OUR DOJ REFUSES TO SEND OFFICIALS TO JAIL – SCOTT BLOCH EDITION

This is getting ridiculous.

The Department of Justice has literally teamed up with Scott Bloch-who previously plead guilty to blowing off Congress—to try to help him avoid any jail time, at any cost to credibility, for that crime. The extent of this collusion first became apparent in a ruling dated February 2, 2011 by Federal Magistrate Judge Deborah Robinson, who is handling the matter.

In a nice touch, DOJ cited the case of Elliott Abrams—a quintessential example of lack of accountability—for their argument that lying to Congress didn't require jail time. And why not? He's among the many criminals Obama now regularly takes advice from.

Now, there's more than a chance that what is going on here is DOJ scrambling to prevent Bloch from doing jail time because they—part of the Executive Branch—like it that people like Alberto Gonzales, Monica Goodling and John Yoo have managed to avoid almost all Congressional oversight. And, now with Darrell Issa cranking up the not-so-way back investigatory machine, they really do not want a precedent made that executive branch officials who lie to Congress have to – gasp – actually serve jail time. In spite of the fact that is exactly what the law clearly specifies on its face. Again, from Judge Robinson:

> In 1857, Congress enacted a statutory criminal contempt procedure, largely in response to a proceeding in the House of Representatives that year. CRS Report RL34114, Congress's Contempt Power: A Sketch, by Morton Rosenberg and Todd B. Tatelman at 7. In the enactment, Congress provided for trial of the contemnor before a court, rather than a

> trial at the bar of the House or Senate. Id. “It is clear from the floor debates and the subsequent practice of both Houses that the legislation was intended as an alternative to the inherent contempt procedure, not as a substitute for it.” Id. (emphasis supplied). In a discussion of the legislative history of the statute, the Supreme Court observed that “[t]his statute was passed . . . as a direct result of an incident which caused the Congress to feel that it needed more severe sanctions to compel disclosures than were available in the historical procedure of summoning the . . . witness before the bar of either House of Congress . . .” Watkins v. United States, 354 U.S. 178, 207 n.45 (1957) (emphasis supplied). Thus, Congress’s intent was to make the penalty for violating the statute punitive. See Russell v. United States, 369 U.S. 749, 755 (1962) (“In enacting the criminal statute . . . Congress invoked the aid of the federal judicial system in protecting itself against contumacious conduct.”) (quoting Watkins, 354 U.S. at 207). With respect to sentencing, the statute, as enacted in 1857, provided that “on conviction,” a person “shall” pay a fine and “suffer imprisonment in the common jail not less than one month nor more than twelve months.” Act of January 24, 1857, ch. 19, 11 Stat. 155 (emphasis
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> supplied).

But avoiding this crystal clear statutory mandate would be utterly consistent with one of the first things the Obama Administration did after taking office—negotiate a deal between Karl Rove and the House Judiciary Committee that required Rove to testify but prevented HJC from arguing their case to the District of Columbia Circuit—which would likely have set a binding

precedent requiring the Executive to testify before Congress. Just can't have that.

But given the record of this Administration—from the mantra of "look forward" to the refusal to charge Dick Cheney for illegal wiretapping Americans to the refusal to charge Jose Rodriguez for destroying evidence of torture—I think it's just that they refuse to send an official—one of their own—to jail. They cannot uphold the law, because the law might be upheld against them.

So, back to I guess he won't see a cell Bloch Scott. Is DOJ really saying that a guy who wiped his hard drive shouldn't go to jail? Yes, and they are willing to fight for him and with him to see that such is indeed the case. First the government filed a Motion to Reconsider dated February 7, 2011 regarding Judge Robinson's 2/2/2011 ruling discussed and linked above. The Motion to Reconsider was basically five pages of whining that there was compelling authority to the effect the *criminal they were prosecuting* did NOT have to serve jail time. Yes, that is one hell of a strange argument for government prosecutors to be making.

Then, the willingness of the government prosecutors to fight to keep the criminal Bloch from serving one lousy second in jail goes from the absurd to the ridiculous. A mere four days after having filed the whiny Motion to Reconsider, and before it was substantively ruled on, the government, by and through the ever ethical DOJ, suddenly files a pleading encaptioned "Governments Motion To Withdraw Its Motion To Reconsider The Court's February 2, 2011 Memorandum Opinion". In this pleading, the government suddenly, and literally, admits their February 2 Motion to Reconsider was without merit.

As if withdrawing their motion with an admission they were full of manure was not strange enough, then the clincher is injected. The DOJ slides the following in as a footnote at the end:

> In light of this Court's ruling that 2 U.S.C. § 192 requires a minimum penalty of one month's incarceration, defense counsel has informed the government that the defendant intends to file a motion to withdraw his guilty plea in this case, on the ground that plea colloquy did not satisfy the requirement of Federal Rule of Criminal Procedure 11(b)(1)(I) that "[b]efore the court accepts a plea of guilty . . . the court must inform the defendant of, and determine that the defendant understands, . . . any applicable mandatory minimum penalty." The government believes that the defendant's position is well-founded, and will not oppose his motion to withdraw his plea. See, e.g., United States v. Hairston, 522 F.3d 336, 338-343 (4th Cir. 2008) (vacating a guilty plea because the defendant was not properly advised of the applicable mandatory minimum sentence).
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> The parties are currently in the process of negotiating another plea agreement, pursuant to which the defendant would plead guilty to a different offense should the Court grant the defendant's motion to withdraw his guilty plea.

Let me put that bluntly for you: the DOJ is helping a guy they have already convicted by way of guilty plea – that has already been accepted by the court – get out of that plea conviction. And they are already negotiating a different deal with the defendant, Bloch, to insure he doesn't serve one stinking day in jail.

I have been in and around criminal defense law for nearly 25 years; you know how many times I have seen something like this? Never. In a couple of extreme cases, I have had the government "take no position", but *never* actively help a defendant withdraw like they are with Bloch. Why? Because it is the government's

job to prosecute and incarcerate criminals; they simply just do NOT care if it turns out the criminal got a month in jail, whether the criminal was expecting it or not. But it is even worse than that, here the DOJ is actively, and somewhat disingenuously, helping Bloch manufacture a basis for the withdrawal.

And, absent some tangible and material just cause, withdrawal of a plea which has been formally accepted by the court is, under the Federal Rules of Criminal Procedure, Rule 11, prohibited:

> A defendant may withdraw a plea of guilty or nolo contendere:
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> (1) before the court accepts the plea, for any reason or no reason; or
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> (2) after the court accepts the plea, but before it imposes sentence if:
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> (A) the court rejects a plea agreement under Rule 11(c)(5); or
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> (B) the defendant can show a fair and just reason for requesting the withdrawal.

The problem with Mr. Bloch's case is there is simply no just cause. The mandatory 30 day jail term is part of the charge Bloch pled guilty to under 2 USC 192. Clear as day. And, as Judge Robinson made Bloch confirm, on the record in open court, he understood what he was pleading to and had the advise of counsel before doing so. End of story.

Or, it would be the end of the story, if the Obama Administration and Holder Justice Department were not willing to make misrepresentations and disingenuous arguments to cravenly insure that Executive Branch officials lying to Congress do not serve so much as a day in jail. Man, I guess they must be awfully worried about Timmeh Geithner, eh? Wonder if the DOJ will be so aggressive for Karl Rodney or Roger Clemens?

[Editor’s note – This post was originally started by Marcy, but finished by bmaz. So, you get the best of both worlds!]