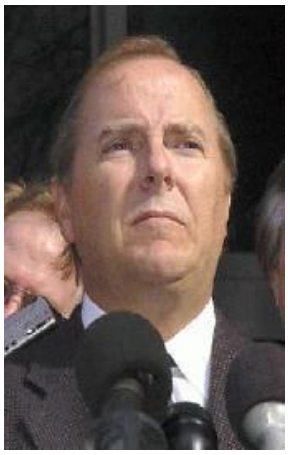
March 14, 2008

The stench of prosecutorial abuse



The stench of **prosecutorial abuse** has long hung over the Enron-related criminal cases. But the extent of that abuse became crystal clear this afternoon when the Fifth Circuit Court of Appeals granted former Enron CEO Jeff Skilling's motion to unseal **his supplemental brief** relating to **the government's interview notes** of former Enron CFO and chief Skilling accuser, Andrew Fastow. I bookmarked the supplemental brief in Adobe Acrobat to facilitate ease of review.

The brief reveals suppression of exculpatory evidence by the Enron Task Force on a massive scale. The entire brief is devastating to the Task Force's prosecution of Skilling and the late Enron chairman, Ken Lay. But if you do not have time to read the entire brief, read the excellent 11-page introduction, which includes the following passage:

> The raw notes are *shocking*. The 420 pages of contemporaneous notes, which we have spent the last many weeks comparing to the thousands of pages of trial record and the Task Force's pretrial disclosures, confirm our worst fears. On the most crucial issues in Skilling's case—especially where it was only Fastow's word against Skilling's—the Task Force suppressed vital exculpatory evidence from its "composite" FBI Form 302s for Fastow and all other disclosures given to Skilling. The Task Force then proceeded to present critical testimony and argument at trial it knew was contradicted by the evidence withheld from Skilling.
>
> Much of the suppressed evidence directly relates to—and *refutes*—the Task Force's pivotal contention that Skilling orally agreed to "secret side deals" to manipulate Enron's financial statements. This "side deal" theory underlies every count of conviction against Skilling. By depriving Skilling of key exculpatory evidence that Fastow conveyed in his interviews, the Task Force was able to skew the proof and convince the jury to accept Fastow's word over Skilling's. As the Task Force later told Fastow's sentencing judge and recounted in a law review article, Fastow's testimony and credibility were the cornerstones to convicting Skilling. . . . Enron Task Force Prosecutor John C. Hueston, *Behind the Scenes of the Enron Trial: Creating the Decisive Moments* ("Hueston"), 44 AM. CRIM. L. REV. 197, 197-99 (2007). The substantial evidence the Task Force kept from Skilling all shares one chatacteristic—it was harmful to the Task Force's case against Skilling. . . .

The implications of this brief reach far beyond the Skilling appeal. For example, the **already-reeling re-prosecution** of the three former Merrill Lynch bankers in the Enron-related Nigerian Barge case would appear to be over -- the Enron Task Force in the first trial of that case not only withheld exculpatory evidence, but put on incriminating testimony from former Enron treasurer and Fastow confidant **Ben Glisan** that directly contradicted the exculpatory evidence that Fastow provided to Task Force prosecutors during his interviews. Other Enron-related criminal cases -- as well as plea bargains -- could well be affected.

I've often noted on this blog that fair-minded people can disagree over whether the government's prosecutorial power is an appropriate tool to regulate business. However, my fervent hope is that even those who favor using the state's awesome power to criminalize merely questionable business transactions will be appalled by what the prosecution did in the criminal case against

Skilling and Lay, as well as the other Enron-related criminal cases. In truth, none of us would be able to survive, as Thomas More reminds us, "**in the winds that blow**" from the unjust exercise of the government's overwhelming prosecutorial power. I continue to hope that Jeff Skilling's unjust conviction and sentence are reversed on appeal, not only for his and his family's benefit, but also for ours.

Update: The Chronicle's Kristen Hays, who is the only mainstream media reporter who I know of following this story, has an article on the Skilling brief **here** (the Chronicle story links to the copy of the Skilling supplemental brief that I bookmarked in Adobe Acrobat to facilitate ease of review; the Skilling supplemental brief on file with the Fifth Circuit is not bookmarked).

Probably in response to an off-the-record response from the DOJ, Hays writes that the Skilling supplemental brief contends that "some of [Fastow's] initial statements to authorities were not as damning as those in his testimony." That's a stark understatement of what the Skilling supplemental brief describes.

The initial Fastow statements set out in the Skillling brief were not only not as damning as Fastow's trial testimony, they were irreconcilable with that trial testimony and described completely legal activity, even by Fastow. Consequently, had the Enron Task Force not been able to to pry Fastow off his original story, the core of the Task Force's case against Skilling and Lay would have have contradicted by Fastow, who was Skilling's main accuser at trial. And the fact that the DOJ did not disclose to the Skilling defense team how Fastow's incriminating testimony evolved over time from his exculpatory initial statements while Fastow and the Task Force were negotiating **a dubious plea deal** is beyond reprehensible. What is the DOJ going to say now, that they didn't disclose the exculpatory earlier statements to Skilling's defense team because Fastow was protecting Skilling in these initial meetings? Yeah, right.

Update 2: The blogosphere is picking up the story quickly, as **Larry Ribstein**, **Ellen Podgor** (see also **here**) and **Warren Meyer** have already commented. Curious, isn't it, that the mainstream media is lagging well behind. Could it be that the story simply does not comport with the media's **pre-conceived notions** of the Enron saga?

Update 3: The WSJ's John Emshwiller, who **covered the Lay-Skilling trial** for the WSJ despite **legitimate questions** about his objectivity, reports on the latest developments **here**.

Update 4: John Hueston, the former Enron Task Force prosecutor who is quite proud of his work in nailing Skilling and Lay on an admittedly weak case (see **here**, **here**, **here** and **here**), is mentioned often in the Skilling supplemental brief because of the law review article he authored that is cited in the passage above. Hueston's law firm bio used to link to a copy of the article, but the firm took the link down some time ago. However, **Cara Ellison**, who has followed the Enron-related criminal cases closely, provides **this handy link** to Hueston's article.

Update 5: A bookmarked copy of the DOJ's reply to the Skilling Supplemental Brief can be downloaded **here**. The DOJ argues essentially that, put in what the DOJ considers to be the proper context, each portion of the Fastow interview notes on which Skilling relies to establish *Brady* violations contains information that Skilling already had prior to trial or is evidence that would have had "minimal" value in impeaching Fastow. Frankly, the DOJ's analysis stands *Brady* on its head. The essence of *Brady* is that the prosecution does not retain the power to make such determinations regarding exculpatory evidence unilaterally -- that information is a part of the mix that the jury and the Court sort out in determining facts and in applying the law. If what the Enron Task Force withheld here is truly harmless error, then the DOJ's need of 70+ pages to explain why that is the case belies that contention. Ellen Podgor passes along similar thoughts regarding the DOJ's brief **here**.

Posted by Tom at March 14, 2008 6:47 PM |

Comments

This is a disgrace to the justice system. As I have felt all along, Skilling is innocent and the case against him was fabricated by the United States Government. I read all 71 pages of this brief and it is now clear to me that the government simply didn't understand the financial transactions undertaken by Enron and in order to save themselves the trouble of learning them, they simply fabricated evidence.

The United States government has ruined this man's life and stolen 15 months from him thus far. It happened in Houston because of an incompetent judge and a lynch mob mentalilty. And there is an innocent man in prison.

The appeals court should rule on this immediately and release Mr. Skilling from custody. Then, they should conduct an investigation into the circumstances surrounding the trial including criminal misconduct by the prosecutors.

Mike Greenleaf

Posted by: Mike Greenleaf at March 15, 2008 7:44 PM

Tom: I've hesitated in the past to ask this question because I didn't want to appear insensitive to those involved, but as the Task Force's case appears to be unraveling before our eyes (we hope) I find I can't help myself.

Is it perhaps time to hear from some of the 100+ un-indicted co-conspirators? I'm obviously not a lawyer and I haven't been able to determine how the statute of limitations affects this case, but it occurs to me that perhaps it's time to put a dent in the Task Force's tactic of divide and conquer. If they thought it important enough to keep these people quiet and separate from each other, I would guess that there might be some rather interesting stories to be told out there. Maybe my revolutionary side is coming out, but I see strength and safety in numbers'a little solidarity might go a long way toward combating the threat of prosecution. If only a percentage of the un-indicted start talking, the press and even Loren Steffy would have to take notice.

All this begs a second ethical question I've never seen discussed here or anywhere else for that matter: If there is anyone out there with information that could set the record straight, not to mention free a man from a life in prison, hasn't the time has long since passed to damn the torpedoes and speak? Isn't it simply the right thing to do? I realize it's far easier to pose this question as an outsider. I also understand the need to protect yourself and your family from the threat of wrongful prosecution, but in our silence, aren't we sending another harmful message to our families? The Fifth Amendment may protect us, but it doesn't clear our conscience. What lesson does silence teach a child about helping those in need? I'm not a religious man, but I do believe we're talking about the 8th Commandment here. I'm even reminded of a Simpson's episode (probably more my speed) that deals with this'Bart is the only person who can prove that the Mayor's arrogant and obnoxious nephew (remind you of anyone else's portrayal in the media?) is innocent of murder, but if Bart speaks out and tells what he knows, he'll also have to admit that he skipped school and face punishment. It takes the whole half hour, but he does the right thing.

Forgive me if I've crossed a line and appear to be blaming the victim. That is certainly not my intent. I fear that any positive outcome in the Skilling appeal will leave the majority of Americans still believing the 'myth' while saying 'he got out on a technicality!' If we really want to combat prosecutorial abuse perhaps we need to do more than wait for a courtroom verdict.

Posted by: RichP at March 16, 2008 4:42 AM

It will be interesting to see if this has implications for the other Enron-related cases. In each of the Enron trials, the prosecution's case relied on relatively few witnesses, most or whom the government had firmly under their thumb. Many of these witnesses admitted that the government had met with them dozens of times before the trial -- this amounts to hundreds of hours of discussion per witness. I suspect that the defendants received only one Form 302 per each of these witnesses. And the government claimed that it had heard nothing exculpatory in any of the meetings with any of the witnesses. This simply is not believable, particularly considering that exculpatory information was pulled from many of these same witnesses during their trial testimony. It is time to teach the government that its Brady obligations must be taken seriously.

Posted by: Evan at March 16, 2008 7:58 AM

Wow, it looks like Nacchio's conviction in the Qwest case has been overturned because of the prosecution's exclusion of evidence: http://afp.google.com/article/ALeqM5hEYAgSqTRSyrg_4d2rZoSYPdAmEg

Cliff Stricklin is the federal prosecutor who led that case for the government. As you have reported, Stricklin also worked on the original Enron broadband trial and Skilling's trial. It looks like Stricklin might have used the same dubious tactics in the Qwest case which he seems to have practiced in the Enron trials.

Posted by: Evan at March 17, 2008 6:57 PM

This isn't directly related, but I thought you might find it interesting. Turns out, Jim Chanos likes to hang out with hookers, though he says he only looks, never touches. Specifically, the Eliot Spitzer hooker.

It's a small world after all...

I just wrote about it on my blog. It seems like everyone who accuses Enron of wrongdoing is ensnared in a scandal.

Posted by: Right Thinking Girl at March 17, 2008 8:21 PM

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