite future misconduct by the Government'"). In short, assuming, arguendo, that the supervisory power could *ever* permit disentitlement in this setting, it cannot avail the government on this record. Having misled the court of appeals, the government has relinquished any right to call upon the court's supervisory authority. To the contrary, if anyone needed "supervision" in this case, it was the prosecutors themselves.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1996

[United States Department of Justice Letterhead]

February 27, 1990

Mr. H.P. Wyssmann
Federal Office for Police Matters,
Berne
Division of International Legal Affairs
Berne, Switzerland

Re: Prosecution of Brian John Degen in Switzerland Reference no.: B78652 HPW-9

Dear Mr. Wyssmann:

Pursuant to your telefax dated January 18, 1990 and in accordance with Article 6 of the Swiss Federal Criminal Code, our office respectfully requests the transfer to Switzerland of the prosecution of Brian John Degen on the federal United States charges for which he was indicted in the District of Nevada. Enclosed herewith are the following:

1. A certified copy of the Arrest Warrant for Brian John Degen.
2. A certified copy of the superseding Indictment charging Brian John Degen with thirty (30) counts of criminal activity.
3. A sworn affidavit by Special Agent Ronald M. Davis of the Drug Enforcement Administration of the United States of America setting forth the evidence against Brian John Degen, and several exhibits thereto.

4. The criminal charges under which Brian John Degen was indicted in the United States.

Sincerely,

Drew C. Arena
Director

Office of International Affairs
Criminal Division

By:

/s/ Jennafer W. Moreland
Jennafer W. Moreland
Trial Attorney

Enclosure

cc: Dorothy Nash Holmes
Assistant United States Attorney
United States Attorney's Office
Organized Crime Drug
Enforcement Task Force
Federal Building and U.S. Courthouse
300 Booth Street
Reno, Nevada 89509

[United States Department of Justice Letterhead]

February 5, 1992

Herrn H.P. Wyssmann
Head, Extradition Section
Federal Office for Police Matters
Bundesrain 20
CH 3003 Bern
Switzerland

Re: Transfer of Brian J. Degan [sic] Prosecution to Switzerland; Swiss Ref. Nr. B78652 HPW-9,

Dear Herr Wyssmann:

Brian J. Degan [sic] is sought by the United States District Court for the District of Nevada for the smuggling of hugh [sic] amounts of marijuana and for attendant money laundering. On November 11, 1990, the Office of International Affairs of the United States Department of Justice sent to Swiss authorities a certified and translated copy of an indictment brought against the Swiss citizen Brian John Degan [sic] for drug trafficking in the United States, as well as certified and translated documents containing evidence gathered during the course of the American investigation against Degan [sic]. Since Degan [sic] is a Swiss citizen and may therefore not be extradited to the United States, at that time we formally requested that the prosecution be taken over by Switzerland.

Since that time, we have supplemented our evidence on two occasions at your request; however, we have seen no indication that the Swiss investigation is moving forward. Can you advise us if or when it can be expected that Degan [sic] will be arrested, what charges he will face and what timetable for trial may be anticipated?

We would emphasize the importance of this case to establishing that transfer of prosecution is an realistic method for Switzerland to guard its citizens, while simultaneously avoiding the untenable result that fugitive [sic] are, in effect, immunized from

punishment for they may not be extradited. We consider this individual to be a major marijuana trafficker, who should not be permitted to flaunt his disregard of the law.

Mary Jo recalls that, a number of years ago, a case originating with one of the Organized Crime Drug Enforcement Task Forces (OCDETF), the Southeast Task Force, was successfully prosecuted in Switzerland. We look forward to a comparable result in this case.

Thank you very much for your assistance in this matter.

Sincerely,

Drew C. Arena
Director
Office of International
Affairs
Criminal Division

/s/ Kenneth J. Harris
By: Kenneth J. Harris
Trial Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

_____

(Title Omitted in Printing)

_____

TRANSCRIPT OF PROCEEDINGS
BEFORE DISTRICT COURT

February 1, 1993

_____

APPEARANCES:

FOR THE PLAINTIFF:	GREG ADDINGTON ASSISTANT U.S. ATTORNEY RENO, NEVADA
FOR THE CLAIMANTS:	DANIEL W. STEWART RENO, NEVADA
	C. FREDERICK PINKERTON RENO, NEVADA
REPORTED BY:	MILDRED J. TERRY, CSR

* * *

[13] THE COURT: MR. ADDINGTON.

MR. ADDINGTON: THANK YOU, YOUR HONOR.

THE SUGGESTION THAT THE WITNESSES SOMEHOW COME AS A SURPRISE TO THE CLAIMANTS IS NOT A SUGGESTION THAT SHOULD BE TAKEN STRONGLY BY THE COURT. TO SUGGEST THAT THE NAME CIRO MANCUSO COMES AS A SURPRISE TO THE CLAIMANTS SIMPLY CANNOT BE CONFIRMED IN ANY WAY. MR. MANCUSO'S NAME WAS MENTIONED CERTAINLY IN

EVERY WITNESS'S DEPOSITION TAKEN IN THIS CASE. HIS NAME IS PLASTERED ALL OVER THE STATE IN SUPPORT OF THE COMPLAINT.

AS I MENTIONED, CATHY WILSON BRYANT'S NAME WAS MENTIONED —

THE COURT: DID YOU GIVE RESPONSES TO INTERROGATORIES WHERE YOU DIDN'T LIST THESE PEOPLE AS POSSIBLE WITNESSES?

MR. ADDINGTON: YOUR HONOR, INTERROGATORIES WERE PROVIDED AND AS PART OF THOSE ANSWERS, AN AFFIDAVIT OF MR. RONALD DAVIS WAS SUBMITTED. THAT AFFIDAVIT NAMED CERTAIN WITNESSES BY CONFIDENTIAL SOURCE NUMBERS. MR. MANCUSO WAS IDENTIFIED BY NAME THROUGHOUT THE AFFIDAVIT.

ADDITIONALLY, THE ACTUAL NAMES OF THE VARIOUS

[14]

CONFIDENTIAL SOURCES WERE ALSO IDENTIFIED SO THAT THE AFFIDAVIT COULD BE READ WITH SOME MEANING. SO MR. MANCUSO'S NAME —

THE COURT: HE WAS NOT MENTIONED AS A POTENTIAL WITNESS HIMSELF?

MR. ADDINGTON: THAT IS CORRECT.

THE COURT: OKAY. WHAT DO YOU THINK ABOUT A STAY OF THIS CASE UNTIL THE CRIMINAL CASE MOVES FORWARD?

MR. ADDINGTON: MY UNDERSTANDING, YOUR HONOR, IS THAT THERE IS NO NEED FOR ANY FURTHER SECRECY IN THAT MATTER. DISCOVERY CLOSED IN THAT MATTER BACK IN JULY OF LAST YEAR. THERE IS NO MORE DISCOVERY TO HAPPEN AND THERE IS CERTAINLY NO NEED FOR ANY STAY, BECAUSE THERE IS NO FURTHER INVESTIGATION, NO FURTHER DISCOVERY TO BE CONDUCTED THAT WOULD IN ANY WAY INTERFERE WITH THE CRIMINAL MATTER, SO I SEE

NO REASON FOR THE REQUESTED STAY, PARTICULARLY IN THE CONTEXT OF THE PENDING MOTION FOR SUMMARY JUDGMENT.

I WOULD POINT OUT, YOUR HONOR, ALSO, THAT MR. DEGEN IS NO LONGER A CLAIMANT IN THIS CASE, HE IS MERELY A WITNESS, AND HIS UNAVAILABILITY SHOULD NOT BE IN ANY WAY BLAMED ON THE GOVERNMENT IN THIS CASE. IF KARYN DEGEN WAS IN THE PROCESS OF PREPARING A MOTION FOR SUMMARY JUDGMENT OR WAS IN THE PROCESS OF COLLECTING EVIDENCE TO SUPPORT HER CLAIM, THEN I THINK IT WOULD FALL ON HER TO

[15]

MAKE CERTAIN THAT SHE HAD THE EVIDENCE SHE NEEDED, THE DECLARATIONS SHE NEEDED, THE EVIDENCE SHE NEEDED TO PRESERVE THAT KIND OF TESTIMONY. IF MR. DEGEN HAD FALLEN DEAD, HIS TESTIMONY WOULD NOT BE AVAILABLE EITHER. HIS UNAVAILABILITY SHOULD NOT, IN MY VIEW, NOT FORM THE BASIS FOR THE REQUEST FOR EXTENSION.

THE COURT: ALL RIGHT. THANK YOU.

CAN YOU POINT, MR. STEWART, TO A SPECIFIC MOTION TO COMPEL OR RESPONSE WHICH PREVENTED YOU FROM HAVING DISCOVERY YOU SOUGHT PREVIOUSLY?

MR. STEWART: YES, YOUR HONOR. I DID FILE A MOTION TO COMPEL IN THIS CASE, FOR THE PRODUCTION OF DOCUMENTS.

THE COURT: CAN YOU TELL ME WHEN THAT WAS FILED?

MR. STEWART: NO, YOUR HONOR, I CAN'T TELL YOU.

THE COURT: JUST GIVE ME A VERY ROUGH IDEA. THE COURT HAS THE DOCKET. I HAVE THE FILE.

MR. STEWART: IT WOULD HAVE HAD TO HAVE BEEN FILED IN MAY OF 1991.

THE CLERK: YOUR HONOR, I SHOW ITEM NUMBER 38.

THE COURT: LET ME LOOK AT THAT.

* * *

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[THE COURT:] I HAVE ALREADY EXPRESSED MY FEELINGS THAT I'M NOT IMPRESSED BY THE PROPOSITION THAT THERE ISN'T SOME WAY OF GETTING TO BRIAN DEGEN SO THAT COUNSEL CAN OBTAIN AFFIDAVITS OR DECLARATIONS FROM HIM AS APPROPRIATE SO WE WILL BE ABLE TO COMMUNICATE WITH HIM. I THINK THE GOVERNMENT, IN ORDER TO PROTECT ITSELF, SHOULD LOOK INTO THE SITUATION OF BRIAN DEGEN SO THAT IT WILL BE IN A POSITION, SHOULD THIS COME UP AGAIN, TO REPRESENT TO THE COURT THAT BRIAN DEGEN IS AVAILABLE AND CAN BE CONTACTED AND PROVIDED INFORMATION AND DECLARATIONS CAN BE OBTAINED FROM HIM. IF IT TURNS OUT THAT IT'S REALLY TRUE THAT HE CAN'T BE CONTACTED, THAT'S GOING TO CAUSE A SERIOUS PROBLEM. THAT MAY WELL BE BEYOND THE POWERS OF OUR GOVERNMENT BECAUSE THIS MAN IS IN SWITZERLAND, BUT NONETHELESS, THE GOVERNMENT SHOULD CHECK INTO THE AVAILABILITY OF MR. DEGEN SO THAT IT CAN DEFEND ITSELF.

[40]

THE COURT IS NOT — THIS IS NOT TO BE IN THE MINUTES, MS. CLERK. I'M NOT IMPRESSED BY THE REPRESENTATIONS THAT THE UNITED STATES GOVERNMENT CAUSED CRIMINAL CHARGES TO BE PRESSED AGAINST DEGEN IN AID OF THIS FORFEITURE CASE. THAT INFORMATION IS AT LEAST SECOND- OR THIRD-HAND, PRESENTED IN THE RATHER OFFHAND WAY, AND I PUT VERY LITTLE STOCK IN THAT REPRESENTATION THAT THERE IS ANY SUCH LETTER. AND AS I SAY, I DON'T PUT MUCH STOCK IN THE PROPOSITION, BASED ON THE PAPERS I HAVE SEEN,

THAT IT'S NOT GOING TO BE POSSIBLE TO CONTACT BRIAN DEGEN AND TO OBTAIN HIS DECLARATION, POSSIBLY EVEN HIS DEPOSITION, AND TO COMMUNICATE WITH HIM AND PROVIDE HIM WITH THE CLAIMS THAT HAVE BEEN MADE ON THE OTHER SIDE. IT APPEARS TO ME THAT SHOULD BE POSSIBLE.

I MIGHT JUST MENTION ONE OTHER THING, AND THAT IS WE DID LOOK TO SEE WHETHER THE FUGITIVE DISENTITLEMENT DOCTRINE WOULD SOMEHOW APPLY TO BRIAN DEGEN, AND WE COULD FIND NO SUCH AUTHORITY AND CONCLUDED THAT BRIAN DEGEN, BY REASON OF BEING A FUGITIVE, WOULD NOT BE BARRED FROM PRESENTING HIS DECLARATION OR DEPOSITION OR TESTIMONY IN THE CASE WHICH NOW INVOLVES ONLY KARYN DEGEN, SINCE BRIAN DEGEN'S CLAIM HAS BEEN DISMISSED. THE DOCTRINE APPEARS TO APPLY TO THE INTEREST OF PARTIES WHO HAVE BECOME DISENTITLED, BUT WOULD NOT BAR A WITNESS WHO IS A FUGITIVE FROM TESTIFYING IN ANOTHER PERSON'S CASE. THE FUGITIVE IS

[41]

NOT ENTITLED TO ENGAGE THE COURT'S RESOURCES, AND BRIAN DEGEN WOULD NOT BE ENDEAVORING TO DO THAT HERE. IT APPEARS FAIR FOR A FUGITIVE TO LOSE HIS RIGHTS BECAUSE HE FLOUTS THE PROCESS, BUT NOT FAIR TO BAR A THIRD PERSON BECAUSE THE WITNESS HAPPENS TO BE A FUGITIVE. SO THAT IS OUR FINDING ON THAT.

I DON'T THINK WE MADE MUCH GROUND HERE, BUT WE WORKED AT IT.

* * *