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Democracy San Francisco Style

Swimming in "Official Misconduct"

by Patrick Monette-Shaw

Is San Francisco governed by its rule of law, or by the law of its rulers?

The hypocrisy of San Francisco's Board of Supervisors and its Ethics Commission no longer comes as a surprise to most open government observers, hypocrisy clearly visible in two cases currently shedding light on the death of democracy in San Francisco.

The first case involves the Board of Supervisors, which wrongly alleged that the Sunshine Ordinance Task Force (SOTF) had violated the City Charter, when in fact the Task Force had not. Supervisor Scott Wiener — who the Task Force had found engaged in official misconduct regarding the Park Merced development deal — went so far as to allege that the SOTF had engaged in "official misconduct," when the Task Force had done no such thing.

The second case involves the Ethics Commission's recommendation now submitted to the Board of Supervisors to remove Sheriff Ross Mirkarimi from office for official misconduct; to reach that recommendation, the Ethics Commission itself appears to have violated the City Charter by exceeding the authority the Charter grants to the Ethics Commission.

It will now be up to the Board of Supervisors to explain how the Ethics Commission could be permitted to violate the City Charter in the Mirkarimi matter, while the Supervisors make false claims against the Task Force, which had ***not*** violated the Charter.

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Ethics Commissioner Paul Renne considered it pointless to discuss any 'relationships' at all. But Commissioners Liu, Studley, and Hayon held to their moral certainly that Mirkarimi was guilty, and through 'backwards reasoning,' they simply made up a middle-ground 'relationship' test."

Sunshine Task Force Shut Down

The *Observer* has reported in its last several issues that the Board of Supervisors has effectively shut down our local Sunshine Ordinance Task Force, the quasi-judicial body that citizen's can file administrative complaints with regarding open access to public meetings and public records. As reported, the Task Force has not met and conducted any of the people's business since the end of May.

Because the Board of Supervisors improperly removed the ordinance-required physically disabled Task Force member and failed to appoint another physically disabled member, the Task Force was forced into abruptly adjourning its June 6 and July 7 meetings, and cancelled its August 1 and September 5 meetings since the body was not in compliance with Sunshine Ordinance section 67.30(a) that requires a physically-disabled member be appointed to the Task Force at all times.

Although the Board of Supervisors had to have known of this legal requirement since at least June, the Supervisors have not appointed a disabled member during the past four months. Unfortunately, on Wednesday, September 19, the Task Force also cancelled its October 3 meeting, because a disabled member had still not been appointed when the Board of Supervisors rejected re-appointing Bruce Wolfe a second time on September 18. The Task Force — and citizen's who have filed legitimate Sunshine complaints — have been immobilized for five months.

In addition to Supervisor Scott Wiener's false claims during the full Board's May 22 meeting and his untrue statements in the Rules Committee's July 17 meeting previously reported in the *Observer*, Wiener repeated his

untruthful performance during the Rules Committee hearing on September 6 when the nomination to re-appoint Bruce Wolfe was heard for a second time at Rules. Though not a member of the Rules Committee, Wiener was allowed to speak at length about removing Mr. Wolfe, but members of the public were not allowed to refute Wiener's allegations, although the Rules Committee voted again to forward Wolfe's name to the full Board for reconsideration.

The "Unnecessary Overtime" Myth

Wiener again wrongly asserted on September 6 that the Sunshine Task Force had not been handling its agendas properly, and that unnecessary overtime had been generated by City employees. The latter charge is completely false, and a canard, for at least two reasons.

First, of the 41 City departments that had responded to the Board's Budget and Legislative Analyst survey of the costs of compliance with the Sunshine Ordinance conducted by Harvey Rose, only four departments reported overtime costs; there were just 77 hours of overtime reported (out of a total of 20,679 hours responding to formal records requests) at an approximate cost of a mere $5,678. Mr. Rose eventually ruled that the costs of compliance with the Sunshine Ordinance is approximately $997,676, so overtime of $5,678 — or 77 of 20,679 hours — is a tiny drop in the bucket, not something Wiener should have gotten so worked up over.

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Second, it is common practice in City government that rather than paying employees overtime to attend after-hours meetings, they are typically asked to adjust their hours by flexing their time to avoid overtime costs. Creative scheduling of employee work hours could have avoided the 77 hours in overtime, as Wiener must kmow.

The "Brazen Violation of the City Charter" Myth

Wiener regurgitated on September 6 his previous claim that the Task Force had violated the City Charter, but he cleverly tried to lay that claim at the feet of his Board colleagues, testifying that "some of my colleagues have mentioned the 'brazen' violation of the City Charter when the Task Force decided to exempt itself from the Charter's quorum requirement," seeking to obscure the fact that Wiener himself had made up and led this charge. To be fair, Supervisor Mark Farrell also alleged on September 6 that the Task Force had "violated the rule of law," and that he could not in good faith vote to support someone for appointment to the Task Force who had voted to "amend their own bylaws in the face of the City Charter." For her part, Supervisor Jane Kim, the Rules Committee chairperson, also indicated on September 6 that she had concerns around violations of the City Charter. The false claims that the Task Force had "brazenly violated" the Charter is all sound and fury, signifying nothing.

Supervisor Farrell's claim that the Task Force had violated the "rule of law" is laughable.

Any claim the SOTF had engaged in a "brazen violation of the Charter" is both pretext and an elephantine canard. When the SOTF considered changing its rules in September 2011, its discussion and vote to amend its rules were conducted in a series of public meetings, and legal advice was sought, including from the City Attorney. After considerable debate, the Task Force disagreed with the advice memo it had received from a Deputy City Attorney. Indeed, the advice memo was written by a Deputy City Attorney, not a formal "opinion" issued by City Attorney Dennis Herrera. The Task Force's intent was to better serve the public and to make their meetings more efficient. The Task Force did not set out to defy the law.

Indeed, there was a difference of opinion in whether Charter Section 4.104, "Boards and commissions – Rules and Regulations," applies to the Sunshine Task Force. Ambiguities between Sections 4.104 (a) and 4.104 (b) cloud the issue, according to knowledgeable observers.

Section 4.104 (a) states: "Unless otherwise provided in this Charter, each appointive board, commission or other unit of the executive branch of the City and County shall: (1) Adopt rules and regulations consistent with this Charter and ordinances of the City and County. …" However, the Task Force is not part of the City's executive branch; if anything, the Task Force is part of the legislative branch. Alternatively, Section 4.104 (b) doesn't include the phrase "of the executive branch."

So reasonable people can and have disagreed whether sub-paragraph (b) applies to the Task Force, since sub-paragraph (a) clearly does not. And notably, members of the Task Force appear to have believed at the time of their vote over a year ago, that "of the executive branch" refers to the entire section of Charter Section 4.104.

It was reasonable for the Task Force to have reached its conclusion, and it is clear they did not willfully violate the Charter when they changed their majority-vote bylaw. They simply held a different opinion than the Board of Supervisors might hold. But that does not mean that they "brazenly" violated the Charter, and for any City supervisor to so allege is simply untrue, and a canard to boot.

Supervisors Invoke "Let's Get Even" Retribution

As previously reported, the issue that launched the Board of Supervisors ire and their "let's get even" retribution, involved a Sunshine complaint regarding the Park Merced development deal, which resulted in four members of the Board of Supervisors being referred by the Sunshine Task Force to the Ethics Commission over allegations of official misconduct. Pastor Lynn Gavin — a candidate for the Board of Supervisors in District 7 and a resident of Park Merced, until being unjustly evicted — had filed a Sunshine complaint that the Board of Supervisors had wrongly considered 14 pages of last-minute amendments to the Park Merced development agreement just minutes before voting on the matter, but without providing the amendments to members of the public prior to their vote. The Task Force ruled the last-minute amendments violated the Sunshine Ordinance, and referred the matter to the Ethics Commission for enforcement of official misconduct against four City supervisors, including David Chiu and Scott Wiener.

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Reportedly, the Board of Supervisors were not as annoyed so much by the SOTF's referral to Ethics[1] as they were by the Task Force's additional referral of the Park Merced violation to the District Attorney. The Task Force began referring official misconduct complaints to the D.A. following years of inaction on official misconduct cases referred to the Ethics Commission, which has dismissed without public hearings all previous official misconduct cases referred to it by the Sunshine Task Force, except the case against Library Commission president Jewelle Gomez.

[**Editor's Note**: On September 18, the same six Supervisors wouldn't budge, and Wolfe was again rejected in a six-to-five vote against his re-appointment.]

Supervisors Haven't Learned Their Lesson

You'd think that after being referred to the D.A. and the Ethics Commission for violating the Sunshine Ordinance involving last-minute amendments to the Park Merced development deal that the Board of Supervisors would have learned their lesson. You'd be wrong.

During the full Board's September 18 meeting, they considered the *Clean Power SF* public power measure with Shell Oil. Supervisor Wiener — along with other supervisors — complained during the September 18 hearing that they had been handed several amendments to the *Clean Power SF* measure just as they were walking into Board chambers to cast their votes. Clearly, members of the public weren't provided copies of *Clean Power SF* amendments before the September 18 hearing, repeating the same situation as the Park Merced amendments.

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[1] The Sunshine Ordinance affords the Task Force with the ability to refer its determinations to entities other than the Ethics Commission, including the Attorney General and District Attorney. As it is, both entities regularly do not respond to any referrals from the Sunshine Task Force. Due to years of inaction by the Ethics Commission, the Task Force grew frustrated and began to additionally send its Orders of Determination to the District Attorney, Attorney General, and the Civil Grand Jury (the latter in a growing effort for them to consider beyond their own report on the Ethics Commission). It is of no additional consequence, and a matter of regular course of business, that the Task Force refers to these additional bodies. It should be of no surprise to any respondent, the Board of Supervisors, or the Mayor, who should all be well versed in the Sunshine Ordinance to know this.

This suggests that the Board of Supervisors haven't learned their lesson about complying with the Sunshine Ordinance, given that they again willfully engaged in what can only be considered "official misconduct."

Ethics Commission Violates City Charter

San Francisco's mainstream daily news media have reported only the most superficial information about the issues underlying Mayor Ed Lee's official misconduct charges against Sheriff Ross Mirkarimi. In stark contrast, a detailed, dispassionate analysis was posted anonymously on September 9 in a blog article titled "*San Francisco Ethics Commission Official Misconduct Proceeding Against Sheriff Ross Mirkarimi — Thoughts on Final Hearing – August 16, 2012*" (see below).

The anonymous author thoughtfully lays out — point after point — successive observations about the deliberations of the Ethics Commission, raising about 90 well-reasoned arguments of how the Ethics Commission went astray.

In a series of tables, the author examines each of the Mayor's six counts against Mirkarimi, counts that had to be revised and reintroduced after the Ethics Commission rejected the Mayor's initial charges. Notably, none of the Mayor's revised six counts were sustained in full by the Ethics Commission, which rejected four of the six counts outright, and then used a single hybrid new charge by picking and choosing portions of the remaining two counts. The made-up hybrid charge was raised just minutes before the Ethics Commission voted four to one against Mirkarimi, depriving him of knowing what charge he was actually fighting and an opportunity to defend himself against the new charge until just seconds before the Commission's verdict.

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Another table illustrates whether the Mayor's charges were sustained and whether they had duties related to the offices Mirkarimi held.

A third table reviews whether truth had been established regarding specific facts alleged by the Mayor, and whether the four (of five) Ethics Commissioners who voted against Mirkarimi had relied on whether alleged facts had been established as true. Of the eight alleged facts (dissuading witnesses, abuse of power, failure to cooperate in a criminal prosecution against him, alleged misconduct in March 2011 and 2008, misconduct in turnover of the Sheriff's guns, etc.), just one fact — physical abuse on New Year's Eve — was found to have truth established.

The author illustrates quite clearly that the only sustained supporting fact (Mirkarimi's wife's bruised arm on New Year's Eve) did ***not*** relate to any of the Sheriff's duties of office, so it can't possibly be "official misconduct" related to Mirkarimi's official duties.

The author examines the new "relationship" tests the Ethics Commission dreamt up to evaluate whether any relationships existed between Mirkarimi's alleged wrongdoing and the office(s) he held. The Ethics Commission went to great lengths to dream up new relationships to support the Mayor's charge that Mirkarimi's conduct had fallen "below the standards of decency, good faith and right action impliedly required of" elected officials. Ethics Commissioner Paul Renne considered it pointless to discuss any "relationships" at all. But Commissioners Liu, Studley, and Hayon held to their moral certainty that Mirkarimi was guilty, and through "backwards reasoning," they simply made up a middle-ground "relationship" test.

But the made-up requirements are so diluted, that they amount to no requirement at all, exactly what Commissioner Renne had insisted: No direct relationship between duties of office held and alleged conduct was necessary.

The anonymous author notes that a court will likely conclude in the future, and reject out of hand, Renne's blatantly unconstitutional interpretation of the definition of official misconduct. The author also believes that with just a bit more effort, a court will also reject the "backwards reasoning" Commissioners Liu, Studley, and Hayon used to arrive at the same unconstitutional conclusion.

The analysis concludes with two key points: First, the Ethics Commission was strictly limited to a single legal question: Did a public official commit "official misconduct" as defined in City Charter Section 15.105(e), or not? The Ethics Commission didn't answer this question.

"Upgrading" Charges Exceeded Commission's Authority

Instead, they made up their own rules. The author notes, "Voters never granted the unelected five-member Ethics Commission the authority to make recall decisions for them. Its authority is strictly limited to a legal question. … The ***Ethics Commission may not exercise authority it has never been granted*** by 'upgrading' non-official misconduct to 'official misconduct' merely because the Ethics Commission is confident — even certain — that voters would not have elected the official had they known what the Ethics Commission has since learned."

The only way the Ethics Commission could do that would be by substituting their own political judgment for the judgment of voters, but they have no authority to do that, either.

Second, how far back in time can a Mayor or Ethics Commission look to uncover evidence of former improper misconduct in misguided attempts to find relationships to previous conduct and an elected or appointed office held? Eight months? Two years? An entire lifetime?

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If this new "standard" is upheld, every City employee could face removal by a vindictive Mayor. Who would ever choose to become a public servant or public employee with rules like that in place? If Mayor Lee is allowed to make up these rules as he goes along, what's to stop him from fabricating charges against, say, Supervisor Sean Elsbernd or Supervisor Scott Wiener? Is any employee safe with this sort of a precedent, and do the Board of Supervisors really want to hand such open-ended authority to the Mayor in perpetuity? How would that work under a really rotten mayor?

By making up the rules of the misconduct proceedings against Mirkarimi as they went along, the Ethics Commission appears to have violated the City Charter themselves by exercising authority it has not been granted by the Charter.

Rule of Law, or Law of Rulers?

The author notes that even Mayor Lee's attorneys conceded that Commissioner Renne's argument — that any and all misconduct is official misconduct, whether it relates to official duties or not — "would cause San Francisco's 'official misconduct' law to fail this [basic] constitutional test," (that to be constitutional, a law must be sufficiently clear that people required to obey it can easily determine what conduct is prohibited). It would be an example of the precise opposite of the rule of law, more appropriately called the "law of rulers."

While the Mayor, the Board of Supervisors, and the Ethics Commission appear to be swimming in their own "official misconduct" signaling the death of democracy in San Francisco, neither Sheriff Mirkarimi nor the Sunshine Task Force have engaged in official misconduct, as wrongly alleged.

Further reading: The dispassionate, anonymous analysis of the Ethics Commission's handling of Sheriff Ross Mirkarimi's case can be found online at http://rjemirkarimi.blogspot.com/2012/09/ethics-commission-proceeding-against.html. It is well worth the read.

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