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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 UNITED STATES OF AMERICA,

4 v.

19 Cr. 561 (LAP)
11 Civ. 691 (LAK)

5 STEVEN DONZIGER,

6 Defendant.

Sentencing

7 -----x

New York, N.Y.
October 1, 2021
10:05 a.m.

10 Before:

11 HON. LORETTA A. PRESKA,

District Judge

13 APPEARANCES

14 RITA M. GLAVIN, ESQ.
15 BRIAN P. MALONEY, ESQ.
16 SAREEN K. ARMANI, ESQ.
Special Prosecutors for the United States

17 LAW OFFICE OF RONALD L. KUBY
Attorneys for Defendant
18 BY: RONALD L. KUBY, ESQ.
RHIDAYA S. TRIVEDI, ESQ.

19 OFFIT KURMAN PA
Attorneys for Defendant
20 BY: MARTIN GARBUS, ESQ.

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1 (Case called)

2 THE COURT: Is the government ready?

3 MS. GLAVIN: Yes, your Honor. Rita Glavin, Brian
4 Maloney, and Sareen Armani.

5 THE COURT: Good morning.

6 And is the defense ready?

7 MR. KUBY: Judge, may I take off my mask from here? I
8 notice you have doffed yours.

9 THE COURT: Well, I'm about 20 feet from everybody
10 else.

11 MR. KUBY: I'm not suggesting the same rules apply.
12 I'm just --

13 THE COURT: No, no. But in the booth, all the lawyers
14 may take their masks off.

15 MR. KUBY: Okay.

16 THE COURT: Yes, sir.

17 MR. KUBY: So, yes. First of all, good morning.

18 THE COURT: Good morning.

19 MR. KUBY: Second of all, I understand the confusion,
20 but they are not, nor have they ever been, the government --

21 THE COURT: All right.

22 MR. KUBY: -- with all due respect.

23 THE COURT: Thank you, Mr. Kuby.

24 MR. KUBY: And third, yes, the defense is ready.

25 THE COURT: Thank you. Good morning.

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1 MR. KUBY: Good morning.

2 THE COURT: Ladies and gentlemen, I just want to
3 remind everyone that there is no recording of or broadcasting
4 of these proceedings allowed, either audio or video.

5 As you know, there is a call-in line so that members
6 of the public may listen but of course may not speak in the
7 proceedings.

8 First of all, I have received voluminous
9 sentencing-related materials. I have the special prosecutor's
10 sentencing submission of September 8; Mr. Donziger's sentencing
11 memorandum of September 12; and Mr. Kuby's several letters
12 appending numerous letters of support from Mr. Donziger's
13 friends and others; I've also received the UN Working Group
14 Decision on Arbitrary Detention.

15 Are there any other materials, counsel, that I should
16 be looking at?

17 MR. KUBY: I believe that's the substance of the
18 defense submission and the totality of the defense submission.
19 I just note that the memo is -- our memo is dated the 21st, not
20 the 12th. That's all.

21 THE COURT: I think I can't type, Mr. Kuby. That must
22 be it.

23 MR. KUBY: I think it's a slight dyslexia. I get it
24 sometimes too.

25 THE COURT: Thank you.

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1 Anything else, Ms. Glavin?

2 MS. GLAVIN: No, your Honor. Just with respect to the
3 UN, the Working Group Decision, I just want to make a record on
4 that. I reviewed that yesterday, and the UN Working Group
5 Decision was based entirely on a quote-unquote source. My
6 understanding is that source is Amnesty International, a group
7 that has been working with Mr. Donziger. The UN Working Group,
8 for the record, did not review any of the court record in this
9 case. As a result, in the view of the special prosecutors, the
10 failure to even go through the court record rendered it
11 misleading, unreliable, and riddled with material omissions and
12 errors. I would hope, going forward, that the UN Working
13 Group, before opining on a case, would spend some time
14 reviewing the actual court docket.

15 MR. KUBY: Judge, I'd like to respond to that, please.

16 THE COURT: Yes, sir.

17 MR. KUBY: Thank you.

18 Amnesty International, which was the original source
19 referenced in the UN Working Group on Arbitrary Detention, is
20 not, quote, a group working with Donziger. It is, without a
21 doubt, the planet's most prestigious human rights organization
22 that has taken up causes, prisoners, prisoners of conscience
23 around the world, including fighting some of the most reviled
24 outlaw regimes. To dismiss it as a group working with
25 Mr. Donziger I think does a tremendous disservice to them.

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1 Number two, the UN Working Group contacted -- and this
2 perhaps was in error -- they contacted the government of the
3 United States of America, under the absolutely incorrect but
4 understandable belief that there was some supervision of this
5 from the government of the United States of America. They did
6 not contact the private, for-profit prosecutor because the
7 United Nations, as I understand it, doesn't deal with private
8 individuals, it deals with government entities. The Biden
9 Administration, which was well informed about this, did or did
10 not make some contact with the private, for-profit prosecutor,
11 but the government of the United States, as the Executive
12 Branch of the United States, one charged with faithfully
13 executing the laws, did not make a response to the UN Working
14 Group as a general matter. When one is making allegations in
15 this type of proceeding where the United States indeed is part
16 of the signatories to the process, if you don't respond to the
17 allegations, generally speaking, they're deemed admitted, and
18 Ms. Glavin has not.

19 THE COURT: Mr. Kuby, Mr. Kuby, Mr. Kuby, I don't care
20 if you go on and on. It's fine.

21 MR. KUBY: Oh, good.

22 THE COURT: I'm just telling you I am taking it for
23 what it is worth, and I'm not sure that your testimony as to
24 any of these facts is moving the ball forward. But if you want
25 to testify, go right ahead.

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1 MR. KUBY: I don't want to testify, but I do want to
2 respond to the amazing, generally amazing contempt for and
3 disrespect of a prestigious international institution. I get
4 it, Judge. We're Americans. We don't care what the foreigners
5 think. This case has amply demonstrated that particular
6 principle. But the United Nations Working Group followed its
7 own procedures. The government of the United States did not
8 respond. Amnesty International yesterday urged the government
9 to immediately implement their recommendations. And while I
10 didn't expect Ms. Glavin to come here with her checkbook to pay
11 Steven Donziger for his detention period, the Court can
12 implement those recommendations by releasing Mr. Donziger.

13 Thank you, your Honor.

14 THE COURT: Thank you, Mr. Kuby. In any event, as I
15 said, I take it for what it's worth.

16 Counsel, it's my understanding that Mr. Donziger has
17 elected to waive any presentence investigation and presentence
18 investigation report as provided for in Federal Rule of
19 Criminal Procedure 32. Is that correct, counsel?

20 MR. KUBY: Yes, Judge.

21 THE COURT: Thank you.

22 MS. GLAVIN: Yes, your Honor.

23 THE COURT: All righty. I find that the voluminous
24 material in the record that I have just noted enables the Court
25 meaningfully to exercise its sentencing authority under

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1 18 U.S.C. Section 3553(a).

2 So I'll start first with the application of the
3 sentencing guidelines. On April 26, 2021, Mr. Donziger was
4 convicted of six counts of contempt of a court order, in
5 violation of 18 -- sorry, if I said April, it was July 26.
6 Thank you. -- in violation of 18 U.S.C. Section 401(3). See
7 Dkt. No. 346. Pursuant to Section 3D1.2(b) of the guidelines,
8 the Court finds that those counts should be grouped together
9 because they involve substantially the same harm. The parties
10 agree that Mr. Donziger's criminal history category is I.

11 Now to determine the applicable offense guideline.
12 Section 2J1.1 of the guidelines applies to contempt offenses.
13 Application Note 1 to that section instructs as follows:

14 "Because misconduct constituting contempt very
15 significantly and the nature of the contemptuous conduct, the
16 circumstances under which the contempt was committed, the
17 effect the misconduct had on the administration of justice, and
18 the need to vindicate the authority of the court are highly
19 context-dependent, the Commission has not provided a specific
20 guideline for this offense."

21 In that vein, the Court of Appeals has recognized that
22 "[t]he Guidelines offer little guidance on sentences for
23 defendants convicted of criminal contempt, in violation of 18
24 U.S.C. § 401(3)." *United States v. Cutler*, 58 F.3d 525, 538
25 (2d Cir. 1995).

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1 Section 2J1.1 directs courts to Section 2X5.1 for
2 "Other Offenses." Section 2X5.1 instructs courts, for
3 felonies, to "apply the most analogous offense guideline" if
4 there is one. But if there is not one, Section 2X5.1 counsels
5 that "the provisions of 18 U.S.C. § 3553 shall control."
6 Conversely, Section 1B1.9 informs that "[t]he sentencing
7 guidelines do not apply to any count of conviction that is a
8 Class B or C misdemeanor or an infraction."

9 18 U.S.C. Section 401 -- the statute under which
10 Mr. Donziger was convicted -- does not indicate what
11 classification of crime criminal contempt is, nor does it
12 prescribe a minimum or maximum penalty of imprisonment. Absent
13 specific statutory guidance, offense classifications are based
14 on the maximum term of imprisonment authorized. See 18 U.S.C.
15 § 3559(a).

16 However, this Court has already determined pretrial
17 that Mr. Donziger, if convicted, would not be sentenced to more
18 than six months in prison or a \$5,000 fine. An offense is
19 characterized as a Class B misdemeanor if the maximum prison
20 term is six months. Accordingly, the Court will consider
21 Mr. Donziger's offenses to be Class B misdemeanors to which the
22 guidelines do not apply. That is consistent with
23 Mr. Donziger's characterization of the offenses in his
24 sentencing memorandum. (See Dkt No. 372 at 3.

25 18 U.S.C. Section 3553(b) instructs that "[i]n the

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1 absence of an applicable sentencing guideline, the court shall
2 impose an appropriate sentence, having due regard for the
3 purposes set forth in subsection (a)(2)." Moreover, the Court
4 finds that, even if Section 2X5.1 of the Guidelines applied, no
5 other Guideline is sufficiently analogous to the offense here.
6 Therefore, even if the Guidelines did apply, the provisions of
7 Section 3553 would still control. Both the special prosecutors
8 and Mr. Donziger agree on that front. (See Dkt No. 364 at 4,
9 Dkt. No. 372 at 3.)

10 18 U.S.C. § 3553(a)(2) requires the Court to consider
11 the following:

12 "the need for the sentence imposed -- (A) to reflect
13 the seriousness of the offense, to promote respect for the law,
14 and to provide just punishment for the offense; (B) to afford
15 adequate deterrence to criminal conduct; (C) to protect the
16 public from further crimes of the defendant; and (D) to provide
17 the defendant with needed educational or vocational training,
18 medical care, or other correctional treatment in the most
19 effective manner."

20 Section 3553(a) also provides other factors for the
21 Court to consider, including, among others, "the nature and
22 circumstances of the offense and the history and
23 characteristics of the defendant." Additionally, consistent
24 with "the historic role of sentencing judges," the Court may
25 take into "consideration the judge's own sense of what is a

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1 fair and just sentence under all of the circumstances." *United*
2 *States v. Jones*, 460 F.3d 191, 195 (2d Cir. 2006).

3 Mr. Kuby.

4 MR. KUBY: Yes.

5 THE COURT: Would you like to speak on behalf of
6 Mr. Donziger?

7 MR. KUBY: Yes, Judge.

8 THE COURT: Would you do so now, please.

9 MR. KUBY: Thank you, Judge.

10 I'm sort of -- I feel like I'm here at the series
11 finale, which is certainly a cliffhanger for all of us.

12 You articulated correctly a whole variety of different
13 factors, all of which you recited accurately. No particular
14 factor weighs more heavily than any other. It's all in the
15 entire and complete discretion of the Court, and so all of
16 those factors are there. It's a bit of a -- it's a bit of a
17 black box, actually, in terms of what the Court decides is most
18 important. So I want to highlight just a few things that the
19 defense thinks the Court should think are important.

20 One is Steven Donziger's character. And look, I know
21 you've reviewed the over 50 at this point letters of support
22 for Steven. These are not his Twitter followers; these are not
23 people who have simply signed an online petition; they're
24 distinguished attorneys with decades of practice, and young
25 lawyers and some law graduates; they're jurists and

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1 journalists, scholars, teachers, activists, and even a Nobel
2 Peace Prize lawyer thrown in. And they've known Mr. Donziger
3 for decades. And hopefully they've provided the Court with
4 aspects of Mr. Donziger's life and character and his dedicated
5 commitment to human rights and justice apart from the details
6 of this case, from the time that he successfully pushed law
7 schools to have pro bono requirements for students some four
8 decades before that became popular to helping prisoners in
9 re-entry programs.

10 THE COURT: Are you sure you're not aging him a little
11 bit with that four decades stuff?

12 MR. KUBY: You know what? He just seems so much older
13 since I've met him. I think he's aged a decade in the past
14 year, Judge. So let's call it -- when did you graduate from
15 Harvard?

16 (Mr. Kuby conferring with the defendant)

17 Well done, Judge. In the three plus decades, yes.
18 He's documented crimes and atrocities in two different war
19 zones in Nicaragua and Iraq, and he's really shown himself to
20 have dedication and passion and fearlessness within the rule of
21 law.

22 Now I understand -- I really do -- that over the
23 course of this case, this Court has grown frustrated at times
24 with Mr. Donziger. I have to tell you, that's universal.
25 Everybody who knows and loves Steven Donziger -- as well as

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1 people who may not love him -- grow frustrated with him at
2 times. He reminds me a little bit of -- speaking of dating
3 myself -- the prison yard fight scene in *Cool Hand Luke*.
4 There's George Kennedy and there's Paul Newman, and Paul
5 Newman -- are you thinking prison yard stories are not the best
6 vibe for this proceeding? But there's Paul Newman, who keeps
7 like getting hit over and over and over again in the face of an
8 adversary who's so much stronger and more powerful and just
9 keeps getting up, and eventually, you know, even the people
10 that don't like him very much say: Just stay down, Luke. Just
11 stay down. But he doesn't stay down. He gets back up till he
12 can't fight anymore.

13 I'll submit, Judge, the qualities that make him such a
14 splendid human being are the same qualities that have,
15 understandably, made him a difficult defendant. But throughout
16 these proceedings, I just want to note that he's treated this
17 Court respectfully, he's been punctual in his appearances,
18 reasonable in his requests, has in no way obstructed the
19 ongoing progress of this trial, and he has respected, albeit
20 disagreed with, virtually every ruling this Court made. I know
21 that that is expected behavior rather than behavior one
22 rewards, but it stands in stark contrast to the private
23 prosecutor's portrayal of him as some sort of feckless,
24 irresponsible, court rule violator who has not shown any
25 respect for the law.

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1 The second part, the second thing I want to address is
2 the whole concept of promoting respect for the law. And given
3 the private prosecutor's submission and given the things the
4 Court has said in the Court's opinion on guilt or innocence
5 about the need to be bound by the rule of law and that that is
6 a sort of sacred fundamental principle on which this society is
7 constructed, I want to talk a little bit about promoting
8 respect for the rule of law, because certainly I agree with the
9 Court's observations. I agree that the rule of law is
10 paramount. But I have to say, against the history of this
11 case, the rule of law hasn't come out well. I mean, Chevron
12 has shown that with its endless resources and abilities to
13 dispatch endless lawyers, fueled by endless dollars, they will
14 not be held accountable by any legal system. That isn't just
15 how things worked out; that's their business model. As their
16 press flack said decades ago in response to the filing of the
17 underlying action back in 1993: We will fight them until hell
18 freezes over, and then we will fight it out on the ice. And
19 here we are close to 30 years later and we've all got our
20 skates on. They were certainly right about that.

21 I would suggest that, as we ponder what promotes
22 respect for the law in this case, this Court just take a couple
23 of minutes to view the totality of these proceedings through
24 the eyes of people this Court has never met and people who live
25 lives that this Court, and indeed few of us, can imagine --

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1 that is, the Ecuadorian villagers and tribes who had 16 billion
2 gallons of toxic oil waste dumped in their lands and waters,
3 causing environmental destruction. And in 1993, a very young
4 and very naive Steven Donziger brings a lawsuit against Chevron
5 here in the Southern District of New York, in the Mother Court,
6 founded 1789. The case is assigned to Judge Rakoff, and for
7 seven years it is Chevron Corporation that battles to get out
8 of the Southern District, to get away from this court, to go to
9 Ecuador. It's Chevron that didn't trust the US courts, not
10 Mr. Donziger. It was Chevron who wanted to go to a place that
11 does not have the rule of law, not Mr. Donziger. And it's
12 Chevron that wanted to go to a place where the verdict is
13 predetermined by politics, not by law; that was not Steven
14 Donziger. And finally, finally, they succeeded, after a
15 promise of, if we lose in Ecuador -- not likely since the
16 government is friendly with us, but of course if we do, we'll
17 pay for or comply with any judgment issued by the Ecuadorian
18 courts. And they lose.

19 And they lose, and their promise proves to be as
20 worthless as everything else, and like some other folks who
21 will go unnamed, they decide that the only way they could have
22 lost is if there is fraud. So they got up and they create and
23 purchase and rent and coerce some proof of fraud. And armed
24 with the judgments, they come back here to the S.D.N.Y. and
25 file motions under 1782. Frankly -- I've been in practice 40

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1 years -- I'd never heard of it. I understand it's not the kind
2 of thing that I ordinarily would encounter. Fairly obscure.
3 But Gibson Dunn & Crutcher has sort of turned it into an art
4 form. They've even got a name for it. And they filed their
5 motion in Part I. They don't go back to Judge Rakoff, who had
6 the case for seven years. They filed it in Part I. They make
7 it returnable the very day that Judge Lewis Kaplan is on the
8 bench. And I don't know if that was simply the god of good
9 judicial pick fortunes smiling on Gibson Dunn & Crutcher or
10 whether something else was involved, but once Judge Kaplan got
11 this case, this little piece of the case, he held onto it like
12 a remora on a shark. And Chevron liked what they heard, and
13 finally they filed the RICO action, not in front of Judge
14 Rakoff, but what they filed in front of Judge Kaplan was an
15 action related to the 1782s. And those Ecuadorian villagers
16 were sort of watching those proceedings, and they got to hear
17 Judge Kaplan mock the Ecuadorian courts and compare them
18 unfavorably with the High Court of England, and to listen to
19 Judge Kaplan talking about RICO and extortion and stripping
20 Mr. Donziger of his privileges, back in 2010. And of course,
21 the institution that we look to or we talk about a lot in
22 America that separates our system from any other system and
23 makes it the best in the world as the institution of --

24 THE COURT: Mr. Kuby, I don't want to miss a word.
25 Try to stay as close as you can to the microphone because

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1 sometimes when you move back, we miss you.

2 MR. KUBY: Oh, I'm sorry, Judge. I'm still trying to
3 get comfortable in my "Kuby-cle."

4 THE COURT: I thought it was the penalty box.

5 MR. KUBY: Well, you know what, one could, not that
6 one would, simply drop a piece of plastic behind me, tilt it
7 over, and wheel me out on a hand truck. Oh, not that you
8 should.

9 THE COURT: I'll keep that in mind.

10 MR. KUBY: One of the institutions we talk about in
11 America as making our system so wonderful is trial by jury.
12 And of course Chevron, with agreement of Judge Kaplan, through
13 a perfectly legal procedural trick -- perfectly legal --
14 decided to forgo its claim for damages to prevent Mr. Donziger
15 from getting his trial by jury. And indeed -- shocker of
16 shockers -- Mr. Donziger lost his case in 2014.

17 And then Chevron pursued a litigation strategy that
18 wasn't just designed to win the case -- they won the case --
19 but it was designed to go after Mr. Donziger, go after the
20 other plaintiffs, go after everybody who dealt with
21 Mr. Donziger, and really send a message, which I think has been
22 sent, which is, no matter who you are, no matter what you do,
23 you can start your career on a case against us and end it on a
24 case against us, and you will never prevail, because we will
25 litigate this forever, we will outlast you, so don't even

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1 bother to try to hold us accountable, in an American court or
2 any other court. And that was the message they sent.

3 Unfortunately, Judge Kaplan, in creating a series of
4 orders, goes to the Department of Justice and asks them to
5 prosecute Steven Donziger. And of course, as we know, if the
6 DOJ agreed, they could proceed by indictment. There would be
7 no particular reason why these would be misdemeanors or lower
8 offenses. They could go ahead and indict him. And the Trump
9 Justice Department, Geoffrey Berman, told Judge Kaplan: We
10 don't have the resources for this case. Judge, it wasn't just
11 a no; it was a no accompanied by the most obvious lie
12 imaginable. We know the Southern District of New York United
13 States Attorney's Office has all the resources it has ever
14 needed for anything it wants to do. That's why it's the
15 "Sovereign District of New York."

16 And at that point, you know, I don't know -- and I
17 guess this is a personal thing. You know, when I try to do
18 something over and over again and people keep telling me no,
19 especially if it's people who I have some respect for, I
20 finally start to think maybe it's not them, maybe it's me.
21 Maybe I should just take a beat here and not proceed like this.
22 But Judge Kaplan decided to bring his own charges, picked his
23 own prosecutors, and instead of wheeling the case out, which
24 would have at least promoted some sense of impartiality in
25 terms of appearance of justice, he picked this Court, and just

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1 in case something went wrong, he remains an unrecused judge on
2 the case. So, you know, come on, Judge. How does this look?
3 He's the complaining witness, he's the guy that brought the
4 charges, he's the guy that wrote the charges, he's the guy that
5 picked the prosecutors, the guy that picked the judge, and he's
6 also the judge. How does that promote any respect for the law?

7 These are all true things. These are things that
8 actually happened. And they're not debatable. So, you know,
9 the world has kind of taken notice. I know that during the
10 guilt/innocence phase of this case, this Court worked very hard
11 to cabin the triable issues very, very closely to the charges.
12 And obviously I understand that. The law is a seamless web.
13 We could have been doing this at trial. But the world has
14 taken notice. I know you've received the United Nations
15 Working Group Report on Arbitrary Detention, Amnesty
16 International, but there are journalists and writers and
17 scholars and professors and lawyers groups all over the world
18 who have been paying attention to this case, and not liking
19 what they see. I mean, senators and members of Congress,
20 they're not all saying what I'm saying, but they're all saying,
21 this is not normal. This isn't how things should function.

22 So look, I think when they compile the next book on
23 great American trials, you know, trials where the law stood
24 tall in the face of adversity and stuff, I don't think the
25 Donziger case is going to be in that book. I really don't.

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1 And I think that you can't correct any of that at this point,
2 but you can do no more harm, which is what I urge you to do.

3 And next and almost last, I want to briefly talk about
4 the principle that federal court orders, unless stayed or
5 invalid on their face -- which is an exception that almost
6 never occurs -- they must be obeyed. And I agree. How could I
7 not, as somebody who's been in places like this for the past 40
8 years? I mean, what isn't generally known to the public is,
9 even if a court order, federal court order is wrong, erroneous,
10 badly thought out, you still have to comply with it unless it's
11 stayed. And it certainly isn't generally known that appeals
12 courts -- I mean, it's generally known to the bar but it's not
13 generally known to the public that appeals courts have their
14 own mechanisms for adjudicating error, and frequently, almost
15 always, they involve not inserting themselves into ongoing
16 proceedings, rarely intervening in ongoing litigation, even if
17 the orders are erroneous. And what that does is it gives a
18 single district judge an enormous -- in some ways like
19 frightening -- amount of power.

20 But I suggest that when a court's orders come with the
21 mandate of total and immediate obedience as they do, those
22 orders should also come with restraint in issuing them, and I
23 think here, that restraint failed. Whether it was a matter of
24 ideology or pique or simply disliking Mr. Donziger and
25 everything he stands for or favoring one party or another, that

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1 restraint failed, and what Judge Kaplan did was to sort of
2 build a Jenga tower of orders, on top of a foundation -- you
3 know Jenga tower, right, Judge? Okay.

4 THE COURT: I used to play too.

5 MR. KUBY: Really. I'm just taking a minute to
6 imagine that.

7 Okay. And Mr. Donziger went to him and said, Judge,
8 you said one thing and then you said something else that was
9 completely different, and now you're allowing discovery and all
10 this abusive discovery based upon stuff that you said I could
11 do; would you please explain or clarify or withdraw or do
12 something. And really leaves Mr. Donziger between Scylla and
13 Charybdis. And I recognize that all court orders are created
14 equal in the sense that they all have to be obeyed, and that a
15 judge has the ultimate power of enforcement. But I would
16 suggest, looking at the case law, that -- and indeed,
17 reflecting upon part of what this Court said -- the interests
18 protected by federal court orders are not the same, they're not
19 identical, and they're not necessarily entitled to equal
20 weight.

21 I mean, if we look at the two cases where attorneys
22 were actually incarcerated, Bruce Cutler and -- or, I'm sorry,
23 were actually prosecuted and convicted of criminal contempt as
24 Class B misdemeanors for contempt outside the presence of the
25 court -- Bruce Cutler and Ruth Pollack -- Bruce Cutler

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1 jeopardized the fairness of one of America's most famous
2 criminal trials, Ms. Pollack jeopardized her own case and used
3 a lot of court time. But even they, of course, received
4 probation or home confinement. The cases in which
5 incarceration seems to be imposed for contempt -- never on
6 attorneys -- are those cases where there's a larger public
7 interest that's been violated by violating a court order, and
8 by that I'm referring to the abortion clinic cases. Whatever
9 you feel about the rightness or wrongness of the cause, it's
10 clear that the protestors, in violating a federal court
11 injunction, were implicating and involving the rights of people
12 who had no relationship to the litigation at all. They weren't
13 parties, they weren't advocates, they simply were going to a
14 clinic to access health services, and those were important
15 public rights.

16 And it really is different here. I mean, the interest
17 being protected in this case, based on the orders that you have
18 found Mr. Donziger violated, were the interests of one of the
19 world's largest corporations that had essentially all of those
20 interests vindicated already. I mean, by the time the Supreme
21 Court denied cert on this case in 2017, in the underlying civil
22 case, it was over. I mean, yeah, there was some i's that
23 needed to be dotted and some t's that needed to be crossed, and
24 Chevron used those things as a vehicle to go after
25 Mr. Donziger, but those interests had already prevailed the

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1 private interest at stake. And, look, Steven Donziger is
2 sitting there in 2017 at his kitchen table, pro se, facing this
3 tsunami of motions and orders and the like from Chevron
4 counsel, and it was all legal in the sense that a federal court
5 authorized it and nobody overturned it. But the sort of
6 demonstration as to what a giant corporation with an endless
7 stream of lawyers can do to a private person pro se doesn't
8 really, you know, vindicate the rule of law much, nor is it the
9 type of interest that needs to be vindicated by incarceration.

10 I next want to address something that has not come up
11 before -- I know, right? -- and that's the issue of a sentence
12 which is authorized by law but has never been raised by the
13 parties, and that's the sentence of probation. Should I just
14 skip that because that's off the table?

15 THE COURT: You have the stage.

16 MR. KUBY: Thank you so much, Judge. Again, trying to
17 maintain the dramatic tension.

18 I had assumed, although it was not an assumption that
19 was based on anything else except expectation, that when this
20 Court initially did not order some sort of presentence
21 investigation report that this Court was not seriously
22 considering a sentence of probation. I assumed that because
23 usually courts contact the probation department and ask their
24 views on whether probation is a good idea, bad idea, is it
25 easy, is it hard, is it necessary, is this the best

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1 distribution of resources, those kinds of issues that go into
2 making that decision.

3 I also assumed that that sentence was unrealistic
4 because Mr. Donziger has spent over two years on pretrial
5 release under the most restrictive conditions this Court could
6 order, short of actual detention. But just in case anybody's
7 thinking of it, I just want to give my reasons as to why I
8 think it's a spectacularly bad idea.

9 One, of course, is he's already done two years under
10 the watchful eye of the probation department. And usually the
11 reason courts impose probation is to help the offender create a
12 sort of instructive and constructive environment that's
13 conducive to preventing reoffending -- you know, get him out of
14 the old neighborhood, no going back to your old friends, we
15 want you to build a new life that doesn't implicate firearms or
16 narcotics or, you know, banking or things like that, as largely
17 a rehabilitation and prevention of recidivism mechanism.

18 Mr. Donziger doesn't need to be rehabilitated. I don't know if
19 he was ever habilitated in the first place, honestly. And he
20 certainly is in little, if any, danger of reoffending, given
21 the fact that his law license has been taken away and he is no
22 longer permitted to represent anybody in the United States.

23 But the third reason -- and I approach this with
24 respect -- this Court made numerous findings with respect to
25 its perception that Mr. Donziger was a flight risk. And as a

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1 consequence, you imposed some extremely onerous conditions. We
2 disputed those at every turn; at every turn, we lost. The
3 Second Circuit at one point did say that they had pause. I
4 don't know what that means. I guess the circuit has more
5 "pause" than a kennel. But they didn't actually do anything
6 about this Court's orders. Fair enough.

7 There was, however, and remains, a perception in the
8 rest of the world that in addition to preventing risk of
9 flight, which sort of our side never saw as something
10 realistic, that there was also a mechanism being used to
11 incapacitate Mr. Donziger, to prevent him from his political
12 activities, to prevent First Amendment activities, to prevent
13 his organizing, to prevent his political life and activism from
14 going forward. I am not going to opine as to whether that was
15 the Court's intention or whether that was simply an inevitable
16 by-product of the conditions you imposed upon him, but I do
17 think at this point it should stop. I don't think that
18 Mr. Donziger needs to be under further supervision from the
19 probation office, and really from this Court. I don't think
20 you need to monitor Mr. Donziger's activities for the next
21 year, two, three, five years. I really think you've done
22 enough, and however this ends today, I would urge the Court to
23 be "Done-ziger."

24 THE COURT: Do you want to spell that for the
25 reporter?

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1 MR. KUBY: It's portmanteau so I don't know. I think
2 it would be D-O-N-E-Z-I-G-E-R, which is short for "done with
3 Steven Donziger."

4 Almost done.

5 This is the part of the sentencing, especially when
6 nobody's been injured, where counsel tells the Court that the
7 defendant has been punished enough. I don't think I've ever
8 seen an attorney stand up and tell the Court, you know, my
9 client hasn't been punished enough. So I'm not going to sort
10 of belabor that point. You know what's happened here. He's
11 lost his livelihood, his ability to practice law; he owes I
12 don't know how many millions of dollars to Chevron Corporation,
13 but it's more money than he would ever earn in his life; he's
14 been, you know, incapacitated for two years. But I'm not going
15 to beg the Court for a specific sentence. I just want to note
16 sort of one final thing, and that is that despite all of their
17 money and all of their lawyers -- and really, really smart
18 lawyers -- Chevron just couldn't take the win in 2017. By that
19 time, the case was basically over. They could have walked
20 away, we won, Donziger's finished. And he kind of was.
21 Instead, Chevron, as part of doing what they do, had to go
22 after him in the most intrusive and abusive ways possible,
23 being aided by a judge who would stack on order after order
24 after order after order. And I recognize that for Chevron,
25 Donziger was just a foe that had to be crushed, completely and

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1 totally crushed. They crushed others; they'll crush others
2 again. But, you know, I got to say, for Judge Kaplan, Donziger
3 was kind of his white whale, you know? Such an unhealthy
4 obsession that I think "Good Ship Justice" ended up being
5 smashed like the Pequod without much care as to who survived.
6 And in response to that, a movement grew up around Steven
7 Donziger. People started to pay attention to what was going
8 on, and noting that it was wrong. And instead of backing down,
9 Chevron just continued. And more and more people and groups
10 around the country and around the world started paying
11 attention. And had they quit in 2017, Donziger would have been
12 just another litigant who lost a case. By this time, Chevron
13 has succeeded in making Steven a bit of a martyr to the
14 environmental cause, and the movement that grew up around him
15 is a movement that's going to continue no matter what this
16 Court does or doesn't do because of the urgent crisis that
17 threatens our planet with destruction. It's up to the Court
18 whether you want to make him a larger martyr than he is
19 already. Again, I don't think that you can make any of this
20 any better, but you can stop it from getting worse, and that's
21 what I'd like you to do, Judge.

22 Thank you very much for listening to me.

23 THE COURT: Yes, sir.

24 Would the prosecution -- I'm sorry, Mr. Kuby.

25 Mr. Kuby has finished. Mr. Donziger, would you like to speak

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1 on your own behalf, sir.

2 THE DEFENDANT: I would, your Honor, but can I just
3 take three minutes --

4 THE COURT: To take a break? Certainly. Three
5 minutes, ladies and gentlemen.

6 (Recess)

7 (In open court)

8 THE COURT: Mr. Garbus, what is it that I always
9 remind you of?

10 MR. GARBUS: My mask.

11 THE COURT: I know. I think --

12 MR. GARBUS: I will be very brief.

13 THE COURT: I'm sorry.

14 MR. GARBUS: I would just like to speak very briefly
15 to one small issue for five minutes.

16 THE COURT: Okay. If you're going to speak, though,
17 you have to put that -- forgive me. I didn't know you were
18 going to talk. You can take your mask off if you're in the
19 box, but if you're going to speak, you have to put your face
20 closer to the microphone so the court reporter and I can hear
21 you.

22 MR. GARBUS: Thank you.

23 THE COURT: All right. Yes, sir.

24 MR. GARBUS: I just want to speak to one document,
25 which you received yesterday, and that was a document from John

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1 Horan. John Horan has been appointed by the Bar Association to
2 hear Mr. Donziger and to take his testimony, and we went
3 through a proceeding where Mr. Horan heard Mr. Donziger, who
4 testified for four hours, and he heard the testimony of Chevron
5 and the other people concerning his conduct. Mr. Horan, a
6 respected member of the bar, who got this appointment from the
7 Bar Association, sent a letter yesterday, and in that letter
8 yesterday, he asked you, after he had heard Mr. Donziger
9 testify for nearly a full day, after he had heard Chevron's
10 testimony in that bar proceeding, he asked you today to suspend
11 sentence.

12 Thank you.

13 THE COURT: Yes, sir. Thank you.

14 Mr. Donziger, are you ready to go?

15 THE DEFENDANT: Good morning, your Honor.

16 THE COURT: Good morning, sir.

17 THE DEFENDANT: Thank you.

18 I'm going to read a statement that I wrote. It
19 shouldn't take more than five or seven minutes.

20 THE COURT: Yes, sir.

21 THE DEFENDANT: Your Honor, I stand before you today
22 for sentencing after a misdemeanor trial for contempt, where I
23 was denied a jury and after I'd been attacked for years by
24 Chevron, I believe in retaliation for helping indigenous
25 peoples and farmer communities in Ecuador try to --

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1 THE COURT: Sir, I know you want people to hear you.
2 Would you mind keeping your voice up, please.

3 THE DEFENDANT: -- for helping indigenous peoples in
4 Ecuador try to do something to save their cultures, their
5 lives, and our planet in the face of massive oil pollution.
6 That's the context I believe for why we are here today, and
7 this matters because it helps the Court -- or I hope it helps
8 the Court -- understand who I am, my character, and my
9 motivations.

10 Here are my points. First, I want to address the
11 issue of personal responsibility. To be clear, I accept full
12 responsibility for all of my actions that have led to this
13 moment. It is my position that ultimately the appellate courts
14 will decide whether what I did was entirely ethical and
15 appropriate, as I maintain, or was a crime, as the Court
16 maintains. What is indisputable is that some of the counts
17 from -- stemming from the civil discovery disputes that I had
18 with Chevron before Judge Kaplan, where I chose to go into
19 voluntary civil contempt to get a direct appeal of orders that
20 I believe would have destroyed the privileges held by my
21 clients in Ecuador, is that no lawyer in this country, as we
22 understand it, on our team, has ever been charged with criminal
23 contempt for engaging in such a course of action -- that is,
24 seeking judicial review as opposed to interfering with the
25 administration of justice. This course of action that I took

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1 has been adjudged appropriate and ethical by literally every
2 federal circuit court in this country. I am the first lawyer
3 charged criminally with contempt for engaging in this course of
4 action. I don't understand how I could be charged criminally
5 for seeking judicial review of a civil discovery order except
6 as some form of retaliation connected to my advocacy against
7 Chevron, a supposition that I believe is -- has been confirmed
8 not just by the rejection of the case by the S.D.N.Y. for
9 prosecution but more recently by the five esteemed
10 international jurists who ruled that my detention thus far
11 violates international law; that is the Working Group decision
12 that you referenced at the beginning.

13 Further, as my team understands it, I am also the
14 first lawyer in the United States ever to be charged criminally
15 based on civil orders that I had already complied with prior to
16 the charges being filed. So to be clear, I maintain I am
17 innocent of these charges. I maintain I always acted with
18 respect for the rule of law. I know we probably disagree on
19 that, but I just want to put out my position.

20 Over the course of 10 years of litigation in this
21 building, mostly before Judge Kaplan, I have literally complied
22 with dozens if not hundreds of court orders that he has issued
23 that have somehow harmed my interests. I believe I am a man
24 who holds the law in high esteem. I believe I respect the rule
25 of law. I've been fighting through the law to help the people

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1 of Ecuador for almost 30 years. And I really question whether
2 Judge Kaplan's orders that I am accused of violating actually
3 adhere to the rule of law. And I don't want to get in a debate
4 about that. I recognize we disagree. But I want to tell you
5 that for that reason, I cannot today express remorse for
6 actions that I maintain are ethical and legal and that I am
7 appealing. And I just hope you do not hold that against me
8 today.

9 As far as the issue of my computer is concerned, my
10 computer and cellphone, which I think is the gravamen of sort
11 of why we are here today, I believe that will be worked out on
12 the civil side. I am more than willing, by the way, to turn
13 over my electronic devices once a protocol is worked out
14 consistent with the ruling by the Second Circuit Court of
15 Appeals, the recent ruling this year on this issue, and we have
16 a chance to work with the Chevron lawyers on a protocol that I
17 hope will protect privileges.

18 Now just a little bit about who I am. As Mr. Kuby
19 pointed out, a lot of people have written the Court letters.
20 Most of them, maybe all of them, attest to my character, my
21 integrity, my professionalism. I hope the Court, upon reading
22 these letters, can see a picture of me, of who I really am,
23 based on those who really know me. Obviously this is a factor
24 in the sentencing factors that the Court must consider. What
25 is notable about these letters, at least for me, more than

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1 anything, is that they paint an entirely different picture of
2 me than the one that Judge Kaplan, Ms. Glavin and her
3 colleagues, and the Chevron lawyers, including some who are
4 witnesses in this very case, have been putting forth for years.
5 One thing is clear about me -- I led a life of good works,
6 motivated by a desire to better our world, to right wrongs, and
7 to address abuses of power by certain corporations, in this
8 case Chevron, but beyond that, by other corporations in the
9 fossil fuel industry that people in my world believe threatens
10 the very survival of our planet and way of life. And to be
11 clear, despite its immense challenges of doing this work, and
12 the obvious unpleasantness for me and my family in this current
13 situation, I have thoroughly enjoyed my work, and I feel
14 blessed to have had so much success in carrying out my chosen
15 purpose.

16 Third, my family. I want to talk just a little bit
17 about my family. My wife and only child Matthew are here
18 today, in the front row, along with my sister Susan Sherman and
19 my first cousin Claudia Cuda. My parents are deceased. My
20 wife and son, just so you know, don't like the public eye. My
21 son just started his third straight year of school -- it's his
22 first year of high school -- with his father wearing a large
23 ankle bracelet; unable to travel, leave his home except under
24 court supervision with permission, usually given 48 hours in
25 advance; unable to go out for dinner; unable to have a father

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1 capable of doing all the things a normal father can do and
2 should do with a child, including act with spontaneity, like
3 wake up and say, hey, it's beautiful out, let's drive over to
4 Jersey and go watch the Giants. Can't do that. Or it's late
5 at night after dinner; we can't walk across the street to get
6 an ice cream at Ben & Jerry's, or go for a run. Beautiful
7 weather. I have an ankle bracelet, and I can't run with an
8 ankle bracelet, although I've tried, and I don't have
9 permission anyway, so we can't really do that kind of thing.
10 And if I could tell you all the times that has happened over
11 these past two years and two months, the look of disappointment
12 on the face of a child, it hurts. That's exacted a cost on me,
13 more importantly Matthew, and also my wife, who has to witness
14 this and is also obviously a part of it. So I ask, if nothing
15 else, that you give as much value as you can when determining
16 my sentence to my relationship to my son, as he has suffered
17 quietly for a good 15 percent of his life as a collateral
18 consequence of my house arrest.

19 Final point, and this has to do with me. I think by
20 any objective measure, I've already been punished quite
21 severely for a Class B misdemeanor. Although I'm not an expert
22 in federal criminal law, I believe it's the lowest level
23 offense in the federal system. Or one of them. I have no
24 criminal record. I've now been wearing an ankle bracelet for
25 787 days, 720 of them pretrial or preconviction. As I

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1 understand it, no lawyer in New York for my level of offense
2 ever has served more than 90 days in a sentence, and that was
3 under home confinement. My home confinement is now more than
4 eight times that amount.

5 As Mr. Kuby pointed out, I've been disbarred. By the
6 way, I never had a hearing where I could challenge the facts
7 that were used to disbar me. As a result, I've been unable to
8 earn income in my profession. I have no passport, as you know.
9 I can't travel. I can't do the human rights work that I
10 believe I'm reasonably good at. Can't go to Ecuador, where
11 people depend on me.

12 In addition -- and this is little known -- Judge
13 Kaplan imposed millions and millions of dollars of fines and
14 court costs on me without a jury. And there's still a pending
15 motion, I believe, for \$32 million against me to reimburse
16 Chevron for its legal fees, or some of its legal fees, in the
17 RICO case. I was never a man of great means. We live in a
18 two-bedroom apartment. And I have no money. I mean, I think I
19 have a potential to earn money, but right now, I don't have a
20 bank account. So I ask you, humbly, might that be enough
21 punishment already for this level of offense?

22 I'm almost done.

23 THE COURT: Take your time, sir.

24 THE DEFENDANT: I want you to know that I respect the
25 rule of law. I try to adhere to the rule of law, will continue

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1 trying my best to do that, as we return to the civil side. I
2 would ask that you agree to let the appellate court do its work
3 in this case and that any residual issues around computers and
4 some of these orders be worked through on the civil side, and I
5 would ask that you, as a result of everything I've said, allow
6 me to go home today without an ankle bracelet and sentence me
7 to time served.

8 Thank you.

9 THE COURT: Thank you, sir.

10 Do the special prosecutors wish to be heard?

11 MS. GLAVIN: Yes, your Honor.

12 With respect to some of the comments made by defense
13 counsel, I feel compelled to respond.

14 I don't agree with Mr. Kuby's recitation and
15 characterization of the history and the background of this
16 particular case. There is a 497-page opinion that's at Docket
17 Entry 1874 in *Chevron Corp. v. Donziger*, and in that decision,
18 Judge Kaplan, in great detail, went through the evidence of
19 Mr. Donziger's actions in engaging in fraud and corruption to
20 obtain a \$9.5 billion verdict in Ecuador and Judge Kaplan's
21 findings that that verdict was the direct result of a series, a
22 parade of corrupt acts by Mr. Donziger and co-conspirators in
23 Ecuador. Judge Kaplan's decision and the findings were
24 affirmed by the Second Circuit on appeal. And in the Second
25 Circuit's opinion, the Second Circuit specifically noted the

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1 absence of any challenge by Mr. Donziger to the factual
2 findings in the 495-page opinion detailing Mr. Donziger's and
3 his co-conspirators' acts of corruption. So I disagree with
4 any characterization of the background of the case and how we
5 got here.

6 With respect to defense counsel's characterizations
7 regarding the post-judgment discovery proceedings, I also
8 disagree with how they have been characterized. Following
9 Judge Kaplan's 2014 opinion, Judge Kaplan issued a judgment so
10 that Mr. Donziger would never be able to profit from the
11 judgment he attained in Ecuador through fraud and corruption.
12 There was a court order prohibiting him from engaging in
13 certain activities and a court order directing him to do
14 certain things, such as to assign his interest in the judgment,
15 his interest to hundreds of millions of dollars that he
16 personally would obtain. Mr. Donziger, starting in 2014, and
17 as the evidence demonstrated at trial, did not comply with that
18 order, and he did so deliberately. He did not assign his
19 interest in the judgment.

20 By 2018, after the Supreme Court denied certiorari,
21 after the Supreme Court of the United States declined to hear
22 any appeal from the Second Circuit's affirmance of Judge
23 Kaplan's lengthy decision, Chevron had obtained evidence, and
24 knew, of course, that Mr. Donziger had not been complying with
25 the RICO judgment, didn't assign his interest in the RICO

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1 judgment, they moved to hold Mr. Donziger in contempt, as was
2 their right, and as they should have. Judge Kaplan authorized
3 discovery, not on the issue, sole issue that Mr. Kuby spoke
4 about, which was Mr. Donziger's fundraising activities. That
5 wasn't what the post-judgment proceedings were solely about.
6 They were also about whether Mr. Donziger was violating Judge
7 Kaplan's judgment from 2014 in other ways, like selling his own
8 interest in the judgment and monetizing it. And it turned out
9 he was.

10 There was also discovery, because Chevron was entitled
11 to collect on the money judgment from the RICO case,
12 approximately \$800,000. Discovery was not limited to the issue
13 that Mr. Donziger says he was challenging on appeal. There
14 were other issues as well. And what happened during those
15 post-judgment proceedings is that Mr. Donziger began violating
16 court orders almost immediately -- court orders that weren't
17 even charged in the criminal contempt case. He was ordered to
18 produce documents; he wouldn't produce them. He withheld them
19 on First Amendment grounds. Judge Kaplan said, First Amendment
20 doesn't apply here. No, you have to turn them over. He still
21 didn't turn them over. This went on for months, with
22 Mr. Donziger refusing to answer questions at deposition, with
23 Mr. Donziger admitting that he had withheld hundreds of
24 documents. And I might add, as we sit here today, Mr. Donziger
25 still hasn't produced documents that he was required to

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1 produce, claiming that he has a First Amendment right not to
2 produce them.

3 Mr. Donziger got where he is today after many, many
4 months of refusing to comply with court orders. He never
5 provided a privilege log. He was on notice that he had to. He
6 was withholding documents on unspecified privilege grounds.
7 And Mr. Donziger knew, because it had already happened to him
8 once in the civil case, that if you don't produce a privilege
9 log, you will be deemed to have waived privilege. He already
10 went through that. That happened years earlier, but he did it
11 again. And so Judge Kaplan did what he had done before, and
12 what the local rules provide for and the Second Circuit has
13 said can happen, which is you end up waiving privilege. And
14 still Mr. Donziger refused to produce documents.

15 Mr. Donziger did not appeal. He did not appeal Judge
16 Kaplan's order directing him to surrender his computer for
17 imaging; never challenged that on appeal. So any claim that
18 Mr. Donziger had gone a route of challenging Judge Kaplan's
19 orders on appeal and then gets charged with civil contempt is
20 not accurate. The orders for which Mr. Donziger was charged
21 with criminal contempt, he did not appeal to the Second
22 Circuit.

23 Mr. Donziger was charged only after Judge Kaplan had
24 tried coercive fines, to no avail; ordered him to surrender his
25 passport to get him to comply, to no avail. And Judge Kaplan

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1 actually gave Mr. Donziger an opportunity -- what he said to
2 him was, Mr. Donziger, look, if you get your appellate brief in
3 by X date, you don't oppose any expedited appeal, I will
4 suspend the portion of my order that would disclose to Chevron
5 any of the privileged information. Mr. Donziger didn't take
6 him up on it. He didn't even say, Judge Kaplan, I think I
7 can't get my brief in by that date, can I have a little bit
8 longer, but, you know -- and I will surrender the computers for
9 imaging but the images will just stay with the forensic expert.

10 The full record of this case is public. There are
11 transcripts. There are numerous court filings. I urge
12 everyone to read the actual underlying record, just as I urged
13 the UN Working Group to do so, because what has been
14 characterized today, and I have seen in other forums by
15 Mr. Donziger, is just simply a mischaracterization of what has
16 happened. The best authority is primary source authority.
17 Read what actually happened. Read what actually was appealed.

18 Mr. Donziger knew what he was doing each step of the
19 way. His conduct was not appropriate, and it most certainly
20 was not ethical. It is unethical for attorneys to not comply
21 or refuse to comply with court orders. It simply is.

22 With respect to the claim that there is no attorney
23 that has been sentenced to jail for misdemeanor contempt,
24 criminal contempt, that is also not true. I refer the Court to
25 *Rojas v. United States*, 55 F.3d 61 (2d Cir. 1995). It is cited

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1 in my papers. That is an attorney here in the Southern
2 District of New York, was sentenced to three months jail after
3 a criminal contempt trial before Judge Duffy. There is another
4 case of an attorney being sentenced to three months in jail in
5 the Second Circuit. That is *United States v. Agajanian*. It is
6 at 852 F.2d 56 (2d Cir. 1988); again, an attorney sentenced to
7 three months jail in this circuit. Mr. Donziger has not been
8 treated differently. Mr. Donziger is here because he did not
9 act appropriately or ethically; in fact, he acted criminally.

10 With respect to the appropriate sentence for
11 Mr. Donziger, your Honor, as I stated in my papers, I defer
12 entirely to the Court.

13 And with that, I rest on my submission.

14 THE COURT: Thank you.

15 Anything further, Mr. Kuby?

16 MR. KUBY: No, Judge.

17 THE COURT: Thank you.

18 Ladies and gentlemen, as I have said before, I
19 recognize that the events giving rise to this criminal contempt
20 case mark the latest chapter in a fierce, decades-long legal
21 battle between Mr. Donziger and Chevron. But, as the Court
22 made clear in its findings of fact and conclusions of law, this
23 case is wholly unconcerned with the debate regarding any
24 responsibility Chevron might bear for the oil pollution in the
25 Orienté region of the Ecuadorian Amazon. Instead, this case is

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1 about the rule of law, implicit in which is the fundamental
2 principle that a party to a legal action must abide by court
3 orders or risk criminal sanctions. Nothing more, nothing less.
4 This is a principle equally applicable to all, the bad and the
5 good alike. All are equal before the law.

6 Mr. Donziger's pointing to the underlying Ecuadorian
7 litigation does not change the facts that, following a lengthy
8 trial, (1) Chevron wanted judgment against him before Judge
9 Kaplan, (2) that judgment was affirmed in its entirety by the
10 Court of Appeals, and (3) the Supreme Court denied
11 Mr. Donziger's cert petition. This case is not about
12 relitigating the case in Ecuador or even about the merits of
13 the civil proceedings before Judge Kaplan. It is only about
14 Mr. Donziger's disobedience of Judge Kaplan's orders. That's
15 it.

16 I'd like to note the well-known principle that the
17 ends do not justify the means. It's clear from Mr. Donziger's
18 comments today, and indeed from the record at trial, that
19 Mr. Donziger does not regret what he did and did not do in the
20 proceedings before Judge Kaplan. I note that today,
21 Mr. Donziger told us that he accepted personal responsibility
22 for his acts, but he expressed no remorse and still blamed his
23 predicament on his advocacy, on Chevron, on Judge Kaplan, and
24 the like. Mr. Donziger told us that he chose to go into
25 voluntary civil contempt. Well, as has been made clear in the

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1 Court's findings of fact and conclusions of law, a contemtor
2 doesn't get to choose. If you go into contempt, you may be
3 punished civilly or criminally. It's not your choice. Indeed,
4 having shown no contrition, Mr. Donziger appears to consider
5 the entire proceeding before Judge Kaplan to be illegitimate
6 and stacked against him, despite the Court of Appeals'
7 decisions to the contrary.

8 In Mr. Donziger's view, his clients' cause is
9 righteous and Chevron is a behemoth trying to crush them. But
10 let's get one thing straight. Even if Chevron is the bad guy
11 in Mr. Donziger's eyes, that does not make Mr. Donziger the
12 good guy. Mr. Donziger is not here because he took on Chevron
13 on behalf of his clients. Rather, he is here as a direct
14 result of his own actions and inactions, his years-long
15 defiance of Judge Kaplan's orders.

16 To be entirely clear: The ends do not justify the
17 means. A righteous cause does not afford Mr. Donziger an
18 unfettered license to disregard lawful court orders that he
19 doesn't like. To the contrary, "a lawyer, of all people,
20 should know that in the face of a perceived injustice, one may
21 not take the law into his own hands." *Cutler*, 58 F.3d at 840.

22 In this country, the rule of law prevails. Since the
23 founding, the government of the United States has been a
24 government of laws, not men. See *Marbury v. Madison*, 5 U.S. (1
25 Cranch) 137, 163 (1803). And "respect for judicial process is

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1 a small price to pay for the civilizing hand of the law, which
2 alone can give abiding meaning to constitutional freedom."
3 *Walker v. City of Birmingham*, 388 U.S. 307, 321 (1967). Just
4 like everybody else, Mr. Donziger is not above the law. And
5 any virtue of his clients' cause does not excuse the fact that
6 he has repeatedly ignored or outright defied Judge Kaplan's
7 orders for the better part of a decade. This shows an
8 astonishing lack of respect for the law and for the authority
9 of the federal courts. And Mr. Donziger's "conduct is
10 particularly egregious in light of the fact that he is an
11 attorney." *United States v. Ware*, No. 04 Cr. 1224-01 (RWS),
12 2008 WL 5203658, at *6 (S.D.N.Y. Dec. 9, 2008).

13 Now a word about the costs incurred litigating this
14 case. In his sentencing submission, Mr. Donziger refers to the
15 taxpayer funds that have been expended relating to this
16 prosecution. The Court observes that those costs were almost
17 surely driven higher by Mr. Donziger's filing repetitive
18 motions, seeking relief that the Court had already denied. For
19 a non-exhaustive list of examples, Mr. Donziger has filed no
20 fewer than five motions to dismiss the charges, three motions
21 to disqualify the special prosecutors, five motions to recuse
22 the Court, five motions seeking vast swaths of discovery to
23 which he has no legal entitlement, and six motions seeking the
24 elimination of the conditions of his pretrial release.
25 Repeatedly, and in flagrant contravention of Local Civil Rule

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1 6.3, those motions asserted contentions that the Court had
2 already rejected, many of them more than once. Yet those
3 repetitive motions necessitated responses from the special
4 prosecutors, replies from Mr. Donziger, and the expenditure of
5 court resources.

6 The Court acknowledges that Mr. Donziger has spent now
7 some 780 days subject to home confinement. The majority of
8 that time has been the result of Mr. Donziger's requests for
9 adjournments due to issues relating to securing counsel to
10 represent him. Trial in this matter was originally scheduled
11 for June 15, 2020. That date was adjourned to September 9,
12 2020, due to the pandemic -- a period of 86 days. (See Dkt.
13 No. 87 at 5:13-18.) But every adjournment after that was
14 granted at Mr. Donziger's request. Although the pandemic was
15 ongoing throughout that period, thanks to the Herculean efforts
16 on the part of the District Executive's Office and other court
17 personnel, the Southern District of New York was able to
18 conduct numerous trials during that time.

19 In total, the trial in this case was adjourned at
20 least six times. Those adjournments significantly delayed the
21 case's resolution and have been the most direct cause of the
22 length of Mr. Donziger's home confinement. Seeking to deflect
23 blame for the delays, Mr. Donziger counters in his papers that
24 all of the delays were due to the pandemic and the delays were
25 the Court's fault because, he says, the Court could have forced

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1 his counsel -- who said she was unprepared and unable to try
2 the case -- to proceed to trial in any event. Once trial
3 finally was held, the Court issued its findings of fact and
4 conclusions of law within one week after the briefing was
5 completed on Mr. Donziger's post-trial motions to dismiss. The
6 blame for Mr. Donziger's lengthy home confinement lies squarely
7 on his head.

8 Now a little bit about the conditions of
9 Mr. Donziger's pretrial supervision. This morning, Mr. Kuby
10 termed Mr. Donziger's conditions as "extremely onerous." And
11 to read Mr. Donziger's submissions, one would think that his
12 conditions of home confinement are such that he has effectively
13 been locked in his apartment 24/7 for the past two years. That
14 is simply not true.

15 At the outset of this case, the terms and conditions
16 of Mr. Donziger's home confinement allowed him to leave home
17 for family obligations, employment, legal meetings, religious
18 services, and other types of activities approved by the
19 pretrial services officer. And according to Mr. Donziger's
20 pretrial services officer, he was "outside daily" for a variety
21 of activities, including walking his son to school and
22 basketball practice every day, regularly going to the park with
23 his son, attending sporting events, such as baseball games,
24 with his son, going to the grocery store, and attending legal
25 meetings several times a week. And lest you think he had to

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1 call 48 hours in advance for each and every one of those
2 outings, that's not the case either.

3 The Court also notes that for a meaningful portion of
4 Mr. Donziger's pretrial supervision, due to the onset of the
5 COVID-19 pandemic, all New Yorkers were ordered to shelter in
6 place and essentially instructed not to leave their homes
7 except for essential activities. Mr. Donziger's conditions of
8 home confinement permitted him to leave for those activities as
9 well, such as purchasing food, going to the pharmacy, attending
10 doctor's appointments, taking walks outside with his son, etc.

11 In short, the Court is not trivializing the conditions
12 of Mr. Donziger's pretrial release. But being able to remain
13 at home, spend time with one's family, and meet critical
14 obligations is simply not the same as being detained in prison
15 pending trial, which is quite routinely the consequence of a
16 criminal charge.

17 Now home confinement does not equal detention, and
18 that understanding is confirmed by the relevant portions of the
19 U.S. Code. Under 18 U.S.C. § 3585(b)(1), "[a] defendant shall
20 be given credit toward the service of a term of imprisonment
21 for any time he has spent in official detention prior to the
22 date the sentence commences . . . as a result of the offense
23 for which the sentence was imposed."

24 As the Court of Appeals has made crystal clear, a
25 defendant "is not entitled to sentencing credit for time spent

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1 during his release on bail." *Martinez v. United States*, 19
2 F.3d 97, 99 (2d Cir. 1994) (per curiam). That is true even if
3 the defendant "was placed under electronic monitoring and
4 largely restricted to his residence," notwithstanding that
5 "such terms of release on bail oftentimes may be rather
6 restrictive." *United States v. Edwards*, 960 F.2d 278, 283 (2d
7 Cir. 1992).

8 But that, of course, was not the case here.
9 Nevertheless, the Court may and does consider Mr. Donziger's
10 time in home confinement. In that consideration, the Court
11 notes two things: first, Mr. Donziger's conditions of home
12 confinement were relatively lenient, permitting him to be
13 outside daily for family obligations, legal meetings, and other
14 activities approved by the pretrial services officer; and
15 second, as the Court has already noted, the primary reason for
16 the length of Mr. Donziger's home confinement was his numerous
17 requests for trial adjournment.

18 Now as we've all agreed, in determining the
19 appropriate sentence, the Court considers the Section 3553(a)
20 factors.

21 Initially, the Court notes that Sections 3553(a)(4),
22 (5), and (7) have little to do with these proceedings. (4) and
23 (5) ask the Court to consider the guidelines range, which we've
24 all agreed are not applicable here. Subdivision (7) instructs
25 the Court to look at the need for restitution. Also not

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1 applicable here.

2 Considering the nature and circumstances of the
3 offense, Mr. Donziger has sought throughout these proceedings,
4 and continuing to today, to downplay the seriousness of his
5 conduct. For example, Mr. Donziger and his supporters
6 characterize his failings as a mere discovery dispute for which
7 Mr. Donziger sought appellate review. (See, e.g., Dkt. No. 373
8 at 3.) Mr. Donziger claims that (1) he "did not ignore the
9 protocol and discovery orders," (2) he "actively engaged in the
10 District Court to modify the orders in ways that would protect
11 the privilege of discovery," and (3) he "went into voluntary
12 contempt to obtain a direct appeal." (Donziger Sentencing
13 Submission at 4.)

14 The record in this case -- apparent to anyone who
15 takes the time and makes the effort to look at it -- tells a
16 different story. And I note that Mr. Kuby urged me to look at
17 this case through the eyes of people the Court has never met.
18 Well, I say to that, it's also through the eyes of people who
19 have never read the record here. And I join the special
20 prosecutor in encouraging folks to read the record. If one
21 reads the record, it will disclose a deliberate, willful, and
22 repeated refusal by Mr. Donziger to obey court orders over a
23 period of years. Let's see what happened.

24 With respect to Counts IV and V, recall that
25 Paragraph One of the RICO Judgment imposed "a constructive

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1 trust for the benefit of Chevron on all property" that
2 Mr. Donziger received or may receive traceable to the
3 Ecuadorian Judgment, and that judgment required Mr. Donziger to
4 assign any such property "forthwith." (GX 1875, ¶ 1.)
5 Mr. Donziger received at least two pieces of such property: (1)
6 a contingent fee under his 2011 Retainer Agreement; and (2)
7 another contingent fee under his 2017 Retainer Agreement. And
8 Paragraph One of the RICO Judgment even made clear, by way of
9 example, that any rights to a contingent fee were subject to
10 the constructive trust, and obviously, within the order, to
11 assign those rights forthwith.

12 The Court found that Mr. Donziger acted knowingly and
13 wilfully when he failed to assign forthwith the 2011 Contingent
14 Fee and the 2017 Contingent Fee. That's Count IV and Count V.
15 Mr. Donziger does not dispute that from 2014 to 2018, he did
16 not comply with Paragraph One of the RICO Judgment's directive
17 that he forthwith assign the 2011 Contingent Fee, even after
18 Judge Kaplan put him on notice that he would consider a
19 contempt finding. Mr. Donziger only complied after a motion to
20 compel was made, and even then, he did not comply with all of
21 Judge Kaplan's instructions.

22 To make matters worse, after the entry of the RICO
23 Judgment that required Mr. Donziger to assign to Chevron his
24 2011 Contingent Fee, Mr. Donziger entered into a new retainer
25 agreement for the 2017 Contingent Fee. He entered into that

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1 agreement after the RICO Judgment was affirmed in full on
2 appeal. Yet he did not disclose that fact, the fact of the
3 2017 Contingent Fee -- even though discovery requests clearly
4 required him to do so. He finally disclosed the existence of
5 the 2017 Contingent Fee in his June 2018 deposition. And only
6 after Judge Kaplan found Mr. Donziger in civil contempt and
7 imposed coercive fines on him did Mr. Donziger assign his
8 rights to the 2017 Contingent Fee.

9 Mr. Donziger's refusal to comply with Paragraph One of
10 the RICO Judgment and failure to obey Judge Kaplan's subsequent
11 related orders had absolutely nothing to do with protecting his
12 clients or any claims of privilege. Indeed, it had nothing to
13 do with anything other than Mr. Donziger's refusal to
14 relinquish a potential personal payday for himself.

15 Count VI related to Mr. Donziger's pledging a portion
16 of his Contingent Fee interest to a life coach in return for
17 personal coaching services. Paragraph Five of the RICO
18 Judgment explicitly forbade Mr. Donziger "from undertaking any
19 acts to monetize or profit from" the Ecuadorian Judgment,
20 whether by "selling, assigning, pledging, transferring or
21 encumbering any interest therein." (GX 1875, ¶ 5.)

22 Mr. Donziger had acknowledged that Paragraph Five
23 prohibited him from monetizing his interest in the Ecuadorian
24 Judgment, and he repeatedly represented to Judge Kaplan that he
25 had never sold his interest in the Ecuadorian Judgment. For

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1 example, GX 2010 at page 26, lines 3-4, reflects Mr. Donziger's
2 telling Judge Kaplan, "I'm not selling my shares; I'm selling
3 my clients' shares."

4 But on December 23, 2016, Mr. Donziger entered into an
5 arrangement with life coach David Zelman under which Mr. Zelman
6 agreed to provide coaching to Mr. Donziger in exchange for a
7 portion of Mr. Donziger's Contingent Fee in the Ecuadorian
8 Judgment. Mr. Zelman confirmed that arrangement in the emails
9 contained in Government Exhibits 105 and 106. In fact, in
10 consideration for services provided beyond those originally
11 contracted for, Mr. Donziger agreed to pledge an additional
12 portion of his contingent fee interest to Mr. Zelman.
13 Mr. Zelman. Government Exhibit 110 shows that.

14 Mr. Donziger never produced his emails with Mr. Zelman
15 regarding this arrangement, even though those emails were
16 responsive to discovery requests that Mr. Donziger had been
17 ordered to respond to. When the arrangement eventually came to
18 light in 2019 and Mr. Donziger told Mr. Zelman that the
19 arrangement had become "problematic," Mr. Zelman emailed
20 Mr. Donziger that he was "cancelling our deal," thus putting
21 the lie to Mr. Donziger's argument that Mr. Zelman's services
22 were pro bono. Mr. Zelman confirmed on the witness stand that
23 he did not provide or even offer any services to Mr. Donziger
24 for free.

25 In sum, Mr. Donziger knowingly and wilfully pledged a

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1 portion of his contingent fee interest to Mr. Zelman, despite
2 his admitting that he knew he was not allowed to sell his own
3 shares in the judgment. And again, this transgression has
4 nothing to do with Mr. Donziger's advocacy, with his clients,
5 or with any claims of privilege.

6 With respect to Counts I and II, the Court found that
7 Mr. Donziger wilfully and deliberately disobeyed
8 Paragraphs Four and Five of the March 5, 2019 Forensic
9 Inspection Protocol. Recall that the reason for the Protocol
10 in the first place was Mr. Donziger's repeated stonewalling of
11 discovery requests that he had been ordered to comply with.

12 Paragraph Four of the Protocol required Mr. Donziger
13 to provide sworn lists of his electronic devices and accounts
14 to a court-appointed neutral forensic expert no later than
15 March 8, 2019. Yet Mr. Donziger did not provide any list
16 relating to his devices until three months later, after Judge
17 Kaplan had found him to be in civil contempt and levied
18 coercive fines. Indeed, Mr. Donziger announced his intent not
19 to comply with the Protocol by saying that he would
20 "voluntarily go into civil contempt . . . in order to obtain
21 proper appellate review." (GX 133.)

22 With respect to Paragraph Five, Mr. Donziger never, to
23 this day, has surrendered any devices to the court-appointed
24 neutral forensic expert. Indeed, you heard him today say that
25 he would be delighted to work out the computer matters on the

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1 civil side. That's not up to him. Indeed, he does not dispute
2 that he did not comply. He wilfully and purposefully refused
3 to do so, which he maintains was to ensure that he could
4 achieve appellate review of the protocol. Yet he never sought
5 immediate relief from the Court of Appeals by way of a stay,
6 mandamus, expedited appeal, or anything. When confronted with
7 the opportunity to obtain the full appellate review that he
8 claimed to have "relentlessly" sought in order to protect his
9 and his clients' rights, Mr. Donziger passed. In absolutely no
10 way did he challenge the lawfulness of the Forensic Inspection
11 Protocol, the Passport Order, or the contempt findings that
12 flowed from those orders.

13 Now Mr. Donziger attempts to explain that by
14 suggesting that his prevailing on what he terms his
15 "foundational objection" justifies all this. The foundational
16 objection is his argument that all post-judgment discovery was
17 inappropriate because the RICO Judgment permitted him to raise
18 funds by selling other people's interests in the Ecuadorian
19 Judgment. His argument is that that small finding undermined
20 the entire Protocol and the Passport Order. Indeed,
21 Mr. Donziger asserts that "while not overruling the other
22 contempts, the Second Circuit's decision provides that all of
23 the discovery orders and forensic protocols that were based, in
24 whole or in part, upon the perception that Mr. Donziger was
25 deliberately trying to conceal material information require

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1 reevaluation by Judge Kaplan in the underlying civil
2 proceeding." (Donziger Sentencing Submission at 5.)

3 That is categorically false. To the contrary, the
4 Court of Appeals did not mince words as to the narrowness of
5 its holding:

6 "Lest this opinion be taken as somehow vindicating
7 Donziger, it is important to put our holding in context. Our
8 ruling today has no effect on, and does not in any way call
9 into question, the district court's thorough and fully
10 persuasive fact findings and legal conclusions, which we have
11 already affirmed in full, establishing Donziger's violations of
12 law and ethics that added up to a pattern of racketeering in
13 violation of the RICO statute. Nor does it question in any way
14 the district court's conclusions that Donziger acted in
15 contempt of the Injunction that resulted from the RICO Judgment
16 in numerous ways. Indeed, except with respect to the very
17 specific alleged violation of the Injunction discussed in this
18 Opinion --" and that's the part that allows Mr. Donziger to
19 sell other people's interests in the judgment -- "Donziger does
20 not even attempt to challenge the district court's findings of
21 his contumacious conduct."

22 *Chevron Corp. v Donziger*, 990 F.3d 191, 212-13 (2d
23 Cir. 2021).

24 Moreover, the Court of Appeals made 100 percent
25 explicit that Mr. Donziger, from the date of the Court of

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1 Appeals opinion, was no longer authorized "to profit in any
2 manner from the sale of interests of any kind in the Ecuadorian
3 Judgment." *Id.* at 213.

4 Additionally, Mr. Donziger's felicitously titled
5 "Jenga tower" theory wholly ignores something Judge Kaplan
6 explained to Mr. Donziger more than once: the post-judgment
7 discovery proceedings were not limited to Mr. Donziger's
8 alleged noncompliance with the RICO Judgment. In fact, those
9 proceedings also encompassed discovery requests in aid of
10 Chevron's enforcing its Money Judgment against Mr. Donziger.
11 In other words, there was another separate, distinct, and
12 entirely permissible basis for the post-judgment discovery that
13 Mr. Donziger did not ever challenge on appeal.

14 As a result of Mr. Donziger's not challenging the
15 Protocol, the Passport Order, or any of the related contempt
16 findings, the Court of Appeals affirmed Judge Kaplan's contempt
17 findings almost in full. The only finding that was not
18 affirmed, as I mentioned, involved Mr. Donziger's raising funds
19 by selling other people's interests in the Ecuadorian Judgment.
20 But none of the counts of the criminal contempt in this case
21 was predicated on those activities.

22 Outside of that specific finding, the Court of Appeals
23 remanded "to the district court to determine the fees
24 reasonably expended to secure the contempt findings affirmed on
25 appeal." 990 F.3d at 215. Yet notwithstanding the Court of

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1 Appeals' clear decision, so far as the Court knows and as
2 Mr. Donziger has admitted today, he still has not complied with
3 Judge Kaplan's order to surrender his devices to the court
4 appointed neutral forensic expert. And from Mr. Donziger's
5 statements and his sentencing submission, it doesn't sound like
6 he's going to do so any time soon.

7 Finally, with respect to Count III, Mr. Donziger
8 wilfully and deliberately disobeyed the order directing him to
9 surrender all of his passports to the Clerk of Court by
10 June 12, 2019, at 4 p.m. That order had been added as a
11 further measure to try to coerce Mr. Donziger into compliance
12 with Paragraph Five of the Protocol. That's the Turn Over
13 Devices paragraph. On June 10, 2019, at a hearing before Judge
14 Kaplan, Mr. Donziger stated, "I will voluntarily surrender my
15 passport until I can deal with it at the Second Circuit." He
16 did not do so. When Judge Kaplan denied his request for a stay
17 and reminded him that he remained "obligated" to surrender his
18 passport, Mr. Donziger still refused to do so. And he did not
19 seek any relief from the Court of Appeals, despite his
20 representation to Judge Kaplan that he was "immediately turning
21 to the task of preparing an emergency stay to the circuit."
22 (GX 2234 at 15 n.6.)

23 In short, Mr. Donziger chose (1) not to comply with
24 Judge Kaplan's order, and (2) not to seek any relief from the
25 Court of Appeals.

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1 All of this is to say that Mr. Donziger's refusal to
2 comply with court orders was not a one-off mistake. And it was
3 not -- as represented by Mr. Donziger in his papers and several
4 of his supporters -- a mere discovery dispute. And it was not,
5 as his counsel characterized it today, dotting i's or crossing
6 t's, one of a handful of imperfect procedural decisions that he
7 made (Dkt. No. 373 at 9) or simply a matter that should have
8 been appealed "here and there or mandamus sought or the like."
9 Mr. Donziger's conduct was a pattern of contumacious behavior
10 that bore out over the better part of a decade. In our system
11 of laws, it was the most serious offense.

12 I now consider Mr. Donziger's history and
13 characteristics.

14 As for Mr. Donziger's criminal history, the Court
15 notes that the parties agree that he's never been convicted of
16 a crime. With regard to his characteristics, the Court has
17 reviewed the numerous letters that were submitted on
18 Mr. Donziger's behalf by his friends and colleagues. Many of
19 these letters speak positively about Mr. Donziger's character
20 and his commitment to his work in Ecuador and elsewhere. The
21 Court recognizes the admirable work that Mr. Donziger has
22 undertaken in the past, including on behalf of those who are
23 disadvantaged. But Mr. Donziger's good works do not excuse his
24 years of refusing to comply with Judge Kaplan's orders. That
25 defiance was no less willful in light of Mr. Donziger's past

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1 good deeds.

2 With respect to the seriousness of the offense, the
3 respect for law, and just punishment, in a system of laws like
4 ours, the refusal of a litigant, particularly a Harvard-trained
5 lawyer, to follow orders of the Court is most serious.
6 Following court orders is the foundation of our legal system,
7 and it is all that separates us from trial by combat. Thus,
8 Mr. Donziger's offenses are extremely serious. Given
9 Mr. Donziger's repeated, willful refusal to obey court orders,
10 it seems that only the proverbial 2-x-4 between the eyes will
11 instill in him any respect for the law. The prosecution and
12 the defense agree that promoting respect for the law is
13 paramount in a case like this, but as I said, his repeated
14 refusals seem to warrant a serious punishment.

15 Deterrence: With respect to specific deterrence, the
16 Court notes that Mr. Donziger was not and still is not deterred
17 by the coercive civil sanctions imposed by Judge Kaplan even
18 after he had an opportunity to obtain full appellate review.
19 Indeed, he has not been deterred into compliance even today.
20 So deterring Mr. Donziger from similar conduct in the future
21 requires, in the Court's view, a serious punishment.

22 More broadly, many people, both lawyers and
23 non-lawyers alike, believe fervently in their causes and might
24 be tempted to refuse to obey court orders with which they
25 disagree, as Mr. Donziger did here. Thus, a serious sentence

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1 is required to deter such persons from emulating Mr. Donziger's
2 conduct.

3 With respect to unwarranted sentencing disparities,
4 Mr. Donziger is correct that the avoidance of sentencing
5 disparities is among the factors enumerated in Section 3553(a).
6 What Mr. Donziger glosses over, however, is that the statute
7 focuses on "unwarranted sentencing disparities among defendants
8 with similar records who have been found guilty of similar
9 conduct." 18 U.S.C. § 3553(a)(6).

10 Contrary to what Mr. Donziger suggests, other lawyers
11 have been sentenced to prison terms for criminal contempt. As
12 the special prosecutor noted, one attorney was sentenced to
13 three months' imprisonment for three times failing to appear in
14 court. See *Rojas v. United States*, 55 F.3d 61, 63 (2d Cir.
15 1995). Another attorney was sentenced to three months for
16 appearing late for trial and making misleading and incomplete
17 statements to the court. See *United States v. Agajanian*, 852
18 F.2d 56, 57 (2d Cir. 1988). The Court of Appeals affirmed both
19 sentences. Moreover, other attorneys sentenced for contempt
20 have received periods of home confinement as well as years-long
21 sentences of probation, suspension from practice, and community
22 service. See *United States v. Cutler*, 58 F.3d at 832; *In re*
23 *Pollack*, 07-MC-347 (ARR), Dkt. No. 40.

24 Mr. Donziger's conduct, which, again, includes years
25 of refusal to comply with numerous court orders, is more

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1 serious than any of those other defendants' conduct. None of
2 those defendants' disobedience occurred over so long a period
3 or in defiance of so many court orders. None of those
4 defendants' disobedience involved the degree of willfulness
5 that Mr. Donziger exhibited, announcing to the world that he
6 would not comply with the court's orders. Because of these
7 differences, none of those defendants' disobedience struck so
8 directly at the foundations of our system of laws, as did
9 Mr. Donziger's. And for those reasons, any disparity between
10 Mr. Donziger's sentence and the sentences of those other
11 defendants is richly deserved.

12 In sum, Mr. Donziger spent the last seven-plus years
13 thumbing his nose at the U.S. judicial system. It's now time
14 to pay the piper.

15 Accordingly, it is my intention to impose a sentence
16 of six months' imprisonment. Although a fine is authorized for
17 this offense, it is my intention not to impose one.

18 Because the Court has already determined that the
19 maximum sentence would be no more than six months or a \$5,000
20 fine, the offense constitutes a "petty offense." Under 18
21 U.S.C. § 3559(b), a period of supervised release is therefore
22 not authorized because petty offenses are specifically exempted
23 from the statute's coverage. See *United States v. Donovan*,
24 No. 04 Cr. 1346 (MHD), 2005 WL 1322715, at *2, n. 4 (S.D.N.Y.
25 May 2, 2005).

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1 18 U.S.C. § 3013(a) mandates the imposition of a
2 special assessment "on any person convicted of an offense
3 against the United States." "Criminal contempt is a crime in
4 the ordinary sense; it is a violation of the law, a public
5 wrong which is punishable by fine or imprisonment or both."
6 *Bloom v. Illinois*, 391 U.S. 194, 201 (1968). And "[p]rivate
7 attorneys appointed to prosecute a criminal contempt action
8 represent the United States." *Young v. United States ex rel.*
9 *Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987). All of which
10 is to say a special assessment is therefore mandatory.

11 The special assessment to be imposed depends on the
12 classification of the underlying crime. Because the Court has
13 already found it appropriate to treat Mr. Donziger's offenses
14 as a Class B misdemeanor for the purposes of the Sentencing
15 Guidelines, the Court will use the same classification here.
16 Accordingly, it is the Court's intention to impose a mandatory
17 special assessment of \$10. See 18 U.S.C. § 3013(a)(1)(A)(ii).

18 Counsel, is there any legal reason why such a sentence
19 should not be imposed?

20 MS. GLAVIN: No, your Honor.

21 MR. KUBY: But for everything that we've been saying
22 for a decade, putting that aside, no, Judge.

23 THE COURT: Thank you, sir.

24 Very well, then. Mr. Donziger, you are sentenced,
25 sir, to a period of six months' imprisonment. There will be no

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1 period of supervised release, as I mentioned, but you are also
2 sentenced to pay a special assessment of \$10, and that should
3 be paid promptly.

4 It is my duty to inform you that unless you've waived
5 it, you have the right to appeal this sentence. Pursuant to
6 Federal Rule of Appellate Procedure 4(b)(1)(A), any notice of
7 appeal must be filed in this court "within 14 days after the
8 later of: (i) the entry of either the judgment or the order
9 being appealed; or (ii) the filing of the government's notice
10 of appeal."

11 Depending on your financial circumstances, you may
12 also have the right to appeal *in forma pauperis*, which means as
13 a poor person, with the waiver of certain fees and expenses.

14 Now, Mr. Donziger, I'm aware that you recently
15 submitted a bail application, at Dkt. No. 339. In response to
16 your application, I stated that the Special Prosecutors could
17 respond, and they did so, at Dkt. No. 342. That order also
18 instructed you to inform the Court if you would reply and, if
19 so, when. Also at Dkt. No. 342. Despite that directive,
20 neither you nor counsel ever filed anything further.

21 Because you have now been convicted and sentenced, the
22 standard for bail has changed from when you made your
23 application. Post-conviction bail applications are governed by
24 18 U.S.C. § 3143, which provides, in relevant part, that "the
25 judicial officer shall order that a person who has been found

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1 guilty of an offense and who is awaiting . . . execution of a
2 sentence . . . be detained, unless the judicial officer finds
3 by clear and convincing evidence that the person is not likely
4 to flee or pose a danger to the safety of any other person or
5 the community if released." 18 U.S.C. § 3143(a)(1).

6 Now as we know, I have previously repeatedly found
7 that Mr. Donziger presented a risk of flight prior to
8 conviction. And that risk certainly is not diminished by the
9 fact that he has now been convicted and sentenced to jail.

10 Mr. Kuby, Mr. Garbus, will either of you be addressing
11 the bail issue?

12 MR. KUBY: Yes, Judge.

13 THE COURT: Yes, sir.

14 MR. KUBY: Okay. Good afternoon, Judge, once again.

15 THE COURT: Good afternoon.

16 MR. KUBY: First of all, I suppose I should thank the
17 Court for at least vindicating my own judgments about what is
18 going to happen and how it's going to happen. You know, one of
19 the great things about getting old that I've discovered is that
20 you usually have a pretty good sense -- no matter how well
21 things seem to be going -- a pretty good sense how they're
22 going to turn out. So yes, indeed, I won the office pool with
23 the guess of six months, something that Mr. Donziger knew quite
24 well before he came into this courtroom today.

25 In anticipation of that, we are submitting a motion, a

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1 fairly lengthy motion, for bail pending appeal, pointing out,
2 of course, the applicable legal standard of substantial
3 question, as well as talking about the conditions he's
4 currently under being sufficient to prevent any risk of flight,
5 even now, when the Court has done what we knew the Court indeed
6 was going to do.

7 I would start out by requesting -- and I have a series
8 of requests that have a similar ending. The similar ending, by
9 the way, Judge, is that we do not hear the jail door slam
10 behind Mr. Donziger today.

11 So the first request is that the Court allow
12 Mr. Donziger to maintain his liberty pending a decision on this
13 motion. I think the special prosecutor may or may not wish to
14 respond, but indeed, it is a substantive motion, it's not
15 just -- that's all. I mean, so that's the first request: May
16 we set a schedule for decision on the motion and thereafter you
17 will set a surrender date for Mr. Donziger.

18 THE COURT: Okay. Why don't you give me your list.
19 Go down the list of requests, would you, sir.

20 MR. KUBY: Okay. So that's the first one.

21 If the Court decides to deny the motion for bail
22 pending appeal from the bench or decides to remand Mr. -- well,
23 if the Court decides to deny bail pending appeal from the
24 bench, I would request, at a -- well, I had a minimum. My next
25 request would simply be that Mr. Donziger remain at liberty

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1 pending voluntary surrender to his institution of designation.
2 I know that ordinarily he would go to the MCC because of the
3 shortness of the sentence. Given the fact that the MCC,
4 finally, has been closed down, *sine die*, everybody's been
5 transferred to the MDC. There are certainly minimal security
6 camps -- like I know that Otisville has a satellite minimum
7 camp -- but I think Mr. Donziger's sentence may be too short
8 even for that, because usually, when you're within six months
9 of your release date, that's when you go to a halfway house.
10 So I have no idea what the Bureau of Prisons will do with
11 somebody with Mr. Donziger's staggeringly low custody and
12 security classification, combined with a six-month sentence,
13 but I would request that he be permitted, as so many others
14 have who were convicted of offenses far more egregious than
15 Mr. Donziger's, to voluntarily surrender at the date of his
16 designation.

17 Failing that, failing that, I would request a period
18 of, say, two weeks for Mr. Donziger to put his affairs in order
19 and for us to go to the Second Circuit in the hands of new
20 counsel who will be taking over, who will be the show runner
21 for the next season of this, and proceed in just an orderly
22 fashion to the Second Circuit rather than, you know, the door
23 slamming shut at 12:30 and new counsel trying to get everything
24 heard by 4:00 this afternoon. I've had preliminary discussions
25 with the special prosecutor about that last request, but I will

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1 not speak for her and I will ask her to speak for herself.

2 THE COURT: Did you wish to be heard?

3 MS. GLAVIN: Yes, your Honor.

4 I don't have an objection to a surrender date for
5 Mr. Donziger. And yes, I would like an opportunity to respond
6 to the motion that Mr. Kuby just handed to me.

7 THE COURT: All right. Anything else?

8 MR. KUBY: I'll just go sit down and see if I've won
9 something yet, Judge.

10 THE COURT: With respect to briefing and the like, the
11 motion for bail pending appeal is denied. The reason for that
12 is, under the statute, the Court is required to detain a
13 defendant unless the Court finds by clear and convincing
14 evidence that the defendant is not likely to flee. As I
15 mentioned earlier, I have found repeatedly that Mr. Donziger is
16 a flight risk. As I mentioned earlier today, that risk has
17 increased now that he has been both convicted and sentenced to
18 jail. So first of all, I do not find that and can't find that.

19 I note that your very substantial motion -- as in lots
20 of pages -- is directed toward the substantial question of law
21 that you wish to raise on appeal. I take no position as to
22 whether it's a substantial question or not, but the point is
23 that the bail statute relating to bail pending appeal requires
24 the Court to find by clear and convincing evidence that
25 Mr. Donziger is not a flight risk. I cannot and do not find

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1 that and therefore bail pending appeal is denied.

2 In the interim, however, I will permit Mr. Donziger to
3 continue on the current terms and conditions of pretrial
4 release on the condition that expedited relief be sought from
5 the Court of Appeals within a week.

6 Is there anything further today, counsel?

7 MR. KUBY: No. I better get to work on that appellate
8 counsel business right now.

9 And I note that we have provided Mr. Donziger with the
10 \$10 so he can at least comply with that in an expedited
11 fashion.

12 THE COURT: Yes, sir.

13 MR. KUBY: Thank you, Judge.

14 THE COURT: Thank you, Mr. Kuby.

15 Good afternoon, ladies and gentlemen. Thank you for
16 your attention.

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