Center for Ethical Organizational Cultures
Auburn University
http://harbert.auburn.edu

Debate

What Are the Ethical Responsibilities in the Prosecution of Corporate Misconduct?

ISSUE: Was it unethical for prosecutors to use abusive tactics to secure witnesses and convictions in the investigation of Enron's corporate wrongdoing?

In December of 2000, Enron Corporation had $30.4 billion in assets and 19,000 employees. One year later, the company filed for bankruptcy after a series of surprise events shook the market's confidence in the company and a lack of investment and operating capital made it impossible to continue operations. Although Enron had roughly $30 billion in assets, it had no cash; its bankruptcy was one of liquidity. With the bankruptcy, roughly 2,000 Houston-based employees lost their jobs; the other 17,000 remained employed worldwide and, eventually, went to work for the companies which purchased Enron's assets. Investors (primarily institutional investors), who had watched the value of their stocks decline from $90 a share in August of 2000 to less than a dollar in December of 2001, lost billions. Although Enron developed the natural gas and electricity trading markets, pioneered the use of video delivery via the Internet, repetitively won accolades from mainstream business press (such as "Most Innovative Company" and "Best Places to Work"), and earned billions of dollars for its employees and investors in the 15 years of its existence, Enron today is the ultimate symbol of corporate wrongdoing and greed.

When Enron filed bankruptcy, the rush to judgment was made at warp speed, particularly in Houston, where the company was headquartered. Multiple governmental agencies opened investigations, and then-President Bush (whose family was friends with Enron Chairman Ken Lay) formed the Enron Task Force, the first federal task force formed to convict corporate executives. Before any investigations began, members of the federal government and the Enron Task Force admitted publicly that their job was to secure convictions of Enron executives.

The first director of the Enron Task Force made the strategic decision to manage the case as though it was an organized crime case and populated her team with FBI agents and federal prosecutors who specialized in working mafia cases. In mafia cases, prosecutors use a technique called "climbing the ladder." They "interview" low-level employees and threaten them with prosecution in order to encourage the low-level employees to "flip," or give them information about the employees at the level above them. The ultimate goal is to get the "bosses." In the Enron Task Force's case, the "bosses" were Chairman of the Board Ken Lay and Chief Executive Officer Jeff Skilling. Both were extremely unpopular in Houston; the first director of the Enron Task Force dubbed Ken Lay "Osama Ken Layden."

In addition to employing a mob strategy and populating the Task Force with mafia prosecutors, the Enron Task Force employed other tactics, including painting the bankruptcy as one of solvency (versus liquidity) and indicting Enron's accounting firm, Arthur Andersen, to help to portray Enron's financial dealings as illegal. The indictment itself put Arthur Andersen out of business; although the U.S. Supreme Court overturned the conviction, it was too late to save the jobs of tens of thousands of Arthur Andersen employees worldwide.

The Enron Task Force used prosecutorially-abusive tactics to secure its witnesses and convictions. Ungagged.net–The Other Side of the Enron Story is a webumentary that describes the strategy of the Enron Task Force. Ungagged.net features video interviews with defendants, attorneys, former Enron employees, and relatives and friends of the defendants. It also describes the judicially-questionable decisions and rulings made by the judge in the Lay/Skilling case. The interview with Mike Ramsey, Lead Defense Attorney for Ken Lay, is the most relevant (http:/ungagged.net/whatitwaslike-03.php).

Ken Lay once said that he felt that one of the great successes at Enron was the creation of a corporate culture in which people could reach their full potential. He said that he wanted it to be a highly-moral and ethical culture and instituted Enron's Vision & Values Program. Although the Vision & Values Program was not a full-fledged ethics and compliance program, it was a precursor to today's ethics and compliance programs. The Vision & Values Program emphasized that employees should work with a focus on four values: respect, integrity, communication, and excellence. The majority of Enron's population worked to embody those values. A small number of people, however, did not.

Andrew Fastow, who was Enron's Chief Financial Officer, his direct report Michael Kopper, and others below them in the organization were stealing from Enron and its investors through off-balance-sheet partnerships that Fastow and Kopper managed. The Enron Task Force used this illegal activity as the basis for their prosecution and argued that Ken Lay and Jeff Skilling were guilty because they "should have known" about the illegal activity. Both Ken Lay and Jeff Skilling maintained during their trial that they were not aware of this activity nor made any money from the partnerships. Jeff Skilling went so far as to take a lie detector test during which he was asked directly if he knew about Andy Fastow's illegal activity. Although he passed the lie detector test when he said that he was unaware of any wrongdoing, the Court did not permit the lie detector test results to be admitted as evidence in the Lay/Skilling trial. The only "evidence" against Lay and Skilling was the testimony of lower-level executives who had plea bargain deals with the government in exchange for reduced sentences. Every former Enron employee who testified against Lay and Skilling had a plea bargain in place when he or she took the stand.

As the jury was preparing to deliberate in May of 2006, Judge Simeon Lake gave them a controversial instruction: they could find Lay and Skilling guilty of consciously avoiding knowledge about wrongdoing. In other words, the jury could find Lay and Skilling guilty because they should have known what was going on at Enron but did not. After five months of trial, the jury reached its verdict in a matter of days: guilty. (For more information about the Willful Blindness jury instruction, watch this section on Ungagged.net: http://ungagged.net/view.php?story=20.)

Jill Ford was one of the jurors in the Lay/Skilling trial. In February 2007, she was interviewed by O.C. Ferrell of the Daniels Fund Business Ethics Initiative at the Anderson School of Management, University of New Mexico. In her interview, she indicated that there was no direct evidence that Ken Lay either participated in or knew about illegal acts that occurred at Enron. She said that when the judge stated that they could convict Lay for what he should have known, the jury had no alternative but to convict him.

Jeff Skilling is currently serving a 24.4-year sentence; Ken Lay died before he was sentenced. In June of 2010, the U.S. Supreme Court ruled that his convictions are to be reviewed, based on the improper use of the federal "honest services" statute that was used to convict him.

In the U.S. military, the commanding officer of a unit is ultimately responsible and held accountable for anything that goes wrong as a result of his/her unit's actions. However, unless criminal action is proven beyond doubt, the commanding officer's punishment is limited to being relieved of duty; there are no monetary fines or imprisonment.

There are two sides to every issue:

1. The investigation and prosecution of CEOs for alleged misconduct should use every legal device available to obtain a conviction.

2. Investigators and prosecutors have ethical obligations not to abuse their power in holding CEOs responsible for illegal conduct when the CEOs were not aware of it.

Sources:

Daniel Kadlec, "Power Failure," Time Magazine, Dec. 02, 2001, http://www.time.com/time/magazine/article/0,9171,1101011210186639,00.html#ixzz0updcIQaT (accessed July 29, 2010).

Daniel Kadlec, "Enron: Who's Accountable?" Time Magazine, Jan. 13, 2002, http://www.time.com/time/business/article/0,8599,193520,00.html#ixzz0v0Yku2MF (accessed July 29, 2010).

Playing the Blame Game, Time Magazine, Jan 20, 2002, http://www.time.com/time/2002/enron/collapse (accessed July 29, 2010).

O.C. Ferrell and Linda Ferrell, "The Responsibility and Accountability of CEOs: The Last Interview with Ken Lay," Working Paper, July 8, 2010.

Ungagged.net: The Other Side of the Enron Story, http://ungagged.net (accessed July 29, 2010).