

generated by the need to investigate the actions of senior White House officials, that necessitated the appointment of an independent counsel.

The Independent Counsel has, however, concluded that the allegations giving rise to this Office's investigation of the matter were not substantiated by the evidence. No reasonable ground exists for concluding that any senior White House official or Mrs. Clinton was involved in Mr. Marceca's actions in obtaining the background files. Rather, the Independent Counsel determined that it was in the public interest to grant Mr. Marceca immunity (he had asserted his Fifth Amendment privilege against self-incrimination before the Senate Judiciary Committee) to confirm the findings of the investigation and to obtain full disclosure of any remaining aspects of the matter. For that reason, the Independent Counsel has now concluded the investigation without presenting an indictment for consideration by a grand jury regarding Mr. Marceca's false statements to Congress.

IV. BACKGROUND

A. Congress Investigated Mr. Marceca's Request for the Confidential FBI Background Report of Fired White House Travel Office Director Billy Ray Dale.

In early 1995, the House Committee on Government Reform and Oversight ("HCGRO" or "House Committee") began its investigation into the May 1993 firings of the White House Travel Office employees. The House Committee sought documents from the White

House related to Travel Office Director Billy Ray Dale and the seven other Travel Office employees who were fired.

In late May 1996, the White House produced certain documents to the House Committee, which included a written request to the FBI for Billy Ray Dale's confidential FBI background report. The request was dated December 20, 1993, seven months after he was fired from his position as Director of the White House Travel Office. The request for the background report consisted of a pre-printed form carrying the name of then White House Counsel Bernard Nussbaum (commonly called a "Nussbaum" form) and listed "ACCESS(S)" as the reason for the request.

After the disclosure of the request for Mr. Dale's background report, the White House gave the FBI three boxes that OPS had archived after Mr. Marceca's departure and that had been held in the custody of the White House Records Management Division. The boxes contained a total of 333 reports, and related materials, with typewritten names of persons who had not worked in the White House during the Clinton Administration. Although a few of the reports carried the names of prominent staff from the administrations of Republican Presidents Ronald Reagan and George Bush, a significant majority carried the names of persons not known to the general public. All of these reports contained copies of confidential FBI background reports.

The White House stated that the reports had been requested by OPS because the Secret Service had provided an outdated list

of White House passholders that OPS used to request background reports for "holdover employees" from the previous Republican administration.¹⁷ White House officials characterized the incident as a "bureaucratic blunder."¹⁸ Among those quoted in the early press reports was Anthony Marceca, a civilian investigator with the United States Army Criminal Investigative Division, who had been detailed to OPS from August 1993 through February 1994.¹⁹ Mr. Marceca reportedly acknowledged he had ordered confidential background reports from the FBI, read them, and notified OPS Director Craig Livingstone if the reports contained "derogatory information."²⁰ Many members of Congress and the public were skeptical of the White House's and Mr. Marceca's explanation of the requests as a bureaucratic blunder.²¹

This skepticism triggered two separate congressional inquiries into the matter. The House Committee and the Senate Judiciary Committee ("SJC") conducted extensive interviews,

¹⁷ E.g., White House Admits Having Background Files, Washington Post, June 8, 1996, A-1.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ Americans Think White House is Lying About Filegate; Poll, Agence-France Press, June 29, 1996; Filegate Arrogant Abuse of Power, Simpson Says, Cong. Press Release, June 28, 1996; Stockman Furious Over Filegate, Cong. Press Release, June 28, 1996.

depositions, and hearings during the summer and fall of 1996. Both committees heard testimony from, among others, the Secret Service and the FBI, as well as former and current employees of OPS and the White House Counsel's Office.

A key issue for these committees was the alleged existence and the precise content of the Secret Service list that the White House and Mr. Marceca claimed was used to order background reports. After reviewing the names of the former White House employees whose background reports, according to the FBI, were requested by OPS, the Secret Service determined that most of the persons were listed as "inactive" in its computer system on or before January 20, 1993.²² The Secret Service then announced that its computer system was not capable of producing an "outdated" list or a list that would wrongly show inactive former employees as active passholders.²³ A Secret Service audit report concluded: "There were no widespread flaws or system breakdowns

²² See USSS Special Agent Jeffery L. Undercoffer, 7/15/96 "Analysis of E-PASS and WAVES, Re: List of 476 Names." 720-DC-00000058 - 720-DC-00000064. (This numbering system reflects a unique identifying number assigned by the Office of the Independent Counsel to all documents produced to the Office pursuant to a grand jury subpoena or other document request.)

²³ House Committee on Government Reform and Oversight ("HCGRO") 6/26/96 Hearing at 65 (statement of Representative Dan Burton); Senate Committee on the Judiciary ("SJC") 6/20/96 Hearing, at 174 (Richard Miller, Assistant Director for Protective Operations, USSS); Undercoffer 7/10/96 HCGRO Depo. at 10, 18; SJC 6/28/96 Hearing at 290, 296-97 (John Libonati, Supervisory Special Agent, USSS); HCGRO 7/17/96 Hearing at 48 (Libonati).

which resulted in the [Secret Service computer] system producing grossly inaccurate or outdated access lists."²⁴ More significantly, the audit report asserted that "[t]here were three types of [computer] printouts: those listing inactive passholders; those listing active passholders; and those listing passholders whose status changed from active to inactive in a given month."²⁵ Secret Service agents testified that a Secret Service list would either (1) set forth the word "Active" or "Inactive" or the letter "A" or "I" beside each name, or (2) indicate on the cover sheet if the list contained only active or inactive passholders.²⁶

The testimony of Secret Service officials directly contradicted that of Mr. Marceca and former OPS employees Nancy Gemmell and Lisa Wetzl. They testified that the list used by OPS to request FBI background reports did not contain a column distinguishing between "Active" and "Inactive" or otherwise

²⁴ USSS Special Agent Jeffery L. Undercoffer, 7/15/96 "Analysis of E-PASS and WAVES, Re: List of 476 Names." 720-DC-00000063. The Secret Service uses a system known as WAVES (White House Access and Visitor Entry System) to keep track of non-passholders who are permitted access to the White House. The electronic gates at the White House are controlled by an electronic pass recognition device, known as the E-PASS computer system, which is regarded as the critical system for controlling passholder access. Changes in a person's pass status are entered into E-PASS and automatically passed to WAVES by the computer.

²⁵ USSS Special Agent Jeffery L. Undercoffer, 7/15/96 "Analysis of E-PASS and WAVES, Re: List of 476 Names." 720-DC-00000060.

²⁶ Libonati 9/9/96 Int. at 2.

indicate whether a person was an active or inactive passholder.²⁷ As detailed below, the Independent Counsel concluded that the Secret Service was mistaken and the OPS employees were right.

On September 28, 1996, the House Committee issued an interim report, noting it had "yet to determine whether colossal incompetence or a sinister motive precipitated these events."²⁸

B. The Federal Bureau of Investigation Conducted an Internal Investigation of its Role in Providing Background Reports to Mr. Marceca.

On June 5, 1996, FBI Director Louis J. Freeh ordered FBI General Counsel Howard Shapiro to conduct an immediate investigation into the FBI's role in the matter. The FBI's internal investigation focused solely on the actions of the FBI in connection with the release of background investigation reports to the White House.

1. The FBI Has Historically Provided the White House and Others with Confidential Background Reports for Certain Specific Purposes.

The FBI's investigative mission includes gathering, maintaining, and, when appropriate, disseminating sensitive

²⁷ Gemmell 6/26/96 SJC Int. at 56; Marceca 6/11/96 Grand Jury ("GJ") at 12; Wetzl 6/17/96 HCGRO Depo. at 105-106 (testifying that she did not remember if the list had an "A" or "I" on it, but assumed that if the list distinguished between "A" and "I" she would have noticed).

²⁸ "Investigation into the White House and Department of Justice on Security of FBI Background Investigation Files: Interim Report," Comm. on Govt. Reform & Oversight, H. Rep. No. 104-862, 104th Cong, 2d Sess. (Sep. 28, 1996) at 3. The Senate Judiciary Committee did not issue any report regarding its investigation.

personal information.²⁹ Such information is appropriately used in determining whether applicants are suitable for federal employment; whether the trustworthiness of potential employees is an issue because of potential access to classified and sensitive information; and whether individuals are disqualified from obtaining certain licenses or certain kinds of employment.³⁰

The FBI has provided sensitive background investigation information to the White House and other executive agencies upon official request since the Administration of President Lyndon B. Johnson.³¹ In particular, the White House has routinely requested background investigations and name checks to determine the suitability of applicants for federal employment and other persons who might require access to the President or sensitive documents or information. In that regard, the FBI responds frequently to requests for private information about individuals being considered for employment on the White House staff, for presidential appointments, for access to classified or sensitive information, and for access to the White House complex.

²⁹ Report of the FBI General Counsel on the Dissemination of FBI File Information to the White House (hereinafter, "Shapiro Report") at 3-4 (June 14, 1996). See 28 U.S.C. § 534(c). The Attorney General delegated the authority to perform these functions to the Director of the FBI. 28 C.F.R. § 0.85; Title II, § 201 (Oct. 25, 1972), 86 Stat. 1115; 42 U.S.C. § 2165; Executive Order 10450; Executive Order 12968; and 5 C.F.R. §§ 732, 736.

³⁰ Shapiro Report 6/14/96 at 3-4.

³¹ Id. at 1.

2. The FBI Issued a Report Concluding That Inadequate Management Controls Contributed to the Release of Background Reports of Former White House Staff to the White House Office of Personnel Security.

On June 14, 1996, the FBI issued its "Report of the FBI General Counsel on the Dissemination of FBI File Information to the White House" (hereinafter, the "Shapiro Report"). The Shapiro Report found that the FBI had responded routinely to unsigned pre-printed form memoranda requesting copies of FBI background investigation reports -- a process that had been followed at least since the Johnson Administration.³² In addition, the Shapiro Report noted that while the research analysts processing the requests had noticed an increase in the volume of requests in late 1993, no one had questioned the propriety of the requests.³³ The Shapiro Report concluded that FBI management had failed to supervise properly the dissemination of information from FBI background reports.³⁴ The Shapiro Report also concluded that although the FBI acted in compliance with the Privacy Act, it failed to assess and balance adequately the competing interests underlying the Privacy Act.³⁵ Since then,

³² Id. at 1.

³³ Id. at 27, 28.

³⁴ Id. at 29.

³⁵ Id. at 13-14.

the White House and FBI have changed their procedures in an effort to prevent similar events in the future.³⁶

C. The Independent Counsel Concluded That the FBI Files Matter Was Not Within His Jurisdiction Over the Travel Office Matter.

After public disclosure of Mr. Marceca's requests for FBI background reports, the Independent Counsel initiated an inquiry into the requests for the background reports as part of his investigation into circumstances surrounding the firing of Mr. Dale and the other Travel Office employees.³⁷ On June 11, 1996, Mr. Marceca and Ms. Wetzl appeared before a federal grand jury investigating the Travel Office matter. They testified that Mr. Marceca had used a Secret Service list to order background reports from the FBI in late 1993 and early 1994, and that Ms. Wetzl had discovered in autumn of 1994 that the list used was

³⁶ The FBI's investigation led to changes in the procedures for handling requests for sensitive background investigation reports. See June 14, 1996 FBI Press Release. In addition, the White House implemented new rules and procedures to cover White House requests to the FBI for background investigation information. See June 14, 1996 Memorandum from Jack Quinn, then Counsel to the President. The FBI and White House coordinated their respective changes to ensure that each entity's procedural changes did not conflict with the other's. Id. at 2.

³⁷ On March 22, 1996, after a specific request by the Attorney General, the Special Division expanded the Independent Counsel's jurisdiction to investigate "whether William David Watkins committed a violation of 18 U.S.C. § 1001 or any other federal criminal law, . . . in the course of his December 1993 interview with the General Accounting Office concerning the May 1993 firing of the White House Travel Office personnel." Order, Div. No. 94-1 at 1-2 (D.C. Cir [Spec. Div.] March 22, 1996). That matter will be the subject of a separate final report to be filed by the Independent Counsel.

overinclusive and so she sent the resulting unneeded reports to be archived.³⁸

The Independent Counsel ultimately determined that the allegation that White House employees had obtained previous background reports from the FBI without legitimate justification did not relate to its existing mandate, and advised the Attorney General that the Office of the Independent Counsel ("OIC") would not conduct any further investigation into the matter.

On June 21, 1996, the Attorney General applied to the Special Division seeking the expansion of the jurisdiction of the Independent Counsel, which was granted that same day, to include matters related to Mr. Marceca's request for confidential FBI background reports.³⁹ In accordance with that authorization, the Independent Counsel initiated this investigation.

V. SUMMARY OF INVESTIGATIVE STEPS

Following the expansion of the jurisdiction of the Independent Counsel by the Special Division to include the FBI Files matter, the Independent Counsel assembled a team of attorneys, agents, paralegals, and support staff to conduct the investigation. This report is the culmination of the investigative work of more than ten attorneys, including

³⁸ Marceca 6/11/96 GJ at 14-15; Wetzl 6/11/96 GJ at 23.

³⁹ Order, Div. No. 94-1 at 1-2 (D.C. Cir [Spec. Div.] June 21, 1996).