



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

fff@fff.org www.fff.org

Martha Down Under: Kangaroos in the Courtroom **by William L. Anderson & Candice E. Jackson**

For all of the supposed high drama the Martha Stewart case produced, in the end, it was all quite anticlimactic. According to [*Time Magazine's* version of the trial and verdict](#) :

Stewart was caught in a simple lie, the evidence so compelling and her attorney's 20-minute defense testimony so curt — Martha's too smart to do this — that after five weeks of testimony, a jury of eight women and four men needed less than three days to deliberate. And much of that time was spent weighing the case against her co-defendant and former Merrill Lynch stockbroker, Peter Bacanovic. He was found guilty as well on four of five counts and almost certainly will see prison time too.

Of course, the writers at *Time* could not resist the cutesy Martha jokes, such as how “black- and-white stripes are in this year” and how “a little lemon and seltzer can remove those pesky ink stains after you've been fingerprinted.” Then, again, given the cozy relationship between the mainstream news media and federal government officials, it is hardly surprising that *Time's* account would be limited to praising the government and joking about a person going to prison, as though that were funny.

But for all of the massive media coverage that this trial produced, it seems that while the mainstream reporters have dutifully stuck to the government's party line and tossed in a few Martha jokes on the side, they missed the real story. Martha Stewart and Peter Bacanovic had no more chance of acquittal than did Tom Robinson, the black man accused of rape in Harper Lee's *To Kill a Mockingbird*. This was *not* because of the evidence, as the government sycophants from *Time* and the *New York Times* have told their readers.

No, Stewart and Bacanovic are going to prison because they fell victim to a system that is rigged to gain convictions, rather than protect people. The quote from Juror Number Eight that has been exponentially repeated — “Maybe this is a victory for the little guys who lose money thanks to these kinds of transactions. Maybe it's a message to the bigwigs.” — stands as a small

window into just how the apparatus of federal “justice” worked in a way that gave the defendants absolutely no chance of demonstrating their innocence.

As we have noted in another [article](#) we wrote postconviction, this was a trial about insider trading, pure and simple. Forget that the government did not secure a criminal indictment of insider trading against Stewart (it elected to pursue a Securities and Exchange Commission civil suit of the same charge); and forget that the judge instructed the jury that the case revolved around an alleged “cover up,” not insider trading. It was insider trading, and the way that the government presented its case — and the jurors’ admission of how they proceeded with their deliberations — demonstrates that Stewart and Bacanovic will go to prison for a crime the government chose not to pursue against them. Furthermore, Judge Miriam Cedarbaum, who presided over the trial, made sure that while the prosecution was able to get in its “insider trading” licks, the defense was not permitted to respond.

The government moved before trial to preclude the defense from arguing or presenting evidence to show that, because the indictment did not charge insider trading, the government itself was not convinced that either defendant had committed insider trading. Judge Cedarbaum granted the government’s motion, ruling that the “defendants may not invite the jury to speculate as to why that charge was not included in the indictment” and defendants could not “argue that the absence of an insider trader charge proves their innocence of such activity.” The judge also cautioned, “If the Government presents arguments or evidence that tend to show that defendants were motivated not only by the fear that they would be accused of trading illegally, but also that such a fear was justified ... then *it will open the door to defense evidence the conduct was not illegal.*” (Emphasis ours.)

(In the same pre-trial ruling, the judge also granted the government’s motion to preclude the defense from arguing or presenting any evidence: (1) that the prosecution’s motives in charging Martha Stewart were improper; (2) that Stewart was being prosecuted — especially on the ridiculous securities fraud charge that the judge eventually dismissed — for exercising her First Amendment right to free speech in declaring her innocence; or (3) that the securities fraud charge — eventually dismissed before jury deliberations — was a novel application of securities law. The defense was prevented from arguing along any of these lines, severely impeding its ability to provide Stewart and Bacanovic with a robust defense and stacking the deck from the get-go in favor of sending them to prison.)

However, in the opening statements of the trial, one of the prosecutors declared that Stewart acted on information that was not available to others in the market. In other words, while not using the “insider” term, she basically alleged the crime, apparently with the approval of Judge Cedarbaum, who did not stop her, despite the judge’s own pre-trial ruling that if the prosecution insisted that Stewart committed insider trading it would open the door for the defense to rebut that accusation. Indeed, if one doubts that the government was alleging insider

trading, then how did the *New York Times* in its postconviction editorial come up with the following statement: “The trial depicted a cozy world where insiders routinely use their wealth and connections to benefit from insider information” ?

(By the way, the *Times* and other journalistic operations routinely benefit from gaining “insider” information. It's called getting “scoops.”)

On a number of occasions defense attorneys attempted to broach the subject of insider trading in order to demonstrate that Stewart did *not* engage in that illegal practice. Each time lawyers tried to educate the jury, Judge Cedarbaum cut them short, in violation of her own pre-trial ruling. In other words, the government was permitted to allege insider trading, even though it had filed no criminal charges for that alleged violation, yet the defense was not permitted to respond.

To see how this might work elsewhere, let us consider an example: A man is on trial for burglarizing Mrs. Jones's house. During the trial, the prosecution alleges that after the defendant “assaulted” Mrs. Jones he robbed her house. However, the prosecution presents no evidence that Mrs. Jones was assaulted and has not charged the defendant with assault. Furthermore, the defense has proof that Mrs. Jones was *not* assaulted. However, the judge permits the prosecution to continue its accusations while not permitting the defense to introduce its exculpatory evidence.

There is no doubt, judging from posttrial comments, that the jury believed Stewart had engaged in insider trading. The “little guys” quote from Juror Number Eight could refer only to what goes on in the securities markets, and the *New York Times* followed suit. In other words, the jurors ignored the judge's directions that they not consider insider trading, which means that the jury acted against the law. (Somehow, we doubt that the prosecutors — one who literally cried tears of joy at the verdict — will be filing juror misconduct against Number Eight and his partners in crime any time soon.)

Not only did Judge Cedarbaum make sure that Stewart and Bacanovic could not defend themselves against charges that they engaged in insider trading, she also did not act to keep the jury from hearing personally unflattering information about Stewart that was not germane to the case. (During the famous Rudy Giuliani show trials of the 1980s, perhaps it would have been nice for the jurors to have heard stories about his personal habits and behaviors, but, alas, federal prosecutors are immune to such assaults upon their character, a privilege not extended to the rest of us.)

The upshot of Judge Cedarbaum's kangaroo court was that Stewart and Bacanovic did not have a chance of acquittal. Making it even more surreal was the fact that the law under which they were charged, the infamous [U.S. Code, Title 18, Part 1, Chapter 47, Section 1001](#), runs only one way, as the noted defense attorney Harvey Silverglate told the *New York Times*. The law applies *only* to persons being “investigated” (although the law itself does not specifically

mention investigations). Officers of the court and federal investigators, however, are *exempted* from this law, which conveniently means that while Stewart was mandated to give an explanation of events that fit what the government wanted her to say, the people on the other side of the table were permitted to lie — and almost surely did just that, if the federal government’s track record in judicial proceedings means anything. (For more on Section 1001, read “[The Wrongful Conviction of Martha Stewart](#),” by Jacob G. Hornberger.)

In its explanation of Section 1001, the *New York Times* pointed out that federal investigators and prosecutors do not record their meetings with people under investigation. Thus, in a criminal proceeding, it is simply the investigator’s word against that of the defendant, with juries almost always siding with the investigators. In retrospect, that seems to be an odd set of circumstances. Common sense and human nature show that persons who do not face even the prospect for sanctions if they lie are going to be *much more likely* to state falsehoods than those who are facing prison sentences if they stray from the truth. After our other articles condemning the Stewart verdicts we have received messages from readers who conclude that her conviction is Stewart’s own fault for being “so stupid” as to actually talk to federal investigators instead of shutting up and remaining silent. That tactic might technically work to avoid a Section 1001 indictment, but pragmatically, we all have an uneasy gut feeling that remaining silent in the face of accusations — especially by government officials — will never be the end of the story; they have enough power to continue harassing us, digging until they find *something* to pin on us, *and that silence is naturally taken as a tacit admission of guilt*. Appallingly, this natural human perception of things is precisely what government investigators *count on* to help them gain convictions.

Section 1001 was first enacted in 1863 and was limited to punishment for false statements in connection with filing false claims with the government (a widespread practice of companies that did business with the U.S. War Department during the Civil War). In 1918 Congress broadened the scope of the law to cover false statements made with intent to cheat, swindle, or defraud the government out of money or property. In 1934 the secretary of the Interior complained to Congress that people were not being punished severely enough for making false statements to the Public Works Administration and numerous other New Deal agencies and programs. Congress responded by amending Section 1001 to cover false statements made in any matter within the jurisdiction of any federal agency or department. That basic formulation has remained unchanged to the current day.

The new formulation of the law was so broad that federal courts across the country created a defense to Section 1001 known as the “exculpatory no” doctrine. It meant that a person could not be convicted under Section 1001 for simply denying wrongdoing during a federal criminal investigation. (Bear in mind that state and local government courts have never historically been given the power to convict suspects solely for lying during criminal investigations. Most people

simply do not innately realize that lying to a federal government official without being under oath is a felony.) Numerous federal courts applied this exception for years, reasoning that Congress could not have intended to criminalize conduct that most people would not realize is criminal. These courts also recognized that the statute came dangerously close to infringing upon a person's Fifth Amendment right to not incriminate himself.

In a 1998 case, [Brogan v. U.S.](#), however, the U.S. Supreme Court put an end to this judicially created exception to Section 1001. Seven justices held that Congress never intended any such exception to exist, and the statute did not violate the Fifth Amendment because people should realize that they have the right to remain silent. Two justices, Souter and Ginsburg, agreed with the majority but wrote separate opinions to emphasize the danger that prosecutors can use Section 1001 to “pile on” offenses and even punish a lie more seriously than the underlying offense being investigated, but insisted that such concerns need to be referred to Congress.

Justices Souter and Ginsburg wrote separately to “call attention to the extraordinary authority Congress, perhaps unwittingly, has conferred on prosecutors *to manufacture crimes.*” (Emphasis ours.) The current version of Section 1001 that got Stewart in such trouble, according to Justices Souter and Ginsburg, “arms Government agents with authority not simply to apprehend lawbreakers, but *to generate felonies, crimes of a kind that only a Government officer could prompt.*” (Emphasis ours.) The justices noted that at oral argument before the Court, the government had admitted that Section 1001 “could even be used to *escalate completely innocent conduct into a felony.*” (Emphasis ours.)

Even more pertinent to Stewart's case, the justices warned back in 1998 that it could become a common practice for an investigator having trouble proving some elements of a crime to ask questions about other elements she knows the answer to, luring the suspect into talking, then seek prosecution for the supposed lies “as a substitute for the crime [she] cannot prove.” Exactly that scenario played out in the Stewart case: despite not being able to prove insider trading, federal prosecutors took advantage of Stewart's willingness to sit down informally and talk with them about their investigation into the ImClone trades. Then the government prosecuted her for violations of Section 1001. (The same acts also formed the basis for the obstruction of justice and conspiracy counts.)

While at least two Supreme Court justices took issue with Section 1001, reminding us that “the function of law enforcement ... does not include the manufacturing of crime,” they insisted that only Congress had the authority to fix the law. They noted that Congress had rejected many proposals over the past 25 years that would have narrowed Section 1001. One proposal would require the government to warn people that lying to a federal investigator was a felony; another proposal endorsed by the 1971 law reform commission would have excluded from Section 1001 any unsworn, oral statements. Congress's refusal to adopt these limitations was further evidence

to the Supreme Court that Congress apparently approved of the statute's "use as a generator of crime."

Given the Supreme Court's passive acceptance of the power Congress has granted federal prosecutors to manufacture criminal charges against people, we are amazed at the "believe the government" religion that seems to be endemic with federal court jurors, particularly in this post-Watergate era when most Americans realize that lies are a daily part of the business of government. Politicians and bureaucrats routinely are at the bottom of polls that rank people by factors of honesty; yet when those same people appear in court, suddenly their word becomes gospel.

In the end, the jurors took a nonexistent crime of insider trading along with anecdotes about Stewart's alleged bad character, and along with her wealth and relationship with her company, and came out with a string of guilty verdicts. (As others have pointed out, the one piece of "evidence" that was the government's basis for the case, the supposedly fabricated "at 60" trading order, seemed to be accepted by the jury as genuine — or at least they were not convinced that it was bogus. Thus, the only other bases upon which the jury logically could have made its decision were the testimonies given by government agents and the nonexistent insider-trading cases.)

Finally, there is the issue of federal criminal law itself. The federal apparatus that exists today decidedly is *not* the system of the "Rights of Englishmen" that this nation inherited from Great Britain (and that Britain also has abandoned). Instead, we have a structure that more closely resembles something that was in place in Stalin's Soviet Union in the 1930s. Where Stalin garnered 100 percent convictions, the modern federal system, according to the U.S. Department of Justice's own document, the 2001 Compendium of Federal Justice Statistics, reports that 95 percent of individuals indicted in this system are convicted, most through guilty pleas.

Keep in mind that indictments are easy in this system. One of Rudy Guiliani's underlings, during the Wall Street prosecutions of the 1980s, bragged that he could "indict a ham sandwich" if he wanted. The very expansiveness of federal law, and its stable of "derivative crimes," makes obtaining indictments from federal grand juries an almost automatic affair, especially since federal prosecutors control the grand jury process itself. Moreover, laws such as those found in Section 1001 enable prosecutors to secure indictments against people even if the underlying act that is being investigated is not criminal in and of itself. A number of journalists remarked posttrial that "once again, we find it was not the crime, but rather the cover up." For those still interested in that hoary notion the ancients once called "justice," not only does the crime of "obstructing justice" run only one way (prosecutors by definition cannot obstruct justice by withholding information), it is also nothing more than a mechanism for the government to do an end run around the Fifth Amendment right protecting persons from self-incrimination.

In the end, Martha Stewart and Peter Bacanovic fell before a law that turns on its head the true purpose of criminal law — protection of innocent people from violations of person and property committed by others — and were convicted de facto of a charge the government never even filed. All of this was sanctified by a court and cheered by a public who wanted to see a rich person go down.

In the meantime, Stewart's company is in shambles and almost certainly will mean huge job losses for the “little people” that government prosecutors swore they were protecting. When she appears before Judge Cedarbaum this summer for sentencing, Stewart will have to bow down to the system and declare that this was all her fault and that she is sorry and contrite for all the harm she has caused. That will be the biggest lie of all.

Before they were executed by a bullet's being fired into the back of their heads, the doomed defendants of Stalin's infamous Show Trials signed confessions that “proved” to the world that they were agents of Leon Trotsky who had conspired to overthrow the USSR and replace it with dreaded capitalism. The confessions were lies, of course, but even Stalin needed to have some sort of show of legitimacy before killing the state's supposed enemies.

Likewise, the U.S. government demands that defendants convicted under its set of vague and expansive criminal laws sign confessions and admit their guilt to the world. Judges lecture the defendants for their transgressions, prosecutors crow to a sycophantic press, the condemned go to prison, and everyone else goes home, waiting for that knock on their door in the middle of the night.

William Anderson is assistant professor of economics at Frostburg State University in Frostburg, Maryland, and Candice Jackson is an attorney with Judicial Watch in San Marino, California.

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