

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.

Finally, the Independent Counsel concluded that although portions of Mr. Marceca's testimony before Congress were false and misleading, his testimony regarding the central issue that necessitated the appointment of an independent counsel was, on this point, truthful: No senior White House official, or Mrs. Clinton, was involved in requesting FBI background reports for improper partisan advantage. Notwithstanding evidence regarding Mr. Marceca's false testimony before Congress, the Independent Counsel concluded that the public interest in full disclosure of all relevant information regarding the matter, especially information regarding the potential existence of a conspiracy, was best served by seeking such disclosure from Mr. Marceca under a grant of immunity.

**A. The Independent Counsel Concluded That There Was No Substantial Evidence of a Conspiracy Involving Senior White House Officials or Mrs. Clinton to Obtain Confidential Background Reports on Former Republican White House Staff.**

The appointment of an independent counsel reflects a primary concern for the investigation of high-ranking executive branch officials.<sup>12</sup> Thus, a fundamental question for the Independent Counsel was whether Mr. Marceca or senior White House officials

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<sup>12</sup> To cite but one of many possible examples, in reauthorizing the independent counsel provisions of the Ethics in Government Act in 1994, the Senate explained that the statute "meets a critical need -- public trust in government. . . . [The statute is] a trusted means of handling the rare case in which an administration is asked to investigate and prosecute its own top officials." S. Rep. 103-11, at 11 (1993).

engaged in criminal conduct to secure derogatory information from the background reports of former Republican political appointees. It was alleged that the derogatory information which might be contained in the FBI background reports of Republican appointees had been obtained by White House staff from the FBI through fraudulent means to be funneled to political operatives and/or other individuals outside of the Office of Personnel Security for improper political use. It was further alleged that various high-level officials within the Clinton Administration, such as White House Counsel Bernard Nussbaum and Associate White House Counsel William Kennedy, and First Lady Hillary Rodham Clinton had direct knowledge of or jointly participated in such activities.<sup>13</sup>

These acts, had they occurred and had the actors possessed the requisite criminal intent, might have violated any number of federal statutes, including 18 U.S.C. § 371 (regarding conspiracy), 18 U.S.C. § 1001 (regarding false statements), and 18 U.S.C. § 641 (regarding conversion of government records). The Independent Counsel's mandate included whether to present to

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<sup>13</sup> Allegations that Mrs. Clinton was involved in hiring Craig Livingstone as Director of OPS appeared to fuel suspicions that she intended to use OPS to compile derogatory information for use against political opponents of the President and Mrs. Clinton. See Final Report In re: Bernard Nussbaum, No. 94-1 (D.C. Cir. [Spec. Div.] Oct. 25, 1996) (filed March 16, 2000). The evidence in In re: Bernard Nussbaum failed to substantiate the allegations against Mr. Nussbaum and Mrs. Clinton that he had lied about her role in the hiring of Craig Livingstone to conceal her involvement in such a scheme.

a grand jury an indictment charging such violations of federal law.

The Independent Counsel determined not to present an indictment to the grand jury because the substance of the allegation was unsupported by the evidence developed in the investigation. To the contrary, the Independent Counsel's principal conclusion was that no substantial evidence -- forensic, documentary, or testimonial -- existed to support the allegation that Mr. Marceca's conduct was criminal. The investigation disclosed no credible evidence establishing that Mr. Marceca, or any high-level Clinton Administration official or Mrs. Clinton, engaged in criminal activity in obtaining confidential FBI background reports related to individuals who no longer required access to the White House. Nor did the evidence establish that any high-level official had prior knowledge of or participated in Mr. Marceca's conduct before that activity was publicly disclosed.

The investigation also developed no significant evidence to suggest that the FBI background information obtained by Mr. Marceca with respect to persons who no longer required White House access was shared with any individuals outside of OPS and the White House Counsel's Office, the office responsible for the operation of OPS. The evidence of Mr. Marceca's limited sharing of derogatory information with others within his office or the Counsel's office was insufficient to establish that Mr. Marceca,

in this regard, violated any law or intended to violate any law within the jurisdictional mandate of the Independent Counsel. The same evidence also was insufficient to establish that any other individual had violated the law or intended to do so in this regard.

**B. Mr. Marceca Did Not Knowingly Make False Statements to the FBI When He Requested the Background Reports of Former White House Staff Who No Longer Required Access.**

Critical to the conclusion that there was no conspiracy was the resolution of the basic allegation presented by the investigative mandate -- whether, in seeking confidential background reports from the FBI, Mr. Marceca violated any federal criminal law. The gravamen of the allegation was that, in seeking background reports from the FBI, Mr. Marceca had falsely stated to the FBI that his purpose in doing so was for determining whether the individual in question should be provided access to the White House, when in truth and in fact, as he allegedly knew, the individuals for whom he requested background reports did not require access to the White House complex. Had Mr. Marceca acted in this manner with the requisite criminal intent, his actions would have violated 18 U.S.C. § 1001 (regarding false statements).

In this instance, the investigation did find sufficient evidence to establish certain elements of the offense. There can be no doubt that Mr. Marceca requested FBI background reports for individuals who no longer required access (and were not being

considered for access) to the White House. Therefore, in representing to the FBI that the reports were sought for this purpose, Mr. Marceca made false and inaccurate statements to the FBI.

The Independent Counsel declined, however, to present Mr. Marceca's acts (of making false and inaccurate statements to the FBI) to a grand jury for indictment because, in the judgment of the Independent Counsel, there was insufficient evidence to establish that Mr. Marceca acted with the requisite criminal intent to violate the law. Two aspects of the investigation supported this conclusion.

First, the evidence was ambiguous as to the nature, extent, and timing of Mr. Marceca's knowledge of the falsity of the statements he made to the FBI. After reconstructing the Secret Service's computer-generated list used by Mr. Marceca to guide his requests for background reports, the Independent Counsel concluded that that list, in fact, included both active and inactive passholders. The inclusion of both inactive and active passholders on this list was contrary to the information initially provided to Mr. Marceca by his predecessor. Although at some point, as he stated under oath to this Office under a grant of immunity, he realized that the list contained the names of persons who no longer required access to the White House, he continued to use the list.

There is no evidence, however, that he ever asked for a background report of any particular person who he knew no longer required access. To the contrary, there is substantial evidence -- memoranda to offices asking if persons still worked there and post-it notes and other markings on some reports -- that supports the conclusion that Mr. Marceca did not know that any particular person whose background report he requested was not a current employee and, therefore, did not require access to the White House. Only after receiving the background report and attempting to verify the employment of an individual in the White House did he realize that a person did or did not require access to the White House complex.

Accordingly, the Independent Counsel concluded that the United States could not prove beyond a reasonable doubt that any particular request for a background report contained a representation that Mr. Marceca knew was false. Rather, other factors, such as the Secret Service's providing to OPS an unlabeled and overinclusive list and the White House's failure to employ experienced personnel and to train and supervise the staff to understand the sensitivity of the background reports that they were handling, contributed to Mr. Marceca's blind adherence to a procedure whose flaws should have been obvious. The quantity of reports requested and received, the proportion of those reports later discovered that related to individuals who no longer required White House access, and the identity of some of those

individuals should, in conjunction with the other factors, have suggested a problem. The presence of these factors, however, supports the conclusion that Mr. Marceca lacked criminal intent, especially in light of the dearth of other evidence to the contrary.

Second, the evidence was ambiguous as to whether Mr. Marceca acted with any of the motives attributed to him, such as the motive to seek out derogatory information on political opponents of the President and Mrs. Clinton for partisan political use at a later time. The investigation established that when Mr. Marceca began his detail, he first requested the background reports of nonpolitical staff of various agencies and offices within the White House. He did not begin requesting the background reports from the White House Operations Personnel ("WHOP") list, which contained the names of some individuals who had previously held significant political positions in the prior administration (e.g., former Secretary of State James A. Baker III, former Assistant to the President for National Security Affairs Brent Scowcroft, and former White House spokesman Marlin Fitzwater), until nearly two and one half months after he began his detail. Furthermore, his requests from this list, as well as the other lists, were generally made in alphabetical order.

The evidence also shows that Mr. Marceca considered "derogatory" information in the reports of some former WHOP staff to include the fact that the person was a Republican -- hardly



the kind of damaging information that could be used for partisan political purposes. Mr. Marceca, however, believed that it was pertinent to performing a part of his job, i.e., identifying so-called derogatory information to determine suitability for employment in the White House of a Democratic President.<sup>14</sup> He also did not differentiate, in looking for such derogatory information, between former senior officials and other former White House employees.

In light of the conclusions that Mr. Marceca had been instructed to request confidential FBI background reports using a list that included active and inactive passholders, that his requests for reports followed that list in a routine fashion, and that he was inexperienced, untrained, and unsupervised, the Independent Counsel deemed there to be insufficient evidence of any nefarious or malfeasant motive that would support an inference of knowing criminal conduct. In short, the Independent Counsel found insufficient proof of a motivation that would convince a jury beyond a reasonable doubt of any criminal intent.

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<sup>14</sup> While the possible use of political affiliation in determining the suitability of current employees presents a genuine concern for privacy and possible impermissible, though not criminal, conduct, requests for the background reports of actual holdover employees was a proper function of OPS. Accordingly, this Office did not examine issues related to requests for background reports of actual holdover employees.

**C. Although Portions of Mr. Marceca's Testimony Before Congress Were False and Misleading, the Independent Counsel Concluded That Prosecution Was Unwarranted.**

Finally, the investigative mandate presented the allegation of whether Mr. Marceca testified truthfully and completely before Congress. The gravamen of this allegation is that, when questioned by Congress, Mr. Marceca knowingly testified falsely when he denied the true nature of his actions in requesting FBI background reports and his subsequent handling of them, thereby wilfully impeding the legitimate investigative authority of the Congress.

The Independent Counsel had declined to prosecute Mr. Marceca for perjury or false statements because, on the central issue of whether he or anyone else had targeted Republicans and requested that the FBI produce their confidential background reports, Mr. Marceca was truthful: Neither he nor anyone else had done so. To ensure the full disclosure of any evidence regarding this issue, after deciding not to prosecute Mr. Marceca, the OIC granted Mr. Marceca immunity. Mr. Marceca's immunized testimony confirmed both the absence of any conspiracy to obtain the background reports and that his testimony in Congress had not been truthful in all respects.

In essence, the Independent Counsel concluded that Mr. Marceca's false statements to Congress bore an insubstantial relationship to the question at the core of this investigation: whether his conduct was evidence that senior White House

officials were involved in obtaining confidential background reports for improper partisan political purposes. It is true, as some may no doubt note, that Mr. Marceca was the only individual named in the grant of jurisdiction to investigate the disclosure of FBI background reports. However, it cannot be gainsaid that, had the original allegations of misconduct been restricted exclusively to Mr. Marceca, no independent counsel would have been appointed.<sup>15</sup>

Rather, an independent counsel was appointed to investigate this matter precisely because of the possibility that Mr. Marceca's conduct was only the "tip of the iceberg" and that other more senior officials in the White House might have participated in or known of jointly undertaken activity.<sup>16</sup> Plainly, it was this potential for a conflict of interest,

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<sup>15</sup> Mr. Marceca was not a "covered" person for whom the Attorney General was required to conduct a preliminary investigation and seek the appointment of an independent counsel if, after the preliminary investigation, she had determined that further investigation was warranted. See 28 U.S.C. § 591(a), (b); 28 U.S.C. § 592(c). Indeed, the Attorney General's application for appointment of an independent counsel in this case expressly noted that she was invoking her discretionary authority to seek the appointment of an independent counsel because "an inquiry into whether Mr. Marceca violated federal criminal law in making the requests to the FBI would constitute a political conflict of interest, as described in 28 U.S.C. § 591(c)(1)." Application, Div. No. 94-1 at 3 (D.C. Cir. [Spec. Div.] June 21, 1996) (emphasis supplied).

<sup>16</sup> Cf. In re: Madison Guaranty Savings & Loan Association, Div. No. 94-1 (D.C. Cir. [Spec. Div.] Jan. 16, 1998) (expanding the jurisdiction of the Independent Counsel to include an investigation of whether "Monica Lewinsky or others" violated federal criminal law).

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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

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