10-20621

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE
V.
JAMES A. BROWN,
DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION
NO. CR H-03-363

MOTION FOR RECONSIDERATION AND REVIEW BY A THREE JUDGE PANEL OF BROWN'S MOTION TO STRIKE THE GOVERNMENT'S BRIEF, DISQUALIFY ALL DEPARTMENT OF JUSTICE ATTORNEYS AND ABATE THE APPEAL

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I. INTRODUCTION.

Brown appeals to this Court from the district court's denial of his Motion for New Trial. After the Government filed its substitute brief, to abandon its untenable dismissal argument, Brown moved to strike the Government's brief, disqualify all of the attorneys in the Department of Justice, abate the appeal, and appoint an independent prosecutor because of Assistant Attorney General Lanny Breuer's participation in the case on the Government's side. Throughout this most recent phase of the litigation, Brown has been concerned about the possibility that Breuer has continued to participate in the case, even though his initial role in the litigation was as a defense attorney for Daniel Bayly, who was Brown's superior at Merrill Lynch and his long-time co-defendant. Brown's concern has been exacerbated by the fact that Brown and Bayly operated under a Joint Defense Agreement. Thus, Breuer's side-switching in this case affects Brown just as much as it affects Bayly himself.

The Government's filing of a brief and then a substitute brief bearing Breuer's name on the covers and in the electronic signature blocks served as the immediately precipitating event for the motion. But Brown's counsel has repeatedly attempted to learn more about Breuer's participation in all aspects of the case, not just the latest brief-writing. Instead of responding with forthright disclosure and reassurance, however, the Government has resisted repeated attempts to clarify the potential

conflict. It has opposed any discovery and issued enigmatic and unsatisfying statements that Breuer had been "recused" and would not "participate," without explaining what that means in actual practice. The little information the Government has now disclosed raises more questions and provides more evidence of likely taint.

Although the Government responded to Brown's motion with remarkable speed, its response was substantively insufficient to answer Brown's legitimate concerns. For example, in the affidavit attached to the Opposition, Principal Deputy Assistant Attorney General Mythili Raman swore that "Mr. Breuer did not review the Government's brief in this appeal, or otherwise participate in any decisions relating to the investigation and prosecution of appellant Brown." However, she does not have personal knowledge of those facts, and therefore stated that they were true on no more than "the best of [her] knowledge and belief." The affidavit does not indicate how long she has served in her current role.

Former Breuer Deputies Rita Glavin and Gary Grindler also participated in this case. Glavin left the Department shortly after a meeting with Brown's counsel at the Department of Justice in 2009. Grindler moved to a different position in the Department. Despite being in this litigation for more than seven years, and having made repeated inquiries to identify the ultimate decision-maker in this case (and

further requesting independent review), Brown and his counsel did not even hear of Mythili Raman until the Government filed its Opposition here.[1]

In its Opposition to Brown's Motion to Strike, Attorney Stephan Oestreicher, the primary author of the two merits briefs, admitted to this Court that he did not know that Ms. Raman was acting Assistant Attorney General on this matter. More significantly, he did not know that Breuer had a conflict or was recused. Oestreicher did say that he personally never consulted with Breuer about Brown's case. Beyond that claim, however, Oestreicher also possesses no personal knowledge of Breuer's conduct, and hence merely referred to Ms. Raman's affidavit. Likewise, Oestriecher provided no information regarding his co-counsel, Deputy Fraud Section Chief, Patrick Stokes, who appeared in the court below and on the brief. Brown has received no information about any contact Stokes or anyone else in the Department may have had with Breuer about this case.[2]

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[1] As we have noted, Breuer does not appear on any of the Skilling briefs, a case which involves some aspect of the barge transaction. As for Ms. Raman, a Westlaw search shows that she has appeared for the Government, during Breuer's tenure, on only a single case, *United States v. Radley*, No. 09-20699 (5th Cir.). On the Government's briefs in *Radley*, Raman appears, alongside an Appellate Section colleague of Oestreicher's, as "Acting" Assistant Attorney General, which is the way she and Oestreicher characterize her role in this case. Assuming *arguendo*, that Breuer, who had an active defense practice, is recused in *Radley*, Raman's appearance there, but not here, suggests that whatever "procedures" may be in place at the Department of Justice failed here.

[2] Also missing from any proffered explanation are the roles of and possible communications of Deputy AAG Rita Glavin, Fraud Section Chief Steve Terrell, and Deputy

Also missing is the voice of Lanny Breuer. Breuer again provided no information about his participation, if any, in the case. Given Breuer's appearance on the brief and failure to notify his subordinates of his recusal, Brown is entitled to know how and what Breuer communicated to his subordinates in the Department of Justice—if indeed he did so—to establish that they were forbidden from taking even implicit or inadvertent guidance from him regarding this case. Oestreicher's filing reveals that none of the attorneys in the Appellate Section of the Criminal Division of the Department were even told that Breuer was recused. *But see United States v. Radley*, No. 09-20699 (5th Cir.) (appellate section lawyer, David Hollar, appearing with "acting" AAG, Mythili Raman). Notably, Oestreicher concedes that this is the first he had heard of it. In addition, no one has ever responded to Brown's requests to identify who made the decision to drop all charges against Breuer's former client (Bayly), and why, but not Bayly's subordinate and co-defendant (Brown).

The Government's stonewalling, poor communication and inadequate response only magnify Brown's suspicion and create an ever growing appearance of impropriety. Yet, without allowing Brown time to file his reply to the Government's Opposition to Brown's Motion To Strike, a single judge of this Court denied Brown's

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AAG Gary Grindler with Breuer and/or Stokes and any combination thereof. Department employees told Brown in June 2009 that Glavin, not Raman, was the decision-maker.

Motion without opinion. Because Brown's motion raises serious ethical issues which affect Brown's constitutional rights and implicate the fair administration of justice, Brown requests rehearing of his original Motion To Strike by a three-judge panel of this Court. On this state of the record, this Court should order a remand to allow discovery and a hearing limited to the question of whether Breuer *actually* participated in some aspect of the Bayly-Brown case after he assumed his duties at the Department of Justice in 2009. Such a limited remand would protect Brown's interest in a fair proceeding and serve this Court's interest in actively policing unethical conduct. *See In re American Airlines*, 972 F.2d 605, 611 (5th Cir. 1992).

A remand for discovery would also serve the interests of the Government itself in meeting its obligation to "turn square corners" in its dealings with the people. *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 387-88 (1947) (Jackson, J., dissenting). The Department would also thereby "satisfy the appearance of justice," *Offutt v. United States*, 348 U.S. 11, 14 (1954), and its obligation as the representative of the sovereign to make sure that it governs fairly. *Berger v. United States*, 295 U.S. 78, 88 (1935). Here, as in *Goot*, "[t]he question whether [a defendant's] rights were violated is not left for his adversary, but is for a court of law." *United States v. Goot*, 894 F.2d 231, 234 (7th Cir. 1990).

Although no doubt ironic coincidence, while the Department of Justice continued its resistance to open discussion of Breuer's supposed non-participation in the Brown case, it simultaneously touted its commitment to an increased level of transparency in other areas. In remarks delivered in a "Sunshine Week" celebration at the Department, Associate Attorney General Tom Perrelli proclaimed:

> The value of transparency comes from the belief that sunlight is the best disinfectant, and the recognition that we had better do our best, and act in a way that would make the public proud if they saw everything we did. . . . .Where there has been a culture of "protecting" information that one could credibly withhold, we want to replace it with a culture of pushing out – and affirmatively pushing out – the information that will empower us to a better, more informed relationship with our government.[3]

The same reasoning should apply here, and sunlight is necessary to dispel the blatant appearance of impropriety.

II. PRUDENTIAL SCREENING IS THE ONLY PRACTICAL WAY TO ENSURE THE NON-PARTICIPATION OF CURRENTLY SERVING BUT RECUSED GOVERNMENT LAWYERS.

Although a personally disqualified lawyer who enters government service (such as Lanny Breuer in this case) does not automatically pass his disqualification on to

[3] Tom Perrelli, Remarks at the Department of Justice Celebration of Sunshine Week, (Mar. 14, 2011), available at http://www.justice.gov/iso/opa/asg/speeches/2011/asg-speech-110314.html (last visited, March 22, 2011).

other lawyers in the same governmental unit through imputation, best practices and avoiding the appearance of impropriety dictate "prudential" screening.[4]

In the private sector, where imputed disqualification is automatic, the imputation to other associated lawyers can sometimes be removed, if (among other things) the affected lawyer is timely "screened" from participation in the former client's matter. "Obligatory" screening of this kind—in the jurisdictions where its use is effective to remove imputation—provides some assurance to the former client that his confidences are not being leaked, even inadvertently, to lawyers representing his new adversary in a substantially related matter. Screening mechanisms that stand up to court's scrutiny are both transparent and well publicized; they usually involve physical separation (such as separately keyed document rooms or denial of access to electronically stored information through password control). As in *United States v. Goot*, 894 F.2d 231, 235 (7th Cir. 1990), everyone in the office should be notified of the recusal.

Because he works for the government, Breuer's personal conflict of interest is not automatically imputed to other lawyers in the Department of Justice.

[4] According to "the ethical rules announced by the national profession in the light of the public interest and the litigants' rights," which this Court treats as important guidelines in developing the federal common law of lawyer disqualification, *In re Dresser Industries, Inc.*, 972 F.2d 540, 543 (5th Cir. 1992), such automatic imputation applies only when lawyers are moving from one practice setting to another in the private sector, or leaving government service. *See* MODEL RULES OF PROF'L CONDUCT R. 1.10(a) and 1.11(b).

Nevertheless, screening has an essential role to play, and the Government repeatedly represented it had been done here.[5] The same "ethical rules of the national profession" that require Breuer's personal disqualification or recusal, *see supra* note 4 and accompanying text, suggest that "ordinarily it will be prudent to screen such lawyers." *See* MODEL RULES OF PROF'L CONDUCT R. 1.11 cmt [2] (2002). In other words, in the public sector, screening is recommended, and it is the only way to avoid lingering questions and the appearance of impropriety.[6]

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[5] *See* Dkt.1187, at p. 5 ("As counsel for Brown is well aware, the government informed her that Assistant Attorney General Breuer had recused himself from any involvement in this case due to his prior representation of Bayly."); *id*. at p. 6 n.1 ("The government states unequivocally that Assistant Attorney General Breuer has recused himself from this case in its entirety because of his former representation of Bayly."); Transcript of Hearing, June 24, 2010, Dkt.1212, at pp. 56-58 (Patrick Stokes: "Lanny Breuer, . . . has been recused from the case"); *see also* Letter from Gary Grindler to Sidney Powell, July 13, 2009 ("AAG Breuer is recused from this matter.").

[6] Screening mechanisms that have been found to successfully protect confidentiality include (1) publicly disseminated instructions to all member of the law firm or organization, (2) prohibited access to case files or information, (3) locked case files with keys distributed to a select few, and (4) secret codes necessary to access pertinent information on electronic hardware. *Cromley v. Board of Education*, 17 F.3d 1059, 1065 (7th Cir. 1994). *See id*. (attorneys in question must have affirmed these screening devices under oath). Moreover, screening mechanisms must be both immediate and effective. *Id*. *See also Cobb Publishing Inc. v. Hearst Corp.*, 891 F. Supp. 388, 389-91 (E.D. Mich. 1995) (disqualification required where new firm waited two weeks before screening lateral lawyer who had worked on opposite side of matter notwithstanding absence of any evidence that lawyer had disclosed confidences to a new firm); *cf. National Union Fire Ins. Co. of Pittsburgh, Pa. v. Alticor, Inc.*, 472 F.3d 436 (6th Cir. 2007). If any cognizable screening mechanisms were ever employed here, they were neither timely nor effective or have been wrongly ignored or discarded.

Therefore, a government lawyer should publicly announce to everyone in his new office that he is not to be approached on any matter involving a former client, and that even off-hand remarks about such a case are forbidden in his presence. Prophylaxis, efficiency and fairness dictate this kind of prudential screening so that the parties and the courts can avoid exactly the kind of disqualification issue and concerns that have arisen in this case.

As explained in GEOFFREY HAZARD, WILLIAM HODES & PETER JARVIS, THE LAW OF LAWYERING (3d ed. 2000, with supplements), §15.9, "[o]ne important reason to screen government lawyers—especially where the disqualification arises under Rule 1.9—is to avoid a motion to disqualify the entire government office or 'firm.'" The benefit of prudential screening is not limited to avoiding disqualification motions; it also reassures the defendant and the public. "[E]ven where disqualification is not ordered, the government may lose some credibility in terms of public opinion, especially in a high-profile case where a current government lawyer had some connection to the government's current opponent." *Id.* Finally, in criminal cases "a former client might have a legal basis of complaint under the Due Process clauses of the Fifth and Fourteenth Amendments, if that client's former lawyer divulged confidential information that was used in a government investigation or prosecution of the client." *Id.* at 15-33 (2005-1 Supplement) (endnotes omitted).

The Government's behavior in this case presents an unfortunate cautionary tale of why prudential screening is important and the regrettable results that ensue when no concrete screening measures are taken or publicized. The rights at stake include Brown's rights as a former client to have his confidences protected, and his constitutional right to a fair trial that comports with Due Process. Furthermore, the Government's non-communication, rebuffing of legitimate inquiry about conflicts, and admitted failures to notify all attorneys of Breuer's conflict, have left Brown and the public legitimately disturbed about Justice Department practices and Breuer's possible participation in this case. In light of its newly declared "sunshine" policy, the aims of the Department of Justice itself are contradicted by its stonewalling here.

III. TO PROTECT THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR PROCEEDING, AND TO MAINTAIN PUBLIC CONFIDENCE IN THE JUSTICE SYSTEM, THIS COURT SHOULD REMAND FOR A LIMITED EVIDENTIARY HEARING ON THE QUESTION OF ASSISTANT ATTORNEY GENERAL LANNY BREUER'S POSSIBLE PARTICIPATION IN THIS CASE.

The Government relies heavily on *United States v. Goot*, 894 F.2d 231 (7th Cir. 1990), which, ironically, depended on exactly the type of prudential screening that should have but did *not* occur in Brown's case. In *Goot*, James Richmond, a newly appointed U.S. Attorney, had represented the defendant in the same case and was conflicted out. Nevertheless, his name appeared on a Government brief against Goot.

The Seventh Circuit considered the issue carefully and, while noting that "more could have been done," *Goot*, 894 F.2d at 235, emphasized the importance of the affirmative and openly declared steps Richmond had taken to screen himself from participation. These measures included the fact that a week before he took office, Richmond wrote to his subordinates stating that he would be recused from all cases in which he had participated while in private practice, specifically referring to *Goot*. The next day, the AUSA informed the Department of Justice about his new boss's communication, and all other attorneys in the office received notice of Richmond's recusal as well. In addition, Richmond's office provided all of this information to Goot and to the Court. *Id*. at 233. Upon taking office, Richmond immediately appointed another attorney in the office as Acting United States Attorney for *Goot*, and the Government *sua sponte* filed affidavits in the district court, from Richmond himself and from *all* of the attorneys who had or would work on the case, specifically stating that no communication transpired between them respecting Goot's prosecution. *Id.*

The district court denied Goot's motion to disqualify all of Richmond's new subordinates, recognizing that the other AUSAs were not automatically disqualified. A key factor in the Court's analysis, however, derived from Richmond's immediate

and impressive screens erected to safeguard against any disloyalty to his former client, breach of confidentiality, or appearance thereof. *Id*.

The Seventh Circuit affirmed, but only after conducting an independent review of each aspect of the screening mechanisms that had been implemented, applying essentially the same standard that would have applied had Richmond moved from one private practice setting to another. Moreover, only after undertaking such a review, and after finding the screening adequate, did the Court accept the argument that Richmond's appearance on the brief was a clerical error arising from the use of a preprinted form, rather than an indication of impermissible participation by a recused lawyer. *Id.* at 234-36.

Indeed, in *Goot*, even with evidence of a fairly robust screening mechanism put in place in advance of and immediately upon the side-switching lawyer taking office, a full panel of the Seventh Circuit still carefully examined whether the prudential screening was adequate. As the Court in *Goot* explained:

> The government's adherence to its standardized procedure and its conductance of an internal review on this issue is commendable and helpful, but it, of course, is not dispositive. The question whether Goot's rights were violated is not left for his adversary to determine, but is for a court of law.

894 F.2d at 234.

The essential differences between *Goot* and this case highlight why Brown's motion should be granted. In *Goot*, the clerical error was the *only* indication that something might be amiss, and the Government had prudently and openly taken numerous steps, to assure that the recused U.S. Attorney was screened from participation and had not, in fact, participated in the case.

Lanny Breuer's appearance on Government briefs in *Brown* (even if from Oestreicher's perspective it represents a different kind of clerical error),[7] is part of a pattern of troubling government behavior about which Oestreicher admittedly was unaware, indicating the increased possibility of Breuer's actual participation and impropriety. Moreover, Breuer has never forthrightly explained what *actual* steps he took to avoid participating in this case in which he was concededly recused, nor has he affirmed that he *did* avoid such participation. Instead, Breuer has steadfastly

[7] In *Goot*, the lawyers filing the papers knew that their boss was recused, but used preprinted templates or forms with his name on them without modifying them. *Id*. at 236. In Brown, the primary author of the briefs in question, Stephan Oestreicher, admitted that he put Breuer's name on this brief, but he did not know that Breuer had ever represented Bayly in this case or was recused. He could only say that he personally never consulted or communicated with Breuer about the case. As Brown's opening Motion established, Breuer does not appear on any briefs in this Court, or the Supreme Court, in the *Skilling* case. In fact, it is rare for Breuer to appear on a brief, and research reveals this is the only brief that has ever been filed by Stokes *and* Oestreicher together.

refused to give either the defendant or the courts or the public the assurances that they deserve. *Contra Goot*, 894 F.2d at 237 (all attorneys provided affidavits).[8]

Significant indicia of Breuer's possible participation include at least four points of concern. First, Breuer's name appears on the briefs' covers and in the signature blocks. Second, no notice of Breuer's recusal was immediately publicized throughout the Criminal Division. Indeed, many individuals, including Breuer himself, either did not acknowledge, recognize or know of the conflict and Breuer's recusal. Breuer did not even inform defense counsel of his recusal in *Brown*. When Brown's counsel wrote to Breuer, then the new Assistant Attorney General, on May 12, 2009, more than a month after he took office, to inquire about the status of the case, Breuer replied: "Thank you, Mr. [sic] Powell. Let me get back to you." Exhibit A, attached. Inexplicably, Breuer did not reply with what anyone would expect a careful lawyer with a disqualifying conflict would say: "I am recused from this case because of my

[8] In addition to the myriad other ways *Goot* illustrates the Government's failures here, the policy considerations that favored against disqualification and in the interest of the Government in that case simply do not exist here. For example, the Government's interest in "utilizing the office situated in the *locus criminis*," *Goot*, 894 F.2d at 236, is not relevant in a prosecution that has been handled out of "Main Justice" and the Enron Task Force since its inception. Furthermore, the Government's "legitimate interest in attracting qualified lawyers to its service," *Id*., can hardly matter here, in the case of career prosecutors and senior officers who have already moved fluidly in and out of the Department for decades based on political winds of fortune. In sum, the Government's "interest" here, and as considered in a reviewing court's calculus of the "respective interests of the defendant, government, and the public" is significantly weaker than in *Goot*. Indeed, the Government's primary interest here should be "in sustaining public confidence in its high level of integrity by dealing fairly, both in fact and appearance, with criminal defendants." *Id*.

past participation on the defense team. All of your inquiries should be directed to ___." Breuer did not identify an Acting Assistant Attorney General for the case.

Even worse, more than two months into Breuer's tenure at the Department, Deputy Fraud Chief Stokes did not know that Breuer was recused. As late as June 2, 2009, in an email arranging a special meeting with Brown's counsel in Washington, Mr. Stokes wrote: "I don't know who, at this point, will be at the meeting or the decision maker. Rita Glavin is the Acting Principal DAAG. Lanny Breuer is the AAG, but he *may* be recused. *If* Lanny is recused, then I believe that Rita will be the decision maker for the Criminal Division." (emphasis added). Exhibit B, attached.

These exchanges alone prove that Breuer took none of the steps taken in *Goot* to notify his subordinates of his conflict–either before or after he arrived at the Department. Consequently, Brown has reason for concern that Stokes, Glavin, Grindler and Terrell who attended the June meeting (or others to this day unknown), may have discussed the Brown case with Breuer early in the latter's current tenure at the Department. Any of those exchanges could have tainted the Government's positions against Brown, including its brief.

Oestreicher's recent admission to this Court that he did not know Breuer was conflicted out and his statement that others in the Appellate Section of the Criminal Division reviewed the Government's briefs bearing Breuer's name reveal that no

attorney in the Appellate Section knew that Breuer possessed this conflict. *But see United States v. Radley*, No. 09-20699 (5th Cir.). And, Deputy Fraud Chief Patrick Stokes, who expressed righteous indignation in the district court at any inquiry regarding Breuer's participation and reviewed the brief, obviously did not tell them either. *See*, *e.g.*, Transcript of Hearing, June 24, 2010, Dkt.1212, at pp. 56-58.

Third, given the absence of clear recusal notices to his subordinates and the uncertainty surrounding Breuer's recusal, Breuer may have had inappropriate (even unintentional) contact regarding this case with others who have not submitted affidavits. Although Oestreicher has represented that he personally had no contact with Breuer regarding this case, he noted that the briefs were reviewed by Patrick Stokes, the Deputy Chief of the Criminal Division's Fraud Section. The Government has not even addressed the possibility that Stokes (or other June 8, 2009, meeting participants such as Glavin, Terrell, or Grindler) discussed the case with Breuer and perhaps passed along insights or confidences without identifying their source. Unlike *Goot*, where all the attorneys submitted affidavits, the many lawyers involved here have remained disquietingly silent.

Fourth, Brown is justifiably troubled by the suspicious and unexplained decision, made within eight months after Breuer became head of the Criminal Division, to quietly drop charges against Bayly (Breuer's personal client) and then,

after a 200-day Speedy Trial lapse, reinvigorate the prosecution of the admittedly less culpable Brown (Bayly's co-defendant) on the identical charges.[9] The charges against Brown were ultimately dismissed on the eve of a trial for which the Government had never prepared, but only after inflicting considerable expense, stress and anxiety on Brown (and his family).

These four factors demonstrate why the Government's Opposition and Ms. Raman's lone affidavit are both inadequate and problematic. Breuer's failure to

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[9] The contrast between the treatment of Brown and his superior Bayly has continued to raise unresolved concerns. According to the Government, Bayly was more involved in the barge transaction. Tr. 6506-7 ("Mr. Bayly's role was to–you know, he's the big fish. He gets the ball rolling on the Merrill side of the fence. He gets the deal through. He's the pressure; he's the support."); Tr. 6948 ("Mr. Bayly ran the meeting, Mr. Bayly was the boss. Mr. Bayly made the decision to go ahead with the deal.").

In contrast, Brown did not participate in the crucial phone call with Fastow, and he opposed Merrill's participation in this deal. It is undisputed that Brown counseled Bayly and everyone against engaging in this transaction, and Brown handed it off to the lawyers upon instructions from Bayly and Merrill Counsel Kathy Zrike on December 23, 1999, and left the state on vacation. Brown did not sign the engagement letter, which we now know was edited by Merrill counsel to comply with the law. As to Brown, even the Task Force conceded: "Actually, Mr. Zweifach [Brown's trial counsel] might have a point with Mr. Brown. It's a little bit hard to put Mr. Brown in the same strata as Mr. Bayly and Mr. Furst here as the organizer/leader. . . . And when you look at the verdict form, and when you look at the instructions, there's organizer/leader. They [Bayly and Furst] have the top role because they're the most criminally culpable in terms of the role in the offense." Tr. 6949.

All of Brown's attempts to discover who made the decision to drop all charges against Bayly and why have been rebuffed by the Department. *See* Brown's Motion to Dismiss for Selective Prosecution, Dkts.1136, 1202. *See also* Transcript of Hearing, April 16, 2010, Dkt.1151, at pp.14, 56.

engage in any prudential screening, or to openly address the issues surrounding his supposed non-participation, make this case significantly more troubling than *Goot*. In this case the Government has presented *no* evidence of institutional procedures–much less identified any standard ones–to prevent leakage of Mr. Brown's confidences or Mr. Breuer's views on the case to others in the Department, whether deliberate or inadvertent. Likewise, despite Brown's repeated requests, no one in the Department has conducted a "helpful" "but ... not dispositive" internal review as was done by the Department in *Goot*. *Id*. at 234.

Accordingly, this Court's inquiry should, of necessity, be more searching. Precisely because Breuer gave no notice of his conflict to his subordinates and was not screened from all participation in advance of his taking office (as was done in *Goot*), or even within two months of his arrival, his subordinates could not know which cases or subjects were off-limits or how to interpret general comments he made about pending cases. Therefore, Brown, this Court, and the public generally have no basis on which to believe–much less be confident–that no impropriety occurred.

The essential differences between the Government's handling of side-switching lawyers in *Goot* and in Brown's case only amplify Brown's concerns and the appearance of impropriety. Instead of actively seeking to allay suspicions and to demonstrate its *bona fides* to Brown, the courts, and the public, the Department has

resisted reasonable inquiry at every turn. Unlike Richmond, who took affirmative steps to avoid the appearance of impropriety and who provided a personal affidavit in *Goot*, Breuer has not provided any accounting of his connection to *Brown*, let alone provide a statement under oath. The considered and elaborate methods of assuring the conflicted lawyer's non-participation in *Goot* are entirely absent in this case. In fact, neither Breuer, Raman, Stokes or anyone who eventually knew of the conflict took any steps to notify any attorney in the entire Appellate Section of the Criminal Division that Breuer had represented Bayly and had an admitted conflict. *But see United States v. Radley*, No. 09-20699 (5th Cir.).

Brown's Motions raise serious and legitimate questions that the Government has not answered and which only further discovery can resolve. In *Goot*, there was one clerical error in the use of a *pre-printed* form–which the Seventh Circuit took extraordinarily seriously. Here, there are multiple triggers for Brown's concern that Breuer may have been participating. These concerns about disclosure of confidences and disloyalty are exactly what the ethical rules are designed to prevent. In addition, the disparate treatment of Breuer's former client, Bayly, versus Brown and the multiple missteps by the prosecution throughout this case raise grave questions and create an appearance of impropriety. Although it is not always true that "where there is smoke, there is fire," so much smoke requires investigation. Given all the

legitimate concerns that Brown raises regarding Breuer's participation in the case after he assumed office in the Department of Justice, this Court should at least allow a meaningful inquiry, through discovery and remand for a hearing limited to that subject.

CONCLUSION

For these reasons and those in Brown's Motion To Strike, Brown requests rehearing of these issues by a three-judge panel of this Court. If Brown's Motion To Strike is not immediately granted in full, Brown requests that the appeal be abated, and the case be remanded to the district court for discovery and a full evidentiary hearing on these issues before this appeal proceeds further. Brown should not be required to file a reply to a brief[10] written in the shadow of Breuer's conflict of interest in a case in which an independent counsel should or would confess error entirely.

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[10] On the current schedule, Brown's reply brief is due April 4, 2011.

Dated: March 24, 2011

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Counsel for Brown conferred with Mr. Oestreicher for purposes of this Certificate of Conference and the Government opposes this motion for the reasons stated in its opposition to Brown's Motion to Strike.

/s/ Sidney Powell
Sidney Powell

CERTIFICATE OF SERVICE

I hereby certify that true and complete copies of Brown's Motion For Reconsideration and Review By a Three Judge Panel of Brown's Motion To Strike the Government's Brief, Disqualify all Justice Department Attorneys, and Abate the Appeal was this day delivered by electronic case filing to the Clerk of the Court and to counsel for United States at the following addresses:

Stephan E. Oestreicher, Jr.
Attorney, Appellate Section
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Dated: March 24, 2011

/s/ Sidney Powell
Sidney Powell

EXHIBIT A

[redacted]

From: Breuer, Lanny A. [Lanny.Breuer@usdoj.gov]
Sent: Wednesday, May 13, 2009 9:19 PM
To: fedapps@bellsouth.net
Cc: torrencelewis@federalappeals.com; hellengoldfarb@federalappeals.com
Subject: Re: US v. Bayly, Brown and Furst--Fifth Circuit appeal and US Dist. Court Houston

Categories: Red Category

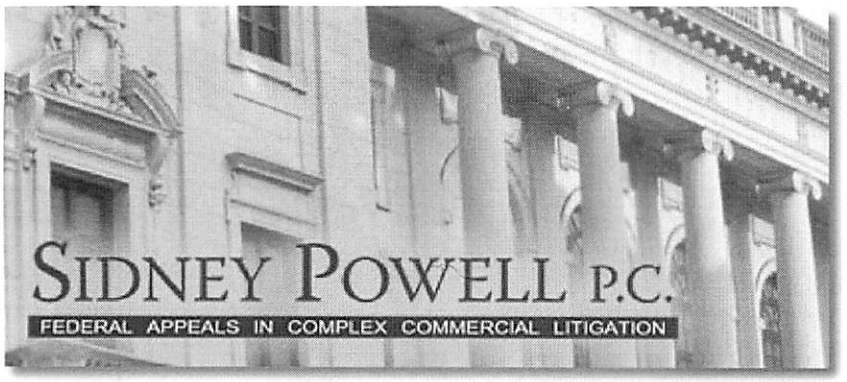
Thank you, Mr. Powell.

Let me get back to you. Lanny Breuer

From: Sidney Powell <fedapps@bellsouth.net>
To: Breuer, Lanny A.
Cc: 'Torrence Evans Lewis' <torrencelewis@federalappeals.com>; hellengoldfarb@federalappeals.com <hellengoldfarb@federalappeals.com>
Sent: Tue May 12 15:06:53 2009
Subject: US v. Bayly, Brown and Furst--Fifth Circuit appeal and US Dist. Court Houston

Dear Mr. Breuer, I spoke with my friend, Frank Hunger, at the recent Fifth Circuit Judicial Conference and he recommended that I contact you directly, especially in view of the fact that I have not received a response from my prior correspondence with Rita Glavin, and this case may not be on your desk yet. I represent James A. Brown, a former managing director of Merrill Lynch, in the Enron Barge case. We have been scheduled for oral argument in the Fifth Circuit on **June 1** on our interlocutory appeal, challenging the Enron Task Force's second prosecution on the same defective indictment—this time on Double Jeopardy grounds (brief attached). I have attached the brief for your convenience. We also have a significant Motion to Dismiss Indictment For Egregious Prosecutorial Misconduct pending in the United States District Court that will be litigated if this case is not otherwise resolved very soon. A copy is also attached. We are currently preparing a supplemental motion to dismiss the indictment, and will renew our motions to obtain *Brady* material that is **still** being withheld.

The Enron Task Force, especially Matthew Friedrich, appointed by the prior administration, engaged in significant *Brady* violations, and we continue to find exculpatory evidence that the prosecution deliberately withheld in the first trial. All of the Merrill Lynch Defendants wrongly served up to a year in prison before the Fifth Circuit found that the conduct charged in the Indictment was not criminal. I request a meeting with you personally to discuss this case at your earliest convenience. There have been many changes in prosecutors since the Defendants prevailed in our first appeal, and I believe it would be in the Department's best interest for us to meet soon—before the Department expends any additional resources in pursuit of a case in which there was no crime and risks further public embarrassment for its prior prosecutors' failures to follow the law. This is another opportunity for this administration to set new, lawful and ethical expectations for the conduct of its prosecutors. I look forward to hearing from you soon. Sincerely, Sidney Powell



Dallas
Phone: 214-653-3933
Mobile: 214-707-1775

Asheville
Phone: 828-274-4063
FederalAppeals.com

EXHIBIT B

From: Stokes, Patrick [mailto:Patrick.Stokes2@usdoj.gov]
Sent: Tuesday, June 02, 2009 5:55 PM
To: Sidney Powell
Subject: RE: meeting?

I don't know who, at this point, will be at the meeting or the decision maker. Rita Glavin is the Acting Principal DAAG. Lanny Breuer is the AAG, but he may be recused. If Lanny is recused, then I believe that Rita will be the decision maker for the Criminal Division.

From: Sidney Powell [mailto:sidneypowell@federalappeals.com]
Sent: Tuesday, June 02, 2009 5:53 PM
To: Stokes, Patrick
Subject: RE: meeting?

Rita Glavin?

From: Stokes, Patrick [mailto:Patrick.Stokes2@usdoj.gov]
Sent: Tuesday, June 02, 2009 5:52 PM
To: sidneypowell@federalappeals.com
Subject: RE: meeting?

Criminal Division Front Office

From: sidneypowell@federalappeals.com [mailto:sidneypowell@federalappeals.com]
Sent: Tuesday, June 02, 2009 5:48 PM
To: Stokes, Patrick
Subject: Re: meeting?

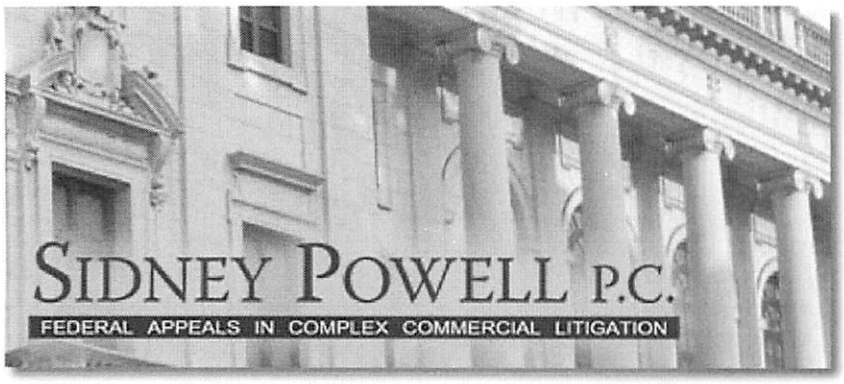
Ok thanks. Have tickets on hold that expire at midnight. Who is Front Office?

Sent via BlackBerry by AT&T

From: "Stokes, Patrick"
Date: Tue, 2 Jun 2009 17:48:21 -0400
To: Sidney Powell<sidneypowell@federalappeals.com>
Subject: RE: meeting?
I still have not heard back from the front office. I'll try again.

From: Sidney Powell [mailto:sidneypowell@federalappeals.com]
Sent: Tuesday, June 02, 2009 4:44 PM
To: Stokes, Patrick
Subject: meeting?
Importance: High

Patrick, Do you have meeting details and confirmation for me? Thanks. Sidney Powell



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