

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of  
Appointing Independent Counsels

Division No. 94-1

FINAL REPORT OF THE INDEPENDENT COUNSEL  
(IN RE: MADISON GUARANTY SAVINGS & LOAN ASSOCIATION)

OF THE INVESTIGATION

IN RE: ANTHONY MARCECA

In accordance with 28 U.S.C. § 594(h) (1) (B) (1994),<sup>1</sup> the Independent Counsel<sup>2</sup> (In re: Madison Guaranty Savings & Loan Association) ("Independent Counsel") files this Final Report in connection with In re: Anthony Marceca, Div. No. 94-1 (D.C. Cir. [Spec. Div.] June 21, 1996), a matter commonly referred to as the "FBI Files" investigation.<sup>3</sup>

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<sup>1</sup> On June 30, 1999, the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591-99 (1994), expired and was not extended by Congress. The Independent Counsel is authorized, pursuant to 28 U.S.C. § 599 (providing for continuation of pending matters), to issue this Final Report.

<sup>2</sup> On October 18, 1999, Robert W. Ray was appointed Independent Counsel, pursuant to 28 U.S.C. § 593(e), following the resignation of Independent Counsel Kenneth W. Starr.

<sup>3</sup> Since the initial appointment of Independent Counsel Starr on August 5, 1994, the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels, has, acting on the request of Attorney General Janet Reno, expanded the Independent Counsel's jurisdiction several times. While Independent Counsel Starr originally intended to file a single final report regarding all matters within the jurisdiction provided by the Court to this Office, Independent Counsel Ray has decided to file separate reports, given the expiration of the Independent Counsel Reauthorization Act and his public commitment, consistent with the statutory mandate, to complete the investigations in a

## I. INTRODUCTION

On June 5, 1996, Representative William F. Clinger Jr., Chairman of the Committee on Government Reform and Oversight of the United States House of Representatives announced that his Committee had discovered that White House officials had requested the confidential Federal Bureau of Investigation ("FBI") background report of Billy Ray Dale, the former Director of the White House Travel and Telegraph Office ("Travel Office"), some seven months after he was fired amid much publicity and controversy. The next day, June 6, 1993, the White House delivered to the FBI three boxes containing hundreds of files of confidential FBI background reports and other materials related to former White House employees in the administrations of Presidents Ronald Reagan and George Bush.

On June 21, 1996, citing the political conflict of interest involved in a Department of Justice inquiry into dealings between the White House and the FBI, the Attorney General sought the appointment of an independent counsel to conduct such an inquiry and recommended that the Special Division expand the jurisdiction of the Independent Counsel for that purpose. Later that same day, upon the Attorney General's application, the United States Court of Appeals for the District of Columbia Circuit, Division

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prompt, responsible, and cost-effective manner.

for the Purpose of Appointing Independent Counsels ("Special Division") issued an order expanding the jurisdiction of the Independent Counsel. The order authorized the Independent Counsel to investigate whether Anthony Marceca, a former detailee in the White House Office of Personnel Security ("OPS"), "committed a violation of 18 U.S.C. § 1001 or any other federal criminal law, other than a Class B or C misdemeanor or infraction, relating to requests made by the White House between December 1993 and February 1994 to the Federal Bureau of Investigation for background investigation reports or materials."<sup>4</sup>

The Special Division's Order also authorized the Independent Counsel to investigate related allegations or evidence of violations "by any person or entity including any person or entity who has engaged in an unlawful conspiracy or who has aided or abetted any federal offense, as necessary to resolve the matter."<sup>5</sup> Finally, the Special Division's Order included authority for the Independent Counsel to investigate "any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law

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<sup>4</sup> Order, Div. No. 94-1 at 1-2 (D.C. Cir. [Spec. Div.] June 21, 1996).

<sup>5</sup> Id. at 2.

arising out of [the Independent Counsel's] investigation of the matter . . . ."6

This report describes the work of the Independent Counsel in fulfilling his obligation under the Special Division's June 21, 1996 Order and the Independent Counsel Reauthorization Act.<sup>7</sup> With the filing of this report, the matter is now closed.

## II. SCOPE OF REPORT

The reporting requirement under which this Office operates, 28 U.S.C. § 594(h)(1)(B)(1994), provides that before the Office is terminated it shall:

file a final report . . . setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought.

This statutory language reflects a change from the pre-1994 law,

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<sup>6</sup> Id.

<sup>7</sup> While many allegations have appeared in the press and elsewhere, this report describes only those matters within the jurisdiction assigned to the Independent Counsel. The Independent Counsel did not, for example, investigate whether Mr. Marceca violated the Privacy Act of 1974, as amended, 5 U.S.C. § 552a (1996). Such a violation, even if substantiated, is not within the jurisdiction of this Office because it constitutes an infraction. 5 U.S.C. § 552a(i)(1); 18 U.S.C. §§ 19 & 3671(b)6 & 7. Such violations are explicitly excluded from the jurisdiction of an independent counsel. 28 U.S.C. § 591(a) (excluding Class B and C misdemeanors from Attorney General's preliminary investigation); see also 28 U.S.C. § 593(b)(3) (instructing the Special Division to grant the independent counsel jurisdiction over "Federal crimes, other than those classified as Class B or C misdemeanors or infractions, that may arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made"). Accordingly, those matters were within the jurisdiction of the Department of Justice.

which concluded with a so-called "declination clause," requiring that the final report include:

a description of the work of the independent counsel, including the disposition of all cases brought and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel.<sup>8</sup>

Thus, the Independent Counsel Reauthorization Act of 1994 did not include an express declination clause.

The deletion of the declination clause does not reflect a Congressional determination that an independent counsel may never express a view relating to the matters under investigation. To the contrary, the deletion of the declination clause resulted from a compromise adopted in the Conference Committee during reauthorization. The Committee explained that it was eliminating the requirement that the independent counsel explain his decision "in every instance," but that "an independent counsel should base the decision [to provide an explanation of any declination] on whether it would be in the public interest for such information to be disclosed."<sup>9</sup> The Committee also considered it "crucial" that a final report include "a discussion of the conduct of the

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<sup>8</sup> 28 U.S.C. § 594(h)(1)(B), Pub. L. 100-191, 101 Stat. 1293, 1302 (1987) (emphasis supplied).

<sup>9</sup> H. Conf. Rep. 103-511, at 19-20 (1994).

person for whom the independent counsel was appointed to office."<sup>10</sup>

Thus, as the 1994 amendment makes clear, Congress disfavored the use of a final report to make conclusory statements and accusations regarding individual culpability. Congress nevertheless expected a final report to contain a recitation of the facts and evidence relating to the matters for which the independent counsel was appointed. Of even greater significance, Congress expressly acknowledged that the "public interest" justifying an explanation of an independent counsel's decision not to indict would involve "a wide range of concerns which need to be carefully balanced" including:

- an understanding of the basis for the independent counsel's decision not to indict;
- an appreciation of the extent to which the individual was central or peripheral to the independent counsel's jurisdictional mandate;
- that the information may exonerate the innocent; and
- protecting individual rights to due process, privacy and fairness.<sup>11</sup>

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<sup>10</sup> Id.; see also Final Report of the Independent Counsel In re: Eli J. Segal, Div. No. 96-1 at 2 (D.C. Cir. [Spec. Div.] Dec. 19, 1997) (deciding "to include in the report sufficient detail to assure the Court, and any others authorized to read it, that our investigation was thorough, professional and competent; that the decision to decline prosecution was based on the merits and on the evidence adduced by this Office; and that resources were used wisely and economically").

<sup>11</sup> H. Conf. Rep. 103-511, at 19-20 (1994).

This report has been prepared with due consideration of these factors in mind.

### **III. FINDINGS**

The Independent Counsel has concluded his investigation and determined that no indictments should be brought in this matter. Consistent with Congress's directives and the statutory report requirement, the Independent Counsel deems it in the "public interest" to provide the following, limited analysis and explanation of the Independent Counsel's exercise of his prosecutorial discretion in reaching this conclusion.

The Independent Counsel concluded that neither Anthony Marceca nor any senior White House official, or First Lady Hillary Rodham Clinton, engaged in criminal conduct to obtain through fraudulent means derogatory information about former White House staff. The possibility that such officials might have engaged in such criminal conduct was the principal investigative issue that resulted in the appointment of an independent counsel with respect to this matter.

Specifically, the Independent Counsel also concluded that Mr. Marceca did not knowingly make false statements to the FBI when he requested confidential background reports of former White House staff. This conclusion further corroborated the findings of this investigation -- that Mr. Marceca's alleged criminal conduct did not reflect a conspiracy within the White House.