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UNITED STATES V. DONZIGER: HOW THE MERE APPEARANCE OF JUDICIAL IMPROPRIETY HARMS US ALL

Jackie Kushner[*]

In 2011, environmentalist lawyer Steven Donziger was sued in a retaliatory lawsuit by the oil company Chevron, following his securement of a multibillion-dollar award against the company for its environmental harms in Ecuador. In a case rife with judicial impropriety, Donziger was ultimately charged with criminal contempt of court and his charges were prosecuted by a private attorney. These suits exemplify the growing problem of powerful corporations using legal tactics to retaliate against activists and undermine the legitimacy of the legal system. Federal judges contribute to the problem by misusing the extensive power they hold in distinguishing criminal from civil contempt, as well as appointing private prosecutors. The impartiality of the judiciary is of paramount importance in ensuring the legitimacy of the justice system, meaning even the appearance of judicial impropriety may be detrimental to the system as a whole. This Note argues that the criminal versus civil contempt classification should be clearly defined based on the intent of the contemptor. It also proposes that public prosecutors, rather than the judiciary, should be responsible for the appointment of private prosecutors. Both of these reforms would have better protected Donziger from the partiality of the judges involved in his cases and would safeguard

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the public's trust in the federal judiciary as a legitimate means to achieving justice in the United States.

INTRODUCTION

In 2011, the Ecuadorian Supreme Court ordered Chevron, a U.S. oil company, to pay over $18 billion in compensation for its environmental misconduct in the country.[1] Steven Donziger, an American environmentalist attorney, represented indigenous peoples of the Amazonian rain forest, spearheading the legal battle against Chevron.[2] In response to the suit, Chevron retaliated against Donziger, filing a suit in 2011 accusing him of fraud.[3] The company argued that Donziger submitted false evidence, bribed a judge and paid a consulting firm to ghostwrite an expert opinion.[4] Furthermore, by using Racketeer Influenced and Corrupt Organizations Act ("RICO") laws and choosing not to seek financial damages, Chevron cleverly maneuvered its claims to ensure that a jury would not be required to decide the case, since a jury would likely be more sympathetic to Donziger's environmental activism than the judge.[5]

The fraud proceedings were overseen by Judge Lewis Kaplan despite the fact that he had investments in Chevron at the time of the trial.[6] During the trial, which lasted from 2011 to 2014, Judge

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[1] Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 621 (S.D.N.Y. 2011), *vacated sub nom.* Chevron Corp. v. Naranjo, No. 11-1150-CV L, 2011 WL 4375022 (2d Cir. 2011), and *rev'd* and *remanded sub nom.* Chevron Corp. v. Naranjo, 667 F.3d 232 (2d Cir. 2012).

[2] *See id.*

[3] *See* U.S. v. Donziger, No. 11-CV-691 (LAK), 2021 WL 3141893, at *3 (S.D.N.Y. July 26, 2021).

[4] *Id.*

[5] *See* James North, *Is Chevron's Vendetta Against Steven Donziger Finally Backfiring?*, THE NATION (Oct. 4, 2021), https://www.thenation.com/article/environment/steven-donziger-chevron-sentencing/ [https://perma.cc/ZH7C-5L3B]. The Racketeer Influenced and Corrupt Organizations Act was designed to prosecute actors in organized crime. If financial damages are not sought, defendants charged under this law do not have the right to a jury.

[6] Press Release, Ada Recinos, *U.S. Judge Kaplan Held Investments in Chevron When He Ruled for Company in Ecuador Pollution Dispute*, AMAZON WATCH (Oct. 29, 2014), https://amazonwatch.org/news/2014/1029-judge-kaplan-

Kaplan ordered Donziger to hand over his personal computer and phone to the court and to a neutral expert, ostensibly to be searched for evidence of impropriety which would then be shared with Chevron's expert.[7] Donziger refused, claiming that doing so violated his First Amendment right of association and Sixth Amendment right to attorney-client privilege.[8] He expressed his concern that the judge was giving "a de facto authorization for Chevron to rifle through [his] files" and stated his "intention to go into voluntary contempt as a matter of principle rather than submit to the review process prior to achieving any appellate review."[9] Judge Kaplan was also not responsive to the concerns Donziger raised regarding the protection of his clients' and colleagues' personal information, even though many are also activists who might be subject to retaliatory attacks by Chevron if their information became public.[10] Ultimately, Judge Kaplan charged Donziger with criminal contempt of court on July 30, 2019.[11]

While this criminal charge itself was a surprising break from the norms of contempt charges, since the authority of the court was not being challenged and a civil contempt charge would have sufficed to compel compliance with its order, Judge Kaplan made an unusual move and appointed private practice attorneys as prosecutors when the U.S. Attorney for the Southern District of New York declined to prosecute the case.[12] Further, the appointed firm, Seward & Kissel,

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held-investments-in-chevron-when-he-ruled-for-company [https://perma.cc/249P-4Z7T] ("Financial disclosure documents filed by the judge . . . show he invested in three J.P. Morgan funds that have holdings in Chevron. The judge never disclosed the investments despite being asked to recuse himself for bias in favor of Chevron . . . .").

[7] *See Donziger*, 2021 WL 3141893, at *3–4, 39.

[8] *See id.* at *35.

[9] *Id.* at *42; *see also* North, *supra* note 5 ("Donziger . . . argu[ed] that his electronic communications would give Chevron's lawyers 'backdoor access to everything we are planning, thinking, and doing.'").

[10] *See* Brief for Appellant at 13–14, *Donziger*, 2021 WL 3141893 (No. 21-2486).

[11] *See Donziger*, 2021 WL 3141893, at *2.

[12] The classification of this contempt as criminal rather than civil is surprising because of Donziger's stated intent to accept civil contempt charges in order to bring the issues up on appeal. His conduct did not merit criminal

previously represented Chevron in unrelated cases, creating a conflict of interest.[13] On top of that, the judge overseeing the contempt proceeding, Judge Loretta Preska, was hand-selected by Judge Kaplan.[14] Judge Preska served on the advisory board of the Federalist Society, which receives substantial donations from Chevron.[15] In 2021, Judge Preska found Donziger guilty and sentenced him to six months in prison, the maximum sentence available, despite the fact that he had already spent almost two years on house arrest awaiting trial.[16] She commented that "only the proverbial two-by-four between the eyes will instill in [Donziger] any respect for the law."[17]

The Donziger case raises concerns about judicial impropriety and the safeguards in place to protect individuals from the wrath of prejudiced judges. However, the public attention the case has received leads to another, maybe even larger, issue: a lack of public trust in the judiciary, especially relating to environmental activism. A series of rallies were organized in August of 2021 to protest Donziger's house arrest and call for his return to freedom.[18]

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penalties, which are intended to vindicate the authority of the court rather than to coerce compliance as is intended by civil contempt charges. North, *supra* note 5.

[13] *See Donziger*, 2021 WL 3141893, at *49.

[14] Brief for Appellant, *supra* note 10, at 20 ("Despite having assigned the criminal case to Judge Preska rather than having it randomly assigned by the Clerk of the Court, Judge Kaplan pointedly declined to recuse himself.").

[15] Jessica Corbett, *'Appalled' UN Human Rights Experts Urge Immediate Release, Compensation for Steven Donziger*, COMMON DREAMS (Sept. 30, 2021), https://www.commondreams.org/news/2021/09/30/appalled-un-human-rights-experts-urge-immediate-release-compensation-steven-donziger [https://perma.cc/4SVC-3HTL]; Stephen Spaulding, *Federalist Society Big Donors Land Very Special Place at Justice Thomas' Table*, COMMON CAUSE (Dec. 5, 2013), https://www.commoncause.org/democracy-wire/justice-thomas-crosses-the-line-again/ [https://perma.cc/M6UC-GWZL].

[16] *See* North, *supra* note 5.

[17] Edward Helmore, *Lawyer Steven Donziger Gets Six-Month Sentence for Contempt in Chevron Battle*, THE GUARDIAN (Oct. 1, 2021), https://www.theguardian.com/us-news/2021/oct/01/steven-donziger-lawyer-sentenced-contempt-chevron [https://perma.cc/2KYH-ZNCN].

[18] Peter A. Allard School of Law, *Rally for Steven Donziger's Release and Justice for Ecuadorean Victims of Chevron's Toxic Legacy*, (Aug. 6, 2021), https://allard.ubc.ca/about-us/events-calendar/rally-steven-donzigers-release-

Additionally, "#freedonziger" has been extremely prominent on TikTok, where videos about his legal battle have been viewed over 700,000 times.[19] Several legal organizations and over 200 individual attorneys have signed a judicial complaint criticizing Judge Kaplan's treatment of Donziger and citing "shocking violations of the judicial code of conduct."[20] The United Nations High Commissioner for Human Rights even issued an opinion in Donziger's favor, claiming that Judge Kaplan demonstrated "a staggering display of lack of objectivity and impartiality."[21] It is widely believed Donziger is not getting a fair trial,[22] and this kind

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and-justice-ecuadorean-victims-chevrons-toxic-legacy [https://perma.cc/K78S-8BXT].

[19] Bob Van Voris, *TikTok Hero and Chevron Foe Donziger Gets Six Months in Jail*, BLOOMBERG (Oct. 1, 2021, 3:04 PM), https://www.bloomberg.com/news/articles/2021-10-01/chevron-foe-donziger-gets-six-months-for-contempt-of-court [https://perma.cc/Y4SF-ETXB].

[20] *More Than 200 Lawyers File Judicial Complaint Against Judge Lewis A. Kaplan Over Abusive Targeting of Human Rights Advocate Steven Donziger*, INT'L ASS'N DEMOCRATIC L. (Sept. 1, 2020), https://iadllaw.org/2020/09/more-than-200-lawyers-file-judicial-complaint-against-judge-lewis-a-kaplan-over-abusive-targeting-of-human-rights-advocate-steven-donziger/ [https://perma.cc/V5ME-FLS9] [hereinafter *200 Lawyers*].

[21] *See* U.N. Human Rights Council Working Group on Arbitrary Detention, Opinion No. 24/2021 Concerning Steven Donziger (United States of America) (Oct. 1, 2021), https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session91/A_HRC_WGAD_2021_24_AdvanceEditedVersion.pdf [https://perma.cc/HD9Z-DZF8].

[22] *See, e.g.*, Van Voris, *supra* note 19 ("Dozens, including Roger Waters of Pink Floyd, protested his prosecution outside the Manhattan federal courthouse on Friday, and videos tagged #freedonziger have been viewed more than 700,000 times on TikTok."); *200 Lawyers*, *supra* note 20; Aaron Regunberg, *Chevron's Intimidation Campaign*, DISSENT MAG. (Nov. 24, 2021), https://www.dissentmagazine.org/online_articles/chevrons-intimidation-campaign [https://perma.cc/T74E-QXHM]; Press Release, AMAZON WATCH, Global Human Rights and Environmental Communities Condemn the House Arrest of U.S. Human Rights Lawyer Steven Donziger, (Nov. 14, 2019), https://amazonwatch.org/news/2019/1114-global-human-rights-and-environmental-communities-condemn-the-house-arrest-of-steven-donziger [https://perma.cc/EU3E-Y3H3] ("Groups signing the statement in support of Donziger include Greenpeace USA, Amazon Watch, London-based Global Witness, The Civil Liberties Defense Center, EarthRights International,

of negative attention aimed at the judiciary can be detrimental to its credibility, especially when the perception is that a wealthy corporation is using the system to exact revenge on an environmental activist.

Part I of this Note describes how the judiciary exacerbates the problem of retaliatory lawsuits brought by corporations against activists, which suppress activism and diminish public faith in the justice system. Parts II and III describe Steven Donziger's case with a particular focus on the issues of criminal contempt and private prosecution, underscoring the potential to inflame public distrust in the American judicial system. Part IV proposes that the judiciary classify acts of contempt based on the intention of the actor and suggests that the judiciary transfer power to the public prosecutor to decide whether to appoint a private prosecutor and, if so, whom to appoint. These changes will better limit the power of the judiciary and prevent the appearance of biased decision-making, which harms the public's confidence in the judicial system and its legitimacy as an institution focused on achieving justice.

I. PUBLIC PERCEPTION OF THE JUDICIARY AND ITS EFFECT ON ACTIVISM

In recent years, the public has become "increasingly skeptical of courts' ability—even their willingness—to do their job properly."[23] There are mounting worries about abuses of judicial authority and the ability of courts to influence political policy.[24] While it has been suggested that a more comprehensive understanding of the judicial branch and its role among Americans would quell this distrust,[25] it

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International Corporate Accountability Roundtable (ICAR), Rainforest Action Network, and others.").

[23] Viet D. Dinh, *Threats to Judicial Independence, Real & Imagined*, 137 DÆDALUS 64, 70 (2008).

[24] *See id.*

[25] *See* Joseph W. Hatchett & Annette Boyd Pitts, *A Balancing Act*, 80 FLA. B.J. 27, 27-28 (Nov. 2006).

("Evidence has long supported the notion that as public knowledge about the justice system increases, public trust and confidence in the courts also increases. Public education and outreach are essential to build long-term support for this institution of democracy.").

seems just as likely that "people do not trust the system because the system is not trustworthy."[26] Inconsistent access to legal services and fair trials further fuels this suspicion.[27] As such, widely-publicized instances of judicial impropriety and injustice strengthen the already prevalent public mistrust of the judiciary, and spark a resort to versions of vigilantism or other actions that undermine our legal system.[28]

The Donziger case also has the potential to silence environmental activists through intimidation. For years, strategic lawsuits against public participation, or SLAPPs, have been used by wealthy and powerful corporations to target those criticizing them

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[26] Rebecca Love Kourlis, *Public Trust and Confidence in the Legal System: The Way Forward*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Sept. 13, 2019), https://iaals.du.edu/blog/public-trust-and-confidence-legal-system-way-forward [https://perma.cc/V8UE-LGVE] ("The rule of law is built on the notion that the laws treat every person equally, and it holds America up as a nation in which race, ethnicity, religion, gender, sexual orientation, and yes, even pocketbook do not affect the outcome of legal proceedings. But people do not believe that is true; hence, they distrust the legal system—and they distrust us, the lawyers and judges who populate it.").

[27] *See id.* ("[I]n the 1960s and '70s, public trust began to unravel. In the wake of Vietnam and Watergate, then the Enron scandal and savings and loan crisis . . . the body politic began to lose faith in the fairness and equality of the system. That trend continues today. Increasing numbers of young Black Americans are being incarcerated, and most recently, concerns about incarceration of the poor for inability to pay court fees and fines have surfaced. There is also a spilling over of mistrust of law enforcement into people's feelings about the courts . . . . This distrust and decamping have other causes beyond the more public failures. In 2016, Rebecca Sandefur diagnosed the unmet civil legal needs of the American public and found that 80 percent of the civil legal needs of the poor go unmet. On a parallel track, recent research by the National Center for State Courts shows that at least one party is unrepresented by an attorney in at least 75 percent of state court cases.").

[28] *See generally* PAUL H. ROBINSON & SARAH M. ROBINSON, SHADOW VIGILANTES: HOW DISTRUST IN THE JUSTICE SYSTEM BREEDS A NEW KIND OF LAWLESSNESS (2018). Shadow vigilantes are disillusioned by the legal system and seek to undermine its operations through certain actions or inactions, such as refusing to report crimes or to convict as a juror. *Id.* at 159. These subversions of the legal system can be sparked by significant displays of the failures of the judicial system. *Id.* at 28.

and attempting to draw attention to their crimes.[29] As of 2015, the United States ranked fourth in the highest number of SLAPP cases in the world.[30] These suits can effectively drain the resources of activist groups through extremely costly litigation, and subsequently stifle their activism.[31] They have a "'chilling effect' on the exercise of freedom of expression" by sparking fear in other activists, and, when courts do not effectively dismiss these cases, they help create the narrative that such lawsuits are "a legitimate use of the legal system."[32] This phenomenon reflects the power wealthy corporations wield in the justice system, and how they are able to abuse the legal system to intimidate and harm community leaders and activists by filing these frivolous suits.[33]

In Donziger's case, nine members of Congress wrote to Attorney General Merrick Garland asking him to take control of Donziger's case and free the lawyer from imprisonment, explaining that the case "has shocked the worldwide community of environmental justice and human rights advocates and creates a distinct chilling effect on this type of advocacy going forward."[34] They cautioned that "[e]xtractive industries everywhere are watching this story to see if Chevron has just completed their proof of concept, that with enough money for lawyers and corporate friendly judges, a polluting company can turn a judgment rendered against them into a RICO charge against the lawyers and the victims."[35] They went on to warn that Donziger "is living proof that Chevron has succeeded, and other

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[29] *See* LADY NANCY ZULUAGA & CHRISTEN DOBSON, BUS. & HUM. RTS. RSCH. CTR., SLAPPED BUT NOT SILENCED: DEFENDING HUMAN RIGHTS IN THE FACE OF LEGAL RISKS 5 (2021); *see also SLAPPS Filed to Silence Individuals Fighting to Protect the Environment*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/slapps-filed-to-silence-individuals-fighting-to-protect-the-environment (last visited Nov. 28, 2021) [https://perma.cc/A45D-RGMK]; *SLAPP Suits*, ENV'T L. ALL. WORLDWIDE, https://elaw.org/category/resource-topic/slapp-suits (last visited Nov. 28, 2021) [https://perma.cc/W3ER-2AE5].

[30] *See* ZULUAGA & DOBSON, *supra* note 29, at 5, 11.

[31] *See id.* at 5, 9.

[32] *Id.* at 9.

[33] *See id.* at 16.

[34] Letter from Rep. Rashida Tlaib to U.S. Att'y Gen. Merrick Garland (Nov. 29, 2021), https://tlaib.house.gov/sites/tlaib.house.gov/files/Dongizer_DOJ_Letter.pdf [https://perma.cc/FLD3-85QP].

[35] *Id.*

companies and industries will replicate this model, turning victims and their lawyers into fraudsters and criminals, culminating unbelievably in actual prison time."[36]

Donziger's case is a particularly egregious example of a SLAPP suit because of the prominent role the judiciary played in his ultimate loss. The suit drained Donziger and his colleagues of time and money, likely intimidated other environmental activists and indigenous people in Ecuador, and highlighted how American courts routinely fail to prevent companies from using the justice system as a vehicle for retaliatory SLAPP techniques.[37]

The following describes criminal contempt and private prosecution in the United States, underscoring how each has provided the judiciary with excessive power and great potential for prejudice.

II. ANALYSIS OF CRIMINAL CONTEMPT LAW AND ITS PROBLEMS

A. The History and Development of Contempt Laws

Contempt proceedings date back to twelfth-century England, where contempt of the court was considered contempt of the king, and the unchecked power of the monarchy meant punishment was extreme and included instances of life imprisonment, dismemberment, and even execution.[38] America adopted the practice of contempt proceedings from the common law system, and

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[36] *Id.*

[37] *See* Amy Goodman, *Lawyer Steven Donziger, Who Sued Chevron over "Amazon Chernobyl," Ordered to Prison After House Arrest*, DEMOCRACY NOW! (Oct. 27, 2021), https://www.democracynow.org/2021/10/27/steven_donziger_judicial_harassment_from_chevron [https://perma.cc/86D8-T3CT] (Steven Donziger claims "this is the first corporate prosecution in U.S. history."); James North, *Facing Prison, Steven Donziger Refuses to Be Silenced*, THE NATION (Oct. 25, 2021), https://www.thenation.com/article/environment/donziger-house-arrest-prison/ [https://perma.cc/TL5P-TLQ6] (Donziger "argued that Chevron wants to intimidate environmental lawyers and grassroots groups more broadly, preventing them from launching similar fights in the first place.").

[38] Philip A. Hostak, International Union, United Mine Workers v. Bagwell: *A Paradigm Shift in the Distinction Between Civil and Criminal Contempt*, 81 CORNELL L. REV. 181, 186–87 (1995).

codified them in the Judiciary Act of 1789.[39] The Act grants U.S. courts the power "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority."[40] The current contempt statute is 18 U.S.C. § 401, and, in conjunction with the federal rules, it gives courts the power to punish contempt according to certain guidelines.[41] This power has been accepted by courts as one inherent in their judicial abilities.[42]

The Supreme Court initially excluded contempt proceedings from the typical constitutional safeguards, stating that "[c]ontempt proceedings are sui generis because they are not hedged about with all the safeguards provided in the bill of rights for protecting one accused of ordinary crime from the danger of unjust conviction."[43] The Court later reformed this sentiment and gradually applied procedural protections to criminal contempt proceedings.[44] These same protections, however, are not granted to those charged with civil contempt,[45] and there is no right to a jury trial in criminal contempt cases classified as "petty offenses."[46]

The Supreme Court has also stated that "[w]hile a court has the authority to initiate a prosecution for criminal contempt, its exercise of that authority must be restrained by the principle that 'only "[t]he least possible power adequate to the end proposed" should be used in contempt cases.'"[47] The primary justification for maintaining this

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[39] *Id.* at 189.

[40] Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83, 83.

[41] *See* 18 U.S.C. § 401; FED. R. CRIM. P. 42.

[42] Hostak, *supra* note 38, at 189, 189 n.59 (noting that courts perceive the contempt statute as codifying their "historical common-law power" to punish contempt of court).

[43] *See Ex parte* Grossman, 267 U.S. 87, 117–18 (1925).

[44] Hostak, *supra* note 38, at 190. These protections refer to those afforded by the U.S. Constitution in criminal proceedings, including the right to a jury trial, the right to an attorney, the requirement of proof beyond a reasonable doubt, etc. *Id.* at n.63.

[45] *See id.* at 191, 206.

[46] *See* Cheff v. Schnackenberg, 384 U.S. 373, 379 (1966) (indicating that "petty offenses" refers to cases where no more than six months imprisonment can be imposed as punishment).

[47] Young v. U.S. *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 801 (1987) (quoting United States v. Wilson, 421 U.S. 309, 319 (1975)). The contempt power looks much more like traditional legislative and executive powers of lawmaking

system of criminal and civil contempt proceedings is that it gives the court a method by which to assert its authority without relying on the other branches of government.[48] This, the Court has argued, is the only way to ensure that the judiciary can retain its independent power and guard against becoming a purely advisory body whose orders can be ignored.[49]

B. Distinguishing Types of Contempt

Instances of contempt can be separated into two categories. The first is contempt occurring in the courtroom versus outside of the courtroom, and the second is criminal versus civil contempt. These classifications are important for identifying the rights owed to an accused individual and the potential penalties they might incur. However, it is often unclear how a particular contemptuous act should be classified, giving judges wide discretion to make these determinations.

1. Distinguishing Between In-Court and Out-of-Court Contempt

One notable Supreme Court case, *Cooke v. United States*, distinguishes between contemptuous conduct occurring inside and outside of the courtroom.[50] In this case, the defendant and his attorney presented the judge with a personal letter to improperly influence his decision.[51] In response, the Court stated, "[t]o preserve order in the courtroom . . . the court must act instantly to suppress disturbance . . . or disrespect to the court, when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense."[52] It explained

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and prosecution, meaning the court's exercise of it, when extended too far, may disrupt the separation of powers among the three branches of government. *See id.*

[48] *See* Kaley Ree Jaslow, *Life in Jail for Misbehavior: Criminal Contempt and the Consequence of Improper Classification*, 71 FLA. L. REV. 599, 600 (2019); *Young*, 481 U.S. at 795.

[49] *Young*, 481 U.S. at 796.

[50] Cooke v. United States, 267 U.S. 517, 533–34 (1925).

[51] *See id.* at 519–21.

[52] *Id.* at 534.

that this kind of "summary vindication of the court's dignity and authority is necessary."[53] Further, in response to these acts of contempt in open court, the court must be able, "upon its own knowledge of the facts, without further proof, without issue or trial, and without hearing an explanation of the motives of the offender, [to] immediately" determine whether punishment should be imposed, and impose the appropriate punishment.[54] The same is not true for actions taken outside of the courtroom where "notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."[55]

2. Distinguishing Between Civil and Criminal Contempt

It can be difficult to distinguish between civil and criminal contempt.[56] The fact that both civil and criminal contempt can occur during a civil or criminal trial, and that the same conduct can be classified as both criminal and civil contempt at different times, further obscures the distinction.[57] The distinction is important because it can be dispositive in determining which safeguards must be afforded to the accused and the appropriate punishments.[58] Currently, the system is "conceptually unclear and exceedingly difficult to apply, thereby fostering uncertainty and unnecessary litigation."[59]

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[53] *Id.*

[54] *Id.* at 534–35.

[55] *Id.* at 536 (quoting Randall v. Brigham, 74 U.S. 523, 540 (1868)).

[56] *See* Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1047 (1993) ("While the current distinction between civil and criminal contempt has unquestionably imposed salutary constraints on an otherwise uncontrolled process, it is confusing, difficult to apply, and ultimately unresponsive to the most serious concerns engendered by the contempt process.").

[57] *See* Jaslow, *supra* note 48, at 603.

[58] *See* Hostak, *supra* note 38, at 190, 195, 197.

[59] Dudley, Jr., *supra* note 56, at 1033.

C. Inconsistent Applications of Contempt Rules

The Supreme Court first addressed the problem in *Gompers v. Buck's Stove & Range Co.*, and stated that the distinguishing feature between the two kinds of contempt is the "character and purpose" of the punishment.[60] It stated that civil contempt punishments are remedial and "for the benefit of the complainant," while criminal punishments are punitive and designed to "vindicate the authority of the court."[61] The Court further explained that civil contempt encompasses violations of mandatory orders, while violations of prohibitory orders are classified as criminal contempt.[62] Determinations of character and purpose, however, are abstract and subjective, leading to confusion among courts and often arbitrary results in classifications.

Even within the Supreme Court these distinctions have proven unclear. In *Shillitani v. United States*, Shillitani refused to testify in front of a grand jury and was charged with criminal contempt.[63] He was eventually sentenced to prison for two years, or until he complied with the court's orders.[64] The Supreme Court determined that this conduct was civil, not criminal contempt.[65] It found that, even though Shillitani was imprisoned, the purpose of the penalty was to coerce compliance, not punish.[66]

In contrast, in *United States v. Wilson*, the Supreme Court found that Wilson's failure to testify after being promised immunity constituted criminal contempt and his subsequent imprisonment was proper.[67] It held that his refusals "were intentional obstructions of court proceedings that literally disrupted the progress of the trial and hence the orderly administration of justice."[68] These two cases demonstrate the tremendous overlap in conduct classified as

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[60] *See id.* at 1037–38; Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441 (1911).

[61] *Gompers*, 221 U.S. at 441.

[62] *See id.* at 441, 443.

[63] Shillitani v. United States, 384 U.S. 364, 365–66 (1966).

[64] *Id.* at 366.

[65] *Id.* at 368.

[66] *Id.* at 370.

[67] United States v. Wilson, 421 U.S. 309 (1975).

[68] *Id.* at 315–16.

criminal and civil contempt in our current system and the lack of clarity regarding which category is at issue in any given case, even within the Supreme Court.

Different circuit courts have developed their own interpretations of the Supreme Court's criminal contempt explanation. For example, the Second Circuit Court of Appeals, in *Hess v. New Jersey Transit Rail Operations*, stated that contempt sentences "imposed for the coercive or remedial purpose of compelling obedience to a court order and providing compensation or relief to the complaining party" are civil and those "unconditionally and punitively imposed to vindicate the authority of the court and not to provide private benefits" are criminal.[69] The court also cited to an earlier case, *In re Weiss*, in which the Second Circuit distinguished between civil and criminal contempt as reflecting the court's desire to either coerce obedience to the court order, or inflict punishment for the contemptuous actions.[70] A more recent case reaffirmed this interpretation, claiming the purposes of criminal contempt charges are to punish the individual, deter future offenses, and vindicate the authority of the court, while civil charges are meant to induce compliance or compensate the other party for the noncompliance.[71]

However, the Court of Appeals for the Fifth Circuit stated that civil contempt can be backward-looking in the same way criminal contempt is, meaning the distinction rests on the fact that civil contempt "remedies the consequences of defiant conduct on an opposing party, rather than punishing the defiance per se."[72]

A First Circuit Court of Appeals case, *United States v. Winter*, offers yet another approach, which directly contradicts *Shillitani*.[73] Here, Winter refused to testify in the criminal trial of a codefendant

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[69] Hess v. N.J. Transit Rail Operations, Inc., 846 F.2d 114, 115 (2d Cir. 1988).

[70] *In re* Weiss, 703 F.2d 653, 661 (2d Cir. 1983); *see Hess*, 846 F.2d at 115–16.

[71] SD Prot., Inc. v. Del Rio, 587 F. Supp. 2d 429, 433 (E.D.N.Y. 2008).

[72] In re Bradley, 588 F.3d 254, 263–64 (5th Cir. 2009).

[73] *See* U.S. v. Winter, 70 F.3d 655 (1st Cir. 1995). The court argued that the facts of *Winter* were distinct from *Shillitani* because the contemnor was already imprisoned, meaning the threat of imprisonment would not have been incentivizing, and the refusal to testify was before an ongoing trial, unlike the contemnor in *Shillitani*.

despite promises of immunity, and he was charged with criminal contempt.[74] The court determined that this was a proper contempt classification because, despite the fact that "the court so strongly expressed a coercive goal," the refusal to testify may destroy a prosecution.[75] This does little to clear the confusion of how to uniformly classify instances of contempt as either civil or criminal in nature.

Circuit courts also disagree about the proper penalties for criminal contempt.[76] The contempt statute does not specify minimum or maximum sentences or classify contempt as a felony, misdemeanor, or petty offense.[77] This allows courts a great deal of discretion in determining what penalty to impose for a specific offense.[78] Congressional limits have not been placed on this discretion, leading to an array of approaches by courts for penalizing contempt.[79] "Under a strict interpretation of the statute, the maximum penalty for criminal contempt is life imprisonment, which would classify a violation as a Class A felony."[80] While some courts do follow this approach, others refuse, recognizing the broad range of contemptuous conduct and the need for more leniency.[81] This latter approach awards courts greater discretion in determining the appropriate penalties for any given contemptuous action through its classification as either a misdemeanor or felony and the use of the corresponding punishments used for analogous crimes.[82] This ensures that the seriousness of the crime is reflected in the penalty imposed on the individual.[83] A third subset of courts reject this kind of classification of contempt in line with other crimes, and instead refer to it as "sui generis" or "[o]f its own kind."[84] This approach allows the judge even more discretion in determining appropriate

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[74] *Id.* at 658.

[75] *Id.* at 665.

[76] *See* Jaslow, *supra* note 48, at 607–14.

[77] *See id.* at 604.

[78] *See id.*

[79] *See id.*

[80] *Id.* at 605.

[81] *See id.*

[82] *Id.* at 605–06.

[83] *See id.*

[84] *Id.* at 606.

penalties because they are not restricted by those given for crimes of similar ranking.[85] This circuit split has not yet been addressed by the Supreme Court.[86]

D. Abuse of Discretion in Contempt Cases

This is particularly important considering the nature of the instances that can give rise to these charges, including disobeying the judge's orders.[87] Allowing judges such a high degree of discretion in these situations creates ample opportunity for judges' negative personal feelings arising from this disobedience, even justifiable disobedience, to impact their decision.

This discretion is counter to both the legality principle and the concept of a balance of powers among the branches of government,[88] both of which are pillars of the American judicial system.[89] The legality principle holds that the legislature is tasked with defining crimes and criminal punishments should be applied only to those who violate these codified crimes.[90] Courts, however, currently have the power to define criminal contempt without significant reliance on statutory guidelines, circumventing the legislature altogether.[91] Therefore, the balance of powers is upset, and "the roles of legislator, adjudicator, prosecutor, enforcer, and, in civil contempt proceedings, fact finder are conflated and devolve

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[85] *Id.*

[86] *Id.* at 609.

[87] *See* Dudley, Jr., *supra* note 56, at 1075 (explaining that contemptuous conduct can include "disruptive or disrespectful courtroom behavior," witness refusals to testify, failure to comply with child support and alimony awards, "[dis]obedience to injunctions in private law disputes," and noncompliance with "'structural injunctions' issued under antitrust, civil rights, or other regulatory statutes.").

[88] *See* Hostak, *supra* note 38, at 194–95.

[89] *See id.* at 194 ("The principle of legality 'is widely recognized as the cornerstone of the penal law.'"); *see also* Hatchett & Pitts, *supra* note 25, at 27 ("Checks and balances are important components of the design of our government . . . . The main point of separation of powers with checks and balances in our government is the prevention of tyranny and the equal protection of individual rights under law.").

[90] Hostak, *supra* note 38, at 194–95.

[91] *See id.* at 195.

upon the judge."[92] The methods by which the executive and legislative branches usually check the judiciary—e.g., defining crimes and deciding when to prosecute—cannot reach these specific actions of the court, leaving defendants completely at the mercy of the singular, judicial branch.[93] Justice Black expressed this sentiment, noting that "[w]hen the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause."[94]

Donziger's case is a prime example of how the ambiguity in the civil versus criminal contempt classification can result in questionable charges and damaged public opinion. Classifying Donziger's actions as "criminal" subjected him to six months in prison, even after an almost two-year stint under house arrest, all because he refused to hand his personal electronics over to the corporate giant he had previously defeated in court.[95] This criminal charge is excessive, especially considering Donziger said he would voluntarily take on civil contempt charges to ensure the constitutionality issue was resolved and his clients were properly protected.[96] This was a valid concern and a rational attempt to seek further judicial review, not an effort to maliciously defy or mock the

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[92] *Id.* at 196.

[93] *See id.* ("When a court imposes contempt sanctions for the violation of its own injunction . . . the judge-fashioned injunction serves as legislation, which the judge then adjudicates and executes.").

[94] *See* Green v. U.S., 356 U.S. 165, 199 (1958) (Black, J., dissenting), *overruled in part by* Bloom v. State of Ill., 391 U.S. 194 (1968).

[95] *See* U.S. v. Donziger, No. 11-CV-691 (LAK), 2021 WL 3141893 (S.D.N.Y. July 26, 2021); *see also* North, *supra* note 5 ("Judge Loretta Preska justified imposing the maximum penalty by asserting that Donziger, now 60, had not shown contrition.").

[96] *See Donziger*, 2021 WL 3141893, at *42; *see also* Nancy Gertner & Mark Bennett, *Criminal Contempt Charges In Donziger Case Are Excessive*, LAW360 (July 13, 2020, 6:24 PM), https://www.law360.com/articles/1290825 /print?section=energy [https://perma.cc/333W-WJRJ] ("Donziger was very clear with the court that he was prepared to be held in civil contempt so he could properly resolve the important constitutional issues at stake, given the dangers faced by his clients in Ecuador.").

court.[97] Further, the ability of the judge to sidestep constitutional safeguards and prevent a jury trial by classifying the contempt as a "petty offense" means Donziger was entirely in the hands of the judiciary, which had already showed its disdain for the attorney and preference for Chevron.[98] The purpose of his contempt charge was solely to vindicate the authority of the court after perceived disrespect, not to serve the interests of justice or the public good.[99] The requirement for the court to use the "least possible power adequate to the end proposed"[100] in cases of contempt was clearly not followed. The judges paid no mind to the legitimate and meaningful defenses put forth by Donziger as to why he could not fulfill the order.[101]

Rather than recognizing this lawsuit for what it was—a SLAPP suit—and dismissing it as a misuse of the judicial system, the judge sided with the giant corporation and against the activist fighting to make it answer for its crimes.[102] Additionally, the court punished Donziger for attempting to protect his indigenous clients' information from the corporation actively plotting against them.[103] It is apparent that the prejudice of the judge had a significant impact on the treatment Donziger faced in the courtroom because judges exercise a great deal of discretion in categorizing, trying, and punishing contempt.[104] This opens the door for spiteful judges to influence the fate of an individual they perceive to be challenging their authority or the authority of the court. Judges' negative

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[97] *See* Gertner & Bennett, *supra* note 96 ("We have never heard of criminal charges being initiated under circumstances in which the lawyer, in apparent good faith, was seeking more judicial review, as opposed to openly flouting the court.").

[98] *See* Recinos, *supra* note 6. In addition to his failure to disclose his Chevron-related investments and to recuse himself for potential bias, Judge Kaplan also "repeatedly disparaged . . . Donziger," saying things like "Donziger wanted 'to become the next big thing in fixing the balance of payments deficit.'"

[99] *See* Gertner & Bennett, *supra* note 96.

[100] *See* Young v. U.S. *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 801 (1987) (quoting U.S. v. Wilson, 421 U.S. 309, 319 (1975)).

[101] *See* Brief for Appellant, *supra* note 10, at 12–19 (outlining Donziger's efforts to inform the court of his reasoning for noncompliance with the discovery orders and the court's disregard).

[102] *See Donziger*, 2021 WL 3141893, at *59.

[103] *See id.* at *3.

[104] *See* 18 U.S.C. § 401; Jaslow, *supra* note 48, at 605–06.

personal feelings may lead them to more readily classify contemptuous conduct as criminal or impose harsher penalties for trivial offenses, for example.

The Supreme Court has cautioned against the possibility of judges imposing their own feelings and prejudices in the exercise of the contempt power.[105] Justice Taft opined that "care is needed to avoid arbitrary or oppressive conclusions . . . caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge."[106] He explained that the judge has to "banish the slightest personal impulse to reprisal" and, whenever possible, allow for another judge to take their place.[107] While Donziger's actions were not exactly a personal attack on Judge Kaplan, they could be construed by the judge as undermining his authority, especially considering the nature of the proceedings up to that point, which included several denials of Donziger's stays of discovery pending appeal and charges of civil contempt.[108] As such, it is unclear why the same cautions would not apply in this case. In fact, a new judge did proceed over the case instead of Judge Kaplan, presumably to avoid the appearance of prejudice.[109] The problem, however, is that Judge Kaplan personally appointed this new judge,[110] undermining any safeguarding effect the shift would otherwise have on the trial. Moreover, apart from the fact that the new judge was personally appointed by Judge Kaplan, the appointed judge also had ties to Chevron that created a potential conflict of interest.[111] As such, the potential for judicial impropriety

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[105] *See* Cooke v. U.S., 267 U.S. 517, 539 (1925).

[106] *Id.*

[107] *Id. See also* Offutt v. U.S., 348 U.S. 11, 14 (1954) ("[T]his Court has deemed it important that district judges guard against this easy confusion by not sitting themselves in judgment upon misconduct of counsel where the contempt charged is entangled with the judge's personal feeling against the lawyer."); Mayberry v. Pa., 400 U.S. 455, 466 (1971) ("[B]y reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor.").

[108] *See* Brief for Appellant, *supra* note 10, at 14–17.

[109] *See* U.S. v. Donziger, No. 11-CV-691 (LAK), 2021 WL 3141893 (S.D.N.Y. July 26, 2021).

[110] Brief for Appellant, *supra* note 10, at 20.

[111] *See* Corbett, *supra* note 15.

in Donziger's case was great, in part due to the considerable lack of clarity in contempt laws and their application.

III. ANALYSIS OF PRIVATE PROSECUTION LAW AND ITS PROBLEMS

A. The History of Private Prosecution

Private prosecution also dates back to early common-law England where victims, or those acting on behalf of victims, were often the primary actors in bringing criminals to justice because there was no centralized system of public prosecution.[112] This continued until 1879, when Parliament instituted the Prosecution of Offenses Act, which created the office of the Director of Public Prosecutions and began the use of a public prosecutor in England.[113] The practice of private prosecution was transferred to America until public prosecutions began to gain traction through an incremental, state-by-state switch.[114] The idea of a public prosecutor is believed to have been adopted from the English, Dutch, or French, but the exact origins are unclear.[115] The contemporary public prosecutor in the United States, however, is granted greater power and discretion than any of their European counterparts.[116] Private criminal prosecutions continued largely unrestricted into the nineteenth century, though certain states began to outlaw the practice, due to concerns about private attorneys' ability to adequately serve the public interests, as is required of prosecutors.[117]

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[112] John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 515 (1994).

[113] Michael Edmund O'Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 671 (2010).

[114] Public prosecutions were gaining prominence in America before the colonies gained independence; however, the process by which each state made the switch differs. For example, in the seventeenth century, Virginia established the office of Attorney General to oversee the cases most important to the Crown, while New York and Pennsylvania employed a "scout" with responsibilities similar to those of a sheriff and prosecutor. *See* Bessler, *supra* note 112, at 516–17.

[115] *Id.* at 517.

[116] *Id.*

[117] *See id.* at 518–21 ("The prosecuting officer represents the public interests, which can never be promoted by the conviction of the innocent. His object, like

Despite the massive shift towards public prosecution, there remains a significant number of private criminal prosecutions in the United States.[118] Rule 42 of the Federal Rules of Criminal Procedure explains how courts request prosecution, and if that request is denied by the public prosecutor, they can instead appoint a private attorney as prosecutor.[119] Some states have instituted complete bans on private prosecution of criminal cases, but others continue to allow them, some with the caveat that there must be a certain degree of control vested in the district attorney.[120] Despite these limitations, private prosecutors are often significantly involved in the pre-trial and trial activities.[121]

In 1987, the Supreme Court encountered the issue of private prosecution in *Young v. U.S. ex rel. Vuitton et Fils S.A.*, where the defendant violated an agreement to cease his infringement on the trademark of a leather goods manufacturer and was subsequently charged with criminal contempt, which was prosecuted by a private attorney.[122] The Supreme Court expressed that courts do have the authority to appoint private attorneys for the prosecution of contempt arising from disobedience to the court, but it also noted that the private prosecutor in these criminal contempt proceedings must be a disinterested party.[123] The majority contended that the "appointment illustrates the *potential* for private interests to

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that of the court, should be simply justice; and he has no right to sacrifice this to the pride of professional success . . . . And criminal cases are not likely to be so presented if the prosecution is permitted to be conducted by the paid attorneys of parties who from passion, prejudice, or even an honest belief in the guilt sic of the accused, are desirous of procuring his conviction." (quoting Biemel v. State, 37 N.W. 244, 245–48 (Wis. 1888))).

[118] *See* O'Neill, *supra* note 113, at 684; *see also* Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 413 (2009).

[119] *See* FED. R. CRIM. P. 42(a)(2).

[120] Alabama, Montana, and Ohio do not subject private prosecutors to any form of consent or oversight by the district attorney, but the majority of states allow private prosecution with varying degrees of oversight and other limitations. Bessler, *supra* note 112, at 521, 529, 542; O'Neill, *supra* note 113, at 683.

[121] Bessler, *supra* note 112, at 512.

[122] *See* Young v. U.S. *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 787 (1987).

[123] *Id.* at 794, 804.

influence the discharge of public duty."[124] The Court emphasized that public and private attorneys hold different ethical obligations,[125] and "representation of other clients may compromise the [private] prosecutor's pursuit of the Government's interest" due to this discrepancy in ethical duties.[126]

Justice Blackmun's concurrence goes even further than the majority, stating that "the practice . . . of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process . . . . [It] requires a disinterested prosecutor with the unique responsibility to serve the public, rather than a private client, and to seek justice that is unfettered."[127] In his concurrence, Justice Scalia also noted that it is "well established that the judicial power does not generally include the power to prosecute crimes."[128]

Courts have interpreted the *Young* decision as permitting the use of private prosecutors,[129] but some understand it to limit the scope of their involvement in the trial activities and require a high degree of oversight by the public prosecutor.[130] Proponents of private prosecutions justify the continuing use of such a practice with a few distinct arguments.[131] They argue that the system saves public resources, helps to limit the power of public prosecutors to decide who is prosecuted, and is necessary for the judiciary to retain its

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[124] *Id.* at 805.

[125] *See id.* at 788.

[126] *Id.* at 804.

[127] *Id.* at 814–15 (Blackmun J., concurring).

[128] *Id.* at 816 (Scalia J., concurring).

[129] *See* Bessler, *supra* note 112, at 535–37.

[130] *See, e.g.*, People v. Powell, 25 P. 481 (Cal. 1891); Davis v. People, 238 P. 25 (Colo. 1925); Ates v. State, 194 So. 286 (Fla. 1940); Allen v. State, 257 S.E.2d 5 (Ga. App. 1979); Brown v. State, 250 S.E.2d 438 (Ga. 1978); People v. Farnsley, 293 N.E.2d 600, 605 (Ill. 1973); Hayner v. People, 72 N.E. 792 (Ill. 1904); State v. Baker, 819 P.2d 1173 (Kan. 1991); State v. Berg, 694 P.2d 427, 431 (Kan. 1985); State v. Sandstrom, 595 P.2d 324 (Kan. 1979); Commonwealth v. Hubbard, 777 S.W.2d 882 (Ky. 1989); Earl v. Commonwealth, 569 S.W.2d 686 (Ky. App. 1978); State v. Hopper, 203 So. 2d 222 (La. 1967); State v. Bartlett, 74 A. 18, 19 (Me. 1909); State v. Wouters, 177 A.2d 299 (N.J. Super. 1962); Ballard v. State, 519 S.W.2d 426 (Tex. Crim. App. 1975); People v. Tidwell, 12 P. 61 (Utah 1886); State v. Dunbar, 566 A.2d 970 (Vt. 1989).

[131] *See* O'Neill, *supra* note 113, at 660–01; Young v. U.S. *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 798 (1987).

authority.[132] Justice Brennan suggested that, without the ability to appoint prosecutors for contempt proceedings, courts' judgements "would be only advisory."[133]

Additionally, the North Carolina Supreme Court stated in *State v. Moose* that private prosecutors "are officers of the court, bound by the ethical responsibilities set forth in the Code of Professional Responsibility" and that they are bound by "statutory rules and case law."[134] It also noted that the prosecutor is "always controlled by the trial judge whose overriding concern is to insure orderly and evenhanded conduct in his courtroom."[135] Far from a reassurance, this declaration only affirms that the judiciary holds all the power in these situations. A private prosecutor appointed by a judge cannot be said to be free of bias simply because they are subject to judicial oversight, as judges can be active contributors to these biases.[136]

B. Criticism of Private Prosecutors

1. Abuse of Power

The use of private criminal prosecutors fails to account for the public interest considerations that public prosecutors are required to serve.[137] Prosecutors have the power to determine "which cases to

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[132] *See id.*

[133] *Young*, 481 U.S. at 798.

[134] State v. Moose, 310 N.C. 482, 489 (1984).

[135] *Id.*

[136] *See* Matt Heller, *The Federal Court System is Corrupt*, CAVALIER DAILY (Nov. 3, 2021), https://www.cavalierdaily.com/article/2021/11/heller-the-federal-court-system-is-corrupt [https://perma.cc/D8PC-MH93] (citing a Wall Street Journal investigation which found that "since 2010, over 130 federal judges have violated laws or ethical rules by hearing cases involving companies in which they or their family owned stock"); *see also* Dylan Hedtler-Gaudette, *POGO Testimony: Increasing Transparency and Accountability in the Judicial Branch*, POGO (Oct. 26, 2021), https://www.pogo.org/testimony/2021/10/pogo-testimony-increasing-transparency-and-accountability-in-the-judicial-branch/ [https://perma.cc/H4CR-YFV3] (explaining the urgent need to better ensure the "legitimacy, integrity, and independence of the federal judiciary"). This is especially true in contempt cases, where the judge may be resentful towards the contemnor for refusing to comply with their orders.

[137] Bessler, *supra* note 112, at 543–49.

prosecute . . . who and when to investigate, what offense to be charged, the timing of an indictment or complaint, and . . . the place of trial."[138] This high level of discretion makes prosecutorial impropriety a primary concern in any given case,[139] and especially in criminal prosecutions where penalties may be severe.

The Supreme Court emphasized the importance of the role of a prosecutor generally, stating that it serves as a representative of "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all" and whose interest "is not that it shall win a case, but that justice shall be done."[140] By contrast, private attorneys have a professional obligation to be staunch advocates for their client even if doing so may not be conducive to the public interest.[141] As such, the duties of a private attorney differ from those of a prosecutor.[142] Courts heavily regulate all other aspects of a trial, including jurors, judges, and defense attorneys, to ensure fairness and to guard against even the appearance of impropriety, yet they provide insufficient regulation for private prosecutors.[143]

2. Lack of Accountability

Private prosecutors are not held to the same degree of accountability as public prosecutors who are "subject to the political process," even if indirectly.[144] Executive branch control over these actors gives the public a greater say in the legal system, rather than

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[138] *Id.* at 566. While these responsibilities do not transfer to private prosecutors, they do indicate the level of importance placed on prosecutorial actors in America, demonstrating why it is necessary to exclude private individuals from the position.

[139] *See* Matthew S. Nichols, *No One Can Serve Two Masters: Arguments Against Private Prosecutors*, 13 CAP. DEF. J. 279, 305 (2001).

[140] Berger v. U.S., 295 U.S. 78, 88 (1935).

[141] *See* MODEL CODE OF PRO. RESP. EC 7-9 (AM. BAR ASS'N 1980).

[142] *See* MODEL CODE OF PRO. RESP. EC 7-13 (AM. BAR ASS'N 1980); MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2003).

[143] *See* Bessler, *supra* note 112, at 553–58.

[144] Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1803 (1993).

leaving every aspect to the judiciary.[145] This is especially important considering the federal judicial branch is the least accountable branch of government in the United States, due to its distance from the political process.[146] Accordingly, the risk of appointing private prosecutors includes the "the perceived danger of abuse by a private attorney wielding prosecutorial power . . . [which] has tremendous potential to undermine public confidence in the very legitimacy of the state's provision of criminal justice."[147]

Further insulation of this prosecutorial role from the will of the public creates the perception, even if inaccurate, that private actors are influencing the legal system in ways that should be left to accountable public officials acting on behalf of the government.[148] Even though "the decision making processes of public prosecutors are notoriously opaque," that of private attorneys exacerbates the issue of transparency due to potential exemptions from free information laws and their tendency to work in locations "removed from other public actors."[149]

3. Imbalance of Power in the Judiciary

The system of private criminal prosecutions contributes to an imbalance of power for the judiciary by allowing it to circumvent both the legislative and executive branches of government. This

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[145] *See* Bessler, *supra* note 112, at 570. Federal public prosecutors are appointed by executive branch officials who are directly elected by the public, meaning they are indirectly accountable to the public through these actors, unlike private prosecutors who are completely separated from the electoral process.

[146] *See* Hedtler-Gaudette, *supra* note 136 ("[S]ince lifetime appointments mean federal judges and Supreme Court justices don't face the same accountability measures as elected officials, it's critical that they are—and that they are perceived to be—impartial . . . . [T]he federal judiciary is the least transparent, and therefore least accountable, branch of government.").

[147] Fairfax, Jr., *supra* note 118, at 441, 438 ("It does not take much imagination to envision the potential for corruption and conflicts of interest when a lawyer who controls the tremendous power of criminal investigation and prosecution also represents private clients.").

[148] *See id.* at 443 ("Private attorneys might have less accountability than public prosecutors. After all, public prosecutors ostensibly are answerable—either directly or indirectly—to the citizenry in whose name they prosecute.").

[149] *Id.* at 444.

undermines the separation of powers meant to protect citizens from government tyranny and ensure public confidence in the fairness of our government systems.[150] While there are currently some rules and regulations aimed at curtailing this power, such as those mandating oversight,[151] they are not comprehensive enough to adequately check the judiciary and protect against a judge's prejudice.[152] Justice Brennan has even said that the problem with the appointment of interested prosecutors is not impropriety, but the "*appearance of impropriety* that diminishes faith in the fairness of the criminal justice system in general."[153]

C. The Role of Private Prosecution in the Donziger Case

In the Donziger case, the appointed private prosecutor, Rita Glavin, had previous ties to Chevron.[154] This raises serious concerns about her ability to fairly prosecute the case without prejudice against Donziger. In its brief, Donziger's legal team cited *Edmond v. United States*, arguing that, due to Glavin's appointment by the court, rather than by the President with the consent of the Senate, the private prosecutor is an "inferior officer" and "must be 'directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'"[155] In Donziger's case, executive oversight by John P. Carlin, the then-Acting Deputy Attorney General of the prosecution, was practically nonexistent.[156]

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[150] THOMAS CAMPBELL, SEPARATION OF POWERS IN PRACTICE 1 (Stanford Univ. Press ed., 2004).

[151] *See* Bessler, *supra* note 112, at 529, 535–37. Certain rules regarding the appropriate scope of private prosecutions have been gleaned from Supreme Court decisions, including the need for government counsel approval and the relegation of the private prosecutor to a "subordinate role" while a public prosecutor retains control.

[152] *See* Brief for Appellant, *supra* note 10, at 28 ("[T]he Special Prosecutor was under no executive branch chain of command.").

[153] Young v. U.S. *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 811 (1987) (emphasis added).

[154] *See* Donziger, 2021 WL 3141893, at *49.

[155] Brief for Appellant, *supra* note 10, at 33 (quoting Edmond v. United States, 520 U.S. 651, 663 (1997)).

[156] *See id.* at 28.

However, even without this finding, the mere perception of bias is a danger to the judicial system,[157] especially when it benefits a massive corporation such as Chevron and harms a single attorney trying to hold the company accountable for its environmental crimes. The U.S. Attorney for the Southern District of New York declined to prosecute the case,[158] which should have been sufficient to end the persecution of Donziger and release him from under Chevron's might.

IV. HOW TO BETTER LIMIT THE APPEARANCE OF JUDICIAL IMPROPRIETY

Donziger's situation is emblematic of the increasingly prevalent tactics corporations use to punish those who draw attention to their wrongdoings.[159] Congress must pass anti-SLAPP legislation if

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[157] *See* Hedtler-Gaudette, *supra* note 136 ("The perception of impartiality is just as important to the Court's legitimacy as actual impartiality."). *See generally* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 446 (2015) (claiming states have a compelling interest in preserving a public perception of judicial integrity in the election of judges); Republican Party of Minn. v. White, 536 U.S. 765, 802 (2002) (claiming "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); The Federalist No. 78, at 522–23 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) ("[courts] have neither Force nor Will, but merely judgment. If the public does not have confidence in courts' judgment, then the legitimacy of courts as a democratic institution is endangered.").

[158] Brief for Appellant, *supra* note 10, at 19.

[159] *See* ZULUAGA & DOBSON, *supra* note 29, at 4 ("The criminalization of defenders and judicial harassment - a range of legal tactics used by states and business actors to violate the rights of defenders - is a growing problem worldwide"); *see also* Morgan Simon, *A Lawsuit A Day Keeps the Activists Away: New Report Finds 355 Lawsuits Filed by Big Business Against Activists*, FORBES (July 27, 2021, 1:00 PM EDT), https://www.forbes.com/sites/morgansimon/2021/07/27/a-lawsuit-a-day-keeps-the-activists-away-new-report-finds-355-lawsuits-filed-by-big-business-against-activists/?sh=766ab44731ec [https://perma.cc/4L6Y-DFH9] ("Increasingly, businesses globally are using lawsuits to try and silence their critics."); *Breaking: Donziger's Appeal Denied, Must Report to Prison Wednesday*, AMAZON WATCH (Oct. 26, 2021), https://amazonwatch.org/news/2021/1026-breaking-donzigers-appeal-denied-must-report-to-prison-wednesday [https://perma.cc/K2KF-P8QQ] ("This case is demonstrative of the global trend of silencing activists around the globe through [SLAPPs].").

America is to begin limiting the power of wealthy companies and protecting activists.[160] However, this presupposes the cooperation of judges who would presumably be responsible for identifying SLAPPs and dismissing them. In Donziger's case, the judges showed no indication that they would have done this.[161] The active participation of the judiciary in this clear SLAPP case demonstrates the importance of impartial judges pursuing justice, rather than revenge on the part of a powerful corporation.

While judicial independence is important for the protection of individual rights against majority tyranny, it opens the door for judges to substitute their own policy preferences and biases in place of codified law.[162] Actors within the legislative and executive branches of government have greater political accountability than those within the judicial branch because of their close proximity to the electoral process and, therefore, the will of the people.[163] As a result, it can be argued that the appearance of impropriety within the federal judiciary is particularly worrisome due to the inability for

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[160] *See* Daniel A. Horwitz, *The Need for a Federal Anti-SLAPP Law*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (June 15, 2020), https://nyujlpp.org/quorum/the-need-for-a-federal-anti-slapp-law/ [https://perma.cc/QWW4-HY2Q] ("[F]ederal anti-SLAPP law is essential to defend against efforts to chill constitutionally protected speech through baseless litigation.").

[161] The judges' ties to Chevron, evident unresponsiveness towards Donziger's privacy concerns, and language towards Donziger within the courtroom, indicate that they likely would not have sided with Donziger over Chevron in the initial suit. *See* Recinos, *supra* note 6 ("The U.S. federal judge who ruled in favor of Chevron in the company's campaign to block collection of its $9.5 billion environmental liability in Ecuador held investments in the oil company at the time of his decision"); Brief for Appellant, *supra* note 10, at 32 ("[T]he judge who brought the contempt charges picked the presiding judge, did not recuse, and needlessly picked a prosecutor with ties to the adverse party in the underlying civil litigation."); Helmore, *supra* note 17 (Donziger claimed he was being tried by a "Chevron-connected judge and prosecuted by a Chevron-connected lawyer").

[162] *See* Dinh, *supra* note 23, at 65.

[163] *See* Hedtler-Gaudette, *supra* note 136 ("[S]ince lifetime appointments mean federal judges and Supreme Court justices don't face the same accountability measures as elected officials, it's critical that they are—and that they are perceived to be—impartial . . . . [T]he federal judiciary is the least transparent, and therefore least accountable, branch of government."); Krent & Shenkman, *supra* note 144, at 1801.

the public to simply vote the individual out of office. In light of these issues, the legal community must find a solution to better limit the power of the judiciary, ensure that corrupt judges and biased attorneys encounter adequate checks on their powers, and safeguard the integrity of the judicial system against the perception of impropriety. This is necessary for the preservation of public confidence in the legal system and its capacity to aid individuals in seeking justice.

A. The Need for Greater Legislative Clarity in Criminal Contempt Law

The current regulations regarding criminal contempt proceedings are insufficient for limiting the discretion of judges to classify contempt as criminal and determine appropriate penalties. They are also too vague to provide an adequate check on the judiciary through the other branches of government. To remedy this problem, the distinction between civil and criminal contempt should be more clearly defined and stricter limits should be set for the subsequent proceedings and punishments.[164] One scholar has proposed that this distinction be completely eliminated and both criminal and civil contempt be treated the same.[165] The solution provided in this Note, however, better adheres to the centuries of jurisprudence of contempt proceedings because it retains the traditional civil/criminal division, clarifies which conduct necessitates increased protection within our system, and explains how to institute this protection. Congress must legislatively clarify the distinction between criminal and civil contempt and implement a system of penalties that correspond to types of offenses.

More specifically, criminal penalties—like those faced by Donziger—should not be applicable in situations where the offender did not actually threaten the authority of the court. Individuals attempting to use the court system to achieve a just assessment of their circumstances should never be subject to criminal proceedings and potential imprisonment for their actions pursuant to that goal.

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[164] One potential approach is to create a statutory maximum sentence for criminal contempt. *See* Jaslow, *supra* note 48, at 599.

[165] *See* Dudley, Jr.*, supra* note 56.

Civil contempt remedies are sufficient to affirm the authority of lower courts in these situations because they are solely aimed at compelling compliance, which should be the only goal in cases involving a litigant's honest effort to work with the judicial system to achieve their goals. There is no reason for judges to exercise the criminal lawmaking power of the legislature in situations where, ultimately, justice continues to be sought in a respectful manner within the courts. These efforts do not undermine the judiciary, and therefore do not warrant any form of criminal punishment to protect the court's power.

This kind of good faith test would exclude certain conduct from the criminal contempt powers of the courts and allow people like Donziger, who mount important objections to the orders of a court, to avoid unfair criminal sanctions. Activists targeted with SLAPP suits would have an extra layer of protection from judicial engagement and participation in these frivolous proceedings, thus limiting the power of entities like Chevron that attempt to silence critics. The solution would better protect people like Donziger, while still providing courts with the ability to vindicate their authority and minimize harmful noncompliance with its orders.

In *United States v. United Mine Workers of America*, Justice Black's concurring and dissenting opinion suggested that the intent of the individual is relevant in determining whether their conduct should be classified as criminal or civil contempt, and therefore what penalties should be applied.[166] To that end, intent should be dispositive in classifications of contempt when it is clear that the contemnor has legitimate aims and is attempting to use the mechanics of the justice system to reach these aims, rather than attempting to undermine the authority of the courts.

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[166] U.S. v. United Mine Workers of Am., 330 U.S. 258, 333 (1947) (Black, J., Douglas, J., concurring in part and dissenting in part) ("In determining whether criminal punishment or coercive sanction should be employed in these proceedings, the question of intent—the motivation of the contumacy—becomes relevant.").

B. Public Prosecutors Should Retain Control in the Appointment of Private Prosecutors

Many have claimed that private prosecutors are unconstitutional, in violation of the Due Process Clause,[167] and some have advocated for the discontinuance of private prosecution altogether.[168] Others have suggested reforms to increase transparency and accountability for private prosecutors.[169] This approach is much more realistic for America's judicial system, where the practice of private prosecution is deeply entrenched.[170]

Private prosecution disrupts the balance of powers because the influence of the judiciary cannot be adequately checked when it essentially acts as judge, prosecutor, and jury. Oversight requirements can be ignored entirely, as they were in Donziger's case.[171] While the complete eradication of private prosecution in the United States is tempting, it may be more feasible to take a smaller step to ensure greater judicial limitations and, ultimately, fairer trials where private prosecutors are present.[172] Therefore, the best solution

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[167] *See* Joan Meier, *The "Right" to A Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85, 129 (1992) (arguing that private prosecutors must be disinterested parties to overcome the due process concerns); *see also* Bessler, *supra* note 112, at 571–97 (arguing private prosecutions are unconstitutional); Nichols, *supra* note 139 (same). Some courts have also found the use of private prosecutors to be unconstitutional. *See* People v. Calderone, 573 N.Y.S.2d 1005, 1009 (N.Y. Crim. Ct. 1991) ("[D]ue process requires that the individual who prosecutes a criminal case not have any personal or financial interest in the prosecution nor an attorney-client relationship with any of the parties."); People v. Benoit, 575 N.Y.S.2d 750 (N.Y. Crim. Ct. 1991) (finding that the use of private prosecutors violates both the due process and equal protection clauses of the Fourteenth Amendment).

[168] *See* Bessler, *supra* note 112, at 571–97 (arguing that private prosecutions violate the due process clause and are therefore unconstitutional); *see also* Nichols, *supra* note 139 (same).

[169] Fairfax, Jr., *supra* note 118, at 453–55.

[170] *See* Bessler, *supra* note 112, at 516–17.

[171] *See* Brief for Appellant, *supra* note 10, at 28.

[172] Private prosecutions appear to be an attractive solution to the problems prosecutor's offices are facing due to their limited resources. Particularly, the use of private prosecutors can be a cost-cutting measure that promotes efficiency. For this reason, the total elimination of private prosecutions would likely be politically unpopular. *See* Fairfax, Jr., *supra* note 118, at 417–19 ("Given the perceived

is to require the public prosecutor, who refuses to prosecute a contempt charge, to decide whether or not to appoint a private prosecutor. If they do decide to, they should be the actor responsible for determining who is appointed. Some jurisdictions have rules mandating that the public prosecutor give consent and retain effective control of the proceedings when private prosecutors are appointed,[173] but these requirements can be circumvented or are too minimal to prove effective.[174] In other jurisdictions, these kind of rules are completely absent.[175] As such, a stronger nationwide law is necessary. The proposed solution will transfer power from the judiciary to a much more accountable actor in the appropriate branch of government, while also distancing the trial from the judge who brought the charges to avoid even the mere perception of bias.

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potential benefits of prosecution outsourcing, it would not be surprising to see the practice expand. Nearly every jurisdiction around the nation is facing severe budget cuts . . . . Given this crisis in the funding of the public prosecutorial function, larger governmental entities increasingly may contemplate turning toward prosecution outsourcing, just as smaller jurisdictions with limited law enforcement budgets have done for some time.").

[173] *See, e.g.*, People v. Powell, 25 P. 481 (Cal. 1891); Davis v. People, 238 P. 25 (Colo. 1925); Ates v. State, 194 So. 286 (Fla. 1940); Allen v. State, 257 S.E.2d 5 (Ga. App. 1979); Brown v. State, 250 S.E.2d 438 (Ga. 1978); People v. Farnsley, 293 N.E.2d 600, 605 (Ill. 1973); Hayner v. People, 72 N.E. 792 (Ill. 1904); State v. Baker, 819 P.2d 1173 (Kan. 1991); State v. Berg, 694 P.2d 427, 431 (Kan. 1985); State v. Sandstrom, 595 P.2d 324 (Kan. 1979); Commonwealth v. Hubbard, 777 S.W.2d 882 (Ky. 1989); Earl v. Commonwealth, 569 S.W.2d 686 (Ky. App. 1978); State v. Hopper, 203 So. 2d 222 (La. 1967); State v. Bartlett, 74 A. 18, 19 (Me. 1909); State v. Wouters, 177 A.2d 299 (N.J. Super. 1962); Ballard v. State, 519 S.W.2d 426 (Tex. Crim. App. 1975); People v. Tidwell, 12 P. 61 (Utah 1886); State v. Dunbar, 566 A.2d 970 (Vt. 1989).

[174] *See, e.g.*, State v. Baker, 819 P.2d 1173 (Kan. 1991) (the privately retained attorney was classified as an "assistant prosecutor" rather than private prosecutor and was allowed greater involvement in the proceedings).

[175] *See, e.g.*, Hall v. State, 411 So. 2d 831, 838 (Ala. Crim. App. 1981) ("The appearance by a qualified attorney . . . does not require an appointment by any court, the District Attorney, or any of his assistants."); State v. Cockrell, 309 P.2d 316 (Mont. 1957) ("[T]he court will indulge the presumption that the appointment was regularly made in the absence of a showing to the contrary.").

CONCLUSION

Despite a landmark ruling against Chevron for its devastating impact on the Ecuadorian people and their rainforests, the company has skirted all consequences and has succeeded in its retaliatory attack on those trying to hold it accountable.[176] Natali Segovia, Donziger's lawyer and attorney with the Water Protector Legal Collective, pointed to Judge Preska's claim that the United States "respects the rule of law" and stated, "what we've seen in this case is exactly the opposite. This is the weaponization of the law against a human rights attorney that has worked for over twenty years to hold Chevron accountable for the damage it caused in the Ecuadorian Amazon."[177]

The crisis in Ecuador is ongoing, and Chevron has escaped responsibility.[178] While this is the true tragedy of the case, its ultimate repercussions also prove troublesome. The direct revenge plot undertaken by a massive oil corporation to destroy a prominent environmental lawyer unearths concerns about the influence of these corporations within the justice system. However, what is truly alarming is the judicial conduct that facilitated Chevron's success in this case, and that raises concerns about the efficiency of existing safeguards on potential judicial prejudices.

Steven Donziger has experienced the consequences that come from challenging a vengeful and powerful corporation, combined with an unsympathetic and unrestricted judiciary. Both the criminal contempt charge and the appointment of a private prosecutor contributed to the injustice of his case. The best way to remedy this injustice, and ensure that it will not happen to anyone else, is to guarantee there are adequate checks on the judiciary by the more

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[176] *See The Brian Lehrer Show: Prison Looms for Steven Donziger* (WNYC radio broadcast Oct. 27, 2021).

[177] *Breaking: Donziger's Appeal Denied, Must Report to Prison Wednesday*, AMAZON WATCH (Oct. 26, 2021), https://amazonwatch.org/news/2021/1026-breaking-donzigers-appeal-denied-must-report-to-prison-wednesday [https://perma.cc/K2KF-P8QQ].

[178] *See* Erin Brockovich, *This Lawyer Should Be World-Famous for His Battle with Chevron – But He's in Jail*, GUARDIAN (Feb. 8, 2022), https://www.theguardian.com/commentisfree/2022/feb/08/chevron-amazon-ecuador-steven-donziger-erin-brockovich [https://perma.cc/E53M-3FGV].

accountable branches of government. To do this, the civil versus criminal contempt distinction must be clearly defined by Congress and the appointment of private prosecutors in criminal cases should be accomplished by the public prosecutor. These solutions will help to check the judiciary and ensure that it will not be yet another barrier to justice for the wealthy and powerful who seek to escape accountability for their actions.