Tom Brady and Theoretical Crime

Exclusive: The NFL meted out a four-game suspension to New England Patriot quarterback Tom Brady while also fining the team $1 million and taking away two draft picks – though the NFL didn't conclusively prove that footballs were deflated, establishing only a theoretical crime, a dangerous precedent, writes Robert Parry.

By Robert Parry

If Tom Brady did order two locker-room assistants to deflate footballs illegally, he should confess and take the harsh punishment meted out by the NFL. But if he's innocent, he and the New England Patriots should fight the ruling because it sets a dangerous precedent for everyone who might fall under this concept of a theoretical crime based on "more probable than not" logic.

In this case of Deflategate, it's not even clear that an offense occurred. NFL outside counsel Ted Wells struggled to get the odds over 50 percent that the footballs were intentionally deflated, even tossing in non-probative "gotcha" moments like the fact that one equipment assistant said he used a "urinal" in a small bathroom when Wells playing a daffy Sherlock Holmes noted that there was only a toilet in the room.

As with much of Wells's report, innocent explanations for common events were rejected in a style that is more common in wild-eyed conspiracy theories than in a serious investigation that affects a person's reputation and the future of a significant business in New England.

That Jim McNally, the assistant, might not have remembered something as mundane as whether he urinated in a urinal or a toilet was apparently not accepted by Wells, nor the logic that whatever McNally was doing in the bathroom urinating or deflating footballs he would have seen the toilet, so his misidentifying it is meaningless.

In my decades as an investigative journalist reading and evaluating many official reports, I have noted that when lawyers start including details like McNally saying "urinal" instead of toilet, they realize how weak their case is and are putting everything they can dig up on their side of the scales.

Similarly, Wells makes a big deal out of Brady signing memorabilia for the other locker room assistant, John Jastremski, though it's a common practice for players to show their appreciation for the often under-paid locker room helpers who take care of the players day to day. But what would normally be regarded as an innocent, appreciative act is transformed into a sinister payoff. Whatever it

takes to get over the “more probable than not” threshold.

As Wells explains, the NFL operates not with a courtroom criminal standard of presumption of innocence requiring proof beyond a reasonable doubt, but rather a much less stringent “more probable than not” standard. However, even by that lax measure, Brady should not have been punished because what Wells actually does is allege a 51 percent chance that footballs were deflated and, if it happened, a 51 percent chance that Brady knew something about it. So, in regards to Brady, that’s not a 51 percent likelihood of guilt but a 26 percent chance.

Wells concludes that in the AFC Championship game on Jan. 18, “it is more probable than not” that McNally and Jastremski “participated in a deliberate effort to release air from Patriots game balls after the balls were examined by the referee.” Wells then adds that “it also is our view that it is more probable than not that Tom Brady was at least generally aware of the inappropriate activities of McNally and Jastremski involving the release of air from Patriots game balls.”

So, there are two calculations here: one is whether anything happened, and two, if something did happen, whether Brady “was at least generally aware” of what happened. In other words, one-half of one-half, or barely a one-quarter chance, thus not meeting the “more probable than not” standard that the NFL uses for disciplinary purposes regarding Brady.

Note, too, the phrase “generally aware.” What does that mean in any legal sense? People are normally prosecuted or punished for ordering that a crime is committed or participating in a conspiracy to commit the crime. But Wells knew his case was flimsy lacking any conclusive evidence, such as a confession, an eyewitness or video of the illegal act so he reached for elastic language to establish some basis for punishment.

Hating Tom Brady

Yes, I know many people hate Tom Brady. He’s a handsome quarterback married to a supermodel and he’s won four Super Bowls. What’s not to hate?

And, it’s kind of fun because, hey, it’s just football. But there is also something fundamentally un-American about this sort of quasi-legal process that assesses substantial penalties not only on Brady, a four-game suspension, but on the New England Patriots, who are fined $1 million and stripped of two draft picks, harming their future competitiveness.

To reach this outcome, Wells had to stretch the case for believing that the footballs were intentionally deflated when the chilly, rainy weather could have accounted for all or nearly all the drop in air pressure, according to the NFL’s

own scientists – while other variables were not fully taken into account, such as the way the Patriots conditioned their footballs by rubbing off the finish that, if not rubbed off, would have made them more water-resistant.

What the scientists hired by the NFL found was that the wetness of a football was a significant factor in both the drop in air pressure and the slowness for the pressure to restore once the football is moved to a warmer location. Thus, the amount of water that penetrates a football would be a relevant factor but that was not fully assessed by the NFL's scientific testing.

By contrast, the footballs used by the Indianapolis Colts had not been rubbed down nearly as much, so they would have retained more of their water resistance.

Another key factor in evaluating the pressure of the Patriots' footballs compared to those used by the Colts was the timing of the balls being tested inside the referees' locker room at halftime. The scientists found that footballs, especially dry ones, regain their pressure fairly quickly once in a warmer environ, so the timing of those comparative tests represented another key variable.

But Wells compressed the gauging sequence as tightly as possible to make the discrepancies between the lost pressure of the Patriots' balls and the lost pressure of the Colts' balls more supportive of his case against the Patriots. Thus, he told the scientists that the NFL officials who tested the balls at halftime didn't start immediately although they knew they had only a very short time to examine the footballs, only 13.5 minutes.

Instead of getting started immediately, according to Wells, the NFL officials waited a couple of minutes. Then, Wells claimed that after testing the 11 Patriots' footballs and finding them under-inflated they didn't add air to them right away but rather turned to the Colts' footballs, which also turned out to be under-inflated though not as much, according to the one gauge that accurately measured the pounds per square inch, or psi. The second gauge gave readings that were between about one-third to nearly one-half psi too high.

But the NFL officials only got through four Colts' balls before running out of time. Then, according to Wells's chronology, they added air pressure to the 11 Patriots' balls. There are, however, doubts about Wells's sequencing. According to the report by Exponent, the scientific consultants hired by the NFL, "there remains uncertainty about the exact order and timing of the other two events," i.e., gauging the Colts' balls and re-inflating the Patriots' balls.

In other words, there are doubts about something as critical as the timing of when the Colts' footballs were tested, whether at the end of the 13.5 minute

halftime break or in the middle.

And there is evidence and logic that suggests that Wells flipped the chronology to better serve his purposes, since the records show that the two officials handling the two gauges switched gauges between the time they measured the Patriots' balls and the Colts' balls. That suggests that something happened between those two sets of measurements, possibly the re-inflation of the Patriots' balls.

Also, the NFL officials only tested four Colts' balls, having to stop because they ran out of time and had to rush the balls back to the field for the second half. That would suggest that checking the Colts' balls was the final step, not a middle one.

But why is there uncertainty about this sequencing, as Exponent says? In a report that plays gotcha with McNally over whether he used a urinal or a toilet, why isn't there certainty about something as crucial as the timing of the measurements when there were several NFL officials conducting the tests?

There are a number of other head-scratching aspects to Wells's report, including why he didn't just call up McNally if Wells really wanted a final interview, rather than insisting that the Patriots arrange it with McNally who only worked for the Patriots on game days. Wells had McNally's cell-phone number and likely other contact information, but chose to make a point about the Patriots not arranging this additional interview.

But perhaps the biggest danger represented by this extraordinary report and the ensuing punishment is the idea that a theoretical offense can be alleged using "more probable than not" standards and that real punishment can be enforced on individuals and groups despite no hard evidence that they knew anything or that the offense even occurred.

And, if it can happen to Tom Brady, it can happen to anyone.

[For more on this topic, see Consortiumnews.com's "Holes in NFL's Deflategate Report" and "Why Write about NFL's Deflategate."]

Punishing Another Whistleblower

Exclusive: Just weeks after ex-CIA Director David Petraeus got a no-jail-time wrist-slap for divulging secrets to his biographer/lover, ex-CIA officer Jeffrey Sterling got 42 months in prison for allegedly alerting a U.S. journalist to a dubious covert op, a double standard of justice, says ex-CIA analyst Ray McGovern.

By Ray McGovern

Former CIA officer Jeffrey Sterling was a whistleblower who was then targeted by the U.S. legal system for retaliation, which now includes a 42-month prison sentence. His real “crime” was going to the Senate Intelligence Committee to report on a dubious and dangerous covert operation that involved giving doctored nuclear-bomb blueprints to Iran.

Though Sterling’s action was “within proper channels,” the move made Sterling a dead duck inside the CIA, which doesn’t want any of its employees to do that and it appears neither do the members of the congressional “overlook” committees who would prefer not to know such things. So, when the account of the Iran scam appeared in James Risen’s 2006 book, *State of War*, the CIA and the Justice Department went after Sterling although the leak might well have come from someone on the Senate committee or elsewhere, not Sterling.

The CIA was especially outraged because Risen’s account made the spy agency look like a bunch of clowns. Someone was going to have to pay for causing the embarrassment and that person became Sterling, who was convicted in what amounted to an entirely circumstantial case under the 1917 Espionage Act, which was meant to apply to spies giving information to foreign governments, not to U.S. government officials providing facts to American journalists to share with the American people.

There were signs that Judge Leonie Brinkema may have had some pangs of conscience over what she had allowed to happen in her courtroom where Sterling was convicted. She had scheduled Sterling’s sentencing for April 24, but that was just a day after retired Gen. (and former CIA Director) David Petraeus received probation and no jail time for divulging highly classified material to his biographer/lover and then lying about it to the FBI.

Instead of sentencing Sterling the next day, when the Petraeus wrist slap was on everyone’s mind, Judge Brinkema postponed the announcement of Sterling’s fate to Monday. My guess is that she wanted to put at least two weeks the proverbial ”decent interval” between Petraeus’s sweetheart deal and the 3 ½ years in prison

that she gave Sterling.

It was painfully instructive witnessing the sentencing in U.S. District Court for the Eastern District of Virginia in Alexandria a jurisdiction that is widely regarded as a prosecutor's dream. Judge Brinkema began on an oddly defensive note, in what seemed to be a rather transparent attempt to deflect charges that the prosecution, the jury and she had succeeded in convicting Sterling solely on circumstantial evidence evidence that, in the view from my seat at the trial in January, did not and does not bear close scrutiny.

In a me-thinks-she-doeth-protest-too-much oration, Brinkema gave a mini-law-lecture explaining that it is, indeed, legally copacetic to end up with a guilty verdict exclusively based on evidence that does not rise above circumstantial.

Seduced by 'Case Officers'

Equally odd and, to my lights, particularly naive and damning were the Justice Department prosecutor's gratuitous closing remarks about what a pleasure it was to get to know CIA "case officers" so well during the long and arduous case. It seems these CIA case officers, who are trained to use wiles to recruit people abroad to betray their countries, had plied their craft on the prosecutors, too.

The CIA was, of course, eager to help the Justice Department imprison Sterling as a message to other potential whistleblowers, not to divulge any secrets that might make the agency look bad. Never have I seen the agency release so much operational cable traffic to nail someone for supposedly revealing some operational secret.

Many of the cables were redacted, but not redacted carefully enough to disguise what, in my opinion, was the real objective of the operation, which involved preparing nuclear weapons development blueprints to be given to Iran and later possibly to Iraq.

Those affable "case officers" explained that the objective was to include serious design errors that would serve to impede progress on a workable nuclear weapon. For me, that never passed the smell test. It seemed more likely that the flawed blueprints were actually a ploy toward making a case that Iran and Iraq were secretly working on nuclear bombs.

The thinking may have been: Why not create blueprints "showing" how far along the Iranians (and possibly the Iraqis) were toward a nuclear weapon and then mount a daring clandestine collection operation to steal the blueprints back as proof of what the CIA and the White House wanted everyone to believe.

Remember the "yellow-cake-uranium-from-Niger" caper of a dozen years ago. That

worked for a while until the International Atomic Energy Agency showed that the "evidence" was a crude forgery. Yet, the quest for learning how the caper began and who was ultimately responsible got lost in the byzantine strategies of George W. Bush's White House to destroy a key whistleblower in that case, former U.S. Ambassador Joseph Wilson.

Then, with President Barack Obama's determination to "look forward, not backward," the Niger scam was among many examples of intelligence-related deceptions that were safely swept under the rug. Which is the case more often than not, except when there's the possibility of nailing some whistleblower who is trying to alert the American people to some misfeasance or malfeasance. Then, there is no forgiveness or forgetfulness.

A Close Look at the CIA Cables

Writer/truth-seeker David Swanson, who joined us in January for much of the Sterling trial, has done us a real service by scrutinizing the evidence that turned up at the trial and going through a lot of it with a studied eye. Dissecting one not-carefully-enough-redacted CIA cable released by the government, he noticed telling signs that Iraq was next on the list for receiving damning blueprints of the kind CIA operatives tried to give to Iran.

On Monday, Swanson re-posted an analytic piece he wrote in January, entitled "In Convicting Jeffrey Sterling, CIA Revealed More Than It Accused Him of Revealing."

Except for an interview that I gave to Steven Nelson of U.S. News & World Report after Sterling's sentencing, Iran's PressTV was the only outlet that called me for comment despite a press release put out by the Institute for Public Accuracy noting my availability.

I began by explaining to the audience that it was the First Amendment to our Constitution that guaranteed my right to speak candidly with them or with anyone else. I then told my Iranian hosts that the First Amendment is actually what the Jeffrey Sterling case is all about. And the opaque Obama administration saw the Sterling trial as an opportunity to draw yet another layer of dark curtain to keep out unwanted light.

The message to potential whistleblowers was: Do not talk to reporters. Your government will learn of it and won't hesitate to pull out all stops to convict you even with the flimsiest of circumstantial evidence spun by charming CIA "case officers." Of course, different standards apply to the powerful and well-connected. The likes of David Petraeus can even lie to the FBI and escape unscathed.

Ultimately, I don’t think this government strategy is going to work and I hope I am not being unrealistic. Evidence is already building that grossly defamed whistleblowers like Edward Snowden and Jeffrey Sterling will eventually be recognized for the patriots they are. Indeed, the process has already begun.

On May 7, for example, a New York appeals court gave tacit vindication to Snowden by ruling that the bulk collection of telephone metadata by NSA was, in fact, “illegal.” Earlier disclosures by Snowden’s actually proved that two of the judges on that appeals court had been lied to by Justice Department lawyers in the past. So, this time around, one of them, Judge Robert Sack, pointedly asked the attorneys from Justice, “What else haven’t you let us know?”

In his formal opinion, Judge Sack compared Snowden to whistleblower Daniel Ellsberg, writing “the ‘leak’ by Edward Snowden that led to this litigation [against the National Security Agency], calls to mind the disclosures by Daniel Ellsberg that gave rise to the legendary ‘Pentagon Papers’ litigation.” Perhaps, in that light, Judge Brinkema will reflect a moment on what she allowed to transpire in her court during the Sterling trial.

Ray McGovern works with Tell the Word, a publishing arm of the ecumenical Church of the Saviour in inner-city Washington, where he teaches a course entitled “Biblical Justice: An Un-American Activity?” A former Army officer and CIA analyst, he teaches, speaks, and writes about how intelligence work relates to Justice or not.