

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).

Assistant United States Attorneys on detail to this Office, several other career prosecutors, and senior OIC staff.

The Independent Counsel also enlisted the services of experienced criminal investigators. Initially, FBI agents already detailed to the OIC assisted in the investigation. However, due to the potential for an appearance of conflict of interest with an investigation involving the conduct of the FBI, the Independent Counsel decided that, where possible, the OIC would avoid using FBI agents. The Independent Counsel requested and received four agents from the Internal Revenue Service to provide investigative assistance. These agents identified, located, and interviewed witnesses and -- perhaps most critical to the investigation -- reconstructed and analyzed the June 10, 1993 White House Operations Personnel list that Mr. Marceca used to request FBI background reports.⁴⁰ These agents had over 80 years of combined investigative experience.

The OIC gathered and thoroughly reviewed the already voluminous record created by the two congressional inquiries and the FBI investigation. Building on this record, the OIC identified, interviewed, and took sworn testimony of more than 90 witnesses regarding their knowledge of matters within the scope of the investigation.

⁴⁰ See, infra, § V.A; see also Appendix 1.

In June 1996, a federal grand jury began to hear evidence related to the OIC's investigation. Between June and December 1996, the grand jury issued seven subpoenas for testimony and twenty-nine document subpoenas. The document subpoenas resulted in the production of over 16,000 documents.⁴¹ In addition, there were eleven voluntary productions totaling approximately 15,000 documents.⁴²

In this regard, the White House, principally through the White House Counsel's Office, provided substantial cooperation

⁴¹ Documents were produced by the United States Secret Service, the White House, and the FBI as well as other government agencies and individuals.

⁴² The Office also reviewed the extensive public record created in connection with the civil law suit Alexander v. Federal Bureau of Investigation, Civ. No. 96-2123 (D.D.C), a private action alleging that the conduct which is the subject matter of this Office's criminal investigation constituted an actionable civil violation of the Privacy Act and other federal statutes. That public record includes pleadings, deposition testimony, and an "Interim Report" issued by attorneys for the plaintiffs ("Judicial Watch Interim Report, Crimes and Other Offenses Committed by President Bill Clinton Warranting His Impeachment and Removal from Office" (Sept. 28, 1998)).

To a large degree that public record is not inconsistent with the factual conclusions outlined in this report. Other aspects of this record were deemed irrelevant to the criminal inquiry. And some aspects of this public record we found to be internally inconsistent (e.g., witness testimony regarding discovery of FBI files "stacked to the ceiling" in Mr. Kennedy's office, contrasted with simultaneous acknowledgment that she had no "vision of what an FBI file would look like." Compare Tripp 12/14/98 Alexander Depo. at 441 with id. at 477-78), or not credible insofar as the record conflicted with the extensive testimonial, documentary, and forensic record developed by this investigation.

and assistance with the investigation of this matter,⁴³ as did the Secret Service and the FBI. The President did not assert any privileges and OIC agents and attorneys were given comprehensive access to facilities, documents, and witnesses to gather evidence. This access facilitated a thorough investigation.

⁴³ Notwithstanding this cooperation and assistance, the OIC recently learned, through the public record in Alexander v. Federal Bureau of Investigation, Civ. No. 96-2123 (D.D.C.), as well as recent public news reports, of the alleged discovery of unarchived electronic mail in the White House that has apparently not been searched for material responsive to grand jury subpoenas issued by the OIC. The Independent Counsel specifically requested additional information regarding those materials from the White House Counsel, who has now confirmed their existence. See Counsel to the President Beth Nolan Letter 3/15/00.

The Independent Counsel has determined to issue this report, notwithstanding these disclosures, for the following reasons:

(1) The evidence in this investigation, which includes certain electronic mail produced by the White House during the relevant time periods, demonstrated overwhelmingly that no senior White House official or Mrs. Clinton was involved in Mr. Marceca's requests for FBI background reports and that Mr. Marceca's requests did not involve any criminal conduct. There is virtually no probability of any electronic mail relating to this investigation altering these fundamental conclusions.

(2) The failure to search electronic mails also likely involves other matters before this Office, including the original mandate involving Madison Guaranty Savings & Loan Association, the Travel Office mandate, and the mandate relating to Monica Lewinsky. Notwithstanding the filing of this report, the OIC will fully investigate the remaining matters within its jurisdiction will insist on full compliance with previously issued subpoenas to uncover all relevant evidence.

A. The Reconstructed June 10, 1993 WHOP List Reflected a Methodology That Was 99 Percent Accurate in Recreating the Portion of the Actual List That Was Recovered.

The OIC conclusively established that the Secret Service list that Mr. Marceca claimed that he used actually existed and that the list did not differentiate between active and inactive passholders. The Secret Service's testimony in this regard was mistaken. That testimony, if not the sole basis for the underlying controversy that gave rise to this investigation, plainly magnified public concerns regarding Mr. Marceca's conduct.

The OIC has now reconstructed the portion of the WHOP list that reflected individuals with last names from "Aa" to "Go" that Mr. Marceca used to request background reports from the FBI with 99 percent accuracy. Although OPS Staff Assistant Lisa Wetzl discarded the portion of the list that Mr. Marceca actually used,⁴⁴ the OIC obtained from OPS a list fitting the exact description of the discarded list -- that is, a list containing the names of "White House Office Personnel" staff alphabetically from "Po" through "Zy," which did not differentiate between active and inactive passholders. The list was dated June 10, 1993, and bore the identifying code "WAV073BS."⁴⁵ The OIC also recovered from OPS lists for other offices that were dated June

⁴⁴ Wetzl 6/27/96 SJC Int. at 9.

⁴⁵ This code reflected the precise program used to create the list.

10, 1993 and bore the "WAV073BS" code and that also did not in any way distinguish between active and inactive passholders. Possession of the "Po" through "Zy" portion of the list was essential in reconstructing what Mr. Marceca actually used.⁴⁶

Having reconstructed the "Aa-Go" portion of the list to a high degree of confidence, this Office compared the list to the FBI's records of OPS requests to determine whether any patterns could be discerned in the requests. This comparison was crucial in determining whether Mr. Marceca used the list in the routine manner in which he claimed.

The requests were generally -- but not exclusively -- in alphabetical order, and they were not restricted to permanent passholders, which they would have been had Mr. Marceca possessed a proper understanding that he was requesting the reports of holdover employees only, and had he possessed a list clearly labeled to identify active permanent passholders. If OPS personnel believed that the Secret Service lists clearly identified active permanent passholders, then OPS would not have requested the background reports of temporary passholders who were recent Clinton Administration appointees who had not yet submitted their SF-86s or completed their background

⁴⁶ A more complete, technical description of the methodology used to reconstruct the list is attached as Appendix 1.

investigations.⁴⁷ The OIC found that in several instances, OPS requested reports for temporary passholders.

There was no overall pattern to the requests that would suggest irregularity. In some alphabetical series, only permanent passholders were requested; in other series, both temporary and permanent passholders were requested; and in still other series, only temporary passholders were requested.

Only fourteen of the permanent passholders between "Aa" and "Go" on the reconstructed list were not requested. These included former President Bush's grandson (also named George Bush), former OPS Director Jane Dannenhauer and her nephew, Michael Dannenhauer, and former OPS employee Nancy Gemmell.

The other names were largely requested in small groups each day, and primarily in alphabetical sequences -- i.e., names that were contiguous on the list were requested on the same day. However, the requests were made in separate alphabetical series that sometimes were not contiguous. This suggests that the pages of the Secret Service list may have been separated, and not always processed in order. It may also suggest that the request forms were not always completed by Mr. Marceca, but by other staff and interns.

⁴⁷ Because of delays at the White House in processing permanent pass requests, few Clinton Administration employees had permanent passes as of June 10, 1993. USSS Special Agent Arnold Cole 6/26/96 Int. at 6.

There were series of names in which only permanent passholders were requested. However, there also were series in which only temporary passholders were requested, skipping permanent passholders who had not yet been requested. And there were series in which temporary passholders were listed in alphabetical order, where the permanent passholders interspersed with them on the list already had been requested. Finally, there were series in which permanent and temporary passholders were requested together.

Mr. Marceca apparently never deviated from the "Aa" to "Go" portion of the list. He did not request the reports of individuals who were either listed on the actual "Po" to "Zy" list or on the missing portion of the list between "Go" and "Po."

In sum, the analysis for patterns discovered none that were inconsistent with a routine, largely alphabetical, procedure for requesting reports. Even the occasional request that did not squarely fit within the routine order⁴⁸ did not suggest particular targeting, either because of individual circumstances justifying the request within the WHOP list order (e.g., a new employee or special request for a potential presidential nominee), or because of minor variations of the reconstructed list from the actual list that would exclude a person from the reconstructed list.

⁴⁸ See Appendix 1 at vi-vii.

B. The Independent Counsel and The Senate Judiciary Committee Asked the FBI to Conduct Forensic Analyses of the Background Reports and Related Documents.

The OIC, with the assistance of the FBI Laboratory, conducted a thorough review and analysis of documents for physical evidence regarding who handled the background reports and what was done with them. The Senate Judiciary Committee also requested that the FBI report to it concerning whether the fingerprints of certain senior White House officials or Mrs. Clinton were discovered on the background reports of certain former senior White House staff. Such evidence was useful in determining whether the documents were handled by individuals outside of OPS and the White House Counsel's Office.

1. The Fingerprint Analysis Disclosed No Fingerprints of Senior White House Officials.

The FBI Laboratory examined for fingerprints the background reports of former senior Republican White House staff, as well as certain background reports in which Mr. Marceca's handwritten notes were discovered. The FBI Laboratory examined the reports for the fingerprints of OPS employees, certain senior White House officials, and Mrs. Clinton. The Laboratory examined the reports of former Republican officials James A. Baker III, Brent Scowcroft, Anthony David Blankley, and Kenneth M. Duberstein for fingerprints of Mr. Marceca, Mr. Livingstone, Mr. Kennedy, Mr. Nussbaum, and Mrs. Clinton, among others. The FBI's reports, which included the results of its work responding to the specific

requests by the Senate Judiciary Committee, reflected that four fingerprints were developed on Secretary Baker's report folder, all of which belonged to Mr. Marceca. Five fingerprints identified as Ms. Wetzl's were found on Mr. Scowcroft's report. Otherwise, there were no fingerprint matches with senior White House staff or Mrs. Clinton.

The OIC obtained a fingerprint examination of all of the actual June 10, 1993 Secret Service lists produced by OPS to the OIC.⁴⁹ The FBI Laboratory examined fifty-eight pages of a computer printout of employee listings. The Laboratory reported that it found one fingerprint of Secret Service technician Maurice Craft,⁵⁰ one fingerprint of former OPS Administrative Assistant Nancy Gemmell, two fingerprints of OPS Administrative Assistant Mari Anderson, and nine fingerprints of OPS Staff Assistant Lisa Wetzl.⁵¹

⁴⁹ The lists included the portion of the WHOP list "Po" through "Zy", as well as the lists for the other offices involved in the Update Project. These lists, of course, did not include the missing portion of the WHOP list that Mr. Marceca used to make his requests.

⁵⁰ Ms. Wetzl believed that she dealt with Secret Service Sergeant Craft when she resumed the Update Project and asked the Secret Service if it could generate a current list of passholders identical to the old list that she had discovered and believed to be the list that Nancy Gemmell had used for the Update Project. Wetzl 8/8/96 Int. at 6.

⁵¹ The Laboratory also checked for but did not discover any fingerprints of OIC employees and other Secret Service employees.

2. The OIC's Physical Examination of Requested Background Reports Revealed Few Documents with Evidence of Multiple Stapling or Folded Corners.

The OIC examined 303 of the background reports of individuals who no longer required White House access for physical evidence that they had been photocopied -- such as missing staples or folded corners.⁵² Only a small fraction of the reports contained pages from which staples had been removed and no pattern of folds was detected from which to conclude that the reports had been photocopied.

a. Staples

The OIC examined 303 background reports obtained directly from OPS after concluding that they were background reports requested for individuals who no longer required access to the White House. The OIC determined that only 11 of the 303 reports

⁵² The FBI examined the remaining original background reports that were returned directly to the FBI in June 1996. When the FBI received the original reports, FBI personnel, wearing gloves, removed all staples from the reports and then bates-stamped and photocopied each page. After removing the staples, the FBI recognized that it might be significant to know whether any of the documents had been re-stapled by OPS. Documents were then examined by lining up the existing staple holes to determine how many times the documents had been stapled. The goal was to determine whether there were multiple holes that did not line up in all the documents, in which case it would be possible that OPS had removed a staple and re-stapled the documents. The examination of the documents was inconclusive. No determination could be made whether OPS had removed any staples to facilitate photocopying. James Stroud, Paralegal Specialist Civil Discovery Review Unit, FBI Office of the General Counsel, 10/17/96 Int. at 1. After these reports were photocopied, FBI personnel re-stapled documents in 135 of the reports.

contained staple holes without staples, indicating that the staples were removed. The OIC determined that the staple holes were consistent throughout all documents in the reports of 10 of the 11 examined. The one report that the Office determined had several different set of staple holes was forwarded to the FBI laboratory for forensic analysis. None of the requests with missing staples belonged to any senior White House officials from previous administrations. They were distributed among NSC, GSA, NPS, and other government agencies. Two had been requested before Mr. Marceca's detail began. Two were among the group containing Mr. Marceca's post-it notes.

b. Folded Corners

The OIC reviewed 407 of the improperly requested previous background reports for evidence of folded corners. Evidence of folded corners would suggest that someone had photocopied the documents without removing the staples or simply read the reports without removing the staples. A few reports were discovered with folded pages, but there was not a sufficient volume of folded pages to discern any patterns or to draw an inference that the reports were photocopied without removing the staples.⁵³

⁵³ Mr. Marceca testified that he initially photocopied some background reports when he was creating memos about derogatory information but stopped when he was told by Mr. Livingstone not to copy them. Marceca 9/11/99 OIC Depo. at 27-28.

3. The OPS File Check-Out Log Contained a Six Month Gap.

The OIC also examined a log book in which OPS kept track of background reports that were taken out of the OPS office. In July 1993, OPS Administrative Assistant Mari Anderson, after a discussion with OPS Director Craig Livingstone, created the log book to keep track of any file that was removed from the OPS office.⁵⁴ The OIC examined the log to determine whether background reports had been improperly removed from OPS, the identities of those individuals who might have removed them, and the dates on which they might have been removed and returned.⁵⁵ An examination of the log book showed that there were no entries in the log between March 29 and September 20, 1994 -- well after the conclusion of Mr. Marceca's detail to OPS.

Although this gap may reflect a failure to use the log, it is inconclusive as evidence that reports were taken out of OPS for improper purposes. Mr. Marceca never used the log, and anyone who wanted to take reports out of OPS did not need to use the log. If a person did not use the log, there would be no record of the removal of a report. Therefore, the gap does not prove that reports were taken out; it only suggests that there were lax procedures in allowing the removal of OPS files.

⁵⁴ Anderson 11/21/96 GJ at 105-06.

⁵⁵ See Saunders 9/24/96 SJC Int. at 7-8; Wetzl 11/21/96 GJ at 60; Anderson 11/21/96 GJ at 103.