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'Deflategate' v. 'Tsarnaev': Why process matters

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BLOG OF THE WEEK

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Two stories have dominated the popular media over the last few weeks: the so-called "Deflategate" matter in which an investigation conducted by a special investigator hired by the National Football League led to the imposition of sanctions by the NFL, and the sentencing phase of the criminal trial of Marathon bomber Dzhokhar Tsarnaev.

The stark contrast between the processes employed in these matters reminds us why decisions reached through the American judicial process are generally regarded with presumptive integrity and validity.

Most would agree that the criminal trial of Tsarnaev provides a good example of a process that instills confidence in the public. There is no question that the judge was an impartial arbiter of the proceedings and that each side had a full and fair opportunity to discover sufficient evidence from the other side to prepare a zealous presentation of its case.

The judge spent days selecting a similarly impartial jury, and whether or not one agrees with the result eventually reached by the jury in the trial or in the sentencing, it is likely that most feel confident in the integrity of the process.

Contrast that with the process in Deflategate. The NFL selected its "regular outside counsel" (according to Bloomberg), to whom it reportedly paid legal fees totaling more than $7 million over the last year, to conduct an impartial investigation.

We litigators are familiar with the "appearance of impropriety" test for recusing a judicial officer, and there is good reason for that standard. When tricky issues — like whether Tom Brady knew that New England Patriots employees were deflating footballs below the minimum required level — are present, the decision-maker must resolve seemingly incompatible versions of the truth.

We litigators know that that process necessarily entails credibility determinations, which turn on a subjective assessment of factors such as witness demeanor, body language, tone of voice, and the context and relevance of lines of inquiry.

We may never know what Mr. Brady knew or didn't know about the psi of those footballs, but by the NFL appointing its own attorneys to conduct an impartial investigation, we can't trust that those subjective assessments are not tainted by bias.

Similarly, the process employed by the special investigator necessarily lacked the hallmarks of judicial fact-finding. Neither party had the right to discover the other party's key evidence, and there appears to have been no fair exchange of the views of the respective parties before or during the process.

The farther a dispute resolution process strays from the benchmark characteristics of the American judicial system, the less likely it is that the result of that process will enjoy public confidence.

Private parties, like the owners of NFL franchises, have the right to adopt a dispute resolution process to their liking, and in this case, one that was faster and less expensive than a judicial-type process. But selection of such a truncated process comes at the expense of public confidence in the results obtained.

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