

United States Senate

July 29, 2021

The Honorable Roslynn R. Mauskopf
Director
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Dear Judge Mauskopf,

We write regarding the use of private prosecutors in the federal courts. Recently, the case of environmental lawyer Steven Donziger has garnered significant attention and shined a spotlight on private prosecutions of criminal contempt charges. These prosecutions are highly unusual and can raise concerning questions of fundamental fairness in our criminal justice system.

In 2011, Donziger won a \$9 billion judgment against the oil company Chevron in Ecuador on behalf of Amazonians whose health and land was damaged by oil-drilling waste.¹ Although appellate courts in Ecuador upheld the judgment, Chevron initiated proceedings in the Southern District of New York to have it set aside on the basis of fraud. Judge Lewis Kaplan denied Donziger a jury trial and ruled in Chevron's favor.²

In 2019, Judge Kaplan ordered Donziger to turn his computer, phones, and other electronic devices over to Chevron.³ Donziger refused, citing his ethical obligations, pending appeal, and constitutional rights.⁴ Judge Kaplan then charged Donziger with criminal contempt. Trial began on May 10, 2021 and lasted five days. On July 26, 2021, Judge Loretta A. Preska, whom Judge Kaplan hand-selected to preside over the criminal contempt case, found Donziger guilty on all six criminal contempt counts.⁵ Pre- and post-trial, Donziger has been under house arrest, required to wear an electronic monitoring device, for a period that now exceeds 700 days.

Federal Rule of Criminal Procedure 42(a)(2) provides that “[t]he court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must

¹ See Oliver Milman, *The lawyer who took on Chevron – and now marks his 600th day under house arrest*, The Guardian (Mar. 28, 2021), <https://www.theguardian.com/us-news/2021/mar/28/chevron-lawyer-steven-donziger-ecuador-house-arrest>.

² *Chevron Corp. v. Donziger*, 974 F.Supp.2d 362 (S.D.N.Y. 2014), *aff'd*, 833 F.3d 74 (2d Cir. 2016), *cert. denied*, 37 S.Ct. 2268 (2017).

³ *U.S. v. Donziger*, 1:11-cv-00691-LAK-RWL, Order to Show Cause Why Defendant Steven Donziger Should Not Be Held In Criminal Contempt (S.D.N.Y. July 31, 2019).

⁴ *Id.*, Response to Contempt Motions (Dkts. 2176, 2719) (S.D.N.Y. Apr. 8, 2019).

⁵ *U.S. v. Donziger*, 1:19-cr-00561-LAP, Findings of Fact and Conclusions of Law at 240 (S.D.N.Y. July 27, 2021).

appoint another attorney to prosecute the contempt.” The U.S. Attorney’s Office for the Southern District of New York declined to pursue the criminal contempt case against Donziger,⁶ so Judge Kaplan appointed three private prosecutors.⁷ Those prosecutors were then with the law firm Seward & Kissel, which had previously represented Chevron.⁸

Additionally, without recusing himself, Judge Kaplan bypassed the standard random assignment process required under the Local Rules and assigned Judge Preska to preside over the criminal contempt case.⁹

In its 1987 decision in *Young v. United States ex rel. Vuitton et Fils*, the U.S. Supreme Court discussed the use of private prosecutors and cautioned that because “[t]he prosecutor is appointed solely to pursue the public interest in vindication of the court’s authority[,] [a] private attorney appointed to prosecute a criminal contempt . . . certainly should be as disinterested as a public prosecutor who undertakes such a prosecution.”¹⁰ Referring to a private prosecutor as “the citizen’s primary adversary in a criminal proceeding,” the Court went on to warn that “[p]ublic confidence in the disinterested conduct of that official is essential.”¹¹ The Advisory Committee Notes for the 2002 Amendment to Rule 42 explain that “[r]evised Rule 42 now explicitly addresses the appointment of a ‘prosecutor’ and adopts language to reflect the holding in [*Vuitton*], permitting a judge to appoint a ‘disinterested’ private counsel to prosecute the alleged contempt when the government declines.”¹²

In light of the preceding, we respectfully request responses to the following questions regarding the use of private prosecutors in the federal courts under Rule 42(a)(2):

1. Please state, for each of the last five years, the number of cases in which federal judges charged individuals with criminal contempt under Rule 42. In how many of those cases did the government decline the required request to prosecute, resulting in the appointment of a private prosecutor?
2. What were the outcomes in the contempt cases prosecuted by the government and those prosecuted by private prosecutors? Are there disparities in dismissals, convictions, plea bargains, or sentences in public-prosecutor contempt cases versus private-prosecutor contempt cases?

⁶ *U.S. v. Donziger*, 1:11-cv-00691-LAK-RWL, Order of Appointment (S.D.N.Y. July 31, 2019).

⁷ *Id.*

⁸ *Id.*, Declaration of Professor Ellen Yaroshefsky (S.D.N.Y. Feb. 27, 2020); Mem. Law U.S. Opp. Def.’s Pre-Trial Mots. at 24 (S.D.N.Y. Mar. 24, 2020).

⁹ *Id.*, Order to Show Cause Why Defendant Steven Donziger Should Not Be Held In Criminal Contempt (S.D.N.Y. July 31, 2019); Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, Rule 50.2 (“All cases shall be randomly assigned by the clerk or his designee in public view in one of the clerk’s offices . . .”), https://img.nyed.uscourts.gov/files/local_rules/localrules.pdf.

¹⁰ 481 U.S. 787, 804 (1987) (footnote omitted).

¹¹ *Id.* at 831.

¹² Fed. R. Cr. P. 42, Advisory Committee Notes on Rules - 2002 Amendment.

3. Are there specific tests judges must apply in determining whether a private prosecutor is “disinterested” under *Vuitton*? If so, what are they? If not, why not?
4. Are private prosecutors appointed under Rule 42(a)(2) required to disclose conflicts of interest? How does the court avoid private-prosecutor conflicts of interest?
5. What ethics rules govern private prosecutors appointed under Rule 42(a)? Do these rules differ from ethics rules applicable to public prosecutors?
6. What ethical rules or other policies provide guidance to judges appointing private prosecutors? Should there be a pool of private prosecutors from which random selection is made?
7. Rule 42(a)(3) provides that “[i]f the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents.” Must a judge recuse him- or herself under this provision before a judge transfers a criminal contempt case to another judge? Is a judge permitted to hand-select another judge to preside over the prosecution of a criminal contempt case rather than follow standard random assignment processes?
8. What additional procedural safeguards are necessary to ensure fair prosecutions for criminal contempt under Rule 42?

We thank you in advance for your attention to these requests. If you have any questions, please contact Andrew Cohen in Senator Markey’s office at Andrew_Cohen@markey.senate.gov and Amalea Smirniotopoulos in Senator Whitehouse’s office at Amalea_Smirniotopoulos@whitehouse.senate.gov.

Sincerely,



Edward J. Markey
United States Senator



Sheldon Whitehouse
United States Senator