DONZIGER V. UNITED STATES: A CONSTITUTIONAL CHALLENGE TO COURT-APPOINTED PRIVATE PROSECUTORS UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 42

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"[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them . . . . It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." The Federalist No. 78 (Alexander Hamilton).

Last term, the Supreme Court denied a petition for writ of certiorari, filed by now famed environmental lawyer Steven Donziger, that presented the question of whether Federal Rule of Criminal Procedure 42(a)(2) violated the Appointments Clause of the U.S. Constitution. The rule allows federal judges to appoint private attorneys to prosecute criminal contempt charges should the government decline to do so and was the mechanism by which Donziger himself was prosecuted. Justice Gorsuch, joined by Justice Kavanaugh, dissented from the denial, arguing that the appointment of the special prosecutors ran afoul of the text of the Appointments Clause and blurred the line between the judicial and executive powers. The denial of the petition is an interesting departure from the Court's recent Appointments Clause jurisprudence, which has been sensitive to separation of powers concerns, and provides a data point on where the Court is unwilling to draw a rigid line between the functions of the three branches.

 J.D., 2024, New York University School of Law; B.A., 2020, The University of Michigan. Thank you to Professors Barry Adler and Paul Barrett for teaching the class that introduced me to the *Donziger* case, and to Professor Adler specifically for supervising my work on this essay. Thank you as well to the Online Department of the *New York University Law Review* for their thoughtful edits to this piece, particularly (in alphabetical order by last name), Gordon Ahl, Elaine Miao, Lydia Schiller, Julius Sim, and Shawn Young.

INTRODUCTION

No shortage of ink has been spilled about the (literal) trials and tribulations of Steven Donziger. He rose to prominence after winning an over $9 billion victory in Ecuador for the Cofán people, an indigenous group living in the Amazon, against Chevron.[1] Chevron had drilled for oil in the region and polluted it, allegedly, and tragically, giving many Cofán people cancer and other diseases.[2] However, an American judge found that Donziger's victory was won through bribery and fraud—that he had taken advantage of opportunities for corruption in the Ecuadorian legal system.[3] The judge ruled that the Ecuadorian judgment could not be enforced in the United States;[4] after decades of litigation, no money changed hands from Chevron to the Cofán people. The ensuing legal battle in the United States culminated in Donziger having to spend months in federal prison and years in house arrest,[5] garnering significant media attention and public outcry.[6]

There are many interesting things to say about every chapter of Donziger and Chevron's decades-long fight. Indeed, the story has inspired a documentary,[7] a book,[8] and hundreds of news articles.[9] The focus of this

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1 Isabella Grullón Paz, *Lawyer Who Won $9.5 Billion Judgment Against Chevron Reports to Prison*, N.Y. TIMES (Oct. 27, 2021), https://www.nytimes.com/2021/10/27/business/energy-environment/steven-donziger-chevron.html [https://perma.cc/AK24-U9W5].

2 PAUL M. BARRETT, LAW OF THE JUNGLE 215-218 (2014) (describing the impact of oil drilling on the Cofán people).

3 *See* Chevron Corp. v. Donziger (*Chevron I*), 974 F. Supp. 2d 362 (S.D.N.Y. 2014), *aff'd*, 833 F.3d 74 (2d Cir. 2016).

4 *See id.* at 642.

5 Paz, *supra* note 1.

6 *See, e.g.*, Erin Brockovich, *This Lawyer Should Be World-Famous for His Battle with Chevron – but He's in Jail*, GUARDIAN (Feb. 8, 2022, 11:54 AM), https://www.theguardian.com/commentisfree/2022/feb/08/chevron-amazon-ecuador-steven-donziger-erin-brockovich [https://perma.cc/3K8K-YXNJ]; Sharon Lerner, *How the Environmental Lawyer Who Won a Massive Judgment Against Chevron Lost Everything*, INTERCEPT (Jan. 29, 2020), https://theintercept.com/2020/01/29/chevron-ecuador-lawsuit-steven-donziger [https://perma.cc/W9F6-386W]; *Support Steven*, FREE DONZIGER, https://www.freedonziger.com [https://perma.cc/B3QD-H2NB] (last visited Dec. 27, 2023).

7 CRUDE (Joe Berlinger Sept. 9, 2009).

8 BARRETT, *supra* note 2.

9 *See, e.g.*, Kevin E G Perry, *Crusading Lawyer Steven Donziger on His 993 Days of House Arrest Amid Battle with Oil Companies*, INDEPENDENT (Jan. 8, 2024), https://www.independent.co.uk/climate-change/news/steven-donziger-interview-texaco-oil-b2446695.html [https://perma.cc/S37Y-3W8L]; Paz, *supra* note 1; Brokovich, *supra* note 6; Lerner, *supra* note 6.

Case Comment, however, is on the end of the story, at least as it stands now: Donziger's constitutional challenge to his criminal contempt prosecution, and the United States Supreme Court's recent decision not to hear the case.[10]

Donziger's legal battle in the U.S. culminated in him being convicted of criminal contempt, the reason that he ultimately spent time in prison.[11] He was prosecuted not by a local district attorney, but by private attorneys that were appointed to serve as special prosecutors by the judge overseeing Donziger's civil case.[12] The judge had authority to do this under Federal Rule of Criminal Procedure 42(a)(2) ("Rule 42"), which provides that in cases of criminal contempt, "[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 appoint another attorney to prosecute the contempt."[13]

The current rule came about after the 1987 Supreme Court case, *Young v. U.S. ex rel. Vuitton et Fils S.A.* There, as in Donziger's case, the defendants were prosecuted for criminal contempt by a private attorney appointed by the district court.[14] Relevant here, they argued that the court lacked such authority under the version of Rule 42 that existed then.[15] The Court held that even though the old Rule 42 did not explicitly authorize courts to appoint private attorneys, it was "long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt."[16] There was a "longstanding acknowledgement" that such authority was "part of the judicial function" and "essential to ensuring that the Judiciary ha[d] a means to vindicate its own authority without complete dependence on other Branches."[17] Without it, the Judiciary would be "at the mercy of another Branch": the Executive.[18] However, the

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10 *See* Donziger v. United States (*Donziger III*), 143 S. Ct. 868 (2023) (denying Donziger's petition for a writ of certiorari).

11 United States v. Donziger (*Donziger I*), 2021 WL 3141893, at *86 (S.D.N.Y. July 26, 2021), *aff'd,* 38 F.4th 290 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 868 (2023); *see also* Brockovich, *supra* note 6 (noting that Donziger reported to serve a six-month prison sentence for contempt).

12 *See* Order of Appointment, United States v. Donziger, No. 11-cv-00691-LAK-RWL (S.D.N.Y. July 31, 2019).

13 FED. R. CRIM. P. 42(a)(2). The Federal Rules of Criminal Procedure are promulgated by the United States Supreme Court, House Comm. on the Judiciary, 116th Cong., Federal Rules of Criminal Procedure iii (Comm. Print 2020), and govern all criminal proceedings across federal courts, where Donziger was prosecuted. FED. R. CRIM. P. 1(a)(1).

14 Young v. U.S. *ex rel*. Vuitton et Fils S.A., 481 U.S. 787, 791–92 (1987).

15 *Id.* at 793.

16 *Id.* The Court also ultimately held that the prosecutors appointed in *Young* were not disinterested because they represented the private beneficiaries of the court order that the defendants allegedly violated, rendering their appointment improper. *Id.* at 814.

17 *Id.* at 795–96.

18 *Id.* at 796. Notably, Justice Scalia concurred in the judgment, but on the ground that prosecution of criminal contempt is part of the Article II executive power, not the Article III judicial

Court indicated that the ability to appoint private prosecutors should be restrained by the principle that "only [t]he least possible power adequate to the end proposed should be used in contempt cases."[19] Therefore, the court should first refer the case to the public prosecutor's office, and it should only appoint a private prosecutor if the request is denied.[20] In 2002, the language of Rule 42 was amended to reflect the holding in *Young*.[21]

It is worth pausing to note that Rule 42 is so remarkable because the prosecution of crimes is traditionally a function of the executive branch.[22] Although common law England used a model of private prosecution, the American colonies quickly recognized the importance of having criminal proceedings conducted by impartial government officials, and so they established local offices of public prosecutors.[23] At the federal level, the Judiciary Act of 1789 provided for the appointment of an attorney in each judicial district to prosecute federal crimes.[24] It also created the Office of the Attorney General, who was to prosecute cases in front of the Supreme Court and advise the President of the United States and the heads of the departments, situating the position in the Article II executive branch.[25] The district attorneys came under the Attorney General's supervision in 1861, and Congress officially established the Department of Justice, which houses all of these positions, as an executive department of the government in 1870.[26] In the years since, it has become an accepted principle that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ."[27]

After Donziger was tried and convicted of criminal contempt by the

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power. Young v. U.S. *ex rel*. Vuitton et Fils S.A., 481 U.S. 787, 816 (1987) (Scalia, J., concurring). The judicial power "includes the power to serve as a neutral adjudicator in a criminal case," but does not "generally include the power to prosecute crimes." *Id.* at 816. To Justice Scalia, the idea of the efficaciousness of judicial judgments being at the mercy of the Executive, "[f]ar from being absurd . . . is a carefully designed and critical element of our system of Government." *Id.* at 817.

19 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)) (internal quotation marks omitted).

20 *Id.* at 801.

21 FED. R. CRIM. P. 42(a)(2) advisory committee's note to 2002 Amendment.

22 *See Young*, 481 U.S. at 816–17 (Scalia, J., concurring) (highlighting that since the prosecution of law violators is part of the implementation of the laws, it is executive power vested by the Constitution in the President); *see also* Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("[T]he decision of a prosecutor in the Executive Branch not to indict [is] a decision which has long been regarded as the special province of the Executive Branch . . . .").

23 *See* Andrew Sidman, Comment, *The Outmoded Concept of Private Prosecution*, 25 AM. U. L. REV. 754, 756–63 (1976).

24 1 Stat. 92 (1789).

25 *Id.*

26 Jim Martin, *The Creation of the Department of Justice*, LIBR. CONG. BLOGS (Dec. 4, 2017), https://blogs.loc.gov/law/2017/12/the-creation-of-the-department-of-justice [https://perma.cc/TB2C-ZY77].

27 United States v. Nixon, 418 U.S. 683, 693 (1974).

special prosecutors appointed pursuant to Rule 42, he appealed on the ground that Rule 42 violated the Appointments Clause to the U.S. Constitution.[28] The Appointments Clause provides that the President of the United States, "by and with the Advice and Consent of the Senate . . . shall appoint . . . Officers of the United States . . . but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[29] Donziger argued that his prosecution ran afoul of the Appointments Clause in two ways. First, the special prosecutors were inferior officers not supervised by a principal officer, which the Court had previously held to be required by the Clause.[30] Second, Rule 42 allows judges to appoint inferior officers without Congress "by Law" vesting appointment authority in the courts.[31] Donziger lost in the Second Circuit, and filed a petition for writ of certiorari with the Supreme Court, posing two questions: Does Rule 42 authorize judicial appointments of inferior executive officers? If so, do those appointments violate the Appointments Clause?[32] In March of 2023, the Supreme Court denied the petition, with Justices Gorsuch and Kavanaugh dissenting.[33]

This Case Comment proceeds in three parts. Part I documents and provides context to the development of Donziger's criminal contempt case, and how his constitutional challenges were handled in the district and appellate courts. Part II details Justice Gorsuch's vocal dissent from the Supreme Court's denial of the petition for the writ of certiorari. Part III evaluates the state of affairs with Rule 42 and attempts to reconcile the Supreme Court's denial of the petition with its recent Appointments Clause jurisprudence, particularly *Arthrex*, as well as *Relentless*, an upcoming case implicating separation of powers concerns.

I
JOURNEY TO THE SUPREME COURT

A. Pre-Criminal Contempt Litigation

The events leading up to this case date back to 1993, when Donziger

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28 Petition for a Writ of Certiorari, Donziger v. United States, 143 S. Ct. 868 (2023) (No. 22-274).

29 U.S. CONST. art. II, § 2, cl. 2.

30 United States v. Donziger (*Donziger II*), 38 F.4th 290, 293 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 868 (2023). In *Edmond*, the Court held that under the Appointments Clause, inferior officers—those not appointed by the President with the advice and consent of the Senate—must be "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." Edmond v. United States, 520 U.S. 651, 663 (1997).

31 *Donziger II*, 38 F.4th at 293–94.

32 Petition for a Writ of Certiorari, Donziger v. United States, 143 S. Ct. 868 (2023) (No. 22-274).

33 *Donziger III*, 143 S. Ct. 868 (2023).

first became involved in the litigation in Ecuador.[34] What unfolded between then and 2014, the year of his conviction in the United States, is a story unto itself—at times so dramatic that it resembles fiction.[35] For the purposes of this Case Comment, however, I start the story in 2014, when Donziger was tried before Judge Lewis Kaplan in the Southern District of New York on charges under the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO), as well as other fraud-related charges, for his conduct in Ecuador.[36] In a lengthy opinion, Judge Kaplan found that Donziger had violated RICO and that his victory in Ecuadorian court had been procured through fraud and other corrupt means.[37] He granted Chevron the equitable relief it requested: that the multibillion dollar judgment in Ecuador be unenforceable in the United States and that Donziger and his team be prohibited from benefitting financially from the fraud (the "RICO judgment").[38]

A negative feedback loop then ensued: Judge Kaplan ordered Donziger to comply with the RICO judgment; Donziger appealed to the Second Circuit and refused to comply; Judge Kaplan penalized him; Donziger appealed the penalties and refused to comply; and so on and so forth.[39] Donziger originally appealed the RICO judgment to the Second Circuit, which affirmed.[40] Judge Kaplan then ordered that, in addition to the equitable relief, Donziger pay Chevron over $800,000 in court costs (the "money judgment"), which Donziger in turn appealed and did not pay.[41] To enforce the money and RICO judgments, Judge Kaplan ordered that Donziger provide a list of all of his electronic devices and digital accounts to a forensic expert and surrender them for imaging,[42] an inherently invasive measure. Donziger announced that he would not comply with the order,[43] citing the attorney-client privilege

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34 BARRETT, *supra* note 2, at 44–48.

35 For a thorough and altogether fascinating account of the events preceding Steven Donziger's prosecution in the United States, see BARRETT, *supra* note 2.

36 *Chevron I*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014), *aff'd,* 833 F.3d 74 (2d Cir. 2016).

37 *Id.* at 644.

38 *Id.* at 639–42.

39 For context, the back-and-forth between Judge Kaplan and Donziger in the courtroom occurred against a background of, and likely amplified, Judge Kaplan's personal animus for Donziger. *See* Patrick Radden Keefe, *Reversal of Fortune*, NEW YORKER (Jan. 1, 2012), https://www.newyorker.com/magazine/2012/01/09/reversal-of-fortune-patrick-radden-keefe [https://perma.cc/2JWW-HT6Y] (describing Judge Kaplan as exhibiting a "palpable dislike" of Donziger over the course of several hearings leading up to the trial).

40 Chevron Corp. v. Donziger, 833 F.3d 74, 151 (2d Cir. 2016).

41 *See* Chevron Corp. v. Donziger, 384 F. Supp. 3d 465, 471–73 (S.D.N.Y. 2019) (hereinafter *Chevron II*) (describing the over $800,000 money judgment as being entered following the Second Circuit's decision and reflecting taxable court costs), *aff'd in part, vacated in part, rev'd in part,* 990 F.3d 191 (2d Cir. 2021).

42 Chevron Corp. v. Donziger, 425 F. Supp. 3d 297, 306 (S.D.N.Y. 2019).

43 *See Chevron II*, 384 F. Supp. 3d at 476 ("Donziger announced in advance that he would not comply with these provisions of the Protocol and has not done so.").

and his constitutional due process rights.[44] Additionally, Judge Kaplan found that Donziger had monetized the Ecuadorian judgment and had not transferred his contingent fees or any profits from the judgment to Chevron, which was part of the equitable relief in the RICO judgment.[45] All of this culminated in Judge Kaplan holding Donziger in civil contempt and ordering him to pay $666,476.34 and a $2,000 fine that doubled every day he did not comply with the contempt order,[46] as well as ordering him to surrender his passport.[47] A few months later, Judge Kaplan granted Chevron's request that Donziger pay the company $3.4 million in attorney's fees.[48]

Unsurprisingly, Donziger did not pay the millions he owed to Chevron,[49] nor did he turn over his devices nor surrender his passport.[50] Judge Kaplan issued an Order to Show Cause and referred the case to the U.S. Attorney's Office for the Southern District of New York.[51] The office declined to pursue criminal contempt charges against Donziger, explaining that the matter would require resources that it did not have readily available.[52] Judge Kaplan proceeded to draft six counts of criminal contempt charges himself in an Order to Show Cause,[53] and, pursuant to his power under Rule 42, appointed three private attorneys from the law firm Seward & Kissel to serve as prosecutors in the case.[54] The Order mandated that Donziger appear

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44 *See* United States v. Donziger, No. 11-CV-691(LAK), 2021 WL 92761, at *1 (S.D.N.Y. Jan. 10, 2021) (explaining that Donziger claimed he would not comply with the protocol until his due process rights were respected); *see also* Letter from Edward J. Markey & Sheldon Whitehouse, U.S. Sens., to Hon. Roslynn R. Manuskopf, Dir., Admin. Off. of the U.S. Cts. (July 29, 2021) [hereinafter Markey & Whitehouse Letter] (discussing Donziger's justifications for not complying).

45 *Chevron II*, 384 F. Supp. 3d at 497.

46 *Id.* at 506.

47 *See* Order to Show Cause Why Defendant Steven Donziger Should Not Be Held in Criminal Contempt, United States v. Donziger, No. 11-cv-691 (LAK), at 6 (S.D.N.Y. July 31, 2019) [hereinafter Order to Show Cause].

48 Michael I. Krauss, *Suspended Ex-Attorney Steven Donziger Condemned to Pay Chevron $3.4 Million*, FORBES (July 17, 2019, 3:12 PM), https://www.forbes.com/sites/michaelkrauss/2019/07/17/suspended-ex-attorney-steven-donziger-condemned-to-pay-chevron-3-4-million/?sh=1f6113ca32cd [https://perma.cc/78ED-YPVT].

49 *See Donziger I*, 2021 WL 3141893, at *43, *47 (S.D.N.Y. July 26, 2021), *aff'd,* 38 F.4th 290 (2d Cir. 2022), *cert. denied,* 143 S. Ct. 868 (2023) (explaining that Donziger appealed the Money Judgment and that his bank accounts were frozen and he did not have the means to pay the fines). By this point, Donziger's law license was suspended. Matter of Donziger, 163 A.D.3d 123, 125 (App. Div. 2018). Further, due to the RICO judgment, he could not pay using money from the Ecuadorian judgment, which he had spent virtually his entire legal career pursuing. *See* BARRETT, *supra* note 2, at 45 (discussing how Donziger joined the case in Ecuador two years after graduating law school).

50 Order to Show Cause, *supra* note 47, at 2, 5, 6.

51 Petition for a Writ of Certiorari, *supra* note 28, at 8.

52 *Id.*

53 Order to Show Cause, *supra* note 47.

54 Order of Appointment, United States v. Donziger, No. 11-cv-0691(LAK) (S.D.N.Y. July 31, 2019); *see also* Markey & Whitehouse Letter, *supra* note 44 (laying out the sequence of events

for trial before Judge Loretta A. Preska, another judge for the Southern District of New York.[55] This rare move of a judge invoking Rule 42 to appoint private attorneys to prosecute a case would come to form the basis of the Appointments Clause showdown in *Donziger v. United States*.

B. District Court Proceedings

Ahead of the criminal contempt trial, Donziger moved to disqualify the special prosecutors.[56] Judge Preska denied the motion, as well as several other motions to dismiss.[57] A little over a month ahead of trial, Donziger's legal team sent a letter to Acting Deputy Attorney General John P. Carlin, asking the Department of Justice to review the prosecution.[58] Three days ahead of the scheduled trial start date of May 10, 2021, Carlin responded via email that the Department had reviewed the request and declined to intervene in the court-initiated proceedings.[59] At the outset of the trial, armed with Carlin's email about the DOJ's absence, Donziger moved to dismiss the case on the ground that the special prosecutors were inferior executive officers not supervised by a principal officer, as is required by the Appointments Clause.[60] Judge Preska found the email from Carlin to be inadmissible hearsay, and denied the motion.[61]

Then, in a development consistent with the eventfulness of the *Donziger* litigation, the Supreme Court decided *United States v. Arthrex*, a major Appointments Clause case having to do with the administrative patent judges

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involved with the criminal contempt proceedings). The firm Seward & Kissel had previously represented Chevron. *Id.*

55 Order to Show Cause, *supra* note 47, at 1. Judge Kaplan apparently bypassed the random assignment process and picked Judge Loretta Preska to oversee the criminal case. *Compare* Order to Show Cause, *supra* note 47, at 10 (ordering that the defendant appear before the Honorable Loretta A. Preska) *with* E.D.N.Y LOC. R.50.2(b) ("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 [https://perma.cc/A3G5-MDAA].

56 Petition for a Writ of Certiorari, *supra* note 28, at 9.

57 *See id.* Early in the criminal contempt case, Judge Preska also deemed Donziger a flight risk—in part because of his ties to Ecuador—and ordered him to house arrest and seized his passport. *See* United States v. Donziger, 853 F. App'x 687, 688–89 (2d Cir. 2021), *as amended* (Apr. 26, 2021) (reviewing the district court's risk-of-flight analysis and discussing the conditions of Donziger's pretrial release).

58 Petition for a Writ of Certiorari, *supra* note 28, at 9–10.

59 *Id.* at 10.

60 *Donziger I*, 2021 WL 3141893, at *52 (S.D.N.Y. July 26, 2021), *aff'd*, 38 F.4th 290 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 868 (2023). Recall that under the Appointments Clause, inferior officers—those not appointed by the President with the advice and consent of the Senate—must be "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate"; *see also* Edmond v. United States, 520 U.S. 651, 663 (1997).

61 *Donziger I*, 2021 WL 3141893, at *52.

(APJs) of the United States Patent and Trademark Office.[62] There, the Court held that the APJs' appointment to the Patent Trial and Appeal Board was inconsistent with their inferior officer status because they had binding, decision-making authority that was not reviewable by a principal officer.[63] Therefore, they were functionally principal officers that had not been appointed by the President with the advice and consent of the Senate, in direct contravention of the Appointments Clause.[64] Emboldened by *Arthrex*, Donziger filed a second motion to dismiss after trial but before the verdict.[65] The special prosecutors themselves maintained that they were *not* subject to executive supervision, but, under *Young*, were merely part of the judiciary's inherent power to prosecute contempt cases.[66] On their account, *Arthrex* was inapplicable because it pertained to only executive, not judicial, branch appointments.[67]

Judge Preska rejected Donziger's Appointments Clause claim raised in his post-trial motion for reasons adopted and reiterated by the Second Circuit, discussed *infra* Part I.C.[68] On procedural grounds, she also found that Donziger's Appointments Clause claim was untimely and should have been raised by the deadline for pretrial motions.[69] This procedural finding supplied the basis for the Second Circuit later applying plain error review to Donziger's challenge on appeal.[70]

Donziger was ultimately convicted of all six counts of criminal contempt and sentenced to six months in federal prison, the maximum for a criminal contempt case not required to be heard by a jury.[71] He moved for a new trial on the ground that, since the district court had found the special

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62 594 U.S. 1 (2021).

63 *Id.* at 23.

64 *See id.*

65 *Donziger I*, 2021 WL 3141893, at *53.

66 *See* Petition for a Writ of Certiorari, *supra* note 28, at 11.

67 *Id.*

68 Donziger raised a host of other arguments as to why the criminal contempt charges should be dismissed—including that the special prosecutors were not sufficiently disinterested as required by Young v. United States *ex rel*. Vuitton et Fils S.A., 481 U.S. 787, 814 (1987)—which the court rejected. *Donziger I*, 2021 WL 3141893, at *49, *aff'd,* 38 F.4th 290 (2d Cir. 2022), *cert. denied,* 143 S. Ct. 868 (2023). For brevity's sake, I will not review Donziger's non-Appointments Clause arguments in any depth.

69 *Donziger I*, 2021 WL 3141893, at *53.

70 *See infra* note 84 and accompanying text.

71 *Donziger I*, 2021 WL 3141893, at *86 (S.D.N.Y. July 26, 2021), *aff'd,* 38 F.4th 290 (2d Cir. 2022), *cert. denied,* 143 S. Ct. 868 (2023); *see also* Paz, *supra* note 1. He was released early under a COVID-19 waiver and served the rest of his sentence at home. Sebastien Malo, *Chevron Foe Donziger Released from Prison Under COVID Waiver*, REUTERS (Dec. 10, 2021, 11:29 AM), https://www.reuters.com/legal/litigation/chevron-foe-donziger-released-prison-under-covid-waiver-2021-12-10 [https://perma.cc/KJZ3-PT8Y]. He was released on April 25, 2022. Steven Donziger (@SDonziger), TWITTER (Feb. 4, 2022, 3:01 PM), https://twitter.com/SDonziger/status/1489690528367226883 [https://perma.cc/F7JB-R4ZG].

prosecutors to be inferior executive officers, Rule 42 violated the Appointments Clause because Congress had not "by Law" vested appointment authority in the judiciary.[72] Judge Preska denied the motion, and Donziger appealed to the Second Circuit.[73]

C. Second Circuit Proceedings

Donziger's argument on appeal was a two-fold constitutional challenge to Rule 42 under the Appointments Clause, a combination of the pre- and post-trial arguments he had raised in the district court. First, he argued that the special prosecutors were inferior officers who were not supervised by a principal officer.[74] Second, he argued that Rule 42 does not satisfy the Appointments Clause requirement that Congress must vest the appointment of inferior officers in the courts "by Law" if it is going to do so.[75]

Writing for the majority, Judge Michael H. Park first addressed the threshold question of whether the special prosecutors were officers of the United States such that they fell in the ambit of the Appointments Clause. If not, there would be no constitutional issue. To qualify as an officer, an individual must exercise "significant authority" pursuant to federal law and "occupy a continuing position established by law."[76] Judge Park reasoned that the role of a federal prosecutor—representing the United States in criminal proceedings—was surely significant authority.[77] Further, the position, though not permanent, was continuing: It extended beyond any one individual, and may (and did in this case) last for years.[78] He concluded that the special prosecutors were indeed inferior officers of the executive branch, subject to the Appointments Clause requirements.[79]

Next, Judge Park turned to, and rejected, Donziger's first Appointments Clause argument on the same ground as the district court. Recall that under the Appointments Clause, inferior officers' work must be supervised at some level by a principal officer.[80] He found this standard to be satisfied by the fact that the Attorney General possessed the broad statutory authority to supervise all litigation involving the United States, which included the authority to supervise, and, if necessary, remove the special prosecutors.[81]

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72 Petition for a Writ of Certiorari, *supra* note 28, at 12.

73 *Donziger II*, 38 F.4th 290, 295 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 868 (2023).

74 *Id.* at 293.

75 *Id.* at 293–94.

76 *Id.* at 296 (citing Lucia v. S.E.C., 138 S. Ct. 2044, 2051 (2018)).

77 *Id.* at 296.

78 *Id.* at 299.

79 *Donziger II*, 38 F.4th at 299; *cf.* Morrison v. Olson, 487 U.S. 654 (1988) (finding an independent counsel to be an inferior officer).

80 Edmond v. United States, 520 U.S. 651, 663 (1997).

81 *Donziger II*, 38 F.4th at 300; *see also* 28 U.S.C. §§ 516–19 (describing the Attorney General's authorities).

Whether they were in fact supervised (they undeniably weren't) was "beside the point."[82] Judge Park considered this finding in line with *Young*, which, per its interpretation, only pertains to the judicial power to *initiate* a prosecution for criminal contempt should the executive branch decline to do so.[83] Under his reading of *Young*, after appointing the prosecutors, the power over the criminal contempt prosecution changes hands from the judicial to the executive branch.

Next, Judge Park turned to, and again rejected, Donziger's second Appointments Clause argument, applying plain error review[84] and finding that that the judicial appointment of inferior executive officers, authorized under Rule 42, but not by statute, did not clearly violate the Appointments Clause. First, he considered it unclear whether the Appointments Clause language that Congress must "by Law" vest appointment authority in courts actually required bicameral approval and presentment, or whether Rule 42 sufficed because it was passed pursuant to the Rules Enabling Act.[85] The Act gives the Supreme Court the power to prescribe rules of procedure for federal courts, such as Rule 42.[86] It must notify Congress, which can modify or reject the rules, but otherwise they automatically go into effect without congressional action.[87]

Second, he found that any error by the district court would not be clear in light of *Young*.[88] Judge Park found that *Young* stands for the proposition that courts possess inherent authority to initiate criminal contempt proceedings by appointing private attorneys to prosecute the charges.[89] He conceded that although *Young* may be "in some tension with the [Supreme] Court's more recent Appointments Clause and separation-of-powers jurisprudence," the district court did not plainly err by following a directly applicable Supreme Court case.[90] In other words, if the Court wanted to overturn *Young*, that was its task to take up.

Judge Park's majority was answered by an impassioned dissent from

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82 *Donziger II*, 38 F.4th at 301. Donziger's argument was premised on both the email from the Department of Justice declining to intervene in the prosecution, as well as the fact that the Department filed a separate amicus brief to the Second Circuit rather than directing the special prosecutors to take its position. *Id.* The court found this evidence insufficient because the Department *could* have directed the special prosecutors if it wanted to. *Id.*

83 *Id.* at 301–02 (citing Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 795, 800–01 (1987)).

84 Donziger raised the specific challenge to Rule 42 after the district court opinion was issued, so the court considered it unpreserved and accordingly applied plain error view. *Id.* at 302–03.

85 *Donziger II*, 38 F.4th at 303.

86 28 U.S.C. § 2072.

87 *Id.* § 2074.

88 *Donziger II*, 38 F.4th at 303.

89 *Id.* (citing Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 793 (1987)).

90 *Id.*

Judge Steven J. Menashi.[91] Judge Menashi's argument was as follows: In the American constitutional framework, the power to prosecute a case lies exclusively within the executive branch.[92] By this point in the litigation, everyone involved agreed that the special prosecutors were inferior officers exercising an executive power—their appointment, therefore, needed to comply with the Appointments Clause.[93] But, according to Judge Menashi, their appointment didn't comply with the Clause because they were appointed by a court pursuant to Rule 42, which was not Congress "by Law" vesting appointment authority in the courts.[94] Therefore, the appointment of the special prosecutors and everything that followed—Donziger's prosecution, conviction, and sentencing—were unconstitutional and void.[95]

Judge Menashi explained that the logic of *Young* no longer made sense now that the court had established special prosecutors to be inferior executive officers and cabined *Young*'s discussion to the judiciary's authority over only the initiation of contempt proceedings.[96] Recall that the justification underlying *Young* was the inherent authority of the judiciary to vindicate its own authority when dealing with disobedient litigants without depending on other branches.[97] Judge Menashi's opinion begged the question: How is that authority actually furthered by authorizing a court to appoint a prosecutor who could be immediately fired by the same executive branch that had just declined to prosecute the case?[98] In Judge Menashi's view, this was not what the *Young* court had in mind.

Judge Menashi further explained that Rule 42 is promulgated pursuant to the Rules Enabling Act, but is not itself a law enacted by Congress, as required by the Appointments Clause.[99] Even though the Act requires that the rule be submitted to Congress before it takes effect, it doesn't have to,

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91 *See id.* at 306 (Menashi, J., dissenting).

92 *Id.* (quoting United States v. Nixon, 418 U.S. 683, 693 (1974)).

93 *Id.*

94 *Donziger II*, 38 F.4th at 310–11 (Menashi, J., dissenting). Judge Menashi also reasoned that the court should not apply plain error review because Donziger had sufficiently challenged the constitutionality of the special prosecutors to preserve the specific Rule 42 argument. *See id.* at 307–09. All along, Donziger had maintained that the prosecutors were unsupervised and therefore acting as principal and not inferior officers, so there was no need to focus on the language in Rule 42 about appointing inferior officers. *Id.* Once the district court affirmatively found them to be inferior officers, he raised it immediately. *Id.* Even under a plain error standard, Judge Menashi would find that Donziger prevails. *See id.* at 309–10.

95 *Id.* at 307.

96 *Id.* at 311.

97 *Donziger II*, 38 F.4th at 311–12 (Menashi, J., dissenting) (citing Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 796 (1987)).

98 *See id.* at 307 ("[A]ll [*Young*] did was authorize a district court to appoint a prosecutor who could be immediately fired by the executive branch. That is not the 'power of self-protection' the *Young* Court had in mind." (internal citations omitted)).

99 *Id.* at 310–11.

and usually doesn't, do anything after being notified.[100]

Judge Park's recognition of *Young*'s tenuousness in light of the Supreme Court's subsequent jurisprudence, and Judge Menashi's laying plain of its dubious logic once establishing that court-appointed prosecutors are inferior executive officers, teed the case up perfectly for Supreme Court review.

II
THE SUPREME COURT'S DENIAL OF THE PETITION FOR THE WRIT OF CERTIORARI

Three months after the Second Circuit's decision in *United States v. Donziger*, Donziger filed a petition for a writ of certiorari to the Supreme Court of the United States.[101] The petition posed two questions: Does Rule 42 authorize judicial appointments of inferior executive officers? If so, do those appointments violate the Appointments Clause?[102] On March 27, 2023, the Supreme Court denied the petition.[103] Justice Neil Gorsuch, joined by Justice Brett Kavanaugh, wrote an ardent dissent.[104]

First, sounding in Judge Menashi's dissent from the Second Circuit opinion, Justice Gorsuch attacked *Young* as a shaky constitutional foundation for the appointment of private prosecutors. *Young* treated court-appointed prosecutors as wielding judicial power, whereas the court-appointed prosecutors in *Donziger* were decidedly wielding executive power and were accountable through the executive branch's chain of command up to the President.[105] *Young*, then, wasn't even applicable on its own terms.[106] And, even on its own judicial power rationale, Justice Gorsuch seemed skeptical as to how *Young* could be squared with the principle of separation of powers: Under the Constitution, a court's role is to serve as a neutral adjudicator in a criminal case, not to prosecute the crimes themselves.[107]

Justice Gorsuch then turned to the Second Circuit's finding that Rule 42 satisfied the Appointments Clause requirement that "Congress . . . by Law vest[ed]" appointment authority of prosecutors in courts.[108] He identified two challenges: First, *Young* itself rejected the idea that the precursor to the modern Rule 42 could serve as an independent source of appointment

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100 *Id.* at 311.
101 Petition for a Writ of Certiorari, *supra* note 28.
102 *Id.* at *1.
103 *Donziger III*, 143 S. Ct. at 868.
104 *Id.* (Gorsuch, J., dissenting).
105 *Id.* at 869.
106 *Id.*
107 *Id.* at 868–69 (quoting Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 816 (1987) (Scalia, J., concurring)).
108 *Id.* at 869 (quoting U.S. CONST. art. II, § 2, cl. 2).

authority.[109] Quoting Justice Scalia's concurrence in *Young*, Justice Gorsuch noted that Rule 42 is after all a "'[r]ule of court rather than an enactment of Congress,' and therefore it cannot 'confer Article II appointment authority on anybody.'"[110] Second, courts have adopted Rule 42 through the Rules Enabling Act, which provides that rules promulgated pursuant to it "shall not abridge . . . or modify any substantive right."[111] Interpreting Rule 42 as authorizing courts to play the part of both accuser and decisionmaker not only transfers the power of prosecutorial discretion from the executive to the judiciary, Justice Gorsuch argued, it also violates the due process rights of the accused.[112]

Justice Gorsuch ended with a broad appeal to the principle of separation of powers—a "basic constitutional promise essential to our liberty."[113] Per that promise, judges lack the power to initiate a prosecution of the defendants before them, just as prosecutors lack the power to judge the cases of those they charge.[114] In light of the majority's denial of the petition, Justice Gorsuch urged lower courts deciding whether to appoint their own prosecutors to "consider carefully Judge Menashi's dissenting opinion in this case, the continuing vitality of *Young*, and the limits of its reasoning."[115] "Our Constitution," Justice Gorsuch announced, "does not tolerate what happened here."[116]

III
POST-DENIAL: THE SURVIVAL OF RULE 42 AND IMPLICATIONS FOR THE COURT'S SEPARATION OF POWERS JURISPRUDENCE

A. The Continued Constitutionality and Operation of Rule 42

In the wake of the Supreme Court's denial of the petition for a writ of certiorari in *Donziger*, a few things appear true: *Young* remains intact, Rule 42 is still considered constitutional, and courts can continue to appoint

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109 *Donziger III*, 143 S. Ct. at 869 (citing *Young*, 481 U.S. at 794).

110 *Id.* (quoting *Young*, 481 U.S. at 816 n.1 (internal quotation marks omitted)).

111 *Id.* (quoting 28 U.S.C. § 2072(b)).

112 *Id.* at 869–70 (quoting Williams v. Pennsylvania, 579 U.S. 1, 9 (2016)).

113 *Id.* at 870. Before concluding, Justice Gorsuch also dispensed with the Department of Justice's argument before the Second Circuit that the court-appointed prosecutors were not inferior executive officers for the purposes of the Appointments Clause but were non-officer employees. *Id.* Like the Second Circuit, Justice Gorsuch found this argument difficult to square with *Morrison*. *Donziger III*, 143 S. Ct. at 869 (citing Morrison v. Olson, 487 U.S. 654, 670–71 (1988)). He also balked at the idea that the Constitution allows one branch to install non-officer employees in another branch—that the President, for example, could choose his law clerk, and he the White House staff. *See id.*

114 *Id.*

115 *Id.*

116 *Id.*

private prosecutors in criminal contempt proceedings. Whether or not they will heed Justice Gorsuch's warnings remains to be seen.

One could argue that *Donziger* and the continued constitutionality of Rule 42 will have minimal impact, if measured by the number of cases in which Rule 42 is used. By all accounts, the invocation of the rule by judges is rare, which is why Judge Kaplan's move to appoint private attorneys to prosecute Donziger when the U.S. Attorney's Office declined to do so was so shocking.[117] As of February 2022, aside from *Donziger*, the records of the Administrative Office of the United States Courts (AO), which assists courts with funding special prosecutors, showed only two other cases in the preceding five years where private counsel served as special prosecutors in criminal contempt cases.[118]

Still, Rule 42 *is* used, if only occasionally, including in a recent high-profile case at the appellate level, *United States v. Arpaio*. There, Maricopa County Sheriff Joseph M. Arpaio was convicted of criminal contempt in federal district court in Arizona and subsequently pardoned by then-President Trump.[119] Arpaio asked the district court to vacate its verdict as well as the scheduled sentencing, which it declined to do.[120] On appeal, the government refused to defend the district court's order, so the Ninth Circuit resorted to appointing a special prosecutor under Rule 42 so that its merits panel would "receive the benefit of full briefing and argument."[121] Though it

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117 *See* Lerner, *supra* note 6 (calling Judge Kaplan's invocation of Rule 42 "virtually unprecedented"); Adam Klasfeld, *When Feds Demur, Judge Charges Ecuador Crusader Himself*, COURTHOUSE NEWS SERV. (Aug. 13, 2019), https://www.courthousenews.com/when-feds-demur-judge-charges-ecuador-crusader-himself [https://perma.cc/4GPD-Z989] (reporting that only one out of five former federal prosecutors interviewed had heard of a judge appointing a private attorney to prosecute criminal contempt).

118 Those two cases are *United States v. Parker* and *United States v. Kilgallon*. Letter from Hon. Roslynn R. Mauskopf, Dir., Admin. Off. of the U.S. Cts., to Edward J. Markey & Sheldon Whitehouse, U.S. Sens. (Feb. 25, 2022). In *Parker*, the U.S. District Court for the Northern District of Alabama invoked Rule 42 to charge two police officers who had allegedly violated the court's sequestration order and attempted to intimidate witnesses in an earlier trial in the case. Notice and Order Regarding Contempt Proceeding at 1–2, United States v. Parker, 696 F. App'x 443 (11th Cir. 2017) (No. 126). Based on the publicly available opinions, it is clear that one of the officers was convicted of criminal contempt, a finding that was upheld on appeal. *Parker*, 696 F. App'x at 444. In contrast to *Donziger*, though, the officer there was only ordered to pay a $2,500 fine and attend liability-management training. *Id.* at 446. In *Kilgallon*, the U.S. District Court for the District of South Dakota used Rule 42 to charge three members of the U.S. Marshals Service who had allegedly allowed the removal of three prisoners from the courthouse without permission from the court after a marshal had refused to tell the judge whether she was vaccinated against COVID-19. United States v. Kilgallon, 572 F. Supp. 3d 713, 717, 721 (D.S.D. 2021). The court ultimately dismissed the criminal contempt charges. *Id.* at 717. AO only keeps records related to payment, so *Parker* and *Kilgallon* may not reflect the entire universe of cases. *See* Letter from Hon. Roslynn R. Mauskopf to Edward J. Markey & Sheldon Whitehouse, *supra*.

119 United States v. Arpaio, 887 F.3d 979, 980 (9th Cir. 2018).

120 *Id.* at 981.

121 *Id.*

may seem like a strange fit, the facts of *Arpaio* show how Rule 42 is used by appellate courts in criminal contempt cases.[122]

The relative infrequency does not render the rule a nullity, nor is it obvious that frequency should be the metric for impact. No doubt when Rule 42 is invoked to prosecute someone for criminal contempt, it can be life-altering for the defendant. With the recent petition of certiorari denial, courts can feel comfortable invoking Rule 42 knowing that the Supreme Court likely won't take up the question of its constitutionality soon, at least while the composition of the court remains as it is.

It is worth noting that Congress could solidify Rule 42's constitutionality and quell the Appointments Clause issue by codifying it in a statute. This would obviously qualify as Congress "by Law" vesting appointment authority in the courts, as opposed to its current form of a rule promulgated by the Supreme Court pursuant to the Rules Enabling Act.[123] But there is no reason to think that such a proposal is top of mind—if anything, there is momentum in the opposite direction. In 2021, while Donziger was in prison, nine members of the House of Representatives wrote to Attorney General Merrick Garland, admonishing that Donziger was in prison "without Executive Branch supervision or ever seeing a jury of his peers," and requesting that the Department of Justice "reclaim control of th[e] case, dismiss the charges, and free Mr. Donziger from his imprisonment."[124] Concern about Donziger's case wasn't limited to the House; also in 2021, two Senators sent a letter to AO asking a series of questions about Rule 42 and raising similar concerns. While there may be congressional support for the rule should the issue come to the fore, these letters indicate that there is some level of discomfort in Congress with Rule 42 in operation. Further, while codifying Rule 42 would alleviate constitutional concerns, it would not cure the bad optics of judges appointing prosecutors in matters before them and the perception of judicial impropriety that caused the uproar in Donziger's case.[125]

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122 On one hand, *Arpaio* demonstrates a potential use case of Rule 42: The policy preferences of the President change and the government jumps ship mid-proceeding, so to speak, leaving judges to decide cases in the dark. On the other hand, though, Justice Gorsuch might answer that that is entirely within the province of the executive branch. President Trump was elected by the American public—a mandate to carry out his policies, including with respect to pardons and criminal law enforcement, that should be implemented down the chain of command.

123 28 U.S.C. § 2072.

124 Letter from Rashida Tlaib & Jesús G. Garcia, Members of Cong., to Hon. Merrick Garland, Att'y Gen., U.S. Dep't of Just. (Nov. 29, 2021).

125 *See, e.g.*, Jackie Kushner, Note, *United States v. Donziger: How the Mere Appearance of Judicial Impropriety Harms Us All*, 30 J.L. & POL'Y 533, 553–54 (2022) (arguing that Judge Kaplan's use of Rule 42 created a perception of bias that undermined judicial legitimacy); Press Release, Int'l Ass'n of Democratic Laws., *More than 200 Lawyers File Judicial Complaint Against Judge Lewis A. Kaplan over Abusive Targeting of Human Rights Advocate Steven Donziger* (Sept. 1, 2020) (reporting that National Lawyers Guild and International Association of Democratic

B. Reconciling Donziger with Arthrex and Other Recent Appointments Clause Cases

Donziger arrived at the Supreme Court's desk amidst a period of developments in its Appointments Clause jurisprudence. Recall that in 2021, the Court in *Arthrex* held that the APJs' appointment to the Patent Trial and Appeal Board of the PTO—which was not done by the President with the advice and consent of the Senate—was inconsistent with their status as inferior officers.[126] Writing for the majority, Justice Roberts seemed primarily concerned with the fact that the APJs possessed the power to issue binding decisions on patentability that were not reviewable by the Director of the PTO, who is a principal officer appointed by the President with advice and consent of the Senate.[127] In Justice Roberts's eyes, such a "diffusion of power carries with it a diffusion of accountability."[128] A party to a case pending before an APJ is "left with neither an impartial decision by a panel of experts nor a transparent decision for which a politically accountable officer must take responsibility."[129] Such a system "blur[s] the lines of accountability demanded by the Appointments Clause," and ultimately leaves the public wondering who to hold to account.[130]

Interestingly, though Justice Roberts was preoccupied with the lack of democratic accountability in the context of the APJs, he did not dissent from the Court's denial of the *Donziger* certiorari petition, though accountability concerns were arguably just as live. The special prosecutors in *Donziger* were appointed by a federal judge and then proceeded to operate for the rest

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Lawyers filed a complaint with the Second Circuit alleging that Judge Kaplan was no longer acting as a judge and had "taken on the role of counsel for Chevron"); U.N. Hum. Rts. Council, Opinion No. 24/2021 concerning Steven Donziger (United States of America), at 13 (Oct. 1, 2021) (calling Kaplan's drafting of criminal charges "a staggering display of lack of objectivity and impartiality").

126 *See supra* notes 62–67 and accompanying text.

127 United States v. Arthrex, Inc., 594 U.S. 1, 14 (2021) (noting that, in contrast to inferior officer appointment schemes previously approved of by the Court, "no principal officer at any level within the Executive Branch directs and supervises the work of the APJs" when they are exercising their power to issue decisions on patentability).

128 *Id.* at 15 (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497 (2010)).

129 *Id.* at 16.

130 *Id.* This concern about democratic accountability is not limited to the Court's Appointments Clause jurisprudence. Rather, it extends to other doctrines that implicate federalism or separation of powers questions in which the Court is troubled that the public either won't be able to identify or will be confused about who is responsible for a governmental decision or policy—for example, the anti-commandeering doctrine. *See* New York v. United States, 505 U.S. 144, 182–83 (1992) (holding that a federal statute can be an unconstitutional infringement of state sovereignty even when state officials consent to the statute because the proper public officials need to be held accountable to voters); Printz v. United States, 521 U.S. 898, 919–23 (1997) (holding that it is unconstitutional for a federal law to force state participation in a federal regulatory program because a state must remain accountable to its citizens). These issues are also live with the Court's jurisprudence on the *Chevron* doctrine and deference to agencies. *See infra* Part III.C.

of the litigation without supervision by any principal officer. Indeed, the DOJ, after declining to prosecute Donziger itself, was wholly absent from the case until the days leading up to the criminal contempt trial when Donziger requested that it intervene—a request it explicitly rejected.[131] Even after Judge Preska resolved that the special prosecutors were executive branch officials who needed to be supervised by a principal officer in the executive branch in order to properly be inferior officers under the Appointments Clause (to the chagrin of the special prosecutors, who were under the impression that they were extensions of the judiciary), the DOJ refused to exercise oversight over them through the rest of the litigation, even filing briefing separate from the special prosecutors in the Second Circuit.[132] The complete lack of principal officer supervision over the special prosecutors appears more egregious than the level of supervision the PTO Director exercised over the APJs.

One way to reconcile *Arthrex* and *Donziger* is on the text of the relevant statutes: The PTO director did not have the statutory authority to review the decisions of the APJs in the context of inter partes review,[133] whereas the DOJ does have the statutory authority to supervise the special prosecutors,[134] it just wholesale refused to use it. Thus, in a world of perfect information and constitutional clarity about the status of the special prosecutors, voters could hold the President to account at the polls for the DOJ's decision not to intervene. However, the real world looks very different: If the special prosecutors themselves didn't believe the DOJ had authority to supervise them initially, how could the public be expected to see through the chaos and know where to situate them between the executive and the judicial branches? If the Court is genuinely concerned about accountability in practice and not just accountability in theory, then, consistent with *Arthrex*, the Court should feel uncomfortable with the lack of executive branch oversight of the special prosecutors.

Arthrex was not a one off, but rather the latest in a series of cases where the Supreme Court came down hard on agency structures that ran afoul of the Appointments Clause. One year earlier, in *Seila Law LLC v. Consumer Financial Protection Bureau*, the Court held that the Consumer Financial Protection Bureau's leadership by a single director removable only for cause was unconstitutional.[135] And, in 2018, in *Lucia v. Securities and Exchange*

131 *See supra* notes 50–51 and accompanying text.

132 *See supra* note 76 and accompanying text.

133 *See* United States v. Arthrex, Inc., 594 U.S. 1, 8–9 (2021) (summarizing the process for inter partes review as provided in 35 U.S.C. §§ 6(c), 316(a)(11), 316(c)).

134 *See Donziger II*, 38 F.4th 290, 300–01 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 868 (2023) (summarizing the Attorney General's "broad authority to conduct and to supervise all litigation involving the United States" as provided in 28 U.S.C. §§ 516–19).

135 Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

Commission, the Court held that the SEC's administrative law judges were "officers" within the meaning of the Appointments Clause and therefore had to be appointed in accordance with it.[136] Though less directly applicable on their facts to *Donziger*, these cases, together with *Arthrex*, represented the Court bringing executive branch officials more squarely under the President's chain of command. This made the Court declining to touch Rule 42 in *Donziger* a departure not only from the Court's last word on the matter in *Arthrex*, but from a broader trend of rigidly enforcing the Appointments Clause and prioritizing the President's control over officers in the executive branch.

One other way to distinguish between *Donziger* and the Court's recent Appointments Clause jurisprudence is that, in *Donziger*, the Court is being asked to invalidate the constitutionality of a rule that, as articulated in *Young*, is fundamentally aimed at enabling the *judiciary* to vindicate its own authority.[137] One could speculate that the Court is operating from a defensive posture, animated by concerns of judicial embarrassment without Rule 42 as a mechanism to prosecute uncooperative defendants. The Court's self-consciousness of its own power, and its inclination to be the final arbiter of the bounds of such power, sounds in other doctrines, including Article III standing,[138] the political question doctrine,[139] and enforcement power under Section Five of the Fourteenth Amendment.[140]

C. This Term: Donziger and Relentless

It is worth pausing to note another context in which the Court is actively weighing democratic accountability and separation of powers concerns: the *Chevron* doctrine. The doctrine, formalized in the 1984 case *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, provides that courts should defer to reasonable agency interpretations of ambiguous congressional statutes.[141] In recent years, conservatives on the court—chief among them, Justice Gorsuch—have taken aim at the doctrine, arguing that

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136 Lucia v. S.E.C., 138 S. Ct. 2044, 2049 (2018).

137 *See* Young v. U.S. *ex rel*. Vuitton et Fils S.A., 481 U.S. 787, 793, 796 (1987).

138 *See, e.g.*, Spokeo, Inc. v. Robins, 578 U.S. 330, 331–32, *as revised* (May 24, 2016) (holding that Congress cannot create standing merely through granting statutory rights, and thus, courts decide whether a plaintiff has suffered concrete injury to satisfy standing).

139 *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2499–502 (2019) (holding that partisan gerrymandering is a political question not justiciable by an Article III court for lack of judicially manageable standards).

140 *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997) (holding that in order for Congress to legislate pursuant to its Section Five enforcement power under the Fourteenth Amendment, the injury to be prevented or remedied must be congruent and proportional to the means adopted).

141 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

it displaces the role of the judiciary to interpret the law,[142] systematically favors the government in disputes,[143] is unworkable,[144] and creates instability from administration to administration,[145] among other critiques. Lingering in the background is the idea that *Chevron* deference undermines democratic accountability in the long run by allowing a democratically elected Congress to pass ambiguous statutes and shirk policymaking responsibilities onto unelected agencies.[146] This is similar to, but distinct from, the accountability concern in the Appointment Clause context about agency officials being insulated from Presidential (and therefore democratic) control.

This term, the Court's conservative majority appears poised to overturn or seriously weaken *Chevron* in a pair of cases called *Relentless, Inc. v. Department of Commerce* and *Loper Bright Enterprises v. Raimondo*. The cases challenge a rule issued by the National Marine Fisheries Service, upheld by both the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. Court of Appeals for the First Circuit applying *Chevron* deference.[147] During oral arguments, the government made an accountability argument in the opposite direction: If the choice is between agency and judicial interpretations of ambiguous statutes, at least agencies are politically accountable vis-à-vis presidential elections, whereas federal judges are unelected.[148] The conservative members of the Court did not appear

142 *See* Buffington v. McDonough, 143 S. Ct. 14, 18 (2022) (Gorsuch, J., dissenting) (quoting Marbury v. Madison, 5 U.S. 137, 178 (1803)) (discussing how in the American judicial system, individuals can bring their disputes to neutral tribunals and trust that they will say "what the law is").

143 *See id.* at 19 ("We place a finger on the scales of justice in favor of the most powerful of litigants, the federal government, and against everyone else.").

144 *See id.* at 19–20 (noting that lower courts have pursued "wildly different" approaches to deciding when a statute is sufficiently ambiguous to merit *Chevron* deference).

145 *See id.* at 20 ("When one administration departs and the next arrives, a broad reading of *Chevron* frees new officials to undo the ambitious work of their predecessors and proceed in the opposite direction with equal zeal. In the process, we encourage executive agents not to aspire to fidelity to the statutes Congress has adopted, but to do what they might while they can.").

146 *See* Petition for Writ of Certiorari at 31, Loper Bright Enters. v. Raimondo, No. 22-451 (Nov. 10, 2022) ("It is far easier to gin up ambiguity in a statute than it is to run the gauntlet of bicameralism and presentment . . . . Worse still, it is far harder for Congress to enact new legislation when one party or the other can rely on their friends in the executive branch to fix the problem without the hassle and accountability that comes with actually legislating."); *cf.* Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 778–86 (arguing that in cases where the Court has not deferred to the agency's interpretation, the agency acted inconsistently with congressional or popular will, and Presidential elections are an insufficient check on agency action).

147 Amy Howe, *Supreme Court Likely to Discard Chevron*, SCOTUSBLOG (Jan. 17, 2024, 6:58 PM), https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/.

148 *See* Transcript of Oral Argument at 124, Relentless, Inc. v. Dept. of Commerce, No. 22-1219 (2024) (arguing that in a world without *Chevron* deference, with potentially each lower court interpreting ambiguous statutes differently, "the force of the political accountability value" would be diminished); *see also id.* at 99 (Justice Ketanji Brown Jackson recognizing the people elect the presidential administration on the basis of policy, but that federal judges "are not accountable to

persuaded,[149] and seemed more concerned with *Chevron* allowing agencies to interpret the law where the judiciary should be doing so.[150] The Court's movement toward overturning *Chevron* provides yet another example of the modern Court enforcing a strict vision of separation of powers. This makes its comfort with Article III judges appointing Article II special prosecutors without express statutory authorization in *Donziger* all the more anomalous.

CONCLUSION

Donziger is no longer in prison or under house arrest.[151] The Supreme Court has declined to decide the question of whether his prosecution was constitutional, at least for now.[152] But, regardless of the propriety of Donziger's conduct, there are reasons to be uncomfortable with his prosecution at the hands of judicially-appointed private prosecutors and without DOJ supervision.

Rule 42 is a double offender. It feels wrong on a gut level: It resembles a bait-and-switch to defendants who would not have been charged had their case been left to the executive branch, which, according to the Supreme Court, has "exclusive authority and absolute discretion to decide whether to prosecute a case."[153] Rule 42 is also unsupported by the text of the Constitution because it vests appointment authority in the courts without Congress doing so explicitly through legislation. If the Supreme Court had taken its own mandate in its Appointment Clause jurisprudence seriously and was truly skeptical of the blending of the separation of powers, it should have heeded the warnings of Judge Menashi and Justice Gorsuch and granted the petition for the writ of certiorari in *Donziger*.

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the people and have lifetime appointments").

149 *See id.* at 132 (Justice Gorsuch expressing concern that *Chevron* almost always favored agencies over individuals "who have no power to influence agencies, who will never capture them, and whose interests are not the sorts of things on which people vote, generally speaking").

150 *See id.* at 22 (Justice Gorsuch expressing concern that under *Chevron*, "judge[s] abdicate th[eir] responsibility and say automatically whatever the agency says wins"); *see id.* at 142 (Justice Kavanaugh stating that it is "the role of the judiciary historically under the Constitution to police the line between the legislature and the executive to make sure that the executive is not operating as a king, not operating outside the bounds of the authority granted to them by the legislature").

151 Molly Taft, *Environmental Lawyer Targeted by Chevron Freed After More Than Two Years Under House Arrest*, AMAZON WATCH (Apr. 26, 2022), https://amazonwatch.org/news/2022/0426-environmental-lawyer-targeted-by-chevron-freed-after-more-than-two-years-under-house-arrest [https://perma.cc/R4YF-C9GZ].

152 *See Donziger III*, 143 S. Ct. 868 (2023).

153 United States v. Nixon, 418 U.S. 683, 693 (1974).