

When Feds Demur, Judge Charges Ecuador Crusader Himself

ADAM KLASFELD August 13, 2019



MANHATTAN (CN) – In the U.S. justice system, federal prosecutors typically have the exclusive power to charge people with crimes, but unknown to most of the public, there are a vanishingly small number of exceptions.

So learned environmental attorney Steven Donziger, who has been fighting for his life, livelihood and liberty in a decades-long battle to hold Chevron liable for oil contamination to the Ecuadorean Amazon.

“This is a serious, serious case, OK,” Donziger acknowledged last week during a bail hearing. “This is criminal. I get it. It is highly serious. I’ve been dealing with the civil up to this point.”

Though the case is captioned *United States of America v. Steven Donziger*, prosecutors from the Southern District of New York declined to take up the case, and so a federal judge drafted [criminal contempt charges](#) and [appointed private counsel](#) to lead Donziger’s prosecution on July 30.

The lead counsel for the “government,” Seward & Kissel partner Rita Glavin, declined to comment.



Steven Donziger poses for a photo in Lower Manhattan in 2013. (Adam Klasfeld/CNS)

Courthouse News reached out to five former federal prosecutors — including veterans from the Southern District of New York, District of Alabama and the Northern District of California— seeking precedent for the maneuver.

Despite a combined total of more than 70 years of experience, only one ex-prosecutor contacted had ever heard of a judge-appointed private prosecution for criminal contempt. That case, filed by an Alabama judge against another crusading plaintiff’s attorney, was ultimately dismissed.

Highly unusual in every other respect, Donziger’s appearance last Tuesday had all of the trappings of a typical bail hearing.

With his wife supporting him in court, Donziger appealed to his family to avoid jail: “I have a son who is 13 years old who needs his father, and I want to be able to go places with him around the city — basketball, school, that kind of stuff.”

With several conditions — house arrest, a \$800,000 bond co-signed by Donziger’s wife and a GPS-powered ankle bracelet — U.S. District Judge Loretta Preska ultimately gave Donziger permission to await trial from his Upper West Side apartment.

“Counsel, I do agree that this is a new type of proceeding, and although Mr. Donziger has appeared in the civil case, we are in a brave new world now,” Preska said at the hearing.

Aldous Huxley’s masterpiece “Brave New World” set a standard for 20th century dystopian literature, and the tangled history of the Chevron litigation also makes for grim reading.

In 1993, attorneys in New York filed a lawsuit on behalf of thousands of indigenous and *campesino* rainforest residents, who claimed that Texaco, which Chevron would later acquire, left their jungle homes an oil-strewn disaster. Nobody doubts that the legacy of

drilling left the Ecuadorean jungle dotted with petroleum pools, but the battles over liability for that pollution have stretched across three continents and more than a dozen jurisdictions.

The environmental case itself migrated to Lago Agrio, Ecuador — where a judge slapped Chevron with a \$9.8 billion judgment — but Chevron brought new litigation in New York.

“Our L-T [long-term] strategy is to demonize Donziger,” Chevron wrote in an internal memo in 2009.

Asserting violations of U.S. anti-racketeering law, Chevron accused Donziger of bribing a judge, ghostwriting the multibillion-dollar judgment against it and cooking scientific studies.

In 2014, U.S. District Judge Lewis Kaplan labeled Donziger’s conduct “criminal” in a nearly 500-page ruling affirming most of Chevron’s allegations against him.

The U.S. Attorney’s office for the Southern District of New York has declined the ruling’s invitation to prosecute Donziger for more than half a decade, and Donziger vehemently denies the allegations against him as a retaliatory campaign by one of the world’s most powerful companies to destroy him. On top of his criminal charges, Donziger faces ongoing disbarment proceedings and may have to pay Chevron millions in attorneys’ fees.

“The larger issue is that for years Judge Kaplan has issued a series of pro-Chevron rulings from the bench that seem designed to rescue a major American company from an adverse foreign court ruling,” Donziger, who declined requests for an on-the-record interview, said in a recent press release.

Chevron spokesman Sean Comey confirmed that the company did not request criminal contempt charges from Kaplan, who brought those allegations on his own accord. The company did file several motions for civil contempt, which Kaplan granted.

Preska, who served previously as the chief judge of the district, will preside over the criminal case.

Appointed two years apart from each other, the two judges are divided by a presidency: George H.W. Bush appointed Preska in 1992, and Bill Clinton appointed Kaplan in 1994, the years surrounding the original filing of the Chevron case.

Two of the six criminal contempt charges against Donziger accuse him of violating Judge Kaplan’s orders to turn over his computer, phones and other electronic devices to Chevron, which has been searching for his assets to collect on millions of dollars in attorneys’ fees that it seeks to collect.

Donziger has objected to the protocol for turning over his case file as an intrusion upon his attorney-client privilege.

Another count charges Donziger with disobeying Kaplan’s order to turn over his passport, which the attorney has used to travel to Ecuador, Canada and other countries where he has tried to drum up support to collect the Lago Agrio judgment.

The remaining charges allege violations of Judge Kaplan’s order blocking collection of the award against Chevron.

At the recent hearing, Donziger made clear: “I intend to contest these charges.”

“I will show up,” he continued. “I’m going to come with counsel. I’m assuming that I will get a jury trial.”

Preska signaled a tough battle for Donziger in remarking last week that the charges appear to be “very strong.”



In this file photo from a so-called “Toxic Tour” of the Amazon, Ecuadorean activist Donald Moncayo dips his gloved hand into oil from the soils of Lago Agrio 5, a site that Chevron said it remediated. (Adam Klasfeld/CNS)

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he U.S. Attorney's Office for the Southern District of New York has never commented publicly on Chevron's case against Donziger and did not respond to a request for comment on the judge-appointed prosecution by press time. Court records indicate that the office told Judge Kaplan contempt charges would "require resources that we do not readily have available."

Justifying his maneuver, Kaplan cited a clause of the Federal Rules of Criminal Procedure stating a judge "must" appoint another attorney if the government declines to prosecute for contempt. In practice, however, this sequence of events is extraordinarily rare.

Former prosecutors within that office, meanwhile, found the reluctance to prosecute these charges significant.

Lowenstein Sandler attorney Elie Honig, who spent more than eight years as a Southern District of New York prosecutor, explained in an interview that criminal referrals by judges can put U.S. attorneys' offices in awkward positions.

"If the U.S. attorney charges a case, there will be at least an appearance that the prosecution aims to appease or curry favor from the judge," Honig said. "But if the U.S. attorney declines, then there's concern over alienating the referring judge, who will continue to preside over other cases brought by the U.S. attorney."

Patterson Belknap partner Harry Sandick noted that a criminal referral by a federal judge is not an "every-day-of-the-week occurrence."

"How many times did the government say, 'No, thanks'?" Sandick asked. "That's even a smaller number."

Attorney Elizabeth de la Vega, who spent more than 20 years as a federal prosecutor in California, and Mimi Rocah, a 16-year veteran assistant U.S. attorney in New York's Southern District, said they had not heard of such a case. Rocah cautioned there may be cases of which she is unaware.

The Southern District of New York's district executive office said it did not maintain records on appointment of counsel in judge-ordered prosecutions. Judge Kaplan's office declined comment.

The only ex-prosecutor reached for comment who could provide an example was Alabama's former U.S. Attorney Joyce Vance, whose district declined a judge's criminal referral against once-powerful attorney Richard "Dickey" Scruggs.

Once a titan of the plaintiff's bar, Scruggs reached a \$248 billion settlement against 13 tobacco companies, in litigation that inspired the film "The Insider." Taking on the chemical, financial and pharmaceutical industries, Scruggs himself became a billionaire, scoring major victories in asbestos-litigation and fraud claims against insurers that excluded flooding from Hurricane Katrina victims.

An Alabama judge accused Scruggs of violating his order to return documents leaked by two whistleblowers in the Hurricane Katrina case.

After Vance's office declined to prosecute, then-U.S. District Judge William Acker would not take no for an answer and pursued criminal contempt charges that were [ultimately dismissed](#) in 2009.

Acker, a Reagan appointee, died last year at age 90.

Like Donziger, Scruggs' meteoric rise had been interrupted by a bribery scandal. The attorney ultimately copped a guilty plea in a separate case, filed by a U.S. Attorney's Office in Mississippi, but he continued to dispute the charges following a five-year sentence.

A book on his case, titled "The Fall of the House of Zeus: The Rise and Ruin of America's Most Powerful Trial Lawyer," depicts the billionaire attorney's downfall as paved in part by the powerful enemies he made along the way.

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