LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

THE FUGITIVE DISENTITLEMENT DOCTRINE: FOIA AND PETITIONS FOR REVIEW

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Practice Advisory[1]
Updated April 29, 2013

In the immigration context, the fugitive disentitlement doctrine arises frequently 1) when courts of appeals apply the doctrine to deny petitions for review and 2) when government agencies invoke the doctrine to deny Freedom of Information Act (FOIA) requests.[2]

First, this practice advisory explores the development of the doctrine and the different contexts in which the courts and DHS apply the doctrine. Second, the advisory explains why DHS cannot apply the doctrine to deny FOIA requests and ways individuals may challenge these FOIA denials. Third, the advisory describes specific scenarios where courts of appeals invoke the doctrine to dismiss petitions for review, and offers arguments that individuals may use to challenge the doctrine.

I. What is the Fugitive Disentitlement Doctrine?

The fugitive disentitlement doctrine is an equitable doctrine that developed in the criminal law context to limit a person's ability to appeal as long as he or she remained a "fugitive." According to the doctrine, an appellate court may dismiss an appeal when the party seeking relief becomes a fugitive. *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239 (1993). The First Circuit described the purpose of the doctrine:

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[1] This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

[2] The concept of disentitlement also arises in other contexts not directly discussed here, such as when the IJ or Board denies a motion to reopen as a matter of discretion after a respondent has failed to report for removal. *See Matter of Barocio*, 19 I&N Dec. 255 (BIA 1985).

> The fugitive-from-justice doctrine is a prudential device which courts may invoke to estop fugitives from challenging criminal convictions in absentia. The driving force behind the doctrine is the idea that a criminal defendant, following conviction and initiation of an appeal, should not be allowed, by absconding, to create a 'heads I win, tails you lose' situation.

United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1098 (1st Cir. 1992) (citations omitted).

The Supreme Court has described the dual enforceability and deterrent justifications for the fugitive disentitlement doctrine: 1) when a person is a "fugitive," there is no assurance that a court's judgment will be enforceable, and 2) dismissal of an appeal after the defendant has fled the court's jurisdiction "serves an important deterrent function and advances an interest in efficient, dignified appellant practice." *Ortega-Rodriguez*, 507 U.S. at 240-42. Although the Supreme Court has never extended the application of the doctrine to cases outside of the criminal context, courts of appeals have applied the doctrine in the civil context. *See, e.g., Empire Blue Cross and Blue Shield v. Finkelstein*, 111 F.3d 278, 281-82 (2d Cir. 1997) (holding that defendants in a civil action were subject to the doctrine because they failed to appear for depositions, to comply with a court order to appear, or to submit to authorities after bench warrants were issued); *Conforte v. Commissioner*, 692 F.2d 587, 590 (9th Cir. 1982), *stay denied*, 459 U.S. 1309 (1983) (finding a petitioner could not appeal a judgment in a civil case because he was a fugitive from a criminal conviction and both actions were related to a general tax evasion scheme).

Courts also have extended the doctrine to immigration cases. *See, e.g., Bar-Levy v. INS*, 990 F.2d 33, 35 (2d Cir. 1993) ("[a]lthough an alien who fails to surrender to the INS despite a lawful order of deportation is not, strictly speaking, a fugitive in a criminal matter, we think that he is nonetheless a fugitive from justice"); *Sapoundjiev v. Ashcroft*, 376 F.3d 727, 728-29 (7th Cir. 2004) (dismissing petition for review because petitioners did not comply with notice to report for removal); *Antonio-Martinez v. INS*, 317 F.3d 1089, 1093 (9th Cir. 2003) (dismissing petition for review because petitioner was out of touch with lawyer and court for approximately two years); *Arana v. INS*, 673 F.2d 75, 77 (3d Cir. 1982) (dismissing petition for review after petitioner failed to comply with an order to report for deportation and could not be located by federal authorities or his lawyer); *Hussein v. INS*, 817 F.2d 63 (9th Cir. 1986) (dismissing petition for review because of petitioner's escape from custody at Florence, Arizona).

Not all circuits have applied the doctrine. The Eighth Circuit, for example, has not yet applied the doctrine to dismiss a petition for review. *See Hassan v. Gonzales*, 484 F.3d 513, 516 (8th Cir. 2007) (declining to apply the doctrine to dismiss the petition for review when the applicant voluntarily departed to Canada); *Nnebedum v. Gonzales*, 205 Fed. Appx. 479, 480-81(8th Cir. 2006) (declining to apply the doctrine, denying petition for review on other grounds). However, despite the decisions of some courts to refrain from applying the doctrine, no court of appeals has said that the doctrine does not apply in the immigration context.

In addition to the courts, DHS has adopted the doctrine to reject FOIA requests after a determination that the FOIA requester is a "fugitive."[3] Denial letters provided to the Legal Action Center state that 1) agency records indicate the requester is a fugitive, 2) that neither the requester nor an agent acting on behalf of the requester is entitled to the access, appeal or review provisions of the Freedom of Information Act, and 3) that the agency will not process the request until the individual surrenders to federal authorities and ceases to be a fugitive. In at least one letter, the agency stated that a relationship existed between the information/records sought and the individual's status as a fugitive, and that the requested records could assist the client in continuing to elude apprehension.

II. Freedom of Information Act

A. What are the Arguments Against Application of the Fugitive Disentitlement Doctrine to Deny FOIA Requests?

i. Any Person May Request Information under FOIA

FOIA explicitly provides that "any person" may request documents under the Act. 5 U.S.C. § 552(a)(3).[4] Courts have long held that the "any person" standard applies to both U.S. citizens and foreign citizens. *Stone v. Export-Import Bank of the United States*, 552 F.2d 132, 136-37 (5th Cir. 1977), *reh'g denied*, 555 F.2d 1391 (5th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978).

Agencies may only withhold information from a FOIA requester under certain exceptions outlined at 5 U.S.C. § 552(b)(1)-(9). Prior to the enactment of FOIA, agencies had discretion to withhold information if the agency believed it to be "in the public interest," for example, or "for good cause shown." *Soucie v. David*, 448 F.2d 1067, 1076 (D.C. Cir. 1971) (citing former provisions of the APA). FOIA's purpose was to increase public access to information and by directing agencies to disclose information to "any person," agencies could no longer consider the particular interests of the FOIA requester. *Id*. at 1077. *See also O'Rourke v. United States Dep't of Justice*, 684 F. Supp. 716, 719 (D.D.C. 1988) ("the Act focuses on whether the material should be accessible to the public and *not on which members of the public should have access*") (emphasis added).

Unless requested material falls into one of the specific statutory exemptions, it must be made available on demand to any member of the general public. None of the exceptions

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[3] *See, e.g.*, DEPARTMENT OF HOMELAND SECURITY, 2009 ANNUAL FOIA REPORT TO THE ATT'Y GEN. 6 (2010), at http://www.dhs.gov/xlibrary/assets/foia/privacy_rpt_foia_2009.pdf (indicating that ICE denied 5 initial FOIA requests because the individual was labeled a fugitive).

[4] "Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to *any person*." 5 U.S.C. § 552(a)(3) (emphasis added).

at § 552(b)(1)-(9) allows information to be withheld due to the fugitive status of the individual requester. The FOIA statute simply does not provide agencies with equitable latitude to deny FOIA requests based on the fugitive disentitlement doctrine.

ii. Equitable Principles Cannot be Applied to Deny FOIA Requests

Denial of information under the FOIA statute on equitable grounds is not appropriate. Although the fugitive disentitlement doctrine was created by the courts to dismiss an appeal for equitable reasons, these equitable principles cannot be applied to create a new exemption to disclosure under the FOIA statute.

Because FOIA explicitly provides exemptions to disclosure, the Act already "strikes a balance among factors which would ordinarily be deemed relevant to the exercise of equitable discretion, i.e., the public interest in freedom of information and countervailing public and private interests in secrecy." *Soucie*, 448 F.2d at 1077. *See also O'Rourke*, 684 F. Supp. at 718-19 (declining to dismiss a FOIA action based on the specific motives of the requesters, because the motives in obtaining the information was irrelevant under the statute and "use of broad equitable powers" was not appropriate in the FOIA context).

iii. In the Alternative, the Equitable Principles Underlying the Fugitive Disentitlement Doctrine do not Apply

In addition to a lack of authority under the FOIA statute for application of the doctrine to deny FOIA requests, the equitable considerations underlying the fugitive disentitlement doctrine are not present in the FOIA context. As mentioned, the Supreme Court has explained the dual enforceability and deterrent function of the doctrine: 1) when a person is a "fugitive," there is no assurance that a court's judgment will be enforceable, and 2) dismissal of an appeal after the defendant has fled the court's jurisdiction "serves an important deterrent function and advances an interest in efficient, dignified appellate practice." *Ortega-Rodriguez*, 507 U.S. at 240-42. Neither of these functions is relevant in the FOIA context.

First, the agency responding to the FOIA requester is not a court that will issue a judgment. Therefore the enforceability of the judgment is not a concern. *Cf. Antonio-Martinez v. INS*, 317 F.3d at 1093 (expressing concern that the fugitive appellant possessed a "heads I win, tails you'll never find me" mentality). In addition, the deterrent function of the disentitlement doctrine does not apply in the FOIA context. As the Supreme Court explained in *Ortega-Rodriguez*, judicial defiance is not punishable by disentitlement when the defiance has no connection to the proceeding. 507 U.S. at 250-51 (finding that the doctrine should not be de facto applied to a person who escaped and was recaptured before appeal because the person's former fugitive status did not necessarily affect appellate proceedings). Therefore, the nature of the proceeding and the fugitive appellant's role in the court proceeding are intrinsic to the doctrine's purpose: to preserve the integrity of the appellate process, including the time and resources of the court and any to the government that might result from a fugitive's absence. *Id*. at 249. Here, the process of requesting information under FOIA does not resemble a court

proceeding. The requester does not have the same obligations as an appellant before a federal court, and must only comply with the statutory requirements for requesting documents under FOIA. Unlike a fugitive in a court proceeding, a fugitive submitting a FOIA request does not cause a delay in FOIA proceedings or defy the jurisdiction of any court or agency. While the status of an appellant is arguably important in a court proceeding, the status of the requester is immaterial to the process of requesting documents under FOIA.

B. How Can You Challenge a FOIA Denial Based on the Fugitive Disentitlement Doctrine?

As explained above, the agency has no authority under FOIA to withhold documents because of an individual's "fugitive" status. The arguments discussed above can be asserted in an administrative and federal court appeal of the agency's refusal to respond to the FOIA request.

First, the FOIA statute provides the right to seek administrative review of a denied or unanswered request. An agency is required to determine whether it will comply with an initial FOIA request within 20 days of receiving the request. 5 U.S.C. § 552(a)(6)(A)(i). If the agency does not respond to the request within 20 days, the failure to respond may be treated as a constructive denial and appealed. Because DHS refuses to respond to requests based on the fugitive disentitlement, the agency's refusal may be treated as a constructive denial.

The agency has an additional twenty days to respond to the appeal of the initial denial. § 552(a)(6)(A)(ii). If the agency fails to respond to both the initial FOIA request and the administrative appeal, the requester is deemed to have exhausted all administrative remedies. § 552(a)(6)(C). At this point, the requester may file suit in district court.

C. Obstacle to Consider – Fugitive Disentitlement Doctrine Applied to Dismiss FOIA Appeal

After appealing a denial of a FOIA request based on the fugitive disentitlement doctrine, it is important to consider that the suit challenging the denial itself may be dismissed under the doctrine.

In Doyle v. U.S. Dep't of Justice, the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal of a FOIA lawsuit based on the plaintiff's fugitive status. 668 F.2d 1365 (D.C. Cir. 1981). The plaintiff in *Doyle* had a pending bench warrant issued for his arrest, and the court of appeals reasoned that the petitioner's FOIA request for all of the Department of Justice records pertaining to him were "not devoid of a relationship to the sentence he [was] evading." *Id.* at 1365. In addition, the court reasoned the doctrine could be used to dismiss the case even though the plaintiff's fugitive status was not an exception to the disclosure requirements under FOIA. *Id. But see Maydak v. U.S. Dep't of Educ.*, No. 04-4436, 2005 U.S. App. LEXIS 20292 (3d Cir. Sept. 21, 2005) (reasoning that the doctrine might not apply to bar review

of a FOIA action if a person filed the FOIA suit in a court separate from the court the petitioner had fled).

Cases That Address the Fugitive Disentitlement Doctrine in FOIA Lawsuits:

- D.C. Cir.
  - *In Doyle v. U.S. Dep't of Justice*, 668 F.2d 1365 (D.C. Cir. 1981) – affirmed district court decision dismissing plaintiff's FOIA complaint under the doctrine

- 3d Cir.
  - *Meddah v. Reno*, No. 98-1444, 1998 U.S. Dist. LEXIS 23620 (E.D. Pa. Dec. 8, 1998) – applied the doctrine to dismiss plaintiff's FOIA complaint
  - *Maydak v. United States Dep't of Educ.*, No. 04-4436, 2005 U.S. App. LEXIS 20292 (3d Cir. Sept. 21, 2005) – affirmed district court decision dismissing plaintiff's FOIA complaint under the doctrine

I. Petitions for Review

A. When Do Courts Apply the Fugitive Disentitlement Doctrine to Deny Petitions for Review in Immigration Cases?

1. When Petitioners Fail to Comply with Notice to Report for Removal

Courts of appeals apply the doctrine to deny petitions for review after finding that a person failed to report to DHS after being issued a notice to report for removal (notices to report for removal are often referred to as "bag and baggage letters"). *See Martin v. Mukasey*, 517 F.3d 1201, 1203-04 (10th Cir. 2008) (finding a person was a fugitive when he failed to comply with a DHS notice to report with identity documents and a one-way ticket to his home country); *Giri v. Keisler*, 507 F.3d 833, 834-35 (5th Cir. 2007) (applying the doctrine after finding petitioners had received and failed to comply with notices to report for removal); *Gao v. Gonzales*, 481 F.3d 173, 176 (2d Cir. 2007) ("for an alien to become a fugitive, it is not necessary that anything happen other than a bag-and-baggage letter be issued and the alien not comply with that letter"); *Bright v. Holder*, 649 F.3d 397, 400 (5th Cir. 2011) (applying the doctrine to dismiss appeal after petitioner did not report for removal even though petitioner's location was known to DHS).

Bright v. Holder, 649 F.3d 397, 400 (5th Cir. 2011)

Some courts also have found that the arrest of a person during an appeal does not cure the individual's fugitive status if he or she initially did not comply with a notice to report for removal. The Sixth Circuit dismissed a petition for review of an individual who was taken into custody during the pendency of his appeal. *Garcia-Flores v. Gonzales*, 477

F.3d 439 (6th Cir. 2007). The court reasoned he was subject to the fugitive disentitlement doctrine because he failed to initially comply with a notice to report for removal after he filed his appeal. *Id*. at 441 n.1, 442 (noting that the court would still have retained Article III jurisdiction to hear petitioner's appeal if he was removed to Mexico).

The Ninth Circuit found that the doctrine applied even when a removal order was wrongfully issued. *See Zapon v. U.S. Dep't of Justice*, 53 F.3d 283 (9th Cir. 1995). In *Zapon*, the petitioners did not receive notice of a deportation hearing and were ordered deported in absentia. *Id*. at 284. The court reasoned that although the deportation orders were wrongfully issued because the petitioners were never notified of their hearing, the petitioners still were required to comply with the outstanding orders to report for removal. *Id*. at 284-85 (finding the government was substantially justified in opposing petitioners' stay of deportation based on the disentitlement doctrine).

2. When Petitioner Cannot be Located After Stay of Removal Granted

Courts have found that a petitioner may be a fugitive even if a removal order has been stayed. In *Antonio-Martinez v. INS*, the Ninth Circuit held that as long as the deportation order was outstanding, the petitioner had an obligation to keep the agency informed of his location so the agency could take him into custody when the stay was lifted. 317 F.3d 1089, 1093 (9th Cir. 2003). The court held that because the petitioner failed to inform INS of his change of address as required by 8 U.S.C. § 1305(a) and 8 C.F.R. § 265.1, his counsel and INS were unable to locate him. Thus, petitioner was a fugitive. *Id*. at 1091-92. The court noted that, although a person granted a stay may not be subject to deportation or confinement while his or her case is adjudicated, but is still subject to the court's authority. *Id*. at 1093 (comparing a person with a stayed deportation order to a criminal defendant on bail pending appeal).

In *Sapoundjiev v. Ashcroft*, the Seventh Circuit held that petitioners were obligated to comply with a notice to report for removal even though they received stays of removal the day before they were required to report. 376 F.3d 727, 729 (7th Cir. 2004). The court held that the stay order "did not affect the Sapoundjievs' obligation to surrender, so that removal could be implemented if the stay should be lifted." *Id*. at 728.

3. Failure to Provide Change of Address

Even if a person did not receive a notice to report for removal, if he or she also did not provide DHS with a change of address, the courts may apply the fugitive disentitlement doctrine. In *Arana v. INS*, the Third Circuit found that although petitioner may not have received notice of an order to report for deportation because he moved from his last-known address, the fugitive disentitlement doctrine prevented petitioner from pursuing the appeal until he informed the government of his current whereabouts. 673 F.2d 75, 76-77 (3d Cir. 1982). *See also Antonio-Martinez v. INS*, 317 F.3d 1089, 1091-92 (9th Cir. 2003) (holding that because the petitioner failed to inform the court of his change of

address as required by 8 U.S.C. § 1305(a) and 8 C.F.R. § 265.1, his counsel and INS were unable to locate him and he was subject to the doctrine).

4. The Merits of the Appeal are Connected to Events that Took Place When Petitioner was a "Fugitive" and/or the Government's case is Prejudiced

Some courts have considered whether the merits of the petitioner's case are related to the "fugitive" period. The Second Circuit, in *Gao,* found this connection important when it dismissed petitioner's case pursuant to the doctrine. It reasoned that allowing the petitioner to proceed would "unduly prejudice the government" because the changed circumstances that would warrant reopening the petitioner's asylum case -- his marriage and the birth of his two children -- took place when petitioner was a fugitive (after receipt of his bag and baggage letter). *Gao v. Gonzales*, 481 F.3d 173, 177-78 (2d Cir. 2007). The court concluded that allowing the case to move forward despite the nexus between petitioner's fugitive status and the merits of the case "would have the perverse effect of encouraging aliens to evade lawful deportation orders in the hope that, while they remain fugitives, they may contrive through their own efforts a new basis for challenging deportation." *Id*. at 178; *Wang v. Holder*, No. 08-5073, 2010 U.S. App. LEXIS 2778, *4 (2d Cir. Feb. 11, 2010) ("the ground on which [petitioner] now seeks relief is an event of his own making that transpired while he was a fugitive") (citations omitted).

B. What are the Arguments Against the Application of the Doctrine to Petitions for Review?

1. The Fugitive Disentitlement Doctrine is a Severe Sanction

Courts that have declined to apply the doctrine emphasize that the doctrine is a "severe" sanction that is not lightly imposed. *See Gutierrez-Almazan v. Gonzales*, 453 F.3d 956, 957 (7th Cir. 2006) ("[t]he Supreme Court cautioned against frequent use of fugitive dismissal, stating that it is too blunt an instrument for deterring other petitioners from absconding and for preserving the court's authority and dignity."); *Hassan v. Gonzales*, 484 F.3d 513, 516 (8th Cir. 2007) (describing the doctrine as "an extreme sanction"); *Wu v. Holder*, 646 F.3d 133, 137-38 (2d Cir. 2011) (declining to apply the doctrine to a "simple case" where petitioner did not seek to take unfair advantage of the courts). *See also Armentero v. INS*, 412 F.3d 1088, 1090-96 (9th Cir. 2005) (Berzon, dissenting) (arguing that the court should not have considered the fugitive disentitlement argument because, inter alia, the government improperly raised the doctrine as a basis for dismissal in its supplemental reply brief and because the resolution of the issues in the case would not be unenforceable due to the petitioner's fugitive status).

It is important to keep in mind that the fugitive disentitlement doctrine is an equitable doctrine. Courts have wide discretion to determine whether or not to apply the doctrine, and are not required to invoke it to dismiss an individual's case. Therefore, it is important to emphasize the favorable and compelling factors in a person's case even if his or her fugitive status is unclear.

2. The Petitioner is not Intentionally Evading the Jurisdiction of the Court

a. The petitioner did not receive the notice to report for removal.

In some cases, petitioner may have an argument that the doctrine should not apply because he or she did not receive the notice to report for removal. The Ninth Circuit has found that the Board improperly applied the fugitive disentitlement doctrine to deny a motion to reopen when critical documents, including a notice to report for removal, were sent to the wrong address on multiple occasions by the agency. *See Bhasin v. Gonzales*, 423 F.3d 977, 988-89 (9th Cir. 2005) (distinguishing *Bhasin* from *Matter of Barocio*, 19 I&N Dec. 255 (BIA 1985), where the Board denied a motion to reopen only after the agency had attempted to locate respondents at "their last known address, the male respondent's last know place of employment, the postal service, the California Department of Motor Vehicles, and the local gas and phone companies").

b. The government has not sufficiently demonstrated that the petitioner is evading the law.

It may be possible to demonstrate that even after an individual fails to respond to a bag and baggage letter, he or she is not actively evading the court's jurisdiction. In *Wu v. Holder*, the Second Circuit explained that the petitioner did not exhibit a "disdain" for authority by failing to report to DHS in response to bag-and-baggage letters when he had also received orders from the court enjoining DHS from deporting him. 646 F.3d at 136. The court recognized that the petitioner should have contacted DHS directly or through counsel, but distinguished this failure to comply with an executive command from failing to comply with a court order – an action that would more directly implicate the fugitive disentitlement doctrine. *Id*. at 137. In *Sun v. Mukasey*, the Ninth Circuit reasoned that, although petitioner received a bag and baggage letter, at the time of her appeal, her counsel, DHS and the court knew her whereabouts. 555 F.3d 802, 805 (9th Cir. 2009). Thus, she was not "currently a fugitive," and it was not appropriate to apply the doctrine to dismiss her case. *Id*.; *see also Brar v. Holder*, No. 08-71471, 2009 U.S. App. LEXIS 12843, *3-4 (9th Cir. June 16, 2009) (although petitioner did not report for removal, there was "no evidence that the petitioner was in hiding or had fled to avoid deportation").

3. Petitioner's Existing Fugitive Status is not Sufficiently Connected to Issue on Appeal and/or the Government's Case is not Prejudiced

It may also be possible to argue that the petitioner's fugitive status is not sufficiently connected to the issue on appeal and therefore, the equitable reasons for applying the doctrine are not present. In *Armentero v. INS*, the dissent argued that the petitioner's fugitive status was not connected to the appellate proceedings because the question on appeal only addressed who was the proper respondent in the petitioner's habeas petition. 412 F.3d 1088, 1094-95 (9th Cir. 2005) (Berzon, dissenting). The dissent reasoned that

deciding that question did not implicate the doctrine because the court's decision on that discrete issue would be enforceable and deciding the issue would not encourage future litigants to flee the court's jurisdiction. *Id.* Note, however, that the majority in *Armentero* found the doctrine applied. *Id*. at 1088.

In *Wu*, the Second Circuit found that the petitioner's fugitive status did arise from the case at issue, but nevertheless, the government had provided no evidence that the petitioner's fugitive status prejudiced the government's case. *Wu*, 646 F.3d at 137-38. The court distinguished the petitioner's case from *Gao*, where the "petitioner premised his claim to relief entirely on events that occurred during the period of his fugitivity, thereby making the government rebut new facts in order to defeat his position on the merits." *Id*. at 138.

4. The Petitioner Surrendered to DHS Custody Prior to or During Appeal and Former Fugitive Status Lacks Connection to Proceedings

If the petitioner fled custody and then surrendered before filing an appeal, the petitioner may argue that his or her former fugitive status lacked the connection to the appellate proceeding necessary to justify application of the doctrine. In *Ortega-Rodriguez v. United States*, the Supreme Court explicitly held that the doctrine should not be applied to dismiss a case when a defendant's flight and recapture occurred prior to the appeal and had "no connection to the course of appellate proceedings." 507 U.S. 234, 246 (1993).

In addition, the petitioner may argue that the doctrine should not apply if he or she surrendered to custody during the pendency of the appeal. The Seventh Circuit explicitly held that the doctrine did not apply to a person who initially did not comply with a notice to report for removal, but later surrendered to DHS. *Gutierrez-Almazan v. Gonzales*, 453 F.3d 956, 957 (7th Cir. 2006) ("a petitioner in an immigration case who fails to report and then faces a motion to dismiss under the fugitive disentitlement doctrine may still surrender to immigration authorities and preserve his appeal"). The court reasoned that the petitioner did not "escape" the jurisdiction of the court, but initially failed to appear because he received a stay of removal and his lawyer erroneously advised him he did not need to comply with the order. *Id*. at 957. *But see Garcia-Flores v. Gonzales*, 477 F.3d 439, 441-42 (6th Cir. 2007) (dismissing a petition for review even though the appellant was taken into custody during the pendency of his appeal).

5. The Petitioner Voluntary Departed the United States and is not Intentionally Evading Jurisdiction of the Court

A petitioner may argue that the doctrine does not apply after they have departed the United States. The Eighth Circuit declined to apply the doctrine when a person left the United States in compliance with a voluntary departure order and continued to pursue her appeal. *See Hassan v. Gonzales*, 484 F.3d 513, 516 (8th Cir. 2007). The government argued that the petitioner was a fugitive because she requested a stay of deportation after leaving the country and then did not meet with government officials to discuss her stay

request. *Id*. The court disagreed, reasoning that the petitioner departed in compliance with a court order; the record did not demonstrate that petitioner was attempting to evade the law; and that the court's judgment still would be enforceable despite the petitioner's absence. *Id*.; *See also Fiadjoe v. AG*, 411 F.3d 135, 164 n. 9 (3d Cir. 2005) (Smith, dissenting) (describing how the government initially moved to dismiss based on the doctrine, but later withdrew the motion when the petitioner explained through letter briefs that she "self-deported" to Canada).

C. Circuit Court Decisions Applying/Declining to Apply the Fugitive Disentitlement Doctrine to Dismiss Petitions for Review or Appeals in Immigration Cases:

Declined to Apply the Doctrine:

- 2d Cir.
  - *Wu v. Holder*, 646 F.3d 133 (2d Cir. 2011) – declined to apply the doctrine to dismiss petition for review

- 7th Cir.
  - *Gutierrez-Almazan*, 453 F.3d 956 (7th Cir. 2006) – declined to apply the doctrine to dismiss petition for review

- 8th Cir.
  - *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007) - declined to apply the doctrine to dismiss petition for review; granted petition and remanded to the BIA
  - *Nnebedum v. Gonzales*, No. 05-2801, 2006 U.S. App. LEXIS 28340 (8th Cir. 2006) – declined to apply doctrine to dismiss petition for review; denied petition on other grounds

- 9th Cir.
  - *Brar v. Holder*, No. 08-71471, 2009 U.S. App. LEXIS 12843 (June 16, 2009) – declined to apply the doctrine to dismiss petition for review; reversed BIA's denial of petitioner's motion to reopen based on the fugitive disentitlement doctrine
  - *Sun v. Mukasey*, 555 F.3d 802 (9th Cir. 2009) – declined to apply the doctrine to dismiss petition for review; granted petition and remanded to the BIA
  - *Zadoorian v. Gonzales*, No. 02-74007, 2005 U.S. App. LEXIS 22972 (9th Cir. 2005) – declined to apply the doctrine to dismiss petition for review; denied petition on other grounds
  - *Luan v. INS*, No. 96-70323, 1997 U.S. App. LEXIS 26543 (9th Cir. 1997) – declined to apply the doctrine to dismiss petition for review; denied petition on other grounds

Applied the Doctrine:

- 2d Cir.
    - *Wang v. Holder*, No. 08-5073, 2010 U.S. App. LEXIS 2778 (2d Cir. Feb. 11, 2010) – applied the doctrine to dismiss petition for review
    - *Lukose v. Holder*, No. 08-5332, 2009 U.S. App. LEXIS 19584 (2d Cir. Sept. 1, 2009) – applied the doctrine to dismiss petition for review
    - *Guo v. United States Dep't of Justice*, No. 07-4455, 2008 U.S. App. LEXIS 9330 (2d Cir. April 30, 2008) – applied the doctrine to dismiss petition for review
    - *Rong v. DOJ*, No. 07-2998, 2008 U.S. App. LEXIS 19434 (2d Cir. Sept. 10, 2008) – applied the doctrine to dismiss petition for review
    - *Gao v. Gonzales*, 481 F.3d 173 (2d Cir. 2007) – applied the doctrine to dismiss petition for review
    - *Huang v. United States Dep't of Justice*, No. 05-4255, 2007 U.S. App. LEXIS 11764 (2d Cir. May 18, 2007)
    - *Bar-Levy v. INS*, 990 F.2d 33 (2d Cir. 1993) – applied the doctrine to dismiss petition for review

- 3d Cir.
    - *Arana v. INS*, 673 F.2d 75 (3d Cir. 1982), *reh'g denied*, 673 F.2d 75 (3d Cir. 1982) – applied the doctrine to dismiss appeal

- 5th Cir.
    - *Bright v. Holder*, 649 F.3d 397 (5th Cir. 2011) – applied the doctrine to dismiss petition for review
    - *Hamideh-Hamideh v. Holder*, No. 08-60268, 2009 U.S. App. LEXIS 2192 (5th Cir. Feb. 2009) – applied the doctrifn.ne to dismiss petition for review
    - Momani *v. Mukasey*, No. 07-60105, 2007 U.S App. LEXIS 28375 (5th Cir. Dec. 7, 2007) – applied the doctrine to dismiss petition for review
    - *Giri v. Keisler*, 507 F.3d 833 (5th Cir. 2007) – applied the doctrine to dismiss petition for review

- 6th Cir.
    - *Garcia-Flores v. Gonzales*, 477 F.3d 439 (6th Cir. 2007) – applied the doctrine to dismiss petition for review
    - *Kacaj v. Gonzales*, No. 04-3315, 2006 U.S. App. LEXIS 1695 (6th Cir. 2006) – applied the doctrine to dismiss petition for review
    - *Juncaj v. INS*, No. 95-3430, 1995 U.S. App. LEXIS 35505 (6th Cir. 1995) – applied the doctrine to dismiss petition for review

- 7th Cir.
    - *Dembele v. Gonzales*, 168 Fed. Appx. 106 (7th Cir. 2006) – applied the doctrine to dismiss the appeal

- *Sapoundjiev v. Ashcroft*, 376 F.3d 727 (7th Cir. 2004) – applied the doctrine to dismiss petition for review

- 9th Cir.
  - *Bello-Tobon v. Gonzales*, No. 06-71152, 2007 U.S. App. LEXIS 6774 (9th Cir. 2007) – applied the doctrine to dismiss petition for review
  - *Armentero v. INS*, 412 F.3d 1088 (9th Cir. 2005) – applied the doctrine to dismiss appeal; dissent argued the doctrine was improperly applied
  - *Antonio-Martinez v. INS*, 317 F.3d 1089 (9th Cir. 2003) – applied the doctrine to dismiss petition for review
  - *Hussein v. INS*, 817 F.2d 63 (9th Cir. 1986) – applied the doctrine to dismiss petition for review

- 10th Cir.
  - *Martin v. Mukasey*, 517 F.3d 1201 (10th Cir. 2008) – applied the doctrine to dismiss petition for review