Coercion, Defiance and Competing Audiences: Understanding the Meaning of Contempt and Sanctions to "True Believer" Litigants

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ABSTRACT

Courts have substantial powers to punish entities that disobey their orders. However, despite potentially severe repercussions, litigants with intensely held ideologies—what this Article calls "true believer" litigants—sometimes choose to defy court orders, which leads to sanctions and contempt charges. This Article argues that, rather than reflecting mistakes or misunderstandings of the law, these choices may reflect subjectively rational decisions, based on these litigants' values. By running the risk of sanctions and contempt, the true believer litigants take stands against their opponents, publicly reaffirm their commitments to their causes, and grow their statures within their movements. Additionally, refusing an order to produce incriminating evidence may shift the public discourse from the content of that evidence to the purported misuse of the judicial process by the true believer litigants' opponents.

This Article considers the theoretical framework of the law of contempt, explores five cases of true believer litigants—ranging from an environmentalist to neo-Nazis—who violated court orders, and then considers the implications of those case studies for the law of contempt.

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I. INTRODUCTION

Courts have numerous, sweeping, and severe powers to punish entities that disobey their orders.[1] However, despite potentially severe repercussions, litigants with intensely held ideologies—what this Article calls "true believer" litigants—sometimes choose to defy court orders, which leads to sanctions and contempt charges. Rather than reflecting mistakes or misunderstandings of the law, these choices may reflect subjectively rational decisions, based on these litigants' values. By running the risk of sanctions and contempt, the true believer litigants take stands against their opponents, publicly reaffirm their commitments to their causes, and grow their statures within their movements. Additionally, refusing an order to produce incriminating evidence may shift the public discourse from the content of that evidence to the purported misuse of the judicial process by the true believer litigants' opponents.

Part II of this Article explores the existing law of contempt and sanctions, including those laws' purposes of compensation to the contemnors' opponents in litigation and deterrence. Part III examines five instances of true believer litigants, which all involved at least temporary refusals to comply with judicial orders[2]: (1) Steven Donziger, an environmental lawyer who refused to turn over evidence and violated an injunction in a federal lawsuit related to his management of a previous Ecuadorian lawsuit against Chevron Corp.;[3] (2) Elliot Kline and Matthew Heimbach, neo-Nazi litigants who refused to turn over evidence in a lawsuit related to violence in Charlottesville, Virginia;[4] (3) Joe Arpaio, the

1. *See, e.g.*, Projects Mgmt. Co. v. Dyncorp Int'l LLC, 734 F.3d 366, 375 (4th Cir. 2013) (describing courts' inherent authority); 18 U.S.C. §§ 401(3), 402; 28 U.S.C. § 1826; FED. R. CIV. P. 37.

2. However, this Article sets aside a common source of contempt prosecutions in state courts: individuals subject to "no contact" restraining orders who contact the victims of their domestic or sexual violence offenses. *See, e.g.*, People v. Casey, 95 N.Y.2d 354, 358 (2000). Though those cases may reflect an ideology, namely misogyny, the defendants in those cases seem to act out of anger or a desire to "fix" their cases, rather than an explicit adherence to that ideology.

3. *See* United States v. Donziger, 2021 U.S. Dist. LEXIS 138923, *187–88 (S.D.N.Y. July 26, 2021) (finding Donziger guilty of criminal contempt of court); *but see* Chevron Corp. v. Donziger, 990 F.3d 191, 206 (2d Cir. 2021) (reversing a portion of the civil contempt finding).

4. *See* Sines v. Kessler, No. 3:17-cv-72 (W.D. Va. Dec. 23, 2019) (order finding Elliot Kline in civil contempt); Sines v. Kessler, No. 3:17-cv-72 (W.D. Va. Jan. 3, 2020) (order for Elliot Kline to surrender to the custody of the U.S. Marshall).

former sheriff of Maricopa County, Arizona, who violated an injunction to cease unauthorized enforcement of federal immigration laws as a local official;[5] (4) Josh Wolf, a videographer who refused a grand jury's subpoena for evidence related to the alleged arson of a police car;[6] and (5) the City of Seattle, which violated an injunction restricting its police officers' use of force against Black Lives Matter protestors.[7] Part IV considers the implications of its findings for the law of sanctions and contempt.

Though some of these case studies—particularly, those of Donziger and Arpaio—have received significant academic attention, those articles focused on the underlying legal issues, rather than the strategies behind the litigants' choices.[8] Another scholar has similarly explored the availability and use of injunctions and contempt in disputes between indigenous activists, who could fall into this Article's conception of true believer litigants, and natural resource corporations, though in the context of the Canadian legal system.[9] In contrast, this Article argues that true believer litigants make choices that lead to contempt for reasons unrelated to the legal merits of their positions but related to the movements of which the true believer litigants are publicly members.

5. *See* United States v. Arpaio, 887 F.3d 979, 980 (9th Cir. 2018); United States v. Arpaio, 951 F.3d 1001, 1002 (9th Cir. 2020).

6. *See* In re Grand Jury Subpoena, 201 F. App'x 430, 431 (9th Cir. 2006).

7. *See* Black Lives Matter Seattle-King Cnty. v. City of Seattle, 516 F. Supp. 3d 1202, 1207 (W.D. Wash. 2021).

8. *See* Emily Seiderman, Note, *The Recognition Act, Anti-Suit Injunctions, The DJA, and Much More Fun: The Story of the Chevron-Ecuador Litigation and the Resulting Problems of Aggressive Multinational Enforcement Proceedings*, 41 FORDHAM URB. L.J. 265 (2013); Nellie Veronika Binder, Note, *Making Foreign Judgment Law Great Again: The Aftermath of Chevron v. Donziger*, 51 SUFFOLK U. L. REV. 33 (2018); Alicia Villanueva, Case Summary, United States v. Arpaio*: The Judicial Limit on The President's Pardon Power*, 49 GOLDEN GATE U. L. REV. 57 (2019); Genevieve A. Bentz, Note, *A Blank Check: Constitutional Consequences of President Trump's Arpaio Pardon*, 11 ALB. GOV'T L. REV. 250 (2018); Sanya Shahrasbi, Note, *Can a Presidential Pardon Trump an Article III Court's Criminal Contempt Conviction? A Separation of Powers Analysis of President Trump's Pardon of Sheriff Joe Arpaio*, 18 GEO. J.L. & PUB. POL'Y 207 (2020); Zachary J. Broughton, Note, *Constitutional Law—I Beg Your Pardon:* Ex Parte Garland *Overruled; The Presidential Pardon Is No Longer Unlimited*, 41 W. NEW ENG. L. REV. 183 (2019); Tyler Brown, Note and Comment, *The Court Can't Even Handle Me Right Now: The Arpaio Pardon and Its Effect on the Scope of Presidential Pardons*, 46 PEPP. L. REV. 331 (2019).

9. Irina Ceric, *Beyond Contempt: Injunctions, Land Defense, and the Criminalization of Indigenous Resistance*, 119 S. ATL. Q. 353 (2020).

II. BACKGROUND

The law of sanctions and contempt includes penalties for filing frivolous documents,[10] disrupting court proceedings,[11] and disobeying court orders. This Article, however, focuses only on the last of those areas. Nonetheless, even when considering the penalties available for a disobeyed court order, federal courts have multiple, overlapping sources of authority. First, Federal Rule of Civil Procedure 37 ("Rule 37") authorizes multiple sanctions for the failure to provide evidence, including finding that "designated facts be taken as established for purposes of the action," preventing one party from raising particular defenses, dismissing claims or the entire suit, awarding attorneys' fees, and, except in cases related to a refusal to submit to a physical or mental examination, holding a party in contempt.[12] Additionally, courts are statutorily permitted to incarcerate a witness who refuses to testify for the duration of the case or the term of a grand jury, not to exceed eighteen months.[13] Next, criminal liability can be imposed for disobeying a court order.[14] Finally, courts have expansive, inherent powers to punish actions that interfere with their processes, some of which may overlap with the previously described powers.[15]

These sources of authority, while distinct, tend to merge in their justification and application.[16] For example, in considering whether Rule 37 sanctions were appropriate, the Fourth Circuit explained that it considers: "(1) whether the non-complying party acted in bad faith, (2) the amount of prejudice that noncompliance caused the adversary, (3) the need for deterrence of the particular sort of non-compliance; and (4) whether

10. *See* FED. R. CIV. P. 11; Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, historical and statutory notes); *see also* United States v. Aisenberg, 358 F.3d 1327, 1335 (11th Cir. 2004).

11. *See* 18 U.S.C. *§* 401(1), (2); *see also* In re Neagle, 135 U.S. 1, 58 (1890) (stating that there is an inherent constitutional power to protect judges).

12. *See* FED. R. CIV. P. 37(b)(2)(A)(i).

13. *See* 28 U.S.C. § 1826(a).

14. *See* 18 U.S.C. §§ 401(3), 402.

15. *See* Chambers v. Nasco, Inc. 501 U.S. 32, 43 (1991) (quoting United States v. Hudson, 11 U.S. 32 (1812)) ("It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'"). These powers include awarding attorneys' fees, even when not authorized by a rule or statute; matters of attorney discipline; and the exclusion of disruptive criminal defendants from the courtroom. *Id.* at 43–45.

16. This paragraph draws from Memorandum of Law in Support of Plaintiffs' Motion for Sanctions Against Defendants Elliot Kline a/k/a Eli Mosley and Matthew Heimbach, *Sines v. Kessler*, 3:17-cv-72 (W.D. Va. Apr. 3, 2019) Dkt. 457, at *14–15.

less drastic sanctions would be effective."[17] Similarly, in considering sanctions based on its inherent powers, the Fourth Circuit considers:

> (1) the degree of the wrongdoer's culpability; (2) the extent of the client's blameworthiness if the wrongful conduct is committed by its attorney, recognizing that [the court] seldom dismiss[es] claims against blameless clients; (3) the prejudice to the judicial process and the administration of justice; (4) the prejudice to the victim; (5) the availability of other sanctions to rectify the wrong by punishing culpable persons, compensating harmed persons, and deterring similar conduct in the future; and (6) the public interest.[18]

In other words, by including "prejudice to the opponent" as a factor, this common law draws on the traditional tort doctrine of seeking to provide compensation to the victim of the bad conduct, in this case, the contemnor's opponent in litigation. Additionally, the discussion of bad faith, culpability, and blameworthiness tracks the traditional tort goal of deterrence and the notion that intentional or reckless conduct should be punished more severely than merely negligent conduct. Finally, the availability of incarceration as a remedy for contempt tracks the criminal law principle that the threat of incarceration can provide deterrence.

III. CASES OF TRUE BELIEVER LITIGANTS

A. Steven Donziger

Steven Donziger asserts that he has been involved with litigation against Chevron Corp., related to Chevron's pollution of the Lago Agrio region of the Ecuadorian rainforest, since 1993.[19] After Chevron's predecessor, Texaco, consented to the jurisdiction of an Ecuadorian court and the Second Circuit upheld the dismissal of the Ecuadorians' U.S. lawsuit for *forum non conveniens*,[20] Donziger and his associates won a

17. Anderson v. Found. for Advancement, Educ. & Emp't of Am. Indians, 155 F.3d 500, 504 (4th Cir. 1998) (citing Wilson v. Volkswagen of Am., Inc., 561 F.2d 494, 503–05 (4th Cir. 1977)).

18. Projects Mgmt. Co. v. Dyncorp Int'l LLC, 734 F.3d 366, 373–74 (4th Cir. 2013) (quoting United States v. Shaffer Equip. Co., 11 F.3d 450, 462–63 (4th Cir. 1993)).

19. *See* Marianne Williamson (@marwilliamson), TWITTER (Apr. 19, 2021, 9:00 PM), https://bit.ly/3Ag7ky0 (stating that his work on the case began in 1993, though the older court filings do not list his name).

20. *See* Jota v. Texaco, Inc., 157 F.3d 153, 155 (2d Cir. 1998) (vacating initial dismissal for *forum non conveniens* due to lack of consent to Ecuadorian jurisdiction); Aguinda v. Texaco, Inc., 303 F.3d 470, 473 (2d Cir. 2002) (affirming second dismissal for *forum non conveniens* due to that consent).

judgment of over $8 billion in Ecuador. Chevron then sued Donziger and his law firm in federal district court in New York, asserting that he had obtained the Ecuadorian judgment through bribery and fraud. As part of the extensive litigation that followed,[21] Donziger eventually refused to comply with both discovery orders and the court's RICO injunction, leading to civil and criminal contempt proceedings.[22]

While under house arrest awaiting his trial for criminal contempt, Donziger continued to advocate for his cause and his position within that cause. For example, in an online interview with Marianne Williamson,[23] Donziger argued that his confinement should be understood in terms of Chevron's bad intent and evasion of liability, rather than his own actions: "Chevron has calculated that if they can keep me confined, they can somehow evade paying the indigenous peoples and . . . the rural communities in Ecuador who continue to die of cancers and other oil-related diseases."[24] He further framed the contempt litigation as a showcase of corporate retaliation against an activist lawyer, without acknowledging how his tactics differed from other activist lawyers' tactics:

> [H]ere, . . . they're trying to make an example of me to, I think, implement a new, corporate playbook that they plan to use—and I mean the fossil fuel industry writ large—against activists, lawyers, and others who successfully hold them accountable, as we have done in the case of Ecuador. So there's a lot at stake here, and I just would just ask that people pay attention. Obviously, we need

21. *See, e.g.*, Lago Agrio Plaintiffs v. Chevron Corp., 409 F. App'x 393, 394 (2d Cir. 2010) (upholding discovery orders); Chevron Corp. v. Naranjo, 667 F.3d 232, 234 (2d Cir. 2012) (holding that New York's judgment-enforcement statute does not provide a cause of action to challenge a judgment preemptively and vacating preliminary injunction against Donziger and his associates); Chevron Corp. v. Donziger, 833 F.3d 74, 81 (2d Cir. 2016) (affirming permanent injunction against Donziger under RICO); Matter of Donziger, 186 A.D.3d 27, 30 (1st Dep't 2020) (disbarring Donziger).

22. *See* Chevron Corp. v. Donziger, 990 F.3d 191, 206 (2d Cir. 2021) (reversing a portion of the civil contempt finding); United States v. Donziger, 853 F. App'x 687, 689 (2d Cir. 2021) (affirming conditions of release pending trial for criminal contempt); United States v. Donziger, 2021 U.S. Dist. LEXIS 138923, *187–88 (S.D.N.Y. July 26, 2021) (finding Donziger guilty of criminal contempt).

23. Williamson describes herself as a "bestselling author, political activist and spiritual thought leader." *See* Marianne's Bio, MARIANNE WILLIAMSON, https://bit.ly/3qEDWwT (last accessed Sept. 3, 2021). Williamson also ran for president, emphasizing the environmentalism among other issues. *See* Environmental Crisis, MARIANNE 2020, https://bit.ly/3rOlbaQ (last accessed Sept. 3, 2021).

24. *See* Marianne Williamson (@marwilliamson), TWITTER (Apr. 19, 2021, 9:00 PM), https://bit.ly/3Ag7ky0.

> support on a personal level, and we've gotten a lot of support.[25]

Despite this bleak assessment, Donziger also asserted that he was up for the conflict: "I get the big picture. I'm strong, resilient, hopeful . . . and [I] believe we will get through this."[26] Significantly, Donziger framed his ideology as the source of his resiliency: "I've always seen my job as a lawyer as subordinate to my duty to speak truth to power. []Chevron can try to steal my law license; it can't take my soul, nor my courage, nor our determination to hold the company accountable."[27] He simultaneously operated websites seeking donations and signatures for petitions related to his contempt litigation.[28]

This framing of the issue does not come through in the judicial decisions but is essential to understanding Donziger's strategy. Although Donziger has had some successes in federal courts (e.g., reversing Chevron's initial, preliminary injunction against his efforts to enforce the Ecuadorian judgment[29] and, later, vacating some of the civil contempt findings against him),[30] he also seems to be facing increasingly steep odds after the Second Circuit upheld a permanent injunction against the enforcement of the judgment[31] and the contempt litigation continues. If his actions are understood only in relation to the courtroom, it is difficult to understand why he should not turn over the files, plead guilty to the criminal contempt charge, and ask that his sentence be the house arrest that he has already served. One explanation is that doing so would hurt his standing as a true believer within his movement and limit his capacity to raise money. Further, he has publicly argued that the judge presiding over Chevron's civil case against him, the judge presiding over the criminal contempt case against him, and the private lawyers appointed to prosecute him for criminal contempt[32] are all corrupt and connected to Chevron.[33] As such, a decision to take a plea deal on the criminal contempt charge

25. *Id.*

26. *Id.*

27. Steven Donziger (@SDonziger), TWITTER (Apr. 20, 2021, 12:55 PM), https://bit.ly/2TgD9Gk.

28. Archived versions of these websites are available at https://bit.ly/3tDR6LZ and https://bit.ly/3A76WkT.

29. *See* Chevron Corp. v. Naranjo, 667 F.3d 232, 234 (2d Cir. 2012).

30. *See* Chevron Corp. v. Donziger, 990 F.3d 191, 197 (2d Cir. 2021).

31. *See* Chevron Corp. v. Donziger, 833 F.3d 74, 80–81 (2d Cir. 2016), *cert. denied* 137 S.Ct. 2268 (2017).

32. The United States Attorney's Office declined prosecuting this case.

33. *See* Steven Donziger (@SDonziger), TWITTER (Apr. 23, 2021, 7:17 PM), https://bit.ly/2UV3PNb ("My Chevron-linked judge (Preska) and private prosecutor (Glavin) weren't just 'hanging out' in this photo—they're friends who work together on the Fordham Law Alumni committee. Does this seem as f'd up to you as it does to me?").

would amount to bowing down to Chevron—an unacceptable outcome to Donziger. Rather, for him and the movement he has tried to build and maintain, fighting the contempt process amounts to publicly standing up to Chevron. Furthermore, it keeps the issue centered on Chevron and purported judicial corruption, rather than whatever his files might reveal about bribery in Ecuador.

Despite the difficult road Donziger has travelled in these proceedings, his strategy may be working out. He has gained national attention—even members of Congress have begun to tweet their support for Donziger.[34] How the members of Congress can have a direct effect on Donziger's case is unclear. However, their commentary could lead to more sympathetic media coverage and donations, as well as, possibly, participation by the Department of Justice as an amicus in support of Donziger or even a pardon of Donziger by President Biden. Significantly, these members of Congress have largely adopted Donziger's framing of the issue, focusing on the underlying allegations of environmental degradation by Chevron, rather than Chevron's assertions of misconduct by Donziger.

B. Elliot Kline and Matthew Heimbach

Elliot Kline and Matthew Heimbach were organizers of the "Unite the Right" rally and violence in Charlottesville in 2017. After the federal district court denied their motion to dismiss the lawsuit brought by residents of the town,[35] Kline and Heimbach stopped responding to their lawyers or the court regarding discovery. However, Heimbach, in particular, continued to post on social media, communicating his hostility to discovery, his hostility to rival white supremacist organizations, and his own ideological dedication. For example, he posted a meme criticizing the American Identity Movement (known, at that time, as Identity Evropa[36]), a rival to his own group, the Traditionalist Worker Party, which stated:

> Everyone [After] C[harlottes]ville: Discord has publicly said that they are helping the SPLC and will leak all chats, let's stop using Discord

34. *See*, *e.g.*, Ed Markey (@SenMarkey), TWITTER (July 30, 2021, 1:01 PM), https://bit.ly/2VvuZL0; Congresswoman Rashida Tlaib (@RepRashida), TWITTER (Apr. 27, 2021, 6:47 PM), https://bit.ly/2Uh909W; Rep. Jim McGovern (@RepMcGovern), TWITTER (Apr. 27, 2021, 4:55 PM), https://bit.ly/2UhDGaN.

35. *See* Sines v. Kessler, 324 F. Supp. 3d 765, 807 (W.D. Va. 2018).

36. *See* Hatewatch Staff, *White Nationalist Group Identity Evropa Rebrands Following Private Chat Leaks, Launches 'American Identity Movement,'* S. POVERTY L. CTR. (Mar. 12, 2019), https://bit.ly/3rMt0h6.

> Identity Evropa: Discord may out all of our members and kneecap us in a year, but it's really convenient so let's keep using it.
> Everyone else: W[h]at?[37]

Significantly, discovery in the underlying lawsuit would have eventually given the plaintiffs access to the relevant Discord chats, regardless of Discord's preferences. However, Heimbach's framing of the issue in terms of "leak[ing]" and "kneecap[ping]," rather than eventual compliance with court orders, enables an implication that hiding records from the other side constitutes a responsible reaction to the other side's bad actions. Additionally, by suggesting that Identity Evropa was failing to make the responsible choice, Heimbach could frame his own group, by implication, as the more cunning one.

Further, Heimbach used his own purported implacability in the face of the lawsuit as a means of publicly asserting his ideological purity. For example, in another post, he criticized another white supremacist who had settled a lawsuit:

> Lawsuits are just money, and as the Bible tells us 'No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other, Ye cannot serve God and mammon.' Too many self described 'nationalists' will turn in their comrades, betray their principles, and renounce their views; not under torture, not under threat of death, but due to a fear of losing money.[38]

In one reading of this post, Heimbach could be implying that he had no intention to settle the Charlottesville lawsuit and that, therefore, he was a true believer. Alternatively, Heimbach could have been implying—in conjunction with his refusal to respond to discovery requests and his post about Discord—that his refusal to participate even in discovery in the Charlottesville lawsuit also signaled his dedication to his cause. Similarly, in another post, Heimbach referred to other white supremacists who had

37. Matthew Heimbach (@HeimbachMatthew), TWITTER (Mar. 8, 2019, 10:20 PM), attached as Ex. 25 to Plaintiffs' Motion for Sanctions Against Defendants Elliot Kline a/k/a Eli Mosley and Matthew Heimbach, *Sines v. Kessler*, 3:17-cv-72 (W.D. Va. Apr. 3, 2019) Dkt. 457-25.

38. Matthew Heimbach (VK), attached as Ex. 22 to Plaintiffs' Motion for Sanctions Against Defendants Elliot Kline a/k/a Eli Mosley and Matthew Heimbach, *Sines v. Kessler*, 3:17-cv-72 (W.D. Va. Apr. 3, 2019) Dkt. 457-22.

been arrested as "prisoners of war,"[39] publicly praising and perhaps previewing a willingness to go to jail for the cause.

However, Heimbach's organization, the Traditionalist Worker Party, collapsed after a violent dispute between Heimbach and his cofounder, and Heimbach's status within the white supremacist movement declined.[40] Subsequently, Heimbach began to cooperate in discovery enough to avoid contempt proceedings. In contrast, Elliot Kline's organization, the American Identity Movement, persisted, and Kline continued to resist discovery to the point of being held in civil contempt and taken into custody.[41] This divergence is telling. Heimbach's refusals to cooperate drew energy from his movement and, simultaneously, reflected an effort to elevate his status within his movement, energize his organization, and protect his organization from liability. Later, his increased compliance correlated with the breakdown of his organization and continued legal pressure. In contrast, Kline, whose organization persisted, resisted far longer.

C. Joe Arpaio

Joe Arpaio served as sheriff of Maricopa County, Arizona, from 1993 to 2017. In 2006, his office entered into an agreement with Immigration and Customs Enforcement allowing his deputies to enforce federal immigration law.[42] However, in 2009, the federal government modified the agreement prospectively, limiting its reach to jails.[43] Residents of Hispanic or Latin descent sued Arpaio, alleging both that he continued to enforce federal immigration law outside of jails after the modification of that agreement and that his enforcement involved systematic racial profiling of motorists. A district court enjoined Arpaio's continued enforcement of federal law,[44] and the Ninth Circuit affirmed.[45] After Arpaio's office disobeyed the court order, the plaintiffs successfully moved for civil contempt and the district judge also referred the case to

39. *See* Matthew Heimbach (@MatthewWHeimbach), attached as Ex. 15 to Plaintiffs' Motion for Sanctions Against Defendants Elliot Kline a/k/a Eli Mosley and Matthew Heimbach, *Sines v. Kessler*, 3:17-cv-72 (W.D. Va. Apr. 3, 2019) Dkt. 457-15.

40. *See* Hatewatch Staff, *When The Big Tent Collapses: Private Discord Posts Offer an Honest Look at a Perpetually Dishonest Movement*, S. POVERTY L. CTR. (Apr. 2, 2018), https://bit.ly/3jziB6q. Though these events predated the motion for sanctions, these events appear to have weakened Heimbach's willingness to continue to resist after the plaintiffs filed that motion.

41. *See* Sines v. Kessler, No. 3:17-cv-72 (W.D. Va. Jan. 3, 2020) (order for Elliot Kline to surrender to the custody of the U.S. Marshall).

42. *See* Melendres v. Arpaio, 695 F.3d 990, 994 (9th Cir. 2012).

43. *See id.*

44. *See* Ortega-Melendres v. Arpaio, 836 F. Supp. 2d 959, 993 (D. Ariz. 2011).

45. *See Melendres*, 695 F.3d at 994.

another judge for criminal contempt. After Arpaio was convicted for criminal contempt, but before he was sentenced, President Trump pardoned him.[46] Arpaio then moved to vacate the guilty verdict and dismiss the criminal proceedings.[47] The district court dismissed the case but refused to vacate the verdict.[48] On appeal, the Department of Justice declined to defend the decision not to vacate the verdict, and the Ninth Circuit appointed a special prosecutor to argue that position.[49] Additionally, members of Congress filed an amicus brief arguing that President Trump's pardon unconstitutionally encroached on the power of the judiciary.[50] Eventually, the Ninth Circuit affirmed the denial of the motion to vacate the verdict.[51]

In his public messaging, Arpaio frequently tied his litigation to national politics. For example, he emphasized the partisan affiliation of the amici members of Congress, writing with an informal and yet aggressive style reminiscent of President Trump's tweets: "Nadler[,] chair of House Judiciary[, and] 23 other Democrats recently filed briefs to vacate [President Trump's] pardon of of [sic] me. My Attorney Klayman & I fighting these House Dem[ocrats]s[']political[,] frivolous actions."[52] Significantly, Arpaio's reference to his attorney is to Larry Klayman, a highly partisan figure, known for, among others things, lawsuits asserting conspiracy theories related to President Obama's birth certificate.[53] Arpaio also directly analogized himself to President Trump, using an intensely "social media" and somewhat ungrammatical writing style to suggest that his contempt litigation was part of an ongoing, anti-immigration struggle: "Chairman Jerrold Nadler & dozens of other Democrats trying to Impeach Pres[ident] Trump and also calling for courts to invalidate President Trump's pardon of me. The war continues as Gen[eral] MacArthur said 'I Shall Return'. That quote also applies to President Trump and I."[54] This authentic writing style and aggressive message seem intended to connect with Arpaio's base and the national anti-immigration movement.

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

47. *See id.*

48. *See id.* at 981.

49. *See id.* at 982.

50. *See* Brief of Amici Curiae Certain Members of Congress in Support of Neither Party, *United States v. Arpaio* (9th Cir. Apr. 29, 2019), 2019 WL 2013098, at *4.

51. *See* United States v. Arpaio, 951 F.3d 1001, 1008 (9th Cir. 2020).

52. Sheriff Joe Arpaio (@RealSheriffJoe), TWITTER (July 17, 2019, 6:51 PM), https://bit.ly/3wijhQB.

53. *See* McInnish v. Bennett, 150 So.3d 1045, 1045 (Ala. 2014), *cert. denied* 574 U.S. 872 (2014); Voeltz v. Obama, 134 So.3d 1049, 1049 (Fla. Dist. Ct. App. 2013); Tia Mitchell, *Judge Tosses 'Birther' Lawsuit; Obama Will Remain on Florida Ballot*, TAMPA BAY TIMES (July 2, 2012), https://bit.ly/3kgSDn4.

54. Sheriff Joe Arpaio (@RealSheriffJoe), TWITTER (Nov. 4, 2019, 2:39 PM), https://bit.ly/3w6X6wr.

Finally, Arpaio maintained ongoing commentary on his case, repeating the analogy between the pardon litigation and President Trump's contemporaneous impeachment: "Nadler [is] in federal court to get President Trump's pardon of me nullified. Now Nadler and his 'band of rebels' want President Trump impeached. Witch hunt continues but will fail."[55] Following Arpaio's failed reelection campaign in 2016, he ran unsuccessfully for U.S. senate in 2018 and for his old sheriff's position in 2020[56] and continued to sell political books.[57] Moreover, he continues to identify himself as "America's Toughest Sheriff"[58] and to assert that "America is facing an illegal immigration crisis."[59]

Arpaio's continued choice to act in contravention of court orders, despite the civil and criminal contempt proceedings against him, can best be understood as an assertion of his political beliefs, an electoral strategy, a fundraising strategy, and an effort to maintain his position within his political movement. His refusal to submit to a federal court's authority was a public, political statement, given how Arpaio's defiance matched President Trump's overt hostility to the purportedly liberal federal judiciary. Further, his emphasis on congressional Democrats' involvement in an amicus brief opposing his appeal reflects an effort to frame the litigation as a political conflict rather than an adjudication of a particular controversy.

Though Arpaio lost the 2016 and 2020 elections for sheriff, his courting of contempt may not have been ill-conceived or irrational as a political strategy. He may have used the contempt proceeding to communicate his commitment to a supposedly tough (i.e. racist and lawless) approach to law enforcement.

D. Josh Wolf

In 2005, Josh Wolf, a freelance journalist, recorded a video of a protest in San Francisco, during which a police officer's skull was fractured and a police car was damaged. After selling a portion of his

55. Sheriff Joe Arpaio (@RealSheriffJoe), TWITTER (Dec. 16, 2019, 2:32 PM), https://bit.ly/3h7ZeQd.

56. Uriel J. Garcia, *Ex-Sheriff Joe Arpaio Loses Arizona Primary Race in Comeback Bid*, USA TODAY (Aug. 7, 2020, 10:49 PM), https://bit.ly/3lnHEub.

57. Sheriff Joe Arpaio (@RealSheriffJoe), TWITTER (Apr. 22, 2021, 5:21 PM), https://bit.ly/2SHXcgu.

58. Sheriff Joe Arpaio (@RealSheriffJoe), TWITTER (Mar. 9, 2021, 2:42 PM), https://bit.ly/3h8q3Ux (showing a nameplate on Sheriff Arpaio's desk self-identifying as "America's Toughest Sheriff").

59. Sheriff Joe Arpaio (@RealSheriffJoe), TWITTER (Mar. 12, 2021, 5:55 PM), https://bit.ly/3qDpEMP.

footage to a TV station, he received a subpoena to produce all of his footage to a federal grand jury and to testify regarding the protest. He refused to comply, was held in civil contempt, and was remanded to federal custody. The Ninth Circuit affirmed the finding of contempt.[60] After 226 days in jail, the prosecution agreed to his release on the condition that he provide the full footage to the grand jury, but he did not have to testify.

The Society of Professional Journalists framed the contempt proceeding as an attack on the free press and provided $30,000 for his legal fees.[61] Notably, Wolf was not identified as a participant in the protest, so his refusal to turn over the film was not due to a concern of self-incrimination. Rather, Wolf emphasized that he had a long-term, journalistic relationship with protest movements and that compliance with the subpoena would jeopardize that relationship:

> I had been covering civil dissent in the Bay Area for the past three years and had – I've developed a rapport with both anarchists and more mainline protesters, protest organizers. These people are our contacts for me, and if I were to be turning myself into an investigator for the government, then they would no longer feel comfortable talking to me.[62]

Eventually, after leaving jail, he took a job with the *Palo Alto Daily Post*,[63] taking a step toward a more traditional, journalistic career.

At the same time, Wolf also argued that the federal grand jury investigation into the alleged arson of the police car was illegitimate.[64] In support, he claimed that local prosecutors, who, in his opinion, had "jurisdiction over th[e] matter," had shown no interest in the case.[65] When Wolf ran unsuccessfully for mayor of San Francisco, he similarly emphasized resistance toward federal involvement in local matters,

60. *See* In re Grand Jury Subpoena, 201 F. App'x. 430, 431 (9th Cir. 2006).

61. *See* Press Release, Society of Professional Journalists, SPJ Awards $30,000 to Defend Jailed Independent Journalist (Aug. 25, 2006), https://bit.ly/2TgIsWg.

62. Simon Scott, *Videographer, Blogger Freed from Prison*, NAT'L PUB. RADIO (Apr. 9, 2007, 10:00 AM), https://n.pr/366duTf.

63. *See* Justin Berton, *Video Blogger Wolf Now a Real Journalist*, SFGATE (Aug. 20, 2008), https://bit.ly/3h7yvTV.

64. Scott, *supra* note 62.

65. *See id.*

arguing that federal law enforcement should not interfere in the medical marijuana business.[66]

By persisting in his defiance to the subpoena, Wolf asserted his status as a journalist and his opposition to federal involvement in local matters. Though he paid a high price, he affirmed his values and, in some professional and political circles, vastly increased his status.

E. City of Seattle

In the summer of 2020, facing large protests, the Seattle Police Department routinely used what it deemed to be "less lethal" weapons, including pepper spray, tear gas, and blast balls, against protestors.[67] A protest organization and individual protestors sued the City, alleging violations of their First and Fourth Amendment rights, and successfully sought an injunction that restricted the use of the "less lethal" weapons.[68] After continued clashes, the protestors moved for contempt, but then agreed instead to a clarification of the injunction. When the protestors moved for contempt a second time, however, the court agreed and awarded the plaintiffs attorneys' fees.[69]

Though it may seem counterintuitive to characterize a municipality as a true believer litigant, there are several reasons why it is appropriate in this case. Presumably, most police officers likely agree on a professional ideology: that law enforcement promotes public safety. After some protestors called for the defunding or abolition of the police department, individual police officers may have felt that their ideology had suddenly become disputable. Due to those calls to defund or abolish the police, police officers may have felt that their careers, at least in Seattle and perhaps nationally, were suddenly in jeopardy. Further, given national media attention on Seattle, some of which focused on violence and perceived anarchy in Seattle,[70] the police department may have felt a need to reassert their authority. In other words, with their professional ideology, their careers, and their practical authority all questioned, at least some police officers seemed to have reacted with the intensity and willingness

66. *See* Josh Wolf, *I'm Running for Mayor*, Blog, JOSH WOLF FOR MAYOR (July 4, 2007), https://bit.ly/3jJpthV.

67. *See* Black Lives Matter Seattle-King Cnty. v. City of Seattle, 505 F. Supp. 3d 1108, 1112 (W.D. Wash. 2020).

68. *See id.*

69. *See* Black Lives Matter Seattle-King Cnty. v. City of Seattle, 516 F. Supp. 3d 1202, 1205 (W.D. Wash. 2021).

70. *See, e.g.*, Lia Eustachewich, *How the Seattle CHOP Zone Went from Socialist Summer Camp to Deadly Disaster*, N.Y. POST (July 1, 2020, 6:39 PM), https://bit.ly/3yoJG0z.

to engage in contempt of "true believer" litigants, rather than the staid compliance of typical governmental litigants.

At the same time, defining the police department as a true believer litigant raises difficult and interesting questions. From a bureaucratic perspective, the Seattle Police Department may have been aligned with other police departments and police unions around the country in resisting calls to defund the police. Continuing the tactics that led to contempt may have been, in part, intended for police officers outside of Seattle to observe in an attempt to support police officers nationally. Alternatively, the movement could have been understood in terms of purely local politics, exhibiting the complex relationship between the mayor and the police department, including efforts by the police to take the lead in responding to protests. Finally, the movement could be understood as reflecting only individual officers as opposed to police departments as a whole, highlighting those officers interested in the most confrontational responses to the protests.

In the end, it is unclear whether the choices leading to contempt were productive for the police officers' goals. On one hand, autonomous protest zones did not reemerge in Seattle. On the other hand, the Seattle City Council cut the Police Department's budget but by less than what some activists had originally sought.[71]

IV. CONCLUSION

After reviewing these five case studies, it seems that, although sanctions and contempt can provide compensation against true believer litigants, clear limits appear on the deterrent value of sanctions against such a litigant. The imposition or consideration of sanctions and contempt can draw public attention and can shift discourse from the merits of the action to the sanctions and contempt. Accordingly, some true believer litigants strategically defy court orders as an analogue to civil disobedience. However, these litigants are performing for competing audiences. The judge remains one audience of the litigants, but seemingly of equal importance are the other members of the ideological movement and the public in general. Still, in the end, sanctions and contempt can force even true believer litigants to comply with judicial orders.

The purpose of this Article is not to evaluate the merits of any litigation discussed above. Nor does it seek to evaluate the morality of the

71. *See* Andy Rose & Hollie Silverman, *Seattle's Mayor is Set to Sign a New City Budget Cutting the Police Department's Funding by 18%*, CNN (Nov. 25, 2020, 4:03 AM), https://cnn.it/3dwpvW9.

litigants discussed above. Rather, the purpose has been to supplement the traditional understanding that contempt and sanctions are rarely invoked, but necessary, means of ensuring the integrity of the judicial process by compensating those harmed by recalcitrance and deterring future acts of recalcitrance. Instead, from the perspective of true believer litigants, the threat or imposition of contempt and sanctions can be tests of their mettle, opportunities to reaffirm their beliefs publicly, means of raising their profiles within their movements, and chances to shift the topic of coverage from the underlying litigation. Reframing the coverage of their litigation allows litigants to potentially detract from their own culpability, at least in the court of public opinion. Of course, the sanctions can also have compensatory and deterrent effects and can dramatically interfere with the lives of the contemnors. However, if lawyers are to understand the role of contempt and sanctions fully, they must think beyond the perspective of the legal system; they must also consider the perspective of those on whom sanctions and contempt are threatened and imposed.