

Office of Special Counsel (OSC) – the dark legacy

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Whistleblowers and federal government workers rejoiced on April 27, 2010, when former head of the Office of Special Counsel (OSC), Scott J. Bloch, pleaded guilty to criminal contempt of Congress. The justice continues to be delayed, as Scott Bloch's sentencing has been rescheduled for the second time and is now set for September 8, 2010. U.S. Magistrate Judge Deborah Robinson said that she wants prosecutors and Bloch's attorney to clarify the applicable guidelines for Bloch's sentence and fine. Robinson is also apparently planning to "*ad-just*" the sentence based on Bloch's guilty plea. She stated that the lawyers failed to clearly define the sentencing guidelines in this matter.

Prosecutors said they would not oppose probation without any imprisonment for Bloch. This should come as no surprise to anyone familiar with our courts. While the Department of Justice relentlessly pursues, prosecutes and imprisons inconvenient whistleblowers, high-ranking bureaucrats who violate their rights are usually coddled by the system. The crooked wheel of justice crushes those at the lower levels of the government and pushes up criminals in high places. This bad egg is being cooked over-easy, with obvious disregard for hundreds of whistleblowers whose careers have been destroyed due to the OSC's failure to investigate their complaints.

The legacy of failure

Here is an abbreviated list of Scott Bloch's dubious "*accomplishments*" as the former head of the OSC:

- Knowingly and willfully ignoring whistleblower disclosures;

- Dismissing and closing hundreds of whistleblowing complaints without investigation;
- Deleting hundreds of files pertaining to whistleblowing disclosures and complaints of retaliation and reprisal;
- Rolling back protections for federal employees against discrimination based on sexual orientation;
- Staffing key OSC positions with cronies who shared his discriminatory views;
- Engaging in retaliatory activities against OSC staffers who opposed his wrongdoing;
- Assigning interns to issue closure letters in hundreds of whistleblower complaints without investigation;
- Intimidating OSC employees from cooperating with government investigators;
- Misusing prosecutorial power for political purposes;
- Reducing the backlog of cases pending at the OSC by 56% percent by closing cases without an investigation and destroying electronic files;
- During the fiscal year of 2008, the OSC filed 0 corrective action petitions with the Merit Systems Protection Board (MSPB);
- During the fiscal year of 2008, the OSC obtained 0 stays from the Merit Systems Protection Board (MSPB);
- Bloch reassigned his perceived critics within the OSC to field offices across the country – giving them 10 days to accept, or else they’d be fired;
- Bloch imposed retaliatory transfers upon OSC staffers he perceived as having a “homosexual agenda”;
- OSC under Bloch rarely recognized legitimate whistleblowers, typically only when the whistleblower has already prevailed elsewhere;

In an ironic twist that shocked his own staffers, in 2007 Bloch initiated a large-scale investigation against Karl Rove. He decided to probe the disappearance of an untold number of emails related to the firing of the New Mexico’s U.S. Attorney, David Iglesias. Bloch assembled a task force to create the impression that the OSC was investigating the White House, while Bloch himself was under investigation for mass-destruction of inconvenient documents. One year earlier, in December of 2006, Bloch hired private technicians with a firm called “*Geeks On Call*” to delete whistleblower complaints and related computer files by conducting the 7-level memory wipe of the computers at the OSC’s office. Bloch was also investigated by the FBI for obstruction of a Hatch Act inquiry for improperly mixing his political and official activities.

Bloch wasn’t charged with obstruction of justice, evidence tampering, destruction of official files, impeding an official federal investigation, civil right violations and violations of the Whistleblower Protection Act (WPA). Instead, he was charged only with criminal contempt. While this charge carried a possible prison sentence, Department of Justice prosecutors said they would not oppose probation for Bloch, who is currently working as (don’t fall down laughing) an employment attorney at the Tarone & McLaughlin law firm in Washington.

Bloch's defense attorney, William Sullivan Jr., a Winston & Strawn partner in Washington, had the audacity to state in court papers that Bloch has "*served with distinction*" as the head of the OSC. Sullivan wrote, "*This case marks an unfortunate aberration for Mr. Bloch,*" submitting 35 pages of letters to Magistrate Judge Deborah Robinson, who is scheduled to preside over the sentencing. These letters include notes from Bloch's wife, his friends and former co-workers.

"*Glad this matter is behind us, and Mr. Bloch is looking forward to getting on with his life,*" Sullivan said as he walked with Scott Bloch to the probation office. Bloch's victims don't have the same luxury, as whistleblowers have been continually oppressed with no recourse throughout OSC's existence.

OSC's dark history

The Office of Special Counsel (OSC) was created in the 1978 Civil Service Reform Act to protect whistleblowers from reprisal and hold responsible agency managers accountable. Under President Carter, OSC languished without permanent leadership or funding. When President Reagan came to power, he quickly appointed Alex Kozinski as the Special Counsel and gutted the OSC. Nearly 50% of the OSC personnel and 70% of attorneys and investigators at the OSC headquarters were fired or had resigned. This was unprecedented for any government agency.

Since that time, over 7,000 federal employees have filed complaints with the OSC. Out of those thousands of cases, OSC requested a hearing to restore jobs in only 2 instances.

The dog-gone mind behind the plan

To understand why the OSC never worked according to its stated purpose, one must go back in history. The Watergate investigation revealed a plan by the Nixon administration to replace the non-partisan civil service system with a politically loyal government workforce. Every government agency had a ghost "*political hiring czar*", whose authority covertly trumped that of personnel offices.

A special manual was prepared by the former White House Personnel Office Chief Fred Malek. This encyclopedia-like guide was dubbed the Malek Manual and provided information on how to harass career employees out of the government by exploiting loopholes in civil service laws. Unpopular federal employees would be replaced by hand-picked applicants.

The Malek Manual emphasized a telling message: "*You cannot achieve management, policy or program control unless you have established political control.*" The manual went on to describe underhanded techniques designed to "*skirt around the adverse action proceedings*" (such as the EEOC and the MSPB), "*to remove undesirable employees from their positions.*"

(The President and the Executive Branch, by Joel D. Aberbach. UCLA Center for American Politics and Public Policy Occasional Paper Series 9 1-9.)

A telling memorandum written by Fred Malek to President Nixon's Chief of Staff stated in relevant part, *"We garnered from reliable sources in the Equal Employment Opportunity Commission that the Commission was preparing to sue the University of Texas for discrimination in the hiring of faculty. This could be disastrous for Texas. When queried, Bill Brown, Chairman of the EEOC, agreed not to pursue it. I will continue to follow this situation closely."*

The sobriquet most often used to describe Fred Malek was *"hatchet man"*, because of his ruthlessness in ousting those deemed to be disloyal. Malek's techniques included mandatory transfers and investigations against whistleblowers and outspoken critics of the establishment. For example, Malek reportedly ordered the FBI to conduct an investigation of then-veteran CBS correspondent and Nixon critic Daniel Schorr, who was placed on the *"Enemy List"*. Sadly, Daniel Schorr died today, on the day of Scott Bloch's scheduled sentencing that has now been delayed.

Fred Malek was infamously ordered by Nixon to count the Jews in high-ranking government positions. Malek admittedly completed this blatantly anti-Semitic order and compiled a list of government employees whom he believed to be Jewish. Shortly thereafter, these senior officials were transferred to other locations and less prominent, dead-end positions.

In spite of his prior activities, after leaving the White House, Fred Malek became the Deputy Director of the Office of Management and Budget (OMB). In 1982 Fred Malek was nominated by President Ronald Reagan to head the U.S. Postal Service. The Senate Governmental Affairs Committee refused to act on his nomination because Senators reportedly felt that Malek had made conflicting statements under oath regarding his role in the *"program"*. Outraged committee didn't hold back its disgust. Then-Senator John Danforth (R-Mo.) said, in relevant part, *"... whether it was legal or illegal . . . it was wrong, just plain wrong... you admit that it was true, you admit that it was wrong . . . you regret it and you will never do it again. . . . Am I wrong or right?"* Fred Malek responded, *"You are absolutely right, senator."* Senator David Pryor (D-Ark.) asked, *"Did it ever occur to you that what you were doing was wrong or immoral?"* Malek replied, *"Yes, sir, it did."*

Under questioning by Senator Carl Levin (D-Mich.), Malek admitted authoring a memo that suggested punishing politically incorrect people. Senator Levin described Malek's role as *"Unethical, immoral and improper"*. Malek lost his bid for the head of the Postal Service and a few years later the same disclosures cost him his job as deputy chairman of the Republican National Committee.

Fred Malek, Then and Now

Another disgusting vignette of Malek's character was revealed when police arrested five

men after locating a blood-spattered car near the park entrance in Peoria, Illinois. After giving conflicting stories, the men finally admitted that they “*caught a dog and were barbecuing it.*” The perpetrators caught, skinned and gutted a dog and barbecued it on a spit. One of them was Fred Malek.

Fred Malek, a Dog and the SEC

Fred Malek’s legacy continued with the Securities and Exchange Commission (SEC) action against him in 2004. The SEC instituted administrative and cease-and-desist proceedings against Malek, his company, Thayer Capital Partners and their affiliates. The SEC charged that pension investments in Malek’s company were used to reward a political supporter, William DiBella, former majority leader of the Connecticut Senate. Malek’s company was ordered to pay a civil penalty of \$150,000, and Fred Malek was personally made to pay a civil penalty of \$100,000. Apparently, a leopard doesn’t change its Jew-counting, whistleblower-retaliating, critic-investigating, dog-barbequing, securities laws-violating spots.

Fred Malek’s career in government and politics didn’t end after his activities were exposed. He is the former President of Marriott Hotels and Northwest Airlines and former assistant to United States Presidents Richard Nixon and George H.W. Bush. Malek has formed seven institutional private equity funds, including three corporate acquisition funds with approximately \$1.5 billion in committed capital and four funds that target hotel investments with over \$500 million in committed capital. He recently served as a National Finance Committee co-chair of John McCain’s presidential campaign. In 2010, Sen. Dianne Feinstein (D-Ca.) called Malek “a man of high principle” who “has proved many times over the years his loyalty to the highest principles of freedom, human rights and international tolerance.”

Should we be surprised that our leaders and government officials are not interested in pushing forth effective whistleblower protection measures? Malek did not respond to this reporter’s request for comments.

The Ink Commission, later created to explore the Watergate Committee’s public record of the abuses, participated in studies and issued recommendations that became the foundation for the Civil Service Reform Act of 1978.

In spite of the exposure, the ugly Malek Manual continued its destructive influence in government service.

Alex Kozinski and the Malek Manual

The next attack on the OSC and the merit system came from within the Office of Special Counsel itself. It was waged by President Reagan’s appointee, the former head of the OSC, Special Counsel Alex Kozinski, who kept a copy of the Malek Manual on his desk. Kozinski reportedly used its techniques (such as transfers, investigations and harassment) to purge

the professional civil service experts from the OSC staff. They were replaced with obedient minions who viewed whistleblowers as crazy, disloyal troublemakers.

While serving as the head of the OSC, Alex Kozinski taught courses to federal managers on how to fire whistleblowers without getting caught by OSC investigators. For example, Alex Kozinski tutored Secretary Watt on how to purge a whistleblowing coal mine inspector from the Department of Interior. He used the OSC Investigations Manual as a handout in these morbid lectures. Senior Supervisors still serving in various government agencies quite possibly received such training on how to get rid of “inconvenient” employees and whistleblowers. These techniques are still being implemented within federal agencies today, with virtual impunity.

Alex Kozinski’s abuses were the major catalyst for passage of the Whistleblower Protection Act (WPA) of 1989, and he was forced to resign.

A few years later, 43 Senators voted against his confirmation for a seat on the Ninth Circuit Court of Appeals, after Senator Levin’s intensive investigation of Kozinski’s tenure as the OSC’s Special Counsel. In spite of the controversy surrounding his dubious OSC performance, Kozinski became the Chief Judge of the U.S. 9th Circuit Court of Appeals.

Curiously enough, OSC fiasco was not the last time Alex Kozinski would bring shame to the public office. In June of 2008, Los Angeles Times reported that Kozinski was caught operating a website that featured photos of naked women on all fours, painted to look like cows. Judge Kozinski’s website reportedly contained suggestive images of bestiality, pictured women shaving their pubic hair, themes of masturbation, public sex, contortionist sex, defecation and urination.

Ironically, the 9th Circuit Court of Appeals Judge Alex Kozinski was set to preside over an obscenity trial (the Issacs trial in U.S. District Court in Los Angeles), from which Kozinski later recused himself.

Porn trial in L.A. is halted – Judge grants a stay after conceding he maintained his own website with sexually explicit images.

With respect to his publicly accessible website, the panel of judges declared that Kozinski was “*careless*” and “*judicially imprudent*“. He was reprimanded but not disciplined. In spite of his OSC abuses, reprehensible anti-whistleblower stance and an obscene behavior, Alex Kozinski still sits as the Chief Judge on the 9th Circuit Court of Appeals.

As the head of the OSC, Bloch continued Kozinski’s legacy of shame and disgrace, by destroying careers of countless whistleblowers he was appointed to protect.

Office of Special Counsel’s War On Whistleblowers

United States Office of Special Counsel

Watchdog groups and ethics advocates are appalled at the lackadaisical approach towards Bloch's crimes. The proposed sentence of probation is not commensurate with the scope and longstanding impact of Bloch's abuse of office and serious violations against federal whistleblowers.

Uncertain future

The OSC has operated without permanent leadership since 2008, leaving federal employees in the dark ages and without recourse. Legal professionals are now advising federal employees against coming forward. *"When people call me and ask about blowing the whistle, I always tell them, 'Don't do it, because your life will be destroyed,'"* says William Weaver, a professor of political science at the University of Texas-El Paso and a senior adviser to the National Security Whistleblowers Coalition. *"You'll lose your career; you're probably going to lose your family if you have one; you're probably going to lose all your friends because they're associated through work; you'll wind up squandering your life savings on attorneys; and you'll come out the other end of this process working at McDonald's."*

Yes, that is the way things are. But that is not the way they ought to be.



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