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Office of Special Counsel's War On Whistleblowers

OSC is investigating Karl Rove's political machine. But until recently OSC head Scott Bloch's policy was to ignore whistleblowers' tips on murder, espionage, and terrorism, while vigorously rooting out any signs of the "homosexual agenda."

Daniel Schulman

April 24 , 2007

it looked as if leroy smith was going to get some recognition after all. A safety manager at a federal prison in California, he had challenged his bosses, risked his job, and endured threats of retaliation to expose hazardous conditions in a prison computer recycling program where inmates were smashing monitors with hammers, unleashing clouds of toxic metals. Now the federal government was flying him to Washington, D.C., as a whistleblowing hero. The Office of Special Counsel (osc), the federal agency charged with protecting government employees who expose waste, fraud, and abuse, had scheduled a catered event honoring Smith as "Public Servant of the Year." The office's director, Scott Bloch, had prepared a flowery speech that was later posted on the agency's website, referencing Sophocles and *The Shawshank Redemption*: "In the end, Morgan Freeman's character truly becomes what his name implies—a Free man," it read. "One person can root out corruption and abuse of power. Once he understands this, he is redeemed and can break out of the trap of fear, and break free into the light of integrity and justice. That is the effect of seeing a brave whistleblower stand up and win; it inspires the rest of us."

Only Bloch never delivered that speech. Just minutes before the September 7 ceremony was to begin, Smith received word that the event was off because a relative of an osc staffer had died. It seemed "kind of fishy" to Smith; indeed, an osc source told me the excuse was so transparent as to be "ludicrous." The real problem, the source said, was that Bloch—a Bush appointee who, employees say, shares his boss' antipathy for dissent—had learned that Smith was planning to speak at a press conference sponsored by the whistleblower group Public Employees for Environmental Responsibility (peer), a persistent critic of the osc. The peer event went forward as planned, and at it Smith told the press that he felt the osc "bears some examination." True, he had been vindicated, but many of his colleagues who'd made similar disclosures had been ignored, and the prison conditions had not changed. "I cannot help but feel that my experience is a beacon of false hope for public servants who are trying to correct wrongdoing," he said.

Then again, given the current climate for whistleblowers, false hope might be all the hope there is. A series of court rulings, legal changes, and new security and secrecy policies have made it easier than at any time since the Nixon era to punish whistleblowers; the climate has deteriorated in recent years with the Bush administration's emphasis on plugging leaks and locking down government information. Bloch's tenure—he is the first director of the whistleblower office to face a whistleblower complaint of his own—has only added insult to injury.

It's come to the point where some advocates now counsel federal employees against coming

forward, period. "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."

Weaver says that most of the people who contact him are so determined, they go ahead with their disclosures anyway. "I see what the result is," he sighs. "It's destruction from one end of their lives to the other."

the term "whistleblower" refers to the warning English bobbies used to sound when they saw a crime in progress, an alarm to other officers as well as bystanders. The first U.S. law protecting whistleblowers, the 1912 Lloyd-La Follette Act, came after the Taft administration tried to forbid federal employees from talking directly to Congress. But whistleblowers continued to encounter harassment and retaliation; in 1969, Air Force auditor Ernie Fitzgerald, who had told Congress about massive cost overruns in the C-5 cargo plane program, found himself fired at the behest of President Nixon. (On the Watergate tapes, Nixon can be heard saying, "Get rid of that son of a bitch!") Later, Nixon's plumbers went after Daniel Ellsberg, who leaked the Pentagon Papers to the *New York Times*, at one point breaking into Ellsberg's psychiatrist's office in an effort to discredit and humiliate him. In response to these and other cases—and to the role that Mark Felt, a.k.a. Deep Throat, had played in exposing Watergate—Congress passed a wave of anti-retaliation measures, including the 1978 Civil Service Reform Act, which established the Office of Special Counsel, and the 1989 Whistleblower Protection Act. But today, many of these safeguards are gone or at serious risk. In 2005, the Washington-based Project on Government Oversight reported that the Whistleblower Protection Act has "suffered from a series of crippling judicial rulings [that] have rendered the Act useless, producing a dismal record of failure for whistleblowers and making the law a black hole." Says Thomas Devine, longtime legal director of the Government Accountability Project and one of the law's key advocates: "My baby turned out to be Frankenstein."

Long gone are the days of successful whistleblowers such as Ernie Fitzgerald—who ended up winning his job back and worked at the Pentagon until his retirement last year. "That's the wrong model for today's environment," a senior Pentagon official told me. "The model for today's environment is Deep Throat. You need to be buried deep in the system, completely anonymous, in order to have effective protection." These days, he added, whistleblowers who go public can expect "15 minutes of fame and 40 years of misery."

In theory, the Office of Special Counsel is supposed to prevent those problems—both by taking whistleblower tips and referring them for investigation, and by helping whistleblowers facing retaliation. In practice, advocates as well as some of the agency's staffers say, the osc has become yet another black hole into which disclosures and complaints disappear.

Bloch, 48, who's tall and heavysset and wears a close-cropped goatee, is a former law professor and attorney from Lawrence, Kansas. A devout Catholic and one-time fellow at the conservative Claremont Institute, he was tapped early in President Bush's first term as the deputy director of the Justice Department's Task Force for Faith-Based and Community Initiatives; then, in June 2003, the president nominated him to run the osc.

It was a culture clash from the start. Having chosen as his deputy a Catholic lawyer who had publicly taken a position against the "homosexual agenda," and hired young lawyers from Ave Maria Law School, the conservative Catholic school founded by Domino's Pizza billionaire Tom Monaghan, Bloch questioned whether the osc should defend federal workers discriminated against

for their sexual orientation. When the story got out and dozens of members of Congress signed letters of protest, Bloch blamed whistleblowers: "It's unfortunate that we have a leaker or leakers in our office who went to the press rather than coming to me," he told the *Federal Times*. Eventually, an embarrassed White House delivered a subtle rebuke to Bloch in the form of a statement reaffirming a long-standing federal prohibition against sexual-orientation discrimination, and noting that the president "expects federal agencies to enforce this policy."

Bloch's high-profile troubles had only begun. In February 2005, his office was accused of improperly dismissing hundreds of whistleblower cases that had been pending when Bloch took over. Among them was the complaint of Adam Finkel, a senior official at the Occupational Safety and Health Administration who, in October 2003, had disclosed to the osc that the government had refused to offer blood testing for federal workplace inspectors who were likely to have been exposed to the toxic substance beryllium while inspecting plants that use the metal. (When osha finally did test the inspectors, in 2004, 3.7 percent in fact came up positive for exposure to beryllium, which can cause fatal lung disease.) "It's bad enough that this all happened at osha, where they have a worker-protection mission," says Finkel, who is now a visiting professor at Princeton University, "but the federal employee who goes to osc looking for some kind of intelligent and grown-up analysis of these health issues, at least in my case, is getting nothing of the kind. I got nothing but skepticism and amateur science.... I was treated like, 'You're a Harvard Ph.D. but you're not a medical doctor, are you?'"

Bloch says he did not dismiss any cases improperly, but was simply trying to reduce the osc's perennial backlog. Before his tenure, he points out, some whistleblowers died while waiting for a response to their complaints. "If outside advocacy groups want to throw rocks at me, that's fine. We can take criticism. But it's really unfair to federal workers, and it's really unfair to the career staff here who have been working their tails off to bring justice in a more timely fashion."

It's those same career staffers, though, who have become Bloch's harshest critics. Weeks before the controversy over the dismissed cases erupted, Bloch announced, with no warning, that he was reassigning 12 staffers—about 10 percent of the total osc workforce, and the majority of them his perceived critics—to field offices across the country. They had 10 days to accept, or else they'd be fired. (Ten ultimately resigned.) Three months later, four Washington-based advocacy groups and an anonymous group of current and former osc employees—some affected by the transfers, some not—filed a complaint against Bloch with his own office. The transfers, says the employees' lawyer, Debra Katz, were retaliation against Bloch's critics, those perceived to be loyal to his predecessor, and those seen to have a "homosexual agenda."

Members of Congress also considered Bloch's reorganization suspicious. During a Senate oversight hearing in May 2005, Senator Daniel Akaka (D-Hawaii) said he was "alarmed" by the restructuring—especially given that it came on the heels of a \$140,000 outside evaluation of the office that had not recommended anything of the kind.

So that Bloch wouldn't have to investigate himself, the complaint against him was ultimately referred to the inspector general in the federal Office of Personnel Management. The investigation has been under way for more than a year, and there have recently been reports in the conservative press—which has cast Bloch as a martyr to liberal and gay activism—that the White House may be trying to cut him loose. "Bloch has been ostracized by the White House and was privately sent word that he should resign," the *Weekly Standard* reported in October. Bloch would neither confirm nor deny the report, saying only, "I look forward to being exonerated. There simply is no truth to the allegations, and I stand by that."

whatever bloch's fate, his critics say the osc controversy is symptomatic of a larger problem. "The Bush administration has absolutely not endorsed the concept of whistleblowing—they see it as

disloyalty," one senior osc official told me. Bloch's tenure, echoes Sibel Edmonds, a former fbi translator and the founder of the National Security Whistleblowers Coalition, is simply "a very good example that shows that the system is broken." Helped by post-9/11 security fears, the Bush administration has worked to lock down information in all areas of government. "Secrecy has become a central axis of executive branch policy," William Weaver, the Texas professor, testified before Congress this winter.

The administration has fought disclosures by invoking provisions such as the State Secrets Privilege and "sovereign immunity"—the English common-law notion that the king can do no wrong. It has worked behind the scenes on Capitol Hill to undermine whistleblower legislation, and, in the case of the National Security Agency's domestic spying program, has launched a criminal probe to determine the source of leaks to the press. The president himself told reporters that leaking the nsa program had been "a shameful act" and said "the fact that we're discussing this program is helping the enemy." More documents than ever before are being shielded from public view—the number of classifications nearly quadrupled from 1995 to 2005, from 3.6 million to 14.2 million. The rampant classifications put whistleblowers at risk of criminal prosecution: Disclosing classified national security information to someone not cleared to receive it is a felony. In fact, in the administration's view, even members of Congress who sit on the intelligence committees and have top security clearances don't have the right to know some of the government's business. After nsa whistleblower Russ Tice made clear his intention to report the agency's warrantless surveillance program, carried out under a highly classified Special Access Program (sap), the nsa warned him that "neither the staff nor the members of the [Senate and House intelligence committees] are cleared to receive the information covered by the saps."

The courts have also not been kind to whistleblowers. Last May, in what whistleblower lawyer Steve Kohn calls "the single biggest setback for whistleblowers in the courts in the past 25 years," newly appointed Supreme Court Justice Samuel Alito cast the tiebreaking vote in *Garcetti v. Ceballos*, a case involving a prosecutor in the Los Angeles district attorney's office who claimed whistleblower retaliation. Under the ruling, Kohn says, public employees—all 22 million of them—have no First Amendment rights when they are acting in an official capacity, and in many cases are not protected against retaliation. "What that means is for employees who are making these disclosures on the job or in any official capacity, unless they have some statutory protection, they're shit out of luck," says Jeff Ruch, executive director of peer, the whistleblower advocacy group. Kohn estimates that "no less than 90 percent of all whistleblowers will lose their cases on the basis of that decision." Members of Congress—both Democrats and Republicans—scrambled to pass broader protections but failed in the face of opposition from the White House.

There are signs that Congress might be poised to reclaim some of its authority. On a bleak and snowy morning in late winter, the House Committee on Oversight and Government Reform—in whose name chair Henry Waxman (D-Calif.) had just restored the word "oversight," stricken by his Republican predecessor—held hearings on government secrecy, with Edmonds and Tice watching from the gallery. That day, Waxman introduced whistleblower-protection legislation that has since passed in the House of Representatives; the White House has threatened a veto. Later this year, Congress will also take up the fate of Bloch's osc, which is up for reauthorization. (Proposals include moving the agency into Congress' Government Accountability Office, removing it from the White House's purview.)

For Bloch's critics, change can't come soon enough. "The public has every reason to be concerned," says the osc official. Bloch, he adds, "has contempt for whistleblowers."

Case Studies

Hung Out to Dry

Joseph Darby**WHISTLE BLOWN ON:** Fellow soldiers at Abu Ghraib**ALLEGATION:** Torture**REWARD:** Death threats**UPSHOT:** Still fears for his life

For weeks after turning over graphic pictures depicting the abuse of prisoners at Abu Ghraib to military investigators, Army Specialist Joseph Darby slept with a cocked pistol under his pillow, fearing what might happen if his fellow soldiers caught wind of what he'd done. His name surfaced in Seymour Hersh's April 30, 2004, *New Yorker* exposé on Abu Ghraib but troops in Iraq didn't notice. A week later, as Darby sat in the mess hall watching a congressional hearing about Abu Ghraib, he heard Defense Secretary Donald Rumsfeld publicly thank "Specialist Joseph Darby, who alerted the appropriate authorities that abuses were occurring." Darby was quickly dispatched back to the United States; upon his arrival, the Army warned him not to return to his hometown of Cumberland, Maryland, where many regarded him as a traitor. He and his wife now live in an undisclosed location. In a rare interview with *60 Minutes* in December, Darby said he still fears for his safety. "I worry about the one guy who wants to get even with me," he said.

Rumsfeld "nailed [Darby] to the cross," a senior Pentagon official told me. "How can you go home and get a job selling cars in Maryland when you've just been revealed to be the guy who narc'd on all your people from Maryland who were from the same unit?" He added, "That case was completely blown. That guy's life has been ruined."

Code Talker

Russ Tice

WHISTLE BLOWN ON: Defense Intelligence Agency**ALLEGATION:** Agency infiltrated by spies**REWARD:** Fired**UPSHOT:** Went on to expose nsa domestic spying

A veteran intelligence official involved with the nation's most secretive special-access (or "black") programs, Russ Tice was subjected to emergency psychological testing, trailed by the fbi, stripped of his security clearance, and then exiled to the National Security Agency motor pool to gas up cars and chauffeur government officials—all after he reported his suspicion that a colleague at the Defense Intelligence Agency might be spying for China. It hardly seemed like a coincidence when, days after his May 2005 appearance at a press conference on Capitol Hill to advocate for stronger whistleblower protections, the nsa fired him.

Seven months later, Tice made headlines as a source for the *New York Times*' exposé on warrantless eavesdropping by the nsa. The Bush administration quickly launched a grand jury investigation—into the leaks, not the eavesdropping—and Tice was served with a subpoena, a move he says was meant to intimidate fellow whistleblowers. Tice insists that he didn't provide the paper with any classified material, and says he has much more information about "probable unlawful and unconstitutional acts" at the nsa and the dia. But thus far he has been prevented from sharing this information with Congress because, the nsa maintains, no one on Capitol Hill has the security clearance to hear what he has to say

Red Team Alert

Bogdan Dzakovic

WHISTLE BLOWN ON: Federal Aviation Administration

ALLEGATION: Lousy airport security (pre-9/11)

REWARD: Demotion

UPSHOT: Still sidelined

Wanna know how to get a bomb onto a plane? A submachine gun? Ask Bogdan Dzakovic, who for seven years led an faa "red team" that probed airport vulnerabilities and managed to breach security 90 percent of the time. Instead of taking action, the faa attempted to whitewash Dzakovic's findings. "We were ordered not to write up our findings in some cases and not to retest airports where we found particularly egregious vulnerabilities to see if the problems had been fixed," he later told the 9/11 Commission. "Finally, the agency started providing advance notification of when we would be conducting our 'undercover' tests and what we would be checking."

After his worst fears came true on 9/11, Dzakovic filed a disclosure with the Office of Special Counsel. Overnight, he went from commanding an elite security force to "punching holes in paper and putting orientation binders together" for the Transportation Security Administration. The osc ordered the Transportation Department to investigate. In 2003, the probe substantiated Dzakovic's key concerns; four years later, Dzakovic is still hole-punching at the tsa.

Life as a State Secret

Sibel Edmonds

WHISTLE BLOWN ON: FBI

ALLEGATION: Bureau infiltrated by spy

REWARD: Fired

UPSHOT: \$285,000 legal bill

Fluent in Turkish, Farsi, and Azeri, Sibel Edmonds was hired in the fbi's translation unit shortly after 9/11. Just six months later, after reporting her suspicions that her department had been infiltrated by a Turkish intelligence operation, she was abruptly fired.

The department's inspector general later found many of her allegations to be well founded and concluded that the fbi displayed "an unwarranted reluctance to vigorously investigate these serious allegations." The report offered eight recommendations for improving the fbi's translation service. None were implemented. Edmonds sued the Justice Department for unfair dismissal; former Attorney General John Ashcroft mounted an unprecedented defense, invoking the State Secrets Privilege to essentially classify any information regarding the case and even barring Edmonds and her lawyer from hearing the government's arguments to the judge. The suit was dismissed and Edmonds was left with a \$285,000 legal bill. "Five years of fight, and it's like, 'Why do we even blow the whistle?'" she says. "It didn't fix the system."

Banished to the Basement

Richard Levernier

WHISTLE BLOWN ON: Department of Energy

ALLEGATION: Nuclear weapons sites wide open to terror attacks

REWARD: Security clearance pulled, demoted

UPSHOT: Retired from dead-end job

Until August 2000, Richard Levernier, a 26-year Department of Energy employee, organized terrorist attacks against U.S. nuclear weapons sites—mock raids designed to expose weaknesses in

the doe's security procedures. More than half the time, his pretend attacks succeeded. "The reason for this abysmal record was ingrained bureaucratic negligence to a terrifying degree," Levernier told Congress last year. Alarmed by doe's refusal to reform security procedures, in 2000 Levernier provided the media with an unclassified, but damning, report by the agency's inspector general. That got his bosses' attention—but instead of fixing the problem, they yanked Levernier's security clearance and transferred him to a windowless basement to oversee the department's foreign-travel program. Levernier took his case to the Office of Special Counsel, which eventually sided with him. But the office didn't have the power to restore his clearance, only to order doe to investigate his allegations. That report took 18 months to complete, and as Levernier noted in congressional testimony last year, it "insisted that all of the problems that I had identified had been fixed, despite the fact that there were at least a dozen reports...that said exactly the opposite." After five years of administrative purgatory, Levernier finally decided to retire last year—rather, he told Congress, "than being paid *not* to contribute to the national security."

Murder, He Wrote

Sandalio Gonzalez

WHISTLE BLOWN ON: Bureau of Immigration and Customs Enforcement

ALLEGATION: Informant implicated in multiple murders while on payroll

REWARD: Ultimatum: Leave, or be downgraded

UPSHOT: Retired, won financial settlement

By the time Sandalio Gonzalez fired off a letter to the Office of Special Counsel on June 30, 2004, he'd tried everything else. For months, the longtime dea agent, then head of the agency's El Paso field office, had been trying to jump-start an official inquiry into the "House of Death" murders, in which a paid informant for the Bureau of Immigration and Customs Enforcement was implicated in a series of brutal drug-related killings in Juarez, Mexico. In one case, the informant bought the duct tape used to bind a victim, restrained him as he was immobilized, and provided quicklime to dissolve the remains. Worse, ice officials, who had the informant wear a wire and monitored his phone conversations, may have had foreknowledge of some of the killings (the code "carne asada" was frequently used to indicate an impending murder), yet refused to intervene, so intent were they on building a case against a particular high-level drug smuggler.

Gonzalez knew that blowing the whistle was unlikely to earn him friends within the agency. Years earlier, when he was the second in command of the dea's high-profile Miami field office, he had raised concerns about the suspicious disappearance of 10 kilos of cocaine from a raid, and for his trouble he had been transferred to the agency's much smaller field office in El Paso. This time, the agency had confronted him with an ultimatum: Retire quietly, or accept a downgrade on a crucial performance review.

Nevertheless, Gonzalez went ahead and alerted the osc. Days later, the whistleblower agency informed him that it "receives a large number of matters concerning disclosures of information" and that "cases are generally processed in the order in which they are received." Facing the end of a 32-year career in law enforcement, he wrote back again in September, this time filing a whistleblower reprisal complaint. When asked to describe the nature of his original disclosure, he wrote in neat capital letters: "MURDER."

By November, Gonzalez had received his response: The case was being closed without investigation. Two months later he retired from the dea, after 26 years of service.

Unlike many whistleblowers, Gonzalez did get a taste of vindication: He won an undisclosed financial settlement from the dea when he filed a retaliation suit in connection with the "House of

Death" case; then, last December, a federal jury found that his transfer had also been an act of retaliation and awarded him \$85,000. Now 56, Gonzalez lives near Miami and works for a defense contractor. Despite his settlement, he remains bitter. "This stuff consumes you," he says. "The whole thing is so unfair. And then you come to the realization that your government is a farce. That's what really hits you. I have no confidence in this government whatsoever, because I've seen it from the inside."

Beyond a "joint assessment" by the dea and ice, whose final report still has not been made public, the "House of Death" murders have never been investigated. Nor has Congress responded to Gonzalez's entreaties for a congressional inquiry.

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