

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED
DEC 20 2004
Michael N. Milby, Clerk

UNITED STATES OF AMERICA §

VS. § CR-H-04-25 (S-2)

RICHARD A. CAUSEY, §
JEFFREY K. SKILLING, and §
KENNETH L. LAY §

**KEN LAY'S REPLY AND REQUEST
FOR HEARING ON ISSUE OF VENUE¹**

Major Fallacy. The Task Force founds its argument upon untenable positions: (1) that the sovereign, by right or law, is compelled to try the case "...where the crime shall have been committed." (citing Art. III, Amend. VI and Rule 18) and that (2) "...the locus of the criminal act is Houston." (p.2, p.5, Gov. Response). Both these propositions, which are load-bearing struts to all that follows, are false. They are based, in part, on a confusion and, indeed, a conflation of the concepts of jurisdiction with venue and, in part, upon a misreading of the indictment. Once this issue is understood properly, the major premise of the argument evaporates, and the cases become inapposite because they are based upon a rationale neither appropriate nor helpful. To take one point at a time:

- (1) Because any sovereign would have jurisdiction (power) to try offenses against it where it might please, the Framers thought it appropriate to protect against abuses of that power. Thus, the individual is vested with a right to venue

¹ Mr. Lay also adopts Reply Memorandum Messrs. Skilling and Causey.

(more an equitable concept of convenience) near "...where the crime shall have been committed." This is basic, irrefutable, hornbook Constitutional law.

(2) Rule 18, in pertinent part, being of more recent origin, and informed by the realities of modern Federal criminal practice, makes the issue plain:

Unless a statute or these Rules permit otherwise, the government must prosecute an offense in *a district* where the offense was committed. [emphasis supplied]

Again, the thrust of the Rule is to limit the Sovereign's power, but note the use of the indefinite article "a" and compare it to the definite article "the" used in both relevant portions of the Constitution. In all reality, based upon the face of the indictment, in this case venue could be laid in any district of any State in the nation and, laying issues of convenience aside, as a matter of Constitutional law be maintained over timely objection. In effect, in modern multi-state, multi-defendant wire fraud, mail fraud and securities litigation we have come full circle.

Thus, the only analytical issue before the Court is whether, due to the unique circumstances of this case, the Houston Division of the Southern District of Texas is a venue where these defendants are certain to get a fair trial? The prosecution postures that Houston is the *only* appropriate venue because the crimes were allegedly committed *here* but omits reference to 18 U.S.C. Section 3237(a) which provides, in relevant part, that "[e]xcept as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired in and prosecuted in any district in which

such offense was begun, continued, or completed.” The Supreme Court has held that “[a] continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy. Where such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each.” *United States v. Midstate Horticultural Co., Inc.*, 306 U.S. 161 (1939). The rule is equally well settled that venue properly lies in any place where any act in furtherance of the alleged conspiracy was committed. *Hyde v. United States*, 225 U.S. 347, 362 (1912). In securities prosecutions, and venue lies virtually anywhere. 15 U.S.C. 78aa.

The truth of the matter is that, due to the nature of the charges lodged against defendants, Houston is not the only district where the government could have “inquired in and prosecuted” this case. The Task Force has chosen Houston *not* because it was compelled to by law but rather for obvious reasons of convenience as well as for tactical and strategic advantage. Thus, as a matter of analytical analysis their house is built upon sand and the tears they shed over the Constitution are crocodilian.

Were we here involved in a Rule 18 or a Rule 21(b) analysis—which we are most assuredly not—Houston would make considerable sense. But it should be noted that both Rules just cited vest rights in defendants, not in the Government. Justice, not convenience or comfort, is what is at stake.²

Equities. The Court has a purely discretionary decision before it—an exercise of the Court’s conscience based upon a fact intensive analysis. In this, we believe the Court would be assisted by an evidentiary hearing.

² Addressing fn.2 at pp.5-6 Gov. Res., the defendants are not asking to exclude “victims” from attendance. (According to the indictment they exist nationwide.) We are trying to avoid the feeling and appearance of “victimization” from influencing the fact-finder.

The Enron imbroglio is the most sensationalized American business scandal since Teapot Dome. Like that earlier unpleasantness, the public perceives that the core of the case lies at an intersection of politics, money and power. Such is the national perception, and that is bad enough. In Houston the matter has been—both in length and in depth—internalized and personalized out of all proportion. The local perception is driven by the blood borne emotions of pride, loss and perceived betrayal. In Houston, it is personal. (See all declarations appended to Skilling’s Motion to Transfer, *passim*.) Thus, any attempt to take reported cases and reason by analogy quickly bleeds off into little more than an anecdotal analysis. The beast is too big and has too much hair on it. The decision before the Court can only be informed by factors beyond the ken of law reports. But it has always been the burden and the glory of common law litigation that it is driven by a bottom-up, pragmatic, fact specific analysis. The exercise of equitable discretion can only be handmade. We believe the Court will be greatly assisted by an evidentiary hearing.

Although media saturation is more a symptom than a cause of the present problem, yet, “Attention must be paid.” It is by symptoms that disease is diagnosed. Marshall McLuhan was not exaggerating much when he observed, “All media exists to invest our lives with artificial perceptions and arbitrary values.” Indeed, as this page is being composed, Sunday, December 19, 2004, the editors of the Houston Chronicle deemed it newsworthy to print³:

³ In fact it was a busy day for those editors who also published one more particularly snotty, personalized editorial on the same day. See attachment A.

TASK FORCE: Nigerian barge trial 'microcosm' of Enron cases

"It's about a company on steroids, artificially enhanced with side deals and other methods, appearing to be something it wasn't. But unlike steroids in the sports world, there are many, many more victims here."

—ANDREW WEISSMAN
Enron Task Force director

In another recent example, Houston's one newspaper delivered itself of the following opinion:

Federal prosecutors seem to have hit on the perfect technique for cracking those tough, macho Enron executives indicted after the company's collapse: just use an investigation of the alleged perp's spouse as a rubber hose *to break down his will to fight it out in court.* (November 19, 2004) [emphasis supplied]

Editorial opinion is a shadow of community sentiment and the opinion that it is laudable to break one's will "...to fight it out in court." is breathtaking. Antidotal matters are seldom dispositive, but they are informative. They are the raw datum out of which equity springs, and can only be fully developed through the thrust and parry of a hearing.

Another notion, which can be exploded upon hearing, is the Task Force's attempt to apply experience gained in the trial of Dan Bayly or Sheila Kahanek. Defendants offer

to prove upon hearing that by putting the name “Ken or Kenneth Lay” into Google one gets—allowing for some duplication—around one-quarter million hits. “Sheila Kahane” gets 1,050 and “Dan or Daniel Bayly” some 1,680. The order of magnitude of difference is spectacular.


Motives. The Defendants believe that the Task Force is asking the Court to drive the heaviest truck in America down the freeway while viewing the road ahead through a soda straw. In fact, the cases spread before the Court counsel “foresight”. We also believe that the Court can fortify that foresight by asking the “Why?” question. Why do the defendants wish so much to leave the Houston venue? They are leaving the comforts of hearth and home behind and at some expense and inconvenience asking that the case be moved to a distant venue. Why does the Task Force so vigorously oppose the move? Is it really in defense of a Constitutional mandate? The obvious answer is that both sides truly believe that the choice of venue will, in fact, influence the outcome of the case. Other than pure convenience, there is no legitimate and compelling prosecution interest in maintaining and defending the Houston venue. In fact, all the lawyers on both sides of the case, save one-half of Mr. Lay’s team, and Ron Woods co-counsel for Mr. Skilling, are from out of town. Of course, the primary support agency of the Task Force, the FBI, maintains offices everywhere. It is laughable to assert that with the amount of ink, sweat and midnight oil being expended upon these papers that both sides are not seeking an advantage. But the advantage sought by the defense is only a fair trial. What is the Task Force seeking?


By remaining in Houston we believe the Court would accept a risk which is not merited, to-wit, that some opinionated jurors will be seated. With the doctrine of merger being what it is, that could never be rectified.

Certainly, the three defendants, a few of their lawyers and this Court personally would be moderately inconvenienced⁴ by moving the case, but that is a small price to pay to diminish what we believe is a real and present danger of the inadvertent contamination of that most sacred of trial rights, an unbiased fact finder.

Thus, Mr. Lay joins Mr. Skilling and Mr. Causey in requesting that a hearing be held and that upon such hearing this proceeding be moved to a more appropriate venue.

Respectfully submitted,


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⁴ As a point of special pleading—i.e., one devoted to convenience—Mr. Lay would emphasize the facility with which Houstonians can travel to and from the city of New Orleans. See attachment B.

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CERTIFICATE OF CONFERENCE

NO CERTIFICATE OF CONFERENCE IS NECESSARY WITH THIS FILING.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this the 20th day of December, 2004 a true and correct copy of the foregoing Kenneth Lay's Reply and Request for Hearing on the Issue of Venue has been delivered to the following, via email:

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Attachment A

Lay's holiday cheer

After a bad year, the former Enron chairman and his high-rise neighbors get a break, sort of.

THINGS haven't exactly been coming up roses for Ken and Linda Lay lately. In addition to getting indicted by federal prosecutors probing his corporation's collapse, Ken Lay endured the indignity of a nationally televised perp walk and reports that his wife is under investigation for stock transactions.

If he's in the mood to seek silver linings in the dark clouds of 2004, Lay need look no further than the next property tax bill on his homestead at the Huntingdon condo on Kirby. While many Houstonians saw property tax rises up to the 10 percent cap, the Harris County Tax Appraisal District lowered the valuation of Lay's 33rd floor nest at the posh River Oaks tower from \$6.8 million to a little more than \$4.8 million. The reduction shaved off nearly a third of the residence's value and provided a tax break worth approximately \$60,000 a year.

HCAD did not act out of sympathy for the embattled Lay, explains assistant chief appraiser Guy Griscom.

Agency appraisers agreed with the representations of the accountant for Lay and other Huntingdon residents that the value of their condos has declined precipitously.

Maintenance problems at the tower are beginning to gnaw away at its image as the ultimate residence of choice for Houston's rich and connected. "The building's getting a little older," Griscom notes, "and there's some capital expenditure things that need to be done and it's showing its age."

In typical Enron take-a-mile style, Ken and Linda had sought an even steeper reduction that would have brought his condo down to a \$2.9 million valuation, but the county's appraisal review board gave their appeal a thumbs down.

While the Lays are getting a sizable tax reduction, there is a sour note to mix with the sweet. If events should force him to sell his sky high residence in the near future, Lay will find it very difficult to get top dollar after providing ample public documentation of the Huntingdon's physical problems.

Attachment B



Southwest Airlines Schedule for Houston Hobby to New Orleans

Flights	Departs	Arrives	Stops	Frequency						
				Mon Dec 20	Tue Dec 21	Wed Dec 22	Thu Dec 23	Fri Dec 24	Sat Dec 25	Sun Dec 26
858	6:00am	6:55am	N/S	✓	✓	✓	✓			
1856	6:40am	7:35am	N/S	✓	✓	✓	✓	✓		✓
1811	7:35am	8:35am	N/S	✓	✓	✓	✓	✓		✓
2372	8:10am	9:10am	N/S	✓	✓	✓	✓	✓	✓	✓
1732	8:45am	9:45am	N/S	✓	✓	✓	✓	✓		✓
710	9:40am	10:40am	N/S	✓	✓	✓	✓	✓		✓
3853	10:30am	11:30am	N/S						✓	
812	10:35am	11:35am	N/S	✓	✓	✓	✓	✓		✓
814	11:55am	12:55pm	N/S	✓	✓	✓	✓	✓	✓	✓
109	1:00pm	2:00pm	N/S	✓	✓	✓	✓	✓	✓	✓
1123	2:35pm	3:35pm	N/S	✓	✓	✓	✓	✓	✓	✓
1083	3:25pm	4:25pm	N/S	✓	✓	✓	✓	✓		✓
1562	4:55pm	5:55pm	N/S	✓	✓	✓	✓	✓	✓	✓
992	6:05pm	7:05pm	N/S	✓	✓	✓	✓	✓	✓	✓
1561	6:50pm	7:50pm	N/S	✓	✓	✓	✓		✓	✓
460	7:20pm	8:20pm	N/S	✓	✓	✓	✓	✓		✓
1048	8:15pm	9:15pm	N/S	✓	✓	✓	✓	✓	✓	✓
685	10:00pm	10:55pm	N/S	✓	✓	✓	✓			✓

✓ - Scheduled Flight

-- - Flight Schedule Unavailable (Either the date has passed or our schedule is not yet open through this date.)

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				Mon	Tue	Wed	Thu	Fri	Sat	Sun
				Dec 20	Dec 21	Dec 22	Dec 23	Dec 24	Dec 25	Dec 26
2737	6:00am	7:05am	N/S	✓	✓	✓	✓			
2257	7:00am	8:05am	N/S	✓	✓	✓	✓			✓
2153	8:10am	9:15am	N/S	✓	✓	✓	✓	✓	✓	✓
20	9:30am	10:35am	N/S	✓	✓	✓	✓	✓		
3202	9:30am	10:35am	N/S							✓
2390	9:40am	10:45am	N/S						✓	
1421	10:25am	11:30am	N/S	✓	✓	✓	✓	✓	✓	✓
562	11:05am	12:10pm	N/S	✓	✓	✓	✓	✓	✓	✓
2646	11:50am	12:55pm	N/S	✓	✓	✓	✓	✓	✓	✓
1151	12:55pm	2:05pm	N/S	✓	✓	✓	✓	✓	✓	✓
1287	2:25pm	3:30pm	N/S	✓	✓	✓	✓	✓	✓	✓
890	3:05pm	4:10pm	N/S	✓	✓	✓	✓	✓	✓	✓
538	4:25pm	5:35pm	N/S	✓	✓	✓	✓	✓	✓	✓
1893	5:05pm	6:15pm	N/S	✓	✓	✓	✓	✓	✓	
3421	5:05pm	6:15pm	N/S							✓
2540	6:15pm	7:25pm	N/S	✓	✓	✓	✓	✓	✓	✓
1276	7:00pm	8:10pm	N/S	✓	✓	✓	✓	✓	✓	✓
106	7:50pm	8:55pm	N/S	✓	✓	✓	✓	✓		✓
862	8:30pm	9:35pm	N/S	✓	✓	✓	✓			✓
2736	9:30pm	10:35pm	N/S	✓	✓	✓	✓	✓	✓	✓

✓ - Scheduled Flight

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