

just, it's not true."<sup>171</sup> 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."<sup>172</sup> He responded: "It was obviously false. The answer is false."<sup>173</sup>

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

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<sup>171</sup> Id. at 103.

<sup>172</sup> Id. at 107-08.

<sup>173</sup> Id. at 109.

statements), or 18 U.S.C § 641 (regarding conversion of government records), especially if it involved the concealment of the reasons for Mr. Marceca's requests for the background reports of individuals who no longer required access to the White House. This Office found no credible evidence, however, of such a conspiracy.

This Office examined whether Mr. Marceca's requests for background reports reflected any knowingly false representation to the FBI. If this Office had found substantial evidence that Mr. Marceca knew, when he made any request for a background report, that he falsely represented that the person whose background report he sought required access to the White House, a prosecution for making false statements in violation of 18 U.S.C. § 1001 might have been warranted. The Independent Counsel concluded, however, that although many of the requests contained a false representation, namely that the person whose background report was the subject of the request required access to the White House, there was no evidence that Mr. Marceca knew, when he submitted the request for any particular person, that the request contained a false representation.

This conclusion further reinforced the Independent Counsel's determination that no conspiracy existed. If Mr. Marceca had knowingly made false statements in his requests for background reports, one explanation for his doing so would have been to further a conspiracy to obtain through fraudulent means

derogatory information for partisan political purposes. The evidence simply did not support this theory. Nor was there any evidence that Mr. Marceca was an unwitting participant in a conspiracy involving senior officials to obtain information from confidential FBI background reports.

Finally, the evidence established that certain portions of Mr. Marceca's testimony before Congress were knowingly false. However, in light of other evidence that no senior White House officials or Mrs. Clinton were involved in Mr. Marceca's requests, the Independent Counsel concluded that the interests in full disclosure of all relevant information, especially information relating to any possible involvement of senior White House officials in Mr. Marceca's activities, justified a grant of immunity. His testimony under a grant of immunity contributed to the Independent Counsel's conclusion that no senior White House official or Mrs. Clinton engaged in any criminal conduct related to Mr. Marceca's requests for FBI background reports. Mr. Marceca's testimony under that grant of immunity also confirmed that he had falsely testified before Congress about certain aspects of his review of the reports for content.

**A. The Evidence Does Not Support the Conclusion that Mr. Marceca's Conduct Reflected a Conspiracy Involving Senior White House Officials or Mrs. Clinton to Obtain Confidential Background Reports.**

In concluding that there was no evidence that Mr. Marceca's conduct reflected a conspiracy involving senior White House

officials or Mrs. Clinton, the Independent Counsel relied on several factors. First, the reconstruction of the Secret Service list established conclusively that Mr. Marceca used an unlabeled and overinclusive list and followed it in rough alphabetical order without substantial variation. Second, there was no testimonial or physical evidence from which this Office could conclude that the background reports themselves or any of the information in them had ever been improperly disseminated beyond the White House Counsel's Office, the unit in the White House that legitimately handles the reports. Third, allegations regarding the possible use of information in the reports by individuals within the White House Counsel's Office were uncorroborated by any physical evidence, such as fingerprints. Finally, there was no substantial evidence that Mr. Marceca intentionally sought the report of any person he knew no longer required access to the White House, tending to negate any suggestion that his requests reflected a scheme to obtain background reports under false or fraudulent pretenses to further a conspiracy within the White House.

The most significant evidence rebutting the allegation of conspiratorial conduct was that Mr. Marceca used an unlabeled and overinclusive Secret Service list and, in the main, made his requests for background information in alphabetical order. This course of conduct is inconsistent with a supposed intent to secure derogatory information on former Republican appointees.

Similarly, Mr. Marceca's use of the list to request first the background reports of non-political passholders -- turning only to the politically sensitive WHOP passholders list two months after his detail began -- tends to negate any inference that Mr. Marceca, for himself or for others, was seeking or was instructed to seek politically significant derogatory information.

Another significant factor relating to the Independent Counsel's finding that no evidence of a conspiracy existed was the fact that there was no testimonial or physical evidence that the background reports or the information contained in them was disseminated beyond OPS and the White House Counsel's Office. Despite the passage of more than two years between the end of Mr. Marceca's detail and the discovery of his actions, there was no evidence that during that time, after the White House had allegedly obtained derogatory information from more than 700 reports, that any of that information was used by the White House for partisan political purposes. If there had been a conspiracy and the White House had obtained the reports for that purpose, there is no reasonable explanation as to why information was not used for the purposes for which it was obtained, especially during the period when no one outside the White House knew that Mr. Marceca had obtained the reports.

Moreover, the physical evidence does not reflect dissemination. The analysis of folds and staples does not suggest that any significant unstapling or folding occurred that

would be consistent with copying reports for dissemination. That evidence is consistent with Mr. Marceca's testimony that he initially copied some reports for Mr. Livingstone until he was told to stop doing so. Nor did the fingerprint analysis suggest that the reports had been handled by anyone outside of the OPS chain of command.

Finally, even the testimony regarding the presence of files in Mr. Kennedy's office suggests nothing nefarious, even if true. Although one witness testified in a separate proceeding that she saw background reports in former Associate White House Counsel William Kennedy's office on several occasions, she also testified that she did not know what FBI files looked like. From such testimony, the Independent Counsel could not expect a jury to conclude beyond a reasonable doubt that the reports were even in the Counsel's office, much less whether there was anything improper about their being there. Also, the absence of Mr. Kennedy's fingerprints from the reports themselves suggests that the reports were never in Mr. Kennedy's possession.

There is also no evidence that anyone else asked Mr. Livingstone or Mr. Marceca to obtain background reports of former White House staff. Mr. Kennedy denied doing so; as did Mrs.

Clinton.<sup>174</sup> There is no substantial credible evidence to the contrary.

**B. The Evidence Establishes That Mr. Marceca Did Not Violate 18 U.S.C. § 1001 Because He Was Unaware That Any Particular Request for a Background Report Contained a Statement That Was False.**

Following the Attorney General's Application for the Appointment of an Independent Counsel, the Special Division expanded the jurisdiction of the Independent Counsel to authorize the investigation of possible false statements by Mr. Marceca, in violation of 18 U.S.C. § 1001, in making his requests to the FBI for background investigation reports.<sup>175</sup> First, the OIC examined the "Nussbaum" forms submitted by Mr. Marceca to the FBI requesting background reports to determine whether these requests were, in fact, false. Second, the OIC gathered, reviewed, and analyzed other evidence to determine whether Mr. Marceca knew, when he submitted the Nussbaum forms to the FBI, that he was requesting previous background reports for persons who did not require access to the White House. Based on a complete analysis of the evidence, the Independent Counsel concluded that Mr. Marceca did not violate 18 U.S.C. § 1001.

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<sup>174</sup> The allegations that Mrs. Clinton was involved in the hiring of Craig Livingstone and that Bernard Nussbaum lied to Congress to cover up Mrs. Clinton's role in such a scheme were unsubstantiated. See Final Report In re: Bernard Nussbaum, No. 94-1 (D.C. Cir. [Spec. Div.] Oct. 25, 1996) (filed March 16, 2000).

<sup>175</sup> Order, Div. No. 94-1 at 1 (D.C. Cir. [Spec. Div.] June 21, 1996).

Section 1001, as then in effect, provided, in relevant part:

[W]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.<sup>176</sup>

A false statements prosecution under section 1001 requires proof of actual falsity<sup>177</sup> and knowledge of a statement's falsity.<sup>178</sup>

**1. The Statement on the Request Form That the Background Report Was Needed to Allow a Person Access to the White House Was False.**

The evidence established that Mr. Marceca's statement "ACCESS" on the Nussbaum forms, describing the reasons for his requests for FBI background reports, was false in every case where Mr. Marceca requested a background report for an individual who no longer required access to the White House. Mr. Marceca testified that he had been instructed to use this term to explain that his reason for requesting the report was that the person whose report he requested required access to the White House.<sup>179</sup>

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<sup>176</sup> 18 U.S.C. § 1001 (1996).

<sup>177</sup> United States v. Diogo, 320 F.2d 898, 902 (2d Cir. 1963).

<sup>178</sup> United States v. Yermian, 468 U.S. 63, 64 (1984); see also United States v. Rodgers, 466 U.S. 475, 483 (1984) ("Section 1001 only applies to those who 'knowingly and willfully' lie to the Government").

<sup>179</sup> HCGRO 2/26/96 Hearing at 39 (Marceca).



The evidence established that Mr. Marceca made at least 726 requests for the background reports of individuals who no longer required access to the White House. Accordingly, all of those requests were false.

**2. Mr. Marceca Did Not Know that the Statement on Any Particular Request was False.**

After extensive analysis of the testimony of key individuals in conjunction with analysis of computer records and physical evidence, the Independent Counsel concluded that Mr. Marceca did not knowingly misrepresent any particular request for a background report of an individual who no longer required access. Although Mr. Marceca realized at some point during the Update Project that his requests to the FBI would likely result in the delivery to him of reports for individuals who no longer required access, there is no evidence sufficient to charge a crime that he ever asked for the background report of any individual knowing, before he made the request, that that individual no longer required access.<sup>180</sup>

**a. The List Mr. Marceca Used Did Not Distinguish Between Active and Inactive Passholders.**

Mr. Marceca used a June 10, 1993 list, produced by the Secret Service, that did not distinguish between active and

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<sup>180</sup> Nor was there any credible evidence that Mr. Marceca used these requests as a "trick, scheme, or device" in violation of section 1001 to obtain the background reports of former White House staff. See United States v. Hubbell, 177 F.3d 11 (D.C. Cir. 1999).

inactive passholders in any way. This essential fact is confirmed by the discovery of the "Po" to "Zy" portion of the WHOP list and the lists for other White House offices that also do not reflect such a distinction. Thus, any suggestion that Mr. Marceca could not have been using such a list because the Secret Service could not create such a list is unsupportable. Mr. Marceca had such a list and used it, without knowing that any particular individual was an active or inactive passholder.

**b. Analysis of Evidence Regarding Mr. Marceca's Use of the June 10, 1993 List.**

A comprehensive review and analysis of the vast amount of documentary, testimonial, and forensic evidence compiled by the OIC permitted a determination as to whether any patterns supporting or rebutting an inference of criminal intent could be discerned from Mr. Marceca's use of the June 10, 1993 list. Nothing in the way Mr. Marceca used that list suggests that he wilfully intended to obtain the background reports of individuals who he knew did not require access. Accordingly, there is no evidence regarding his use of the list that suggests Mr. Marceca was targeting specific individuals in order to obtain derogatory information.

The evidence regarding the use of the June 10, 1993 computer lists suggests instead that Mr. Marceca simply followed the procedures for the Update Project as he had been instructed by Ms. Gemmell. The comparison between the reconstructed June 10,

1993 list and Mr. Marceca's requests for background reports shows that Mr. Marceca used the June 10, 1993 list that Ms. Gemmell had shown him in the vault and had told him to use in conducting the Update Project. Consistent with her instructions (and inconsistent with a motive to obtain derogatory information on political opponents of the White House), he began by requesting reports related to employees at GSA, NSC, and the White House residence before making requests from the more politically sensitive WHOP list, nearly three months into his detail.

Similarly, his requests for background reports from the WHOP list were largely, though not exclusively, alphabetical, did not differentiate between temporary (who were mostly new appointees) and permanent passholders, and did not request any background reports beyond "Go" in the alphabet before his detail ended. Also, the fact that he did not request the background reports of certain individuals (e.g., former OPS Administrative Assistant Nancy Gemmell, former OPS Director Jane Dannenhauer and her nephew, and possibly President Bush's grandson) suggests that he did not make requests when he was certain that a person no longer required access to the White House. Unless Ms. Gemmell's procedures served as an elaborate cover for Mr. Marceca to obtain derogatory information for partisan political purposes, Mr. Marceca's use of the list suggests that he simply carried out the Update Project as he had been instructed to do without realizing that the result of this process, namely obtaining the background

reports of hundreds of individuals who no longer worked at the White House, was unusual.

**c. Evidence Relating to Lack of Intent to Conceal Contemporaneously His Requests For Background Reports.**

Other evidence shows that Mr. Marceca did not try to conceal his requests for background reports, which is reflected in the memoranda he sent, under the signature of Mr. Livingstone, to supervisors in employing agencies and offices. If Mr. Marceca had been trying to conceal his efforts to obtain information on employees who he knew no longer worked at the White House, he presumably would not have communicated with supervisory personnel in other offices regarding the need for new background reports for people who no longer worked there; he would simply have taken the derogatory information and used it for whatever improper purpose he had planned. The memoranda show that he believed, albeit mistakenly and without proper regard for the privacy interests at stake as the result of his carelessness, that these individuals still worked at the White House and still required access.

Mr. Marceca's preparation and retention of lists reflecting the background reports that he received each day between September 20, 1993 and February 10, 1994 also show that he did not seek to conceal his requests. In the absence of other evidence of improper motive, the OIC concluded that, if Mr. Marceca had thought that there was something unlawful about his

requests or his possession of the background reports, it is unlikely he would have kept lists reflecting his wrongdoing and left them with other materials where people would find them after his detail ended.

**d. Lack of Supervision, Training, and Experience.**

Mr. Marceca's actions, instead, are consistent with the lack of supervision, training, and experience in OPS. Mr. Livingstone took a "hands-off" approach to the Office and knew virtually nothing about the Update Project. Mr. Marceca received his only "training" when he visited Ms. Gemmell, a career White House employee, and she briefly explained the Office's procedures to him before she retired.

OPS had fewer staff than in previous years, but more work due to the change in administrations and political parties. The office employed no one with prior career White House experience and, for the first time, used volunteer interns to assist in its work. While a person with adequate supervision, proper training, and even a modest amount of White House experience might have realized that the requests should not have generated background reports for so many individuals who no longer were employed at the White House, none of those qualifications were possessed by Anthony Marceca in late 1993 and early 1994.

**e. Review of Background Reports for Suitability.**

Although Mr. Marceca and Mr. Livingstone testified that it was OPS's responsibility to review background reports for

derogatory information that might reflect on an individual's suitability for employment and access, the only physical evidence of such a review were Mr. Marceca's post-it notes and highlighting on some of the background reports that Mr. Marceca requested. Analyzing the nature of Mr. Marceca's notes and highlighting reveals that Mr. Marceca did not seek out only derogatory information that could be used against a person to embarrass them publicly. To be sure, Mr. Marceca did note such material in the reports that he marked. But, at the same time, he noted items such as party affiliation or relationships with Republican officials. The post-it notes and highlighting also appeared on the reports of persons in a variety of positions, which did not reflect any pattern to target former senior Republican political advisors.

The failure to differentiate between political connections and negative information regarding law enforcement or financial issues, or to differentiate between possible political targets and others, suggests that Mr. Marceca (1) viewed both kinds of information as substantially related to suitability for employment at the White House; and (2) was interested in that information solely for the purpose of making a suitability determination with respect to every holdover employee. While allegations were made that Mr. Marceca was seeking derogatory information on former employees for political purposes, it is inconceivable that disclosing the party affiliation of a former

employee would have served any improper partisan purpose. Instead, his notes suggest that he believed that his review involved only current employees and that it was his responsibility to identify issues relating to suitability for employment in a Democratic White House. While this, too, may reflect the lack of experience, training, and supervision at OPS, and suggest a genuine threat to the privacy rights of actual holdover employees, Mr. Marceca's requests for the background reports for those individuals were proper and a legitimate part of his job, absent any evidence of an improper motive. And, once he was informed that political affiliation was not a criterion for suitability, he stopped noting it in the reports passed on to his superiors. Thus, while Mr. Marceca's partisan political background in Democratic presidential campaigns might have led him to believe that party affiliation should influence employment decisions in the Democratic White House, there is no evidence that he thought that he should misuse his position and access to confidential records for improper partisan purposes.

Similarly, it is inconceivable that Mr. Marceca believed that the kind of personal information that he found and noted would have any political significance for most of the individuals whose reports he read. Those individuals whose reports contained post-it notes or highlighting were largely individuals who had not held significant political positions, and therefore would not be vulnerable to political attack.

Moreover, the expressed concerns about the continued employment of individuals whose derogatory information Mr. Marceca noted also show that he believed that they were still employed at the White House at the time he obtained their background reports. This evidence further supports the conclusion that he believed that he was seeking the reports only of currently employed individuals at the White House and that he was unaware that any particular requests involved making a false representation to the FBI to obtain the reports.

**C. Although Portions of Mr. Marceca's Testimony Before Congress Were False, the Independent Counsel Declined to Prosecute Him Because Such a Prosecution Would Not Vindicate the Independent Counsel's Mandate.**

Having concluded that Mr. Marceca was not part of a conspiracy to obtain derogatory information about political opponents through fraudulent requests for the FBI background reports, the Independent Counsel also decided not to prosecute Mr. Marceca even though portions of his testimony before Congress were false. There were substantial inconsistencies between Mr. Marceca's testimony before Congress and other evidence regarding the process Mr. Marceca used to obtain background reports. In addition, Mr. Marceca's testimony regarding whether he read the content of background reports was both internally inconsistent and contrary to other evidence of his reading the reports. Nevertheless, the Independent Counsel concluded that Mr. Marceca's testimony was accurate with respect to the core issue



in the investigation: whether he or anyone else sought to obtain through fraudulent means confidential FBI background reports for improper partisan political purposes or any other improper purpose. His testimony on that question was clear and consistent with all of the other evidence: Neither he nor anyone else had done so.

The evidence that no senior White House officials or Mrs. Clinton were involved in seeking FBI background reports resolved the central issue that required the appointment of an independent counsel. For that reason, the Independent Counsel declined prosecution and granted Mr. Marceca immunity to ensure full disclosure of all relevant information related to the investigation.

Mr. Marceca confirmed that portions of his testimony about both the process that he had used to request background reports and his review of the reports were false and that, at the time that he made those statements, he knew they were false. Under immunity, he also testified that there was no conspiracy involving senior White House officials or Mrs. Clinton to misuse the reports of former White House staff.

**1. Mr. Marceca's Testimony in Congress Was Knowingly False When He Said That He Never Suspected That There Were Individuals on the List Who Were Not Current Passholders.**

There were significant discrepancies between Mr. Marceca's description of how he handled the Update Project and other

evidence regarding the project. His testimony that he never suspected that there was a problem with the list was inconsistent with other evidence that he met with Mr. Livingstone and Ms. Anderson in December 1993 to discuss the problems with the project. There is also simply no evidence that, as he testified, after that meeting he "changed [his] approach" to the Project. He also testified that he would not order a background report unless he also had a new SF-86, contrary to his admitted understanding of the project and Ms. Gemmell's practices and instructions.

His immunized testimony confirmed, consistent with the evidence of his December meeting with Mr. Livingstone and Mari Anderson, that he did realize that there was a problem with the list, but only after the creation of hundreds of "dead" files and the unnecessary review of sensitive background information of individuals who no longer required access to the White House. Similarly, he admitted that he asked for reports from the list without regard to having a new SF-86 and that he did nothing to change his approach after that meeting, although he said that by "change of approach," he had meant his realization of the existence of a problem.

**2. Mr. Marceca's Statements That He Read the Contents of the Background Reports Only in Certain Circumstances Were False.**

Mr. Marceca made numerous statements that he read all confidential FBI background reports requested for the Update

Project for derogatory information. He made these statements to the Washington Post, in the sworn declaration he provided to Mr. Livingstone's lawyer, in an interview with OIC attorneys and agents, and in his public testimony before a House Committee. Notwithstanding these statements, when he was questioned closely about such a review, he claimed that he read them only for the date of the last investigation or the office in which a person worked, or he read them only when they had a current SF-86. This testimony was inconsistent not only with his prior statements, but also with a trail of other evidence -- the post-it notes and highlighting -- on several reports that showed he read the reports for other content or that he read reports that did not have a current SF-86.

In Mr. Marceca's immunized testimony, he admitted that he read background reports for content and that when he responded to specific questions in his House deposition, he had testified falsely. Although he testified that in one exchange he had truly understood the question to be one dealing only with files with a current SF-86, he admitted frankly that he read the reports for content because Mr. Livingstone had instructed him to look for derogatory information that reflected on suitability for employment and that he included, in that definition, a person's political affiliation.

**3. Mr. Marceca's Testimony That No Senior White House Official Was Involved in Requesting Background Reports was True.**

Mr. Marceca testified that no one ever told him to look for derogatory information for any purpose other than to carry out his responsibilities at OPS. That testimony is consistent with other testimony and physical evidence that there was no involvement by senior White House staff or Mrs. Clinton to obtain such information for partisan political purposes. Although there is evidence that White House officials failed to appreciate sufficiently the importance of OPS and its role in handling sensitive material, there is no evidence of the involvement of any senior White House official or First Lady Hillary Rodham Clinton, in the request for the background reports of hundreds of former White House staff.

**VIII. SUMMARY CONCLUSION**

The FBI Files matter represented a failure of process at many levels. The Secret Service provided critical erroneous information that confused the issue and caused Congress and the public to leap to some understandable but ultimately unsupportable conclusions. Mr. Marceca maintained that he had blindly relied upon a list provided by the Secret Service that did not distinguish between active and inactive passholders and that he therefore assumed that everyone on the list was authorized for access to the White House. He was right. The