Water Protector Legal Collective

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March 15, 2024

President Joseph R. Biden, Jr.
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Re: Presidential Pardon for Steven Donziger

Dear President Biden:

We write to urge you to use the inherent power of your Office to issue a pardon for Steven R. Donziger. Mr. Donziger is a well-known American human rights lawyer who helped Amazon Indigenous and farmer communities in Ecuador win a landmark pollution judgment against Chevron for the dumping billions of gallons of cancer-causing oil waste into waterways relied on by local residents for their drinking water and general subsistence.

Mr. Donziger recently was subject to arbitrary detention in New York for 993 days on a Class B misdemeanor contempt charge prosecuted by a private Chevron law firm after the Department of Justice declined to pursue the case. As far as we can tell, this was the nation's first private corporate prosecution and is an obvious violation of the rule of law. As a result of the private prosecution, Mr. Donziger, a resident of New York City, spent close to three years in detention at home and in prison even though the maximum sentence under the law for his misdemeanor offense level was 180 days. The judicial process that led to Mr. Donziger's detention has been condemned by highly respected jurists in the United States and around the world. These include the United Nations Working Group on Arbitrary Detention (WGAD), whose five members characterized the bias in the judicial process against Mr. Donziger as "appalling" and his detention as illegal and "arbitrary" under international law; a team of prominent international trial observers led by U.S. Ambassador Stephen A. Rapp, who served as Ambassador for War Crimes under the Obama Administration; as well as by one prominent federal appellate judge (Steven Menashi) and two U.S. Supreme Court justices (Neil Gorsuch and Brett Kavanaugh), all of whom condemned the trial and imprisonment of Mr. Donziger as unconstitutional.

The pardon we seek would apply to Mr. Donziger's 2022 Class B federal misdemeanor conviction after a non-jury trial for contempt of court. The conviction, which for reasons we will explain set a dangerous legal precedent for human rights defenders and attorneys nationwide, followed a

patently biased prosecution by a group of three Chevron-linked lawyers. A pardon would bring a measure of justice to a prosecution that has been widely criticized as a violation of international law by respected international and US-based jurists, and as a grave threat to free speech by a multitude of political leaders and over 120 respected civil society organizations including Amnesty International, Global Witness, and Greenpeace.

The wide range of voices from across the political spectrum criticizing the attacks on Mr. Donziger demonstrate that fundamental constitutional principles, not politics, are at stake here. Given that Mr. Donziger has exhausted his domestic legal remedies, only your Office has the power to provide redress at this point through the issuance of a pardon. For reasons related to individual fairness for Mr. Donziger and his family, but also to the need for our government to support human rights defenders more broadly, we urgently ask that you do so.

Background

Chevron's toxic dumping and abuse of Amazon communities in Ecuador

Mr. Donziger, who graduated in the same Harvard Law School class as President Obama, was a key figure in a lawsuit brought in 1993 by Indigenous Peoples and farmer communities in Ecuador seeking damages from Chevron for pollution caused by the deliberate dumping of billions of gallons of toxic oil waste into rivers and streams relied on by local residents for their drinking water, bathing, and fishing. Experts call the area the "Amazon Chernobyl" and many consider the contamination the most extensive and harmful in history. Chevron, then operating as Texaco, constructed hundreds of unlined oil waste pits in the affected communities that now exist next to homes, schools, and even health clinics. The engineering of a system of oil extraction designed to pollute created a major public health catastrophe. The catastrophe has drawn the criticism of environmental justice advocates from around the world. These include, among others, 68 Nobel laureates; global climate leaders such as Greta Thunberg, Erin Brockovich, and Bill McKibbon; and Congresspersons such as James McGovern, Jamie Raskin, Alexandria Ocasio-Cortez, Cori Bush, and Rashida Tlaib.

Chevron's vicious retaliation campaign against Steven Donziger

After Mr. Donziger helped the affected communities win a landmark $9.5 billion judgment from Ecuadorian courts in 2011, Chevron retaliated by suing Mr. Donziger in New York federal court for the highest potential liability – $60 billion – to which an individual ever had been subjected in US history. The lawsuit was an "intimidation play" designed to force Mr. Donziger off the case and to send a chilling message to other human rights advocates and environmental defenders to refrain from challenging the industry, according to the highly respected attorney Deepak Gupta, who represented Mr. Donziger. Chevron framed its claims as a civil "racketeering" (RICO) lawsuit

that asserted the entire case in Ecuador was actually "sham" litigation tainted by fraud and coercion. The same claims brought by Chevron were considered and dismissed in unanimous opinions by the two highest Ecuadorian appellate courts, the National Court of Justice and Constitutional Court. Those court decisions came after an internal Chevron email was disclosed that indicated the company's main defense strategy was to "demonize Donziger" rather than litigate the claims on the merits.[1]

Chevron then persuaded a pro-corporate trial judge in New York, Lewis A. Kaplan, to make Mr. Donziger the first and only defendant ever in a civil RICO case to be denied a jury. He also allowed Chevron to put forth false testimony targeting Mr. Donziger from a witness to whom it had paid at least $2 million in cash and benefits. The witness later recanted most of his testimony after admitting Chevron lawyers had coached him for 53 days prior to taking the stand.[2] During the proceedings, Judge Kaplan issued a highly questionable order purporting to enjoin all courts in any country throughout the world from enforcing the Ecuador judgment against Chevron – an order for which the court clearly had no authority and which was later overturned on appeal.[3]

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1 *See, e.g.*, Rex Weyler, *How Did a Lawyer Who Took on Big Oil and Won End up Under House Arrest?*, Mother Jones, Aug. 10, 20202, at https://www.motherjones.com/environment/2020/08/how-did-a-lawyer-who-took-on-big-oil-and-won-end-up-under-house-arrest/; Chevron email chain dated March 26, 2009, referencing fact that "[o]ur L[ong]-T[erm] strategy is to demonize Donziger," available at http://chevrontoxico.com/assets/docs/2009-03-26-gidez-email-re-demonize-donziger.pdf.

2 *See, e.g.*, Eva Hershaw, *Chevron's Star Witness Admits to Lying in the Amazon Pollution Case*, Vice News, Oct. 26, 2015, at https://www.vice.com/en/article/neye7z/chevrons-star-witness-admits-to-lying-in-the-amazon-pollution-case; Marco Simons, *What You Think You Know About Chevron and Steven Donziger Is Wrong*, EarthRights International, Oct. 30, 2015, at https://earthrights.org/blog/what-you-think-you-know-about-chevron-and-steven-donziger-is-wrong/.

3 The RICO judgment against Mr. Donziger was condemned by human rights bodies and countless other legal observers for many reasons, including that it accepted Chevron's use of paid witness testimony and fell short of minimal standards of due process. A detailed review is provided by the UN Human Rights Council's Working Group on Arbitrary Detention, in its opinion concerning the case which is discussed extensively below. *See* U.N. Doc. A/HRC/WGAD/2021/24 (Oct. 1, 2021) at https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/Opinions/Session91/A_HRC_WGAD_2021_24_AdvanceEditedVersion.pdf ("Working Group Opinion"); *see also* Stephen Rapp *et al.*, Donziger Criminal Contempt Proceedings Violated International Human Rights Law and Standards, International Monitoring Panel Report (2022), at https://impetusmonitors.org/wp-content/uploads/2022/01/IMPETUS.Donziger.FinalReport.January2022.pdf ("Rapp Report"). Underscoring the judicial bias found by the UN WGAD opinion, dozens of legal organizations around the world representing more than 500,000 lawyers along with 200 individual lawyers signed on, submitted a judicial complaint in September 2020, detailing the actions of Judge Kaplan over the course of a decade violated his duty of impartiality under the canons of judicial conduct. Available at: https://nlginternational.org/newsite/wp-content/uploads/2020/09/Mirer-Kaplan-Complaint.pdf.

After the judge limited the injunction to block enforcement of the Ecuador judgement only in the United States, Mr. Donziger (as was his right) continued to assist his Ecuadorian clients in their efforts to enforce the pollution judgment in jurisdictions around the world including in Canada. In response, Chevron maintained a constant press of litigation and public relations attacks against Mr. Donziger in New York and beyond. The company even launched websites and purchased millions of dollars of on-line advertisements dedicated to destroying Mr. Donziger's reputation.[4] Given his lack of resources, Mr. Donziger was forced to represent himself *pro se* against roughly 150 Chevron lawyers. Chevron later obtained from Judge Kaplan an unprecedented order that would have forced Mr. Donziger to give the company his personal computer and reams of privileged and confidential client communications. Such an order, a direct attack on the very foundation of attorney-client privilege, was designed to force Mr. Donziger to violate the ethical duties owed to his vulnerable clients and clearly would have put their lives in danger.

On behalf of his clients and himself, Mr. Donziger appropriately sought appellate review of the order. In response, Chevron moved to hold him in contempt of court and urged the district court to imprison him. Chevron simultaneously lobbied the U.S. Attorney's Office in New York to indict and prosecute Mr. Donziger. The office refused to do so.

Chevron orchestrates an unprecedented private corporate prosecution

Judge Kaplan ignored the federal prosecutor's considered rejection of the criminal contempt charges targeting Mr. Donziger and went forward anyway by essentially corrupting the legal process. In what can only be described as a judicial power grab stunning in its audacity, Judge Kaplan publicly charged Mr. Donziger with criminal contempt of court in July 2019 for appealing an unprecedented order that he turn over his computer and confidential case file to his adversary counsel at Chevron. After the U.S. Attorney declined the court's request that it prosecute Judge Kaplan's contempt charges, Judge Kaplan – whose fierce animosity toward Mr. Donziger has been recognized by countless sources[5] – appointed ***a private Chevron law firm*** to act in the name of the

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[4] *See, e.g.*, Working Group Opinion, ¶ 81 (the judge displayed "a staggering display of lack of objectivity and impartiality"); Rex Weyler, *Steven Donziger: The man who stood up to an oil giant, and paid the price*, Greenpeace International, Feb. 26, 2020, at https://www.greenpeace.org/international/story/28741/steven-donziger-chevron-oil-amazon-contamination-injustice/; Debra Cassens Weiss, *Lawyer blasted by judge for conduct in Chevron case should get his law license back, ethics referee says*, ABA Journal, Feb. 26, 2020, at https://www.abajournal.com/news/article/lawyer-blasted-by-judge-for-conduct-in-chevron-case-should-get-his-law-license-back-ethics-referee-says (quoting decision by magistrate appointed by the New York State Bar: "The extent of [the] pursuit [of Donziger] by Chevron is so extravagant, and at this point so unnecessary and punitive.").

[5] *See, e.g.*, Paul Barrett, *Chevron Looks to Its Home Court for a Comeback Win*, Bloomberg Businessweek, July 14, 2011, at https://www.bloomberg.com/news/articles/2011-07-14/chevron-looks-to-its-home-court-for-a-comeback-win ("Kaplan has signaled strongly where his sympathies lie. He doesn't disguise his disdain for the lead plaintiffs' attorney, Steven R. Donziger."); James North, *How*

US government and prosecute the case. To oversee the case, he also circumvented the federal court's random case assignment system to handpick a judicial colleague with a long history of business-friendly rulings. This judge, Loretta Preska, was a leader of the Federalist Society, an organization that receives significant donations from Chevron. Judge Kaplan's animus and these conflicts of interest tainted the case.

Judge Preska wasted no time in helping to carry out Judge Kaplan's and Chevron's clearly planned attacks on Mr. Donziger. She immediately granted a motion from the private Chevron prosecutor that Mr. Donziger be detained at home pending trial even though the case was a low-level misdemeanor for which no defendant in New York ever had been locked up. Mr. Donziger then remained detained with a GPS monitor attached to his ankle for over ***two years*** of pre-trial litigation even though the maximum sentence on the underlying misdemeanor contempt charge was six months. As with so much in Chevron's abusive prosecution of Mr. Donziger, this aspect of the case also broke new ground. No lawyer in the US prior to Mr. Donziger ever had been detained pre-trial on a misdemeanor contempt of court charge for even one day, much less than for more than four times the maximum sentence allowed by law had there been a conviction. Also unprecedented was the concept of one judge serving as the grand jury, prosecutor, jury, and judge in the same case which was Judge Kaplan's functional role in the unfair prosecution of our client. Worse, Judge Kaplan appears to have approved at least $1 million in fee payments to the Chevron prosecuting law firm (Seward & Kissel) from a taxpayer-funded court account to pursue a petty misdemeanor case that lasted years. The totality of these disturbing facts amount to a clear violation of the rule of law and the Constitution, and provide a compelling basis for a pardon.

It is indisputable that the private corporate prosecution and arbitrary detention of a human rights lawyer remains unprecedented in the history of the United States.

Court of Appeals issues critical ruling questioning Judge Kaplan

In a highly significant decision, in 2021 the Court of Appeals for the Second Circuit (the federal appellate court in New York) confirmed that Mr. Donziger's assistance to his Ecuadorian clients never had been in violation of Judge Kaplan's RICO injunction even though this was the entire

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a Human Rights Lawyer Went From Hero to House Arrest, The Nation, March 31, 2020, at https://www.thenation.com/article/activism/steven-donziger-chevron/ ("From the beginning of the RICO trial, Kaplan made his pro-business outlook clear."); Hon. Nancy Gertner and Hon. Mark Bennett, *Criminal Contempt Charges In Donziger Case Are Excessive*, Law360, July 13, 2020, *available at* http://www.nancygertner.com/news/criminal-contempt-charges-donziger-case-are-excessive; Daniel L. Greenberg, *Judge Appointing an Attorney To Pursue Steven Donziger Is Disconcerting*, The New York Law Journal, Aug. 21, 2019, at https://www.law.com/newyorklawjournal/2019/08/21/judge-appointing-an-attorney-to-pursue-steven-donziger-is-disconcerting/.

basis of Judge Kaplan's criminal contempt case that led to his private prosecution and arbitrary detention. In other words, the appellate court ruled that Chevron's post-judgment RICO litigation against Mr. Donziger (from which Judge Kaplan's contempt charges derived) had been baseless. Nevertheless, even after this decision, the Kaplan-appointed private prosecutor from the Chevron law firm continued to pursue the criminal contempt case and vehemently opposed multiple motions before the Kaplan-appointed trial judge to free Mr. Donziger. The private prosecutor also vehemently opposed all of Mr. Donziger's requests for a jury of impartial fact finders, ensuring that the conflicted Judge Preska would rule alone on the contempt charges. In July 2021, Judge Preska predictably convicted Mr. Donziger of misdemeanor contempt after she (like Judge Kaplan before) all but denied his right to mount a defense. She had so little interest in the evidence she was openly reading a newspaper during part of the witness testimony. Despite massive public outcry from across the human rights and environmental justice worlds about the numerous and flagrant violations of Mr. Donziger's due process rights, Judge Preska sentenced Mr. Donziger to a maximum term of six months in federal prison on top of the 26 months of house arrest that he already had been subjected to prior to trial. After playing a key role alongside Judge Kaplan and Chevron lawyers in violating Mr. Donziger's rights, Judge Preska showed no hint of irony when she made highly vitriolic comments during sentencing as Mr. Donziger's wife and young son watched from the gallery: "It seems that only the proverbial two-by-four between the eyes will instill in him any respect for the law," she said.

In all, in a case prosecuted by a Chevron-conflicted law firm, Mr. Donziger ended up detained more than four times the maximum six-month sentence allowed under the law for a petty misdemeanor. The case clearly was driven by Chevron's desire to retaliate against Mr. Donziger and his clients in Ecuador for their successful human rights advocacy. Corrective action by your office is required not only as a matter of fundamental fairness, but also to help restore public faith in our judiciary and to reaffirm the moral consistency of our nation's foreign policy on matters of human rights and the rule of law.

Public outcry and review by the UN Working Group on Arbitrary Detention

Throughout the legal process described above, dozens of civil society groups and individuals of conscience protested the obvious mistreatment of Mr. Donziger and rallied to his defense. No fewer than 68 Nobel laureates,[6] numerous U.S. Senators and Members of Congress,[7] and hundreds

[6] *See, e.g.,* Letter from Jody Willams, Joseph Stieglitz, et al., to Attorney General Merrick Garland dated May 4, 2021, at https://static.twentyo-verten.com/5bfc4ebe4f558976a90e6e2c/ofI2EOWRz31/CVX_2021_Nobel-Laureates-letter-to-Atty-Gen-Garland_20210504.pdf.

[7] *See* Letter from U.S. Senators Edward J. Markey and Sheldon Whitehouse to Judge Roslynn R. Mauskopf, Director of the Administrative Office of the U.S. Courts, dated July 30, 2021 at

of human rights and environmental organizations from around the world raised their voices in concern. Additionally, as referenced above, Amnesty International filed a petition on Mr. Donziger's behalf to the UN Working Group on Arbitrary Detention (WGAD), a subsidiary body of the Human Rights Council and one of the UN's oldest and most respected authorities on human rights. The Working Group interprets and applies international human rights law, in particular the International Covenant on Civil and Political Rights (ICCPR). The United States ratified this document as legally binding in 1992. The UN Working Group is recognized throughout the world for having developed a sophisticated jurisprudence on detention and fair trial issues that is considered authoritative by the governments of most nations.

In a decision on Mr. Donziger's case published in September 2021, the UN Working Group carefully reviewed the facts of Chevron's criminal contempt prosecution and Mr. Donziger's arbitrary detention for over two years prior to trial. It concluded that the treatment of Mr. Donziger was fundamentally incompatible with minimum standards of due process and international human rights. Specifically, it found the prosecution involved "very serious" violations of ICCPR articles 2, 9, 10, 11, 14, and 26.[8] The five members of the Working Group also observed that the Chevron prosecution appeared to have been motivated by a private retaliatory interest. It characterized the evidence of bias by the district court against Mr. Donziger as "staggering."[9] Overall, the Working Group members were "appalled" by the degree of impropriety in the case.[10] When Mr. Donziger brought the Working Group decision to the attention of the trial court overseeing his non-jury criminal contempt trial, Judge Preska snidely dismissed it.

Vigorous dissents by US appellate judges relevant to the pardon consideration

In June 2022, the Second Circuit federal appellate court in New York upheld Mr. Donziger's misdemeanor contempt conviction in a split 2-1 decision, but the entirety of that decision (both the affirmance and dissent) were clear endorsements of Mr. Donziger's position that his case was unconstitutional. Most notably, the majority agreed that Judge Kaplan and Chevron had targeted Mr. Donziger with an illegal prosecution. But the majority found that even though Mr. Donziger repeatedly had challenged the constitutionality of the private prosecution during his trial, he had not raised the "specific argument" he made on appeal (an objection based on the Constitution's

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https://www.markey.senate.gov/imo/media/doc/markey-whitehouse_letter_to_judge_mauskopf1.pdf; Letter from U.S. Representatives Jim McGovern, Alexandria Ocasio-Cortez, Cori Bush, et al., to Attorney General Merrick Garland dated April 27, 2021, at https://mcgovern.house.gov/uploaded-files/donziger_042621.pdf.

8 Decision at ¶ 77; *cf. id.* 72-86.

9 *Id.* at ¶ 81.

10 *Id.* at ¶ 84.

obscure appointments clause) and thus had waived his right to challenge his conviction. Essentially, the majority let Chevron and Judge Kaplan escape accountability for their violations of the rule of law based on a technicality. In a passionate 19-page dissent in favor of Mr. Donziger, Judge Steven Menashi strongly disagreed with the majority. He found that Mr. Donziger had indeed raised the specific argument that he asserted on appeal and that a major violation of the Constitution had taken place. Judge Menashi also found that the constitutional issue was so important and so wrongly decided by Judges Kaplan and Preska that the conviction should be voided in its entirety. In short, Judge Menashi concluded that judges violate the separation of powers doctrine by personally prosecuting those they charge with contempt, rather than letting the executive branch handle the prosecution. (In other words, Judge Kaplan's contempt charges should have been dismissed once the Department of Justice declined to prosecute.) "This is not how defendants are prosecuted in a system of separation of powers," he wrote.

The same disturbing implications for separation of powers were also on the minds of Justices Gorsuch and Kavanaugh when they dissented from the U.S. Supreme Court's denial of a writ of certiorari in March 2023. Their grave concerns about the unfair treatment meted out to Mr. Donziger by Judges Kaplan and Preska, and the private Chevron prosecutor, are worth quoting at length:

> However much the district court may have thought Mr. Donziger warranted punishment, the prosecution in this case broke a basic constitutional promise essential to our liberty. In this country, judges have no more power to initiate a prosecution of those who come before them than prosecutors have to sit in judgment of those they charge. In the name of the "United States," two different groups of prosecutors have asked us to turn a blind eye to this promise. Respectfully, I would not. With this Court's failure to intervene today, I can only hope that future courts weighing whether to appoint their own prosecutors will consider carefully Judge Menashi's dissenting opinion in this case, the continuing vitality of *Young*, and the limits of its reasoning. ***Our Constitution does not tolerate what happened here.*** (*emphasis added*)

Justice Gorsuch's "hope" is cold comfort for defenders of the rule of law like Mr. Donziger and his colleagues. The executive branch of our government suffered an egregious intrusion into its constitutional prerogatives so that Chevron could arbitrarily detain Mr. Donziger for almost three years in retaliation for helping Indigenous Peoples hold the company accountable for its toxic disaster in the Amazon. Fortunately, the pardon power is available in these unusual circumstances so the President can fully protect the function of the executive branch in our system of separation of powers. When a judge oversteps his or her authority and becomes a prosecutor as well as a jury and judge on the same case, corrective action from the executive branch again

becomes an absolute necessity. Such action is necessary both to protect the Constitution and to align the conduct of our government with international law binding on our domestic courts.

Pardon Steven Donziger

A pardon of Mr. Donziger based on these truly extraordinary circumstances would serve at least three important government objectives. Most critically, it would decisively clarify that the executive branch will not tolerate the usurpation by judges of the prerogative of prosecutorial discretion—not in any case, but particularly not in this case which is so transparently driven by a powerful corporation manipulating the judiciary to try to silence a respected human rights lawyer who helped hold it accountable for its pollution of ancestral lands in the Amazon. Second, a pardon would reinforce the respect of our government for its international human rights obligations and for critical institutions that promote human rights like the UN Working Group. Finally, a pardon would serve the interests of justice by acknowledging the arbitrary injustice inflicted on Mr. Donziger. In so doing, the issuance of a pardon would send a powerful signal to environmental and human rights defenders that the chilling precedent of a private corporate prosecution will not stand and will not be tolerated by this Administration. A pardon also would demonstrate that a corporation does not have the right to use the judiciary to try to "criminalize" a human rights defender who worked to hold it accountable – especially at a critical moment when our planet is facing the existential challenge of the climate crisis.

Reaffirm constitutional principles

A disturbing feature of the proceeding that resulted in Mr. Donziger's conviction is that executive branch officials abided and even at times advocated for the breach of separation of powers that Judge Menashi and Justices Gorsuch and Kavanaugh condemned. A pardon in this case will reaffirm that executive power is not "up for grabs" but must remain fully within the executive as a matter of constitutional principle and political accountability. In this case, a presidential pardon would redirect federal prosecutorial officers to guard their constitutional prerogative, and it would establish a clear executive branch position that only professional prosecutors appointed by the executive and approved by the Senate have control over criminal prosecutions."[11]

It is true that use of the pardon power outside of the structure of the U.S. Pardon Attorney[12] is and should be exceedingly rare. But this unique case presents an exception to the usual rule. Rule of

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[11] Menashi at 19 (quoting Cox, 342 F.2d at 171).

[12] Notably, only the president can offer a pardon in this context in light of the long-established "general policy" of the U.S. Pardon Attorney of not awarding pardons in misdemeanor cases. This is not typically a controversial policy because rarely will a misdemeanor case give rise to the kind of grave implications seen here.

law principles already were broken by the district court and Chevron; a pardon is necessary to restore the rule of law and to reaffirm the principle of separation of powers. In this context, *not* acting would risk opening the floodgates to more constitutional conflict as corporations look for ever more creative ways (including use of private contempt prosecutions) to attack their adversaries. While direct use of the pardon power is rare, it is not unprecedented even without the important constitutional dimensions that permeate this case. Examples of pardons aimed at correcting excesses of prosecutorial discretion in important cases include President Carter's pardon of objectors to the Vietnam War draft and President Obama's commutation of the sentences of more than 1,000 drug offenders.[13]

Reaffirm respect for international human rights law and key institutions

A pardon also would serve the important interest of signaling U.S. support for the Working Group as a key ally in the fight to protect human rights defenders from the increasing repression emanating from autocratic regimes around the world. Russia's unjust imprisonment and apparent killing of Alexi Navalny, and the murder by the Saudi regime of the journalist Jamal Khashoggi, are just two examples of why an unequivocal stance by our own government to protect all human rights defenders is so critical.

As noted, the pardon power serves the president's "take care" responsibility enshrined in the Constitution as well as its treaty obligations.[14] The ICCPR is legally-binding on the U.S. and is a legitimate factor in the president's exercise of his plenary pardon power. As a member of the Human Rights Council, the U.S. government has undertaken the commitment to "fully cooperate" with the Council's protection work including Special Procedures mandate-holders such as the Working Group.[15] There is no doubt that the Working Group is a key ally in U.S. efforts to protect human rights and fight autocracy. Archbishop Desmond Tutu has called the Working Group "a

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[13] *See, e.g.*, Jeffrey P. Crouch, THE PRESIDENTIAL PARDON POWER (2009); Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833 (2016). Other examples can be found in the practice of state governors, many of whom exercise a similar clemency power, who have commuted the sentences of dozens of women who were prosecuted and convicted for killing spouses and intimate partners in the context of severely abusive relationships.

[14] *See, e.g.*, Louis Henkin, *The President and International Law*, Am. J. Int'l L. 930, 934 (1986); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L. Rev. 97, 164 (2004) (noting that constitutional text, history, and policy all support the interpretation that the responsibility in the Take Care Clause encompasses treaties).

[15] *See* General Assembly Res. No. A/RES/60/251 (Mar. 15, 2006); *see also* Council Res. No. A/HRC/RES/42/22 (Sept. 26, 2019), at https://undocs.org/A/HRC/RES/42/22.

candle in the darkness"[16] and Working Group decisions have been critical to securing the release of numerous individuals whose treatment preoccupied U.S. foreign policy, such as Chinese dissident Yang Jianli and Malaysian opposition leader Anwar Ibrahim. As such, support for the Working Group serves the national interest as well as moral imperatives. To support the Working Group's recommendations to other governments on issues of arbitrary detention but to ignore it when it applies to our own government (regarding a US citizen) undermines the moral authority and consistency of our foreign policy.

U.S. support for the United Nations WGAD was greatly undermined by the district court's dismissive treatment of the September 2021 decision recommending Mr. Donziger's release from arbitrary detention. It also was undermined by the failure of our State Department to respond to the WGAD's direct requests for information and action. This failure to respond is seen by some as a sign of our government's insufficient support for international human rights institutions, despite the more engaged approach currently taken by your Administration.[17] Again, issuance of a pardon in this instance would signal a more respectful stance toward key ally institutions on matters of human rights.[18]

Interests of justice

Finally, a pardon of Mr. Donziger would serve the interests of justice. This would be true not only for Mr. Donziger, but also for the broader community of environmental and human rights defenders who fear a corporate criminal prosecution – if allowed to stand – would have a chilling impact on their First Amendment rights and advocacy campaigns.

Most environmental and human rights defenders in this country and globally have been "appalled" (as the Working Group was) at the private prosecution of Mr. Donziger. The extent to which supposedly neutral officials of the U.S. legal system twisted the rules to try to "criminalize" Mr. Donziger without a jury or due process of law is inexplicable, except for the fact that it so

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[16] *See* JARED GENSER, THE UN WORKING GROUP ON ARBITRARY DETENTION : COMMENTARY AND GUIDE TO PRACTICE (Cambridge 2019) at xix.

[17] *See* Press Statement of Anthony J. Blinken, Oct. 14, 2021, at https://www.state.gov/election-of-the-united-states-to-the-un-human-rights-council-hrc/ (promising, inter alia, "to restore American engagement internationally").

[18] The president should also direct the appropriate federal offices to consider the other recommendations of the Working Group, namely *(a)* the payment of compensation or provision of other reparations to Mr. Donziger; *(b)* the initiation of a formal investigation into the abuse of private prosecution in the U.S. federal court system; and *(c)* the consideration of legislative amendments or changes in practice as needed to harmonize the laws and practices of United States with its international obligations concerning fair trials.

neatly accords with the interests (in the words of Judge Kaplan) of "a company of considerable importance to our economy." [19] Other human rights defenders who challenge powerful corporations were left to wonder whether they too might face "criminalization" in the same way.[20] A pardon also would be a powerful affirmation that the U.S. legal system will protect civil dialogue on the important issues of the day and will not be a space for corporate manipulation and abuse.

Conclusion

To undermine and criminalize Mr. Donziger's human rights work, the U.S. judiciary and the Department of Justice "turned a blind eye" (as Justice Gorsuch describes) to severe collateral damage to our constitutional order, our respect for human rights, and to the protection of the civic space available for advocacy. A wide range of people of conscience already have spoken out against the unfair treatment imposed on Mr. Donziger. Many who support Mr. Donziger in the human rights and environmental space regard the entire process used against him as shameful. Regardless, there is very broad agreement that the conviction of Mr. Donziger was an injustice that nobody who believes in the rule of law wants to see happen again. The President's pardon power is uniquely situated to respond to an injustice of this nature and to take action to protect our legal system and our democracy from further harmful consequences.

For the reasons herein, we urge an immediate pardon of Steven Donziger.

Sincerely,

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19 This was the candid characterization of the district court judge at the very beginning of Chevron's civil litigation attacks against Mr. Donziger.

20 The concern is not speculative. Chevron's hyper-aggressive civil RICO case against Mr. Donziger and his clients, starting in 2011, did in fact inspire copycat SLAPP-style litigation from the fossil fuel industry against Greenpeace and other environmental and human rights organizations. True to their harassing purpose, these lawsuits have taken years of distracting and expensive litigation to defeat. 61 RICO cases were brought against environmental defenders in Atlanta, Georgia that are also in active litigation.

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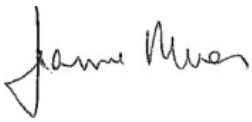

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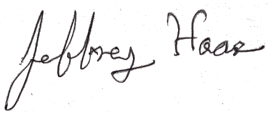

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