

VI. FACTUAL SUMMARY

A. Anthony Marceca, a Former Campaign Advance Worker, Without Experience, Training, or Supervision, Was Assigned the Task of Reviewing Confidential FBI Background Reports.

Anthony Marceca, a former Democratic presidential campaign advance worker,⁵⁶ began his detail⁵⁷ at OPS on August 18, 1993. At that time, the office consisted of three full-time employees who had not previously worked at the White House:⁵⁸ its Director, Craig Livingstone, who had started in February; Administrative Assistant Mari Anderson, who had been hired on February 17, 1993, and supervised the day-to-day operations of OPS; and Lisa Wetzl, who had worked as an unpaid intern from June until August 1993 when she was promoted to the paid position of

⁵⁶ Mr. Marceca had been employed as a field organizer and did advance work for the Presidential campaigns of Democratic Senators Edmund Muskie, George McGovern, John Glenn, Gary Hart, and Paul Simon, former Vice President Walter Mondale, and Vice President Albert Gore, Jr. HCGRO 6/26/96 Hearing, at 54-55 (Chairman Clinger and Marceca).

⁵⁷ Mr. Marceca obtained his detail to OPS through his relationship with OPS Director Craig Livingstone. Mr. Marceca met Mr. Livingstone in 1984 when they both worked on the presidential campaign of Democratic Senator Gary Hart. Marceca 6/18/96 HCGRO Depo. at 9, 12, 23. They continued to work together when Marceca did advance work for the presidential campaign of Walter Mondale in July 1984. Id. at 26. Mr. Marceca also worked with Mr. Livingstone on the Presidential Inaugural Committee. HCGRO 6/26/96 Hearing at 55 (Chairman Clinger and Livingstone). Mr. Livingstone requested a detailee due to staff reductions in the White House and the substantial volume of work resulting from the change in Administrations. Kennedy 6/18/96 HCGRO Depo. at 28-30. HCGRO 6/26/96 Hearing at 34 (Livingstone).

⁵⁸ Gemmell 7/29/96 Int. at 4.

Staff Assistant.⁵⁹ For the first time, the office also relied on volunteer interns to assist in the performance of its functions.⁶⁰ The former Director, Jane Dannenhauer, had retired in February after serving in four previous administrations.⁶¹ Nancy Gemmell, who had worked in the office since 1981 and served as the OPS Administrative Assistant, had retired only a few days before Mr. Marceca's detail began.⁶²

The responsibilities of the three existing full-time employees and Mr. Marceca included the processing and handling of highly sensitive FBI background reports. Among his particular duties, Mr. Marceca was assigned, as a low priority, the task of assembling new background files (that included confidential FBI background reports) for White House employees and contractors who had worked in the White House during the previous administration of President Bush and who would continue to work in the White House during the administration of President Clinton.⁶³ This "Update Project" was necessary because all OPS files relating to the background investigations of these "holdover" employees from

⁵⁹ Livingstone Notification of Personnel Action, effective date February 8, 1993, 705-DC-00001740; Anderson 9/30/94 Int. at 1; Wetzl 6/11/96 GJ at 4.

⁶⁰ Gemmell 7/29/96 Int. at 8; HCGRO 6/19/96 Hearing at 81-82 (Gemmell); HCGRO 6/19/96 Hearing at 81 (Dannenhauer).

⁶¹ HCGRO 6/19/96 Hearing at 36, 38 (Dannenhauer); Dannenhauer 5/6/97 Int. at 3.

⁶² Gemmell 6/10/96 Int. at 1.

⁶³ Marceca 6/11/96 GJ at 13-14.

the previous administration had been archived pursuant to the Presidential Records Act.⁶⁴ Mr. Livingstone, the Director of OPS, was considered a "hands-off" manager and was not involved with this project because he considered it "innocuous."⁶⁵

Although the archiving of these files left OPS with no record of the background investigations of holdover employees, the creation of new files was, nonetheless, a low priority because a background investigation had, at least once, been conducted for each holdover employee when he or she first began working at the White House.⁶⁶ Of higher priority were two projects: (1) the processing of background investigations for new staff, who had not had a background investigation and required permanent access to the White House; and (2) the processing of temporary passes to provide interim access for new employees awaiting their permanent clearance and for contractors and other visitors to the White House who might require short-term access.⁶⁷ The need to ensure the efficient functioning of these

⁶⁴ 44 U.S.C. §§ 2201-2207; Gemmell 6/26/96 SJC Int. at 92; HCGRO 6/19/96 Hearing at 69 (Dannenbauer); HCGRO 6/19/96 Hearing at 104-106 (Gemmell).

⁶⁵ Wetzl 8/8/96 Int. at 5; Livingstone 7/1/96 GJ at 61. Further evidence of Mr. Livingstone's hands-off approach included testimony that he spent some of his time while Director of OPS doing advance work for Presidential events. Gemmell 7/29/96 Int. at 4.

⁶⁶ Gemmell 7/29/96 Int. at 7; Gemmell 6/26/96 SJC Int. at 97.

⁶⁷ Marceca 6/11/96 GJ at 13-14.

projects was particularly acute due to the high volume of work caused by the beginning of a new administration of a different political party.⁶⁸

Prior to undertaking his duties at OPS, Mr. Marceca met with Ms. Gemmell, who had worked at OPS since 1981 and who had worked on the Update Project, among other things, until her retirement on August 13, 1993.⁶⁹ In early June 1993, Ms. Gemmell requested that the Secret Service provide OPS with a list of all active White House passholders from its computer system.⁷⁰ In response to this request, the Secret Service provided OPS with a list of what Ms. Gemmell believed to be each active passholder's full name, date of birth, city and state of birth, and social security number.⁷¹ The Secret Service list was broken down by office within the White House and then alphabetically within each office.⁷² Thirteen separate offices or categories were listed: National Park Service ("NPS"), AT&T, C&P Telephone, CIA, Diversified Reporting, Misc. Non-Government, White House Credit Union, FBI, Other Government Agency, General Services

⁶⁸ Shapiro Report 6/14/96 at 22.

⁶⁹ Gemmell 6/26/96 SJC Int. at 50.

⁷⁰ Gemmell 7/29/96 Int. at 6.

⁷¹ Gemmell 6/26/96 SJC Int. at 50. This additional information was needed to include in the request form sent to the FBI to secure background reports. Id.

⁷² HCGRO 6/18/96 Hearing at 91, 125 (Gemmell); Gemmell 6/26/96 SJC Int. at 53-58.

Administration ("GSA"), National Security Counsel ("NSC"), Residence Staff, and White House Office of Personnel ("WHOP").

In July 1993, OPS began the process of requesting background reports for the Update Project.⁷³ OPS first requested background reports for individuals who worked in offices within the White House that historically had little turnover (e.g., NPS, AT&T, C&P Telephone).⁷⁴ Ms. Gemmell advised the OPS staff that the White House Office Personnel list should be processed last in the Update Project, as this group would have substantial turnover relative to other offices.⁷⁵ When Ms. Gemmell met with Mr. Marceca, she briefly explained the Update Project and showed him the Secret Service list that she had obtained in early June.⁷⁶

1. Mr. Marceca Routinely Proceeded Through the Offices and Names on the June 10, 1993 List.

The OIC's analysis of Mr. Marceca's requests revealed that the FBI did not receive Mr. Marceca's first "Nussbaum" form requesting a background report related to the Update Project until September 3, 1993, more than two weeks after his detail

⁷³ Gemmell 6/26/96 SJC Int. at 66-67.

⁷⁴ Id. at 58-60.

⁷⁵ Id. at 58-59.

⁷⁶ Marceca 6/9/96 Decl. at 1-2; Marceca 6/18/96 HCGRO Depo. at 62-63. Ms. Gemmell's recollection of the meeting is more vague. She recalls a more general discussion of the operation of OPS, however she does recall showing Mr. Marceca the Secret Service list. Gemmell 6/26/96 SJC Int. at 82.

began.⁷⁷ He asked for the background reports of the GSA staff first, followed by the NSC, and the White House Residence staff, before turning to the WHOP list.⁷⁸ His first request for a background report of any person on the WHOP list occurred on December 3, 1993, two and one half months after his detail began.⁷⁹

Mr. Marceca worked through the Secret Service list office by office, in roughly alphabetical order.⁸⁰ His procedure for the Update Project consisted of first determining whether a file had been created for an individual on the list shown to him by Ms. Gemmell which he had found in the vault when he began working on the project.⁸¹ If OPS did not already have a file containing the background reports relating to that person, Mr. Marceca filled

⁷⁷ See Marceca 6/10/96 Int. at 1 (identifying Marceca's start date as August 18, 1993).

⁷⁸ HCGRO 6/26/96 Hearing at 193-194 (Representative Barrett and Marceca).

⁷⁹ "Nussbaum" form (12/3/93) AL-DC-00011073.

⁸⁰ See HCGRO 6/26/96 Hearing at 193-194 (Representative Barrett and Marceca); HCGRO 6/26/96 Hearing at 39-41 (Marceca). By the time Mr. Marceca's detail began, most of the background reports for the low turnover offices had already been requested. The background reports of only part of the General Services Administration, the entire National Security Council list, and the White House Residence staff, other than the WHOP, had not been requested. We ascertained this by matching the requested names with their respective list (which notes the office for which they worked).

⁸¹ Marceca 6/18/96 HCGRO Depo. at 64. That list was the Secret Service list that did not differentiate between active and inactive passholders and that was the subject of the Secret Service's erroneous testimony.

out a pre-printed "Nussbaum" form addressed to the FBI Liaison requesting a copy of that person's previous background report.⁸² This form included a space for OPS to list the purpose of the request. In that space, Mr. Marceca typed "ACCESS(S)," which he had been told meant that the person named required access to the White House complex.⁸³

When Mr. Marceca received background reports from the FBI, he reviewed them to determine: (1) the date of the person's last investigation; (2) the office where they worked; and (3) any derogatory information.⁸⁴ After determining the names of individuals on the list for a particular office whose background reports were more than five years old, Mr. Marceca prepared a memorandum under the signature of Mr. Livingstone asking if the person still worked in that office and notifying the office that the person needed to complete a new SF-86 form to initiate a new background investigation.⁸⁵ When the NSC received such a memo regarding a number of its former employees, it responded that

⁸² HCGRO 6/26/96 Hearing at 39 (Marceca); Marceca 6/18/96 HCGRO Depo. at 64. This is consistent with Ms. Gemmell's description of the process by which she requested previous background investigations. HCGRO 6/19/96 Hearing at 50-51 (Gemmell).

⁸³ HCGRO 6/26/96 Hearing at 39 (Marceca); Marceca 6/9/96 Decl. at 1-4.

⁸⁴ Marceca 9/11/99 OIC Depo. at 26, 50-51.

⁸⁵ HCGRO 6/26/96 Hearing at 40 (Marceca). A new SF-86 would need to be filled out by a holdover employee if an updated background investigation needed to be conducted.

virtually none of the individuals identified in his memorandum as due for a background investigation was still employed by their agency.⁸⁶ Whenever, during this process, Mr. Marceca determined that an individual was no longer at the White House, he would place that person's background report in a "dead file" and no further action was taken.⁸⁷

For background reports of individuals who did not currently require a new background investigation, Mr. Marceca created a new file, noted the date when the individual would be due for a new background investigation, and placed the folder in the vault.⁸⁸ Mr. Marceca also created lists, between September 20, 1993 and February 10, 1994, of the previous background reports received from the FBI each day, which he left with the files in the vault when his detail ended.⁸⁹

In July 1993, OPS Administrative Assistant Mari Anderson, after a discussion with Mr. Livingstone, created a log to record the removal of any files from the OPS office.⁹⁰ The log, which was maintained in a three-ring binder, identified the person to whom a file was furnished, the date the file was furnished, and

⁸⁶ Marceca 9/11/99 OIC Depo. at 38.

⁸⁷ Marceca 6/18/96 HCGRO Depo. at 119; HCGRO 6/26/96 Hearing at 38-40 (Marceca).

⁸⁸ HCGRO 6/26/96 Hearing at 39 (Marceca).

⁸⁹ Id. at 95-99 (Chairman Clinger, Representative Wise, and Marceca).

⁹⁰ Anderson 11/21/96 GJ at 105-06.

the date the file was returned.⁹¹ There were no entries in the log between March 29, 1994 (after Mr. Marceca left OPS) and September 1994. While Mr. Marceca was aware of the log, he never used it.⁹²

By the end of his detail, Mr. Marceca had requested background reports for persons named on the list from "Aa" through "Go" in substantially alphabetical order and had ordered and received more than 1100 confidential background reports. Of that number, more than 700 (or well over 60 percent) related to individuals who no longer required White House access. These requests included the background reports of 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.

2. Mr. Livingstone and Mr. Marceca Did Nothing to Change the Process after They Realized That There Was a Problem.

In December 1993,⁹³ Mr. Marceca became concerned about the large number of background reports that he was obtaining for

⁹¹ Saunders 9/24/96 SJC Int. at 7-8; Wetzl 11/21/96 GJ at 60; Anderson 11/21/96 GJ at 103.

⁹² Anderson 10/1/96 SJC Int. at 33; Marceca 6/11/96 GJ at 34.

⁹³ In December 1993, Mr. Marceca began to request reports for individuals on the WHOP list in much greater numbers than he had requested reports from the other lists. Shapiro Report 6/14/96 at 22-24.

individuals who no longer required access to the White House.⁹⁴ Although he met with Mr. Livingstone and OPS Administrative Assistant Mari Anderson at that time and discussed the large number of reports being requested, there does not appear to have been any change in the process for conducting the remainder of the Update Project during Mr. Marceca's detail.⁹⁵

At about that time, the FBI also became concerned about its ability to process effectively the large number of requests and asked OPS to limit its requests to no more than 50 per week.⁹⁶ The FBI, however, never recognized that any of OPS requests between July 1993 and January 1994 related to individuals who no longer required White House access.⁹⁷ The two FBI analysts who handled the OPS requests noticed only an increase in requests for previous reports near the end of 1993.⁹⁸ One stated that she did

⁹⁴ Marceca 9/11/99 OIC Depo. at 78-79.

⁹⁵ Id. at 80, 92-93.

⁹⁶ Marceca 6/18/96 HCGRO Depo. at 73-74.

⁹⁷ Shapiro Report 6/14/96 at 27-28.

⁹⁸ Id. at 23; FBI Analyst Janice George 9/24/96 Int. at 3; FBI Executive Agency Sub-Unit Supervisor, Peggy S. Larson 9/26/96 Int. at 3. The Executive Agency Sub-Unit ("EASU") employees that handled the requests were career employees with many years of experience. Ms. George has worked for the FBI for approximately 28 years. George 9/24/96 Int. at 1. She worked as a research analyst in the EASU from January 1990 through March 1996. George 9/24/96 Int. at 1. FBI Analyst Sherry Carner began working at the FBI in 1965. Carner 9/24/96 Int. at 1. She was assigned to the EASU as a clerk in 1966 and ten years later she was promoted to research analyst, her position at the time she was interviewed. Id.

recall seeing Secretary Baker's name on one request and shared this with the other.⁹⁹ Both stated that they did not believe the request was necessarily inappropriate since there could be many reasons why the former Secretary of State required access to the current White House.¹⁰⁰

Sometime in late 1994 or early 1995 (after Mr. Marceca's detail ended), Ms. Wetzl, on her own initiative, took over the Update Project.¹⁰¹ She discovered the hundreds of "dead" files created by Mr. Marceca.¹⁰² She also discovered the June 1993 Secret Service list that Mr. Marceca had used. Ms. Wetzl reviewed the list used by Mr. Marceca and, realizing that the list was outdated, notified Mr. Livingstone, discarded the list, and sent the files to archives¹⁰³ from which they were recovered after the discovery of the request for Billy Ray Dale's background report in May 1996.¹⁰⁴ Ms. Wetzl completed the Update

⁹⁹ Carner 9/24/96 Int. at 3; George Int. 9/24/96 at 5.

¹⁰⁰ See Carner 9/24/96 Int. at 3; see also George Int. 9/24/96 at 5.

¹⁰¹ Wetzl 6/11/96 GJ at 12-13; HCGRO 6/26/96 Hearing at 46-50 (Wetzl).

¹⁰² HCGRO 6/26/96 Hearing at 46-48 (Wetzl).

¹⁰³ Id. at 60-61 (Wetzl) ; Wetzl 6/17/96 HGRO Depo. at 34-35, 57-58; Livingstone 6/14/96 HCGRO Depo. at 35-42.

¹⁰⁴ Livingstone 6/14/96 HCGRO Depo. at 75-76; June 6, 1996 White House "Memo for the Record Re: Counsel's Office Request" from Jane Sherburne, Sally Paxton, David Kitchen, Lee Johnson, Thomas Kelley, and Terry Good. 705-DC-00004556.

Project using a new updated list from the Secret Service in conjunction with lists of current employees she had requested from the supervisors of each office in the White House complex.¹⁰⁵

3. Mr. Marceca Read the Contents of Some Background Reports.

Mr. Marceca read at least some of the background reports for content. He placed post-it notes with substantive notations or highlighted substantive portions on several reports.¹⁰⁶ Ten reports contained substantive notations, and one contained highlighting of substantive material within the report. Of the eleven reports with either notes or highlighting, ten involved individuals who were not holdover employees and who no longer required access to the White House. Mr. Marceca did not believe that the handwriting was his on only one post-it note.¹⁰⁷

The notes and highlighting reflected commentary on various matters, including reported arrests, credit history information,

¹⁰⁵ Wetzl 6/11/96 GJ at 16-18; Wetzl 8/8/96 Int. at 6-7.

¹⁰⁶ Thirty-three of the 709 reports in the possession of the OIC were discovered with notes or highlighting. Twenty-nine reports contained post-it notes, two reports contained notes written on White House note paper, one report contained a note written on a piece of scrap paper (size 5" x 3½"), and one report contained pink highlighting. Notes in 23 of the reports did not relate to the substance of the background report. Those notes appear to relate to information that was missing, such as place of birth, middle name and social security number, or where the person worked.

¹⁰⁷ A complete description of the reports on which post-it notes and highlighting were discovered is attached as Appendix 2.

as well as political affiliation.¹⁰⁸ Notes and highlighting were reflected on the reports of former White House staff at a variety of levels, without any pattern suggesting the targeting of more politically visible former senior officials. When Mr. Marceca identified "derogatory" information in a report, he reported it to Mr. Livingstone.¹⁰⁹ Initially, he copied reports for Mr. Livingstone to review and highlighted some portions on the original reports.¹¹⁰ At some point, probably in September 1993, Mr. Livingstone told him that past political affiliation was not derogatory information that served as a criterion for suitability for employment in the Clinton Administration.¹¹¹ Also, when Mr.

¹⁰⁸ In addition to affixing post-it notes and highlighting, Mr. Marceca drafted memoranda to OPS Director Craig Livingstone regarding what he considered derogatory or inconsistent information contained in several background reports. Marceca 9/11/99 OIC Depo. at 26-28, 35, 65-66. Some of these memoranda were recovered from Mr. Marceca's computer and reviewed by OIC investigators and were found to contain information similar to, or in at least one case, identical to, the information referenced in the post-it notes and highlighting. Compare Appendix 2 at iii (relating to F[11]) with Marceca Memo. to Livingstone, "Subject: Analysis of Personnel Background." 706-DC-00000186. Thus, the post-it notes are not the only physical evidence of Mr. Marceca's review for substance of the requested background reports, but they are sufficiently representative of the kind of information that Mr. Marceca considered relevant to an individual's suitability for employment in the Clinton White House.

¹⁰⁹ Marceca 6/10/96 Int. at 2 (stating that he reported such information to Mr. Livingstone three times); Marceca 9/11/99 OIC Depo. at 27.

¹¹⁰ Marceca 9/11/99 OIC Depo. at 27-28, 35.

¹¹¹ Id. at 28.

Livingstone discovered that Mr. Marceca had copied reports and highlighted portions of original reports, Mr. Livingstone told Mr. Marceca to cease making any marks on the reports and not to copy them.¹¹²

B. After the Discovery of the Request for Billy Dale's Background Report, Mr. Marceca Gave Sworn Testimony in a Declaration, Before a Grand Jury, in a Congressional Deposition, And in a Public Congressional Hearing.

After Chairman Clinger announced the discovery of the request for Billy Ray Dale's confidential FBI background report, Mr. Marceca provided a sworn declaration to Mr. Livingstone's attorney and provided testimony before a federal grand jury, in a Congressional deposition, and in a public hearing before the House Committee on Government Reform and Oversight.¹¹³ Although he gave testimony regarding some of the details of his conduct that was both internally inconsistent and inconsistent with other evidence from the investigation, there was never any substantial evidence that contradicted his testimony about the central issue in this investigation: No senior White House official or Mrs. Clinton ever asked him to obtain confidential FBI background reports of former White House staff.¹¹⁴

¹¹² Id. at 27.

¹¹³ After the House Committee hearing, the Senate Judiciary Committee held a hearing in which Mr. Marceca invoked his privilege against self-incrimination under the Fifth Amendment of the U.S. Constitution. SJC 7/18/96 Hearing at 26 (Marceca).

¹¹⁴ See HCGRO Hearing 6/26/96 at 88-9 (Marceca) (responding to questioning by Representative Tom Lantos regarding involvement

1. Mr. Marceca Testified That He Believed That All of the Names on the List Were Current White House Passholders.

Mr. Marceca was repeatedly asked whether, at the time he requested background reports from the FBI, he believed that all of the individuals listed on the Secret Service list were current passholders. Although Mr. Marceca acknowledged that he came to believe there were "problems" with the list, he repeatedly denied any knowledge that the Secret Service list contained inactive passholders.

a. Mr. Marceca's June 9, 1996 Declaration.

In the declaration he provided to Livingstone's attorney on June 9, 1996, Mr. Marceca gave the following explanation of how he ordered previous reports from the FBI:

It was my understanding that every person on the lists from which I was working was properly included on the lists because they had a legitimate need for access to the White House complex. I was not told, and I had no reason to believe, that some of the persons on the lists no longer should have been included on the Secret Service's White House access list. . . .¹¹⁵

of senior White House officials); see also Marceca 6/9/96 Decl. at 4 (testifying that "[he] was not asked to, and [he] did not seek to, obtain a Previous Report on any person for any reason other than to create a current personnel security file for an individual whom [he] believed was properly included on the White House access list"); see also Marceca 9/11/99 OIC Depo. at 36 (denying that "anybody ever [told him] or suggest[ed] to [him] that the White House Personnel Security Office could be used to gather information about political opponents").

¹¹⁵ Marceca 6/9/96 Decl. at 2.

b. Mr. Marceca's June 11, 1996 Grand Jury Testimony.

On June 11, 1996, Mr. Marceca appeared before a federal grand jury investigating the Travel Office matter. He testified that when he began to work on the Update Project, he went to the vault in the office and found the tray containing a computer-generated list that he believed the Secret Service had provided and was "the same list that Nancy [Gemmell] showed me."¹¹⁶ He also testified that he did not recall that the list designated individuals using "A" (for active) or "I" (for inactive).¹¹⁷ When asked whether he used the same list the entire time, he replied, "I worked on that same list" and "d[id] not recall having it updated."¹¹⁸ Finally, he testified that it was "[his] understanding when [he was] working off that list . . . that all the people on that list were current . . . White House passholders" and that "[i]t never occurred to [him] . . . that there were people on that list who no longer held a White House pass."¹¹⁹

c. Mr. Marceca's June 18, 1996 House Deposition.

In his June 18, 1996 House deposition, Mr. Marceca was questioned about whether he ever realized there were "problems"

¹¹⁶ Marceca 6/11/96 GJ at 11.

¹¹⁷ Id.

¹¹⁸ Id.

¹¹⁹ Id.

with the list and whether the persons on the list were "properly included" on the lists.¹²⁰ Mr. Marceca testified that he took steps to avoid ordering reports for persons who had departed. He testified that when he began to realize that he was not proceeding through the list very quickly, he typed up lists of names and circulated them among the offices, such as GSA, to determine whether the persons on the list were still employed in those offices.¹²¹ When an office identified a person as still employed in that office, he testified:

[He] would then immediately take that file, that name, and [he] would order up -- [He would] look in the file to find out if there was a file. If there was no file, [he] would immediately order up their SBI [secret background investigation].¹²²

He further testified that, after learning that a person was no longer employed at the White House:

I would go back to the file then and I would check off on the list and I would not call for an SBI because I knew they were not there

But there was not that many of those that -- there's a number that I canceled but I don't know how many I canceled by not calling for an SBI, but if all else failed I then sent for an SBI.¹²³

Subsequently, Mr. Marceca reiterated that he did not question whether the list was a list of active passholders. He testified

¹²⁰ Marceca 6/18/96 HCGRO Depo. at 73.

¹²¹ Id. at 99-100.

¹²² Id.

¹²³ Id. at 100.

that he "believed that everybody on that list had legitimate access unless [he] could establish that they were no longer on the access list" and "that he had no reason to suspect anything other than they were legitimate pass holders or had access to the White House."¹²⁴

Nevertheless, Mr. Marceca acknowledged in the House Committee hearing that, at least after he received a report and contacted the office where the person was supposed to work, he discovered that he had obtained reports of persons who no longer were at the White House. He testified that after he obtained a background report and determined that the person was not there, he "now had an SBI on somebody that was gone, and in the dead file it went" and that "once he identified clearly that the person was gone, then it would go in the dead file It was done."¹²⁵

**d. Mr. Marceca's Testimony at the June 26, 1996
Public Hearing in the House of Representatives.**

On June 26, 1996, Mr. Marceca testified in a public hearing before the full House Committee on Government Reform and Oversight. In response to questioning by Representative Collin Peterson, he testified that reading the names on the list that were obvious senior staff from the prior administration did not

¹²⁴ Id. at 113-14.

¹²⁵ HCGRO 6/26/96 Hearing at 162-63 (Marceca).

suggest to him that he was ordering the reports of individuals who did not require access to the White House. He responded:

But at the time, in the file, I was unaware that I was pulling -- I was unaware that I was pulling people who did not have access when I was -- when I was ordering their files; and none of them stood out at the time.¹²⁶

Later in the hearing, Mr. Marceca expressed in a single response both his belief in the accuracy of the list and his realization that persons on the list were no longer at the White House:

Rep. Michael Flanagan. Did you have a current list, then?

Mr. Marceca. I understood that it was a current list. I did not say it was outdated.

Rep. Flanagan. You understood it was current, and it turns out it wasn't. Was it fair to say it was an updated [sic] list?

Mr. Marceca. No, sir. It is fair to say that I believed the list was current when I had that list. Later on it developed that there were people that had left the White House, when I started that project they [sic] had no reason to believe that that list was outdated or that those people did not have access to the White House.¹²⁷

Finally, Mr. Marceca testified that at some point he *did* realize there were "problems" with the list he was using:

¹²⁶ Id. at 162-63 (Marceca) (emphasis supplied).

¹²⁷ Id. at 284 (Marceca) (emphasis supplied).

Mr. Marceca.

I had what I believed was a master access list.

Rep. Flanagan.

How often is that list updated? Would an old list be destroyed or replaced by a new list?

Mr. Marceca.

I believe I worked on that list until I discovered, and it was not a sudden discovery but somewhere after a couple of months -- well, it is being pointed out it was always the same list. When I discovered that there were problems with that list, I then changed my approach to updating.¹²⁸

e. Mr. Marceca's September 11, 1999 Immunized Admissions Regarding the Requests for Background Reports.

In light of Mr. Marceca's claim before the Senate Judiciary Committee of his Fifth Amendment privilege against self-incrimination, the Independent Counsel granted him immunity, and, on September 11, 1999, Mr. Marceca was questioned in a sworn deposition about statements he made in his June 18, 1996 House staff deposition and in the House Committee hearing regarding the requests for background reports. Mr. Marceca responded to specific questions regarding the accuracy of his responses to questioning in the grand jury on June 11, 1996, in the staff deposition of the House Committee on Government Reform and Oversight, and in the House Committee hearing by Representatives Peterson and Flanagan.

¹²⁸ Id. at 285-86 (Marceca) (emphasis supplied).

In each instance Mr. Marceca admitted that his testimony had been inaccurate and that he had known that it was inaccurate at the time. Specifically, he admitted that he had knowingly testified falsely when he told the grand jury that it "was [his] understanding that all the people on the list were current . . . White House passholders" and that [i]t never occurred to [him], or [he] never suspected that there were people on that list who no longer held a White House pass."¹²⁹ In other words, he admitted that he did know that there were people on the list who did not have current White House passes.

He admitted that he did not testify truthfully in the deposition conducted by the staff of the House Committee on Government Reform and Oversight. He conceded that his denial that "there [came] a time when [he] found out that there were people who were not properly on those lists," was false because "there did come a time when [he] knew that there were individuals on the list who no longer worked there."¹³⁰

He also agreed that he had knowingly testified falsely regarding the same issue in the House Committee hearing. He admitted that his statement, responding to Representative Peterson, was inaccurate when he said: "I was unaware that I was pulling people who did not have access when I was ordering their

¹²⁹ Marceca 9/11/99 OIC Depo. at 81-82 (citing Marceca 6/11/96 GJ at 11-15).

¹³⁰ Marceca 9/11/99 OIC Depo. at 82-85.

files"131 He further conceded that his statement, responding to Representative Flanagan, that "I believed the list was current when I had that list" was inaccurate because he learned in late 1993 that the list was not current.¹³²

Finally, when asked about his testimony that "he changed his approach" after realizing that there was a problem with the lists, he admitted that there was no real change. He claimed that he really only "sort of changed [his] state of mind."¹³³

2. Mr. Marceca Testified That He Did Not Read the Contents of Confidential FBI Background Reports, Except in Limited Circumstances.

On June 8, 1996, the Washington Post reported as follows:

Mr. Marceca said he read the files and notified Craig Livingstone, the head of the White House personnel security office, if they contained "derogatory information." He said most of the files had no such derogatory remarks and went directly . . . into the White House security office vault.¹³⁴

Subsequent stories repeated Mr. Marceca's assertion that he had reviewed the reports in search of "derogatory information."¹³⁵

¹³¹ Id. at 86.

¹³² Id. at 87.

¹³³ Id. at 93-94.

¹³⁴ White House Admits Having Background Files, Washington Post, June 8, 1996, A-1 (emphasis supplied).

¹³⁵ Whitewater Counsel Begins FBI Inquiry; Investigators Interview Army Aide at Pentagon Who Obtained Files on Republicans, Austin American-Statesman, June 11, 1996, A-1; List of Files May Be Incomplete; White House Stories Face Hill Questions, Washington Times, June 11, 1996, A-1.

In a series of statements in different venues, Mr. Marceca gave conflicting answers to questions concerning whether and to what degree he reviewed the background reports for derogatory information. Ultimately, notwithstanding Mr. Marceca's confusing testimony, the House Committee concluded that he had read the background reports to determine an individual's suitability to serve in the Clinton Administration.¹³⁶

a. Mr. Marceca's June 9, 1996 Declaration.

In the declaration Mr. Marceca provided to Livingstone's attorney on June 9, 1996, Mr. Marceca acknowledged he reviewed the background reports for substance -- issues that went to suitability -- but implied that he was looking primarily for "inconsistencies" between the previous report and a new SF-86, which would exist only for legitimate holdover employees. The declaration stated:

When the previous report came into the office, I pulled the file I had created for the individual and reviewed the report to determine the date for the individual's next periodic reinvestigation, and to determine whether there was any information in the individual's Previous Report that could raise a question as to the individual's suitability to have access to the White House complex. In particular, I looked for inconsistencies between the information obtained by the FBI in its background investigation and the information

¹³⁶ "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. (Sept. 28, 1996) at 47.

voluntarily provided by the individual in his or her application for federal employment (SF-86).¹³⁷

The first sentence of the above excerpt discloses that Mr. Marceca reviewed the reports when they arrived at the OPS. The second sentence, however, implies that he did not read the reports of persons who had left the White House, since they would not have completed new SF-86s. Following the above excerpt, the declaration states Mr. Marceca gave reports to Mr. Livingstone only if there were inconsistencies,¹³⁸ reinforcing the impression that Mr. Marceca reviewed the reports only after an employee provided a new SF-86.

b. Mr. Marceca's June 10, 1996 Interview with OIC Agents.

On June 10, 1996, during an interview with agents of the OIC, Mr. Marceca expressly stated he read all of the reports:

The FBI would send back their background reports to Mr. Marceca. Once Mr. Marceca received the background reports from the FBI, he would review them for derogatory information.¹³⁹

Mr. Marceca further told the OIC that Nancy Gemmell had told him to look for the derogatory information, presumably as part of his job.¹⁴⁰

¹³⁷ Marceca 6/9/96 Decl. at 3 (emphasis supplied).

¹³⁸ Marceca 6/9/96 Decl. at 3.

¹³⁹ Marceca 6/10/96 Int. at 2 (emphasis supplied).

¹⁴⁰ Id. at 2. Nancy Gemmell said that during the previous administration, no OPS employee other than Ms. Dannenhauer read background reports. Gemmell 5/8/97 Int. at 5-6. Ms. Gemmell

c. Mr. Marceca's June 11, 1996 Grand Jury Testimony.

The very next day, in response to a series of questions before a federal grand jury, Mr. Marceca at one point narrated the Update Project process but omitted his review of the reports for derogatory information, returning instead to the misleading notion that he was looking only for inconsistent information.¹⁴¹ In his narration of the Update Project, Mr. Marceca testified about his actions when there was no current SF-86:

I looked -- I had to read the file for the last date of investigation, and that would go on the folder. And the reason it would go on the folder is because the next person that followed behind me, within four or six months would have to pull that folder, get the SF-86 filled out -- the new SF-86 filled out -- from the person, and a new background -- a secret background investigation -- would be conducted.

So I put their date -- that was the purpose of putting their date on the file. That's -- that in total is the Update Project that I worked on.¹⁴²

When asked what he would do "if [he] were looking through a background investigation, and [he] saw information in there that [he] thought was significant," he responded that if he found

realized that Mr. Livingstone did not desire to remain as Director of OPS, and she thought that Mr. Marceca might take over the leadership job. Id. at 3. Ms. Dannenhauer confirmed that she considered it to be part of her responsibility to review FBI reports when she was the head of the OPS. Dannenhauer 5/6/97 Int. at 5.

¹⁴¹ Marceca 6/11/96 GJ at 30-33.

¹⁴² Marceca 6/11/96 GJ at 31 (emphasis supplied). This is an incomplete description of the Update Project, because it does not disclose that Mr. Marceca read each report for suitability, not just for the date of the previous background report.

"contrary information" where "the SBIs came back and the SF-86s had some things that were different in there," he "believed" he would "have to have an SF-86 to flag a report" because he was "looking for essentially information that contradicted the SF-86."¹⁴³

Later, Mr. Marceca repeated his testimony "to some sense of certainty" that in every case, he was only flagging information that was "contradictory" to information in an SF-86.¹⁴⁴ When pressed on what he would do if he did not have an SF-86, he vaguely referred to "gaps" in background investigations (reflected by missing background reports) and that he would re-request the background reports.¹⁴⁵

d. Mr. Marceca's June 18, 1996 House Deposition.

Mr. Marceca testified directly on the subject of whether he read the substance of the previous background reports in his June 18, 1996 deposition conducted by staff of the House Committee on Government Reform and Oversight. Although Mr. Marceca again described the Update Project process without mentioning that he had read the substance of the reports, he acknowledged reading the reports in an effort to determine where the person worked, which would require more detailed reading than merely looking at

¹⁴³ Marceca 6/11/96 GJ at 31-32.

¹⁴⁴ Id. at 33.

¹⁴⁵ Id. at 29-33 (emphasis supplied).

the date on the top of the first page to determine the date of the last background investigation.¹⁴⁶ He specifically testified that he remembered three instances where there were "problems" that he identified in the reports, two of which he described as a "personnel problem" and "an arrest record."¹⁴⁷

Mr. Marceca later testified about what he usually did with reports received from the FBI. He stated, in passing, that he "would look at" and "review" the background reports to determine the date of the last background investigation and the office where each person worked.¹⁴⁸ That review, he said, took place "when the SBI came back," before he determined that the person was no longer at the White House.¹⁴⁹

As for the reports of persons who had departed the White House, Mr. Marceca repeated that he "looked at them for previous investigations, the date of previous investigation, and . . . for the office that they would work in so that I could identify who should get a new SF-86."¹⁵⁰

As to whether Mr. Marceca had reviewed the background reports for substance, he resisted admitting that he had done so. He repeated that he had to review the reports to find the date of

¹⁴⁶ Marceca 6/18/96 HCGRO Depo. at 70-71.

¹⁴⁷ Id. at 70-72.

¹⁴⁸ Id. at 70-71.

¹⁴⁹ Id. at 118-19.

¹⁵⁰ Id. at 126.

the last background investigation and the office where each person worked.¹⁵¹ He also stated twice that he "would look at a report in depth" only if it had an SF-86 attached to it.¹⁵² Apparently referring to the background reports of people who were no longer working at the White House, he said he "didn't waste [his] time looking at those," that he "would have fallen asleep," because "[t]he SBIs are mostly what great things people say about one another."¹⁵³

Mr. Marceca most directly denied that he read the substance of the background reports when he responded to questioning about whether he reviewed the background reports of any person whose background investigation had been conducted in the last five years. He stated unequivocally: "I didn't have the time. No, I did not."¹⁵⁴ He was also asked the question in a different way:

So you did not read that category of files that didn't need an update, that didn't have an 86, that were ordered on the Nussbaum previous report [sic]; is that a correct statement to say? And you didn't read them for content, you only read them to see if they needed an update?¹⁵⁵

¹⁵¹ Id. at 118.

¹⁵² Id. at 128.

¹⁵³ Id. at 127-29.

¹⁵⁴ Id.

¹⁵⁵ Id.

To this question, Mr. Marceca simply responded: "That's correct."¹⁵⁶

e. Mr. Marceca's Testimony at the June 26, 1996 House Committee Hearing.

On June 26, 1996, at the House Committee hearing, Mr. Marceca expressly stated without limitation in his opening statement that he had read the reports for content when they arrived at the OPS, although his main focus was to determine the date of the most recent background report:

When the previous reports came into the office, I pulled the file I had created for the individual and reviewed the report to determine the date for the individual's next periodic reinvestigation and to determine whether there was any information in the individual's previous report that could raise a question as to the individual's suitability to have access to the White House complex. In almost every case, my basic function was to determine from the previous reports whether a new investigation was needed. If the previous report showed that a background investigation had been done within the last 5 years, I marked on the label on the file the date when a new investigation would be needed and I put the folder into the general file. If the previous report showed that a background investigation had not been done in the last 5 years, I began the task of putting together a proper file to initiate the reinvestigation process.¹⁵⁷

The underlined statements in the above excerpt represent an unequivocal assertion that he reviewed every report for

¹⁵⁶ This is the most significant response, because it is not qualified as to time (e.g., after a new SF-86 was returned) or as to the level of review (e.g., "in depth").

¹⁵⁷ HCGRO 6/26/96 Hearing at 39 (Marceca) (emphasis supplied).

suitability as soon as he received it, regardless of whether he obtained a new SF-86.

Mr. Marceca admitted he reviewed the reports of the individuals on the WHOP list, including those who no longer worked at the White House, when he responded to Chairman Clinger's questioning regarding whose reports he had reviewed. He testified that he "reviewed A to G," signifying his review of all the WHOP personnel background reports from "A" to "G."¹⁵⁸

In discussing one of the memoranda that Mr. Marceca wrote under Mr. Livingstone's name to the NSC (inquiring whether persons with outdated background reports were still on staff), the following question was asked:

Rep. Tom Davis: Are you saying you wouldn't have gone ahead -- the only limited use you would have had for the file was to see when the previous investigation was completed and before you go through them again you wanted to see if they were still on staff?

Mr. Marceca: Yes. What I did is when they came in I put the date of the last investigation on that file and I knew by glancing at it that they needed to be updated.¹⁵⁹

Notwithstanding Mr. Marceca's admission in his opening statement that he reviewed all reports, his affirmative response to Representative Davis's question explains that he did not review a

¹⁵⁸ Id. at 132 (Marceca).

¹⁵⁹ Id. at 211-12 (Marceca) (emphasis supplied).

report for substance until he confirmed that the person was still working at the White House.

Apologizing before the Committee, however, Mr. Marceca appeared to acknowledge that he "reviewed" the reports. He said: "I am sincerely and deeply sorry about my involvement in this matter and when private citizens' files were reviewed, I would -- that's just uncalled for. If they were not to be reviewed, they should never have been reviewed."¹⁶⁰

Finally, Representative Steven LaTourette asked Mr. Marceca about the memorandum Mr. Marceca had prepared for Mr. Livingstone analyzing the background report of a person identified for privacy reasons only as individual F(11).¹⁶¹ Mr. Marceca testified that the analysis involved a comparison of the SF-86 and the person's background report.¹⁶² Although Mr. Marceca redacted the memorandum before providing a copy to the Congress, it was clear from Congress's copy that the background report for individual F(11) that Mr. Marceca was analyzing was dated November 2, 1990 -- less than three years before Mr. Marceca went to work at the OPS.¹⁶³ Nonetheless, no one questioned him about the assertion that his analysis involved a review of an SF-86,

¹⁶⁰ Id. at 259-60 (Marceca).

¹⁶¹ See Appendix 2, at iii, for a description of this memorandum.

¹⁶² See HCGRO 6/26/96 Hearing at 304-05.

¹⁶³ Id.

nor did anyone note the inconsistency between this memorandum and his earlier testimony that he did not read reports of persons who did not require updated background reports.¹⁶⁴

In the House Committee's Interim Report concerning the FBI Files matter, the Committee cited Mr. Marceca's opening statement for the following proposition: "After receiving the previous report from the FBI, Mr. Marceca stated that he would review it to determine the suitability of the person for a position in the Clinton administration, and to check the date for the standard 5 year reinvestigation."¹⁶⁵ The report does not mention any conflicting testimony at the deposition or the hearing.

f. Mr. Marceca's September 11, 1999 Immunized Testimony Regarding Whether he Read the Contents of the Background Reports.

In light of Mr. Marceca's claim before the Senate Judiciary Committee of his Fifth Amendment privilege against self-incrimination, the Independent Counsel granted him immunity, and, on September 11, 1999, Mr. Marceca was questioned in a sworn

¹⁶⁴ Mr. Marceca specifically testified: "To my recollection, this specific letter was developed because there was [sic] apparently some inconsistencies somewhere between previous reports and a person's SF-86. This document that you are looking at may pass into the wastebasket when it gets to Mr. Livingstone, if he finds it has no value. So it is just my personal observations. It may have no merit after it leaves my desk." HCGRO 6/26/96 Hearing at 304-05 (Marceca).

¹⁶⁵ House Committee on Government Reform and Oversight, "Investigation into the White House and Department of Justice on Security of FBI Background Investigation Files" 9/28/96 Interim Report ("HCGRO Interim Report") at 47 (emphasis supplied).

deposition about statements he made in his June 18, 1996 House staff deposition and in the House Committee hearing regarding whether he read the previous background reports obtained from the FBI. Mr. Marceca testified that his statements on that subject had been inaccurate.

Early in the OIC deposition, he was asked whether he read the reports.¹⁶⁶ He replied that he had and that he read them as soon as he received the reports from the FBI.¹⁶⁷ He testified that Mr. Livingstone told him to review the reports for derogatory information that might reflect on suitability for White House employment.¹⁶⁸ He said that he looked for "previous arrests . . . that sort of stuff."¹⁶⁹

When he was questioned about his House deposition, he was asked about his testimony that "[i]f [he] would look at a report in depth, it would have an SF-86 attached to it," to compare the information in the SF-86 to information in the report, and that "he didn't waste [his] time" reading the background reports of those individuals who did not have a current SF-86.¹⁷⁰ He testified that "there's various inaccuracies about it and it's

¹⁶⁶ Marceca 9/11/99 OIC Depo. at 26.

¹⁶⁷ Id. at 26.

¹⁶⁸ Id. at 26-27.

¹⁶⁹ Id. at 27.

¹⁷⁰ Id. at 101-02.

just, it's not true."¹⁷¹ Later in the same questioning, he explained his answer that "[he] did not waste [his] time" reading some reports as reflecting his understanding that the question related only to those reports that were not the most recent.

Thereafter, Mr. Marceca acknowledged the problem with his denial in his House deposition that he read "the category of files that didn't require an update, that didn't have an 86, that were ordered on the Nussbaum previous report."¹⁷² He responded: "It was obviously false. The answer is false."¹⁷³

In sum, Mr. Marceca's testimony under a grant of immunity, which could never be used to prosecute him, confirmed that he read the background reports for content. Contrary statements in his House staff deposition and his testimony before the Committee were therefore untrue.

VII. ANALYSIS OF POTENTIAL STATUTORY VIOLATIONS

The central issue presented to the Independent Counsel was whether Mr. Marceca's conduct reflected a conspiracy within the White House to compile derogatory information from confidential FBI background reports. Such conduct, if proven, might have involved violations of federal criminal law, such as 18 U.S.C. § 371 (regarding conspiracy), 18 U.S.C § 1001 (regarding false

¹⁷¹ Id. at 103.

¹⁷² Id. at 107-08.

¹⁷³ Id. at 109.