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## **Martha Stewart Case: Where's the Victim?**

**by Sheldon Richman**

We live in a topsy-turvy world. People may ask politicians to give them some of the loot taken from the taxpayers — and no one is even suspected of wrongdoing. Yet if someone's stock sale piques the curiosity of government investigators armed with vague legal concepts such as insider trading and obstruction of justice — watch out.

As the whole world knows by now, Martha Stewart was found guilty of conspiracy, obstruction of justice, and making false statements to the government in connection with the sale of her ImClone Systems stock. She says she sold the stock because the price went below \$60, as previously arranged with her then-Merrill Lynch stockbroker and co-defendant Peter Bacanovic. The government says she sold it because she was illegitimately tipped off that ImClone CEO and friend Samuel Waksal was unloading his stock. (He was selling because he had learned before the public did that the Food and Drug Administration would reject his application for the cancer drug Erbitux. The government never alleged that Stewart knew about the FDA decision. Most ironically, the FDA has now approved Erbitux.)

Two points, woefully overlooked in the hours of cable-television commentary, need to be made. First, there are absolutely no grounds for putting the Stewart case in the category of "corporate crime," as epitomized by Enron, WorldCom, and Tyco. The allegations in those cases relate to corporate officers' stealing and hiding material facts from shareholders. Martha Stewart's actions, even examined in the worst light, are nothing like the actions in those cases. The worst that can be said of Stewart is that she lied, while *not* under oath, to investigators about her reasons for selling the shares from her personal portfolio. But this has to be kept in its larger context. Why was the government asking? Because they were looking for a case of insider trading. The rules are purposely vague in this area because enforcers like the flexibility of nonobjective law. This is improper in a society that prides itself on the rule of law, because nonobjective law makes it impossible for anyone to know in advance whether his actions are illegal.

Given this vagueness, one can understand why Stewart would be reluctant to admit (if indeed she lied) that she sold after learning that Waksal was selling. But even if it was her reason,

that should not be a crime or an object of government interest. Martha Stewart was not an ImClone insider; she owed no contractual duty to the company or its shareholders. That she came into possession of information that other shareholders and potential shareholders did not have cannot change that fact. Under rational securities law, Stewart would not have had to fear that the government suspected her of trading on nonpublic information. This doesn't mean that Waksal and Bacanovic did no wrong. Both may have committed civil offenses against ImClone shareholders and Merrill Lynch clients, respectively. The civil courts are the place to redress such grievances. But Stewart wronged no one — there were no victims.

This brings up the second point that nearly everyone has missed. As Kelly G. Black, a lawyer from Mesa, Arizona, noticed, the jury apparently did not believe the government's charge that Stewart's "sell at \$60" agreement was concocted as a cover-up. In the bill of indictment, each of the two counts of making false statements listed several alleged lies. The jury was instructed to check off which statements it found false. What has gone unreported is that the jury left unchecked the statements relating to the agreement to sell at \$60. In other words, the jury did not believe the government on this matter. To drive home this point, the jury acquitted Bacanovic of making false documents by altering a worksheet after the fact to indicate an order to sell at \$60.

The upshot is the government did not prove beyond a reasonable doubt that Stewart lied when she said she had decided weeks before the sale that she wanted the shares sold when the price fell to \$60.

It may well be that Stewart learned that Waksal was selling and that this reinforced her plan to sell. But it also seems to be the case that she would have sold the shares anyway.

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