

-DONZIGER CASE MONITORING COMMITTEE-

Michael Tigar | Nadine Strossen | Jeanne Mirer | Simon Taylor | Charles Nesson | Christopher "Kip" Hale

Chief Judge Colleen McMahon
Daniel Patrick Moynihan
United States Courthouse
Courtroom 24A
500 Pearl St.
New York, NY 10007-1312

Judge Loretta Preska
Daniel Patrick Moynihan
United States Courthouse
Courtroom 12A
500 Pearl St.
New York, NY 10007-1312

Chief Judge Debra Ann Livingston
United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: Intent to Monitor Donziger Matter Live

Dear Judges McMahon, Preska, and Livingston:

The Donziger Case Monitoring Committee was formed on August 17th of this year in response to numerous concerning developments in a continued campaign against world-renowned human rights defender Steven Donziger.¹ Mr. Donziger has been the target of attempts to silence him and to criminalize his successful representation of the indigenous peoples of Ecuador harmed by Chevron's destruction of their ancestral lands in the Amazon rainforest. On Monday October 5th, Judge Loretta Preska held a hearing that furthered our concern with respect to fundamental principles of due process of law, the right to a fair and public trial, the right to counsel, the right to an unbiased judge and fact finder, and the right to a disinterested prosecutor.

¹**"DONZIGER CASE MONITORING COMMITTEE' LAUNCHES IN WAKE OF MAJOR IRREGULARITIES IN HUMAN RIGHTS LAWYER CASE" New York—August 17, 2020**—The Donziger Case Monitoring Committee (DCMC) announced its launch today to ensure upcoming trials of American human rights lawyer Steven Donziger in U.S. Federal Courts are conducted in a way that upholds due process, judicial ethics, and the rule of law. The DCMC was created after a number of major judicial abnormalities and irregularities were carried out in cases against Donziger, resulting in the human rights lawyer's unprecedented year-long house arrest at the behest of oil giant, Chevron."

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Four major issues during the hearing highlighted ongoing concerns in regards to Mr. Donziger's criminal contempt trial, as follows:

Right to Counsel

Judge Preska has decided not to allow Mr. Donziger adequate time to replace his two lead trial attorneys, whom she disqualified in August—just days prior to his previous trial date of September 9th. While Ron Kuby, Esq. has agreed to represent Mr. Donziger at trial (pro bono), Judge Preska has refused to accommodate Mr. Kuby's scheduling conflict which prevents him from trying the case before December 7th. Instead, Judge Preska insists Mr. Donziger go to trial on November 4th, one day after what promises to be the most contentious presidential election in decades. Lauren Regan, Mr. Donziger's only current attorney of record, lives in Oregon and is uncertain whether she will be able to defend Mr. Donziger in person at a November 4th trial given other ongoing professional commitments and the COVID-19-related dangers traveling to New York City pose to her health. Rather than delay the matter, Judge Preska has indicated a willingness to jeopardize Mr. Donziger's constitutional right to the counsel of his choice and his right to adequate representation.

Lack of Judicial Fairness

Judge Preska started the hearing by reading her ultimate decision on the very issues upon which she was ruling. Rather than using the proceeding as an opportunity to *hear* both parties and reach a positive resolution, Judge Preska used it as an opportunity to deliver a predetermined set of talking points. In fact, Judge Preska stated at the very outset and then reiterated in her concluding statement that "make no mistake about it" the date of the trial was a "firm date." There was no deliberation or discussion, just a command that November 4th will be the trial date regardless of any of the many reasons that militate in favor of a delay. For all practical purposes, Judge Preska's unwillingness to grant a delay violates Mr. Donziger's right to the counsel of his choice and undermines his ability to defend himself. Judge Preska should take the reasonable step of moving the trial date to December 7th or later to allow Mr. Kuby, a highly experienced lawyer, to represent Mr. Donziger at the trial, in person.

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Prosecutor's Misuse of Procedure

The lead private prosecutor, Ms. Rita Glavin, and the two other prosecutors from the Seward & Kissel law firm (which counts Chevron among its recent clients) abused their discretion in their inappropriate insistence on a *Curcio* hearing on the eve of trial. Doing so forced Mr. Donziger to either waive a fundamental constitutional protection or lose his two lead lawyers. (The hearing was prompted by Ms. Glavin's 11th hour demand for a hearing because Mr. Donziger's lead lawyers were potential witnesses on one of the six counts of the charging document.) Ms. Glavin should have disclosed her intention to have a *Curcio* hearing months before she did, and certainly before Mr. Donziger's prior counsel, Andrew Frisch, withdrew from the case on July 4th. Ms. Glavin's explanation for her deployment of the *Curcio* process was that she never had any indication that Mr. Donziger would not eventually waive his own rights rather than have his counsel disqualified. Ms. Glavin claimed to have been "lulled" into this belief, perhaps based on her recognition that having counsel disqualified would be devastating to the defense. In fact, the record indicates that Judge Preska chose to explain away Ms. Glavin's inappropriate use of the *Curcio* hearing as a sword against Mr. Donziger rather than the shield to protect criminal defendants it was intended to be. The net result is to effectively deprive Mr. Donziger of the counsel of his choice at the worst possible time.

Issues with Witnesses

Judge Preska is demanding something virtually unprecedented: that the defense reveal its witness information and defense strategies before trial. Criminal defense attorneys have no legal obligation to reveal this information to prosecutors prior to trial. This principle is fundamental to the defense in criminal cases, and is not some frivolity, as Ms. Glavin and Judge Preska have been treating it.

Mr. Donziger is still under conditions of home confinement, as he has been since his arraignment on these misdemeanor charges in August of 2019. There remains no reasonable explanation for why an upstanding, highly visible member of the New York legal community with

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no criminal record, who has never missed a court date in this or the underlying civil case, would be deemed a flight risk when facing a maximum of six months in jail. The implication that Mr. Donziger would flee in these circumstances has always been and continues to be entirely unreasonable. In the United States, punishment may only follow a determination of guilt, not precede it.

Furthermore, one must ask why, in the middle of a once-in-a-century pandemic, Judge Preska is racing full speed ahead to hold a bench trial without even addressing Mr. Donziger's concerns about securing counsel. At a time when trials related to the most violent and egregious crimes with incarcerated defendants have been indefinitely delayed, why is Mr. Donziger's misdemeanor contempt case being pursued with such haste, despite the very clear health risks to everyone involved and the unprecedented legal challenges that having this trial on November 4th present?

According to the record from the October 5th hearing, it appears that Judge Preska will force Mr. Donziger into a trial without the counsel of his choice, during a global pandemic for which even the President of the United States has been hospitalized, with counsel possibly having to appear over video, and apparently, only a semblance of due process. When in fact, Judge Preska should ask the private prosecutors to drop the charges in the interest of justice given the issues presented in this case and the extraordinary length of Mr. Donziger's pre-trial confinement. Short of that, Judge Preska should grant a continuance until December 7th, or later, when Mr. Kuby will be able to represent Mr. Donziger in person, in court.

The disturbing events described above are in addition to glaring irregularities that have occurred in recent months. These include:

- Mr. Donziger has never had a jury of his peers, including in determining the underlying bribery allegations upon which the civil RICO case relies. Chevron avoided a jury by dropping money damages in the underlying civil case, yet now Mr. Donziger is saddled with multi-million-dollar costs orders from Chevron as well as fines. It is highly questionable to impose ruinous financial costs on a defendant without a jury trial.

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- The one time the Executive Branch, the U.S. Attorney's Office for the Southern District of New York, had a chance to exercise prosecutorial discretion about this case, they refused Judge Kaplan's request to pursue it.
- The private prosecutors are conflicted given that their firm has recently represented Chevron and other Chevron-related entities and failed to disclose their conflict for seven months while they sought and successfully obtained Mr. Donziger's unprecedented pre-trial detention soon after he won a historic pollution judgment against Chevron.
- The Second Circuit is currently considering an appeal directly germane to the counts in this case, which should be decided prior to the criminal contempt trial.
- The procedure for Judge Preska's appointment over this case has never been revealed and seems inappropriate, as she was not assigned pursuant to local court rules requiring random assignment of criminal cases, the subject of, *inter alia*, Martin Garbus's recent Motion to Recuse.
- Judge Kaplan is still officially presiding over this case, acting as Judge, prosecutor (through his appointment of Seward & Kissel, an oil industry law firm) and alleged victim of the contempt, all while he is the subject of a Judicial Ethics Complaint filed by the International Association of Democratic Lawyers.²
- Judge Kaplan and the private prosecutors appear to be having *ex parte* communications about the case, yet refuse to disclose the specifics of their conversations, in violation of judicial and prosecution standards. This is the subject of a Judicial Ethics Complaint filed by Mr. Donziger's recently disqualified attorney Rick Friedman.
- The private prosecutors from Seward & Kissel refuse to be transparent about their costs to the taxpayer and what they are billing. These prosecutors are, in effect, acting in a for-profit capacity and billing by the hour. This creates an inherent conflict of interest: the more hours the three private prosecutors spend pursuing Mr. Donziger, the more they can bill, a perverse incentive intended to be avoided by salaried DOJ employees managing prosecutions.

Intent to Monitor Donziger Case

² <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/>

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We have been monitoring, and will continue to monitor, the developments in this matter and plan to attend the in-person trial beginning November 4 or on any later dates that the trial may take place. Knowing the inherently dangerous situation due to COVID-19, and the countless lives lost, including officers of the court, we request that there be enough space in the courtroom for every participant to maintain at least 6 feet in social distance, which would require a large courtroom. Legal monitors from all over the world are watching this matter and many plan to attend, live or remotely. Thank you in advance for making the appropriate arrangements for both of these forms of public access. In furtherance of fair and public trials, this should also be, first and foremost, a *safe* trial.

Signatories,

- **Michael Tigar**, Professor Emeritus, Duke Law, fmr. chair of the ABA Section of Litigation
- **Nadine Strossen**, John Marshall Harlan II Professor of Law, Emerita at New York Law School, fmr. President of the ACLU
- **Jeanne Mirer**, President of the International Association of Democratic Lawyers
- **Simon Taylor**, Director and Co-Founder of Global Witness
- **Charles Rothwell Nesson**, the William F. Weld Professor of Law at Harvard Law School, founder of the Berkman Center for Internet & Society
- **Christopher "Kip" Hale**, Attorney specializing in atrocity crimes accountability, co-editor of the *International Due Process and Fair Trial Manual*