

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

Division No. 94-1

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

OF THE INVESTIGATION

IN RE: BERNARD NUSSBAUM

In accordance with 28 U.S.C. § 594(h)(1)(B)(1994),¹ the Independent Counsel (In re: Madison Guaranty Savings & Loan Association)² files this Final Report in connection with In re: Bernard Nussbaum, Div. No. 94-1 (D.C. Cir. [Spec. Div.] Oct. 25, 1996), an investigation into whether former White House Counsel Bernard Nussbaum committed perjury, in violation of 18 U.S.C. § 1621, when he testified on June 26, 1996, in Washington, D.C., before the Committee on Government Reform and Oversight of the United States House of Representatives.³

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

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

³ Since the initial appointment of Independent Counsel Starr on August 5, 1994, the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels ("Special Division"), has, acting on the requests of Attorney General Janet Reno, expanded the OIC's jurisdiction several times. While former Independent Counsel Starr originally intended to file a single final report

I. INTRODUCTION

This matter arose in connection with an investigation by the House Committee on Government Reform and Oversight ("House Committee" or "HCGRO") into requests by the White House Office of Personnel Security ("OPS") in the administration of President William J. Clinton for confidential Federal Bureau of Investigation ("FBI") background reports relating to the White House staff of former Presidents Ronald Reagan and George Bush, a matter commonly referred to as the investigation of the "FBI Files" matter.⁴

On June 5, 1996, Representative William F. Clinger, Jr., Chairman of the Committee on Government Reform and Oversight of the United States House of Representatives, announced that his Committee had discovered that the White House had requested the confidential FBI background report of Billy Ray Dale, the former Director of the White House Travel and Telegraph Office ("Travel Office"), some seven months after Mr. Dale was fired amid much publicity and controversy. The next day, June 6, 1996, the White House delivered to the FBI three boxes containing hundreds of

regarding all of the Office's investigative mandates, Independent Counsel Ray has decided to file separate reports, given the expiration of the Independent Counsel Reauthorization Act and his public commitment, consistent with the statutory mandate, to complete the investigations in a prompt, responsible, and cost-effective manner.

⁴ See Final Report In re: Anthony Marceca, Div. No. 94-1 (D.C. Cir. [Spec. Div.] June 21, 1996) (filed March 16, 2000).

files of confidential background reports and associated material related to former White House employees of the administrations of Presidents Ronald Reagan and George Bush.

The White House stated that the reports had been requested by OPS because the Secret Service had provided an outdated list of White House passholders that OPS used to request background reports for "holdover employees" from the previous Republican administration.⁵ The White House characterized the incident as a "bureaucratic blunder,"⁶ which many members of Congress and the public viewed with skepticism.⁷

This skepticism triggered two separate congressional inquiries into the matter. The House Committee and the Senate Judiciary Committee ("SJC" or "Senate Committee") conducted extensive interviews, depositions, and hearings during the summer and fall of 1996. Both committees heard testimony from, among others, the Secret Service and the FBI, as well as former and current employees of OPS and the White House Counsel's Office.

⁵ White House Admits Having Background Files, Wash. Post, June 8, 1996, at A-1.

⁶ Id.

⁷ Americans Think White House is Lying About Filegate; Poll, Agence France Press, June 29, 1996; Filegate Arrogant Abuse of Power, Simpson Says, Cong. Press Release, June 28, 1996; Stockman Furious Over Filegate, Cong. Press Release, June 28, 1996.

After the disclosure of the requests, the OIC initiated an inquiry as part of its investigation into circumstances surrounding the firing of Mr. Dale and the other Travel Office employees.⁸ The Independent Counsel ultimately determined that the allegation that the White House had obtained confidential background reports from the FBI without legitimate justification did not relate to his 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 United States Court of Appeals, Division for the Purpose of Appointing Independent Counsels ("Special Division") seeking the expansion of the jurisdiction of the Independent Counsel, which was granted that same day, to include matters related to the requests by OPS for confidential FBI background reports.⁹

On June 26, 1996, the House Committee held a hearing on the FBI Files matter. The panel of witnesses appearing that day

⁸ On March 22, 1996, after a specific request by the Attorney General, the Special Division expanded the OIC's jurisdiction to investigate "whether William David Watkins committed a violation of 18 U.S.C. § 1001 or any other federal criminal law, . . . in the course of his December 1993 interview with the General Accounting Office concerning the May 1993 firing of the White House Travel Office personnel." Order, Div. No. 94-1 at 1-2 (D.C. Cir [Spec. Div.] Mar. 22, 1996). That matter will be the subject of a separate final report to be filed by this Office.

⁹ Order, Div. No. 94-1 (D.C. Cir [Spec. Div.] June 21, 1996).

included OPS Director Craig Livingstone, former Associate White House Counsel William Kennedy, and Bernard Nussbaum, White House Counsel from January 20, 1993 until April 5, 1994.

During the hearing, Representative Stephen Horn asked Mr. Kennedy whether First Lady Hillary Rodham Clinton was involved in the hiring of Craig Livingstone. Mr. Kennedy testified, "I can state that I have never discussed Mr. Livingstone with Mrs. Clinton in any way, shape or form."¹⁰ Mr. Nussbaum immediately added: "Nor did I."¹¹ When Chairman Clinger directly asked Mr. Nussbaum if he knew who hired Mr. Livingstone, Mr. Nussbaum answered: "I don't know who brought Mr. Livingstone into the White House."¹²

Nearly a month later, on July 25, 1996, Chairman Clinger publicly disclosed the discovery of an insert -- an unsigned memorandum -- in the FBI background investigation report of Mr. Livingstone.¹³ The insert contained a statement attributed to Mr. Nussbaum that arguably contradicted his testimony before the House Committee. The insert had been prepared by then FBI Special Agent Dennis Sculimbrene who, according to the insert, had interviewed Mr. Nussbaum in March 1993. The insert reported

¹⁰ HCGRO 6/26/96 Hearing at 282 (Kennedy).

¹¹ Id. (Nussbaum).

¹² Id. at 57.

¹³ Chairman Links First Lady to FBI File Investigation, ABC World News Tonight, July 25, 1996; Papers Point to Hillary in Hiring; Nussbaum Denies FBI Agent's Notes, Wash. Times, July 26, 1996, at A1.

that Mr. Nussbaum told Agent Sculimbrene that Mr. Livingstone "had come highly recommended to him by Hillary Clinton, who has known his mother for a longer [sic] period of time."

The disclosure by the House Committee of the insert from Mr. Livingstone's background report fueled suspicions that OPS's requests for confidential FBI background reports were part of a scheme by senior White House officials, including Mrs. Clinton, to misuse the FBI background reports to compile derogatory information on political opponents for future partisan political purposes.¹⁴ On September 28, 1996, the House Committee issued an interim report, noting it had "yet to determine whether colossal incompetence or a sinister motive precipitated these events."¹⁵

On October 24, 1996, the Attorney General, citing a political conflict of interest involved in an inquiry into statements by former senior White House staff to the FBI concerning the First Lady, applied to the Special Division pursuant to 28 U.S.C. § 593(c)(1) for expansion of the

¹⁴ White House Enemies List, The Orange County (Calif.) Register, June 11, 1996 at B06; Republicans Call FBI Files Search for Political Dirt, Orlando (Fla.) Sentinel Tribune, June 24, 1996 at A6; FBI File Caper, The (New Orleans, La.) Times-Picayune, June 21, 1996, at B07.

¹⁵ "Investigation into the White House and Department of Justice on Security of FBI Background Investigation Files: Interim Report," at 7, Comm. on Govt. Reform & Oversight, H. Rep. No. 104-862, 104th Cong, 2d Sess. 3 (Sept. 28, 1996). The Senate Judiciary Committee did not issue any report regarding its investigation.

Independent Counsel's jurisdiction to include authority to conduct such an investigation.¹⁶

The Attorney General observed that an expansion of jurisdiction, rather than appointment of a new independent counsel with respect to this matter, was appropriate since the OIC was already investigating similar matters involving some of the same individuals.¹⁷ The Attorney General's application was premised on information received from the House Committee alleging that Mr. Nussbaum's statements to the House Committee "'appear to be inconsistent' with statements he may have made in 1993" to the FBI.¹⁸ The Application further stated: "According to Congressman Clinger, Special Agent Sculimbrene's report indicates that Mrs. Clinton recommended [Mr.] Livingstone to [Mr.] Nussbaum."¹⁹

On October 25, 1996, the Special Division expanded the Independent Counsel's jurisdiction to investigate "whether Bernard Nussbaum committed a violation of 18 U.S.C. § 1621 or any other federal criminal law, . . . relating to statements he made on June 26, 1996, before the Committee on Government Reform and

¹⁶ Application at 3, Div. No. 94-1 (D.C. Cir. [Spec. Div.] Oct. 24, 1996).

¹⁷ Id. at 3-4.

¹⁸ Id. at 1-2.

¹⁹ Id. at 2.

Oversight of the United States House of Representatives."²⁰ This report reflects a complete description of this Office's work in fulfilling its obligation under the Special Division's October 25, 1996 Order and the Independent Counsel Reauthorization Act.

II. FINDINGS

The OIC found no credible evidence that Mr. Nussbaum testified falsely when he denied ever having spoken to Mrs. Clinton about Craig Livingstone, which included ever discussing hiring him with her,²¹ or when he denied "know[ing] who brought Mr. Livingstone into the White House."²² The evidence compiled by the OIC did not substantiate that Mrs. Clinton or Mr. Nussbaum

²⁰ Order at 1, Div. No. 94-1 (D.C. Cir. [Spec. Div.] Oct. 25, 1996).

²¹ It should be noted at the outset that the statement in the insert is only arguably inconsistent with Mr. Nussbaum's testimony in that the insert itself does not expressly state that Mr. Nussbaum had any conversation with Mrs. Clinton about Mr. Livingstone. Rather, it only reflects that Mr. Livingstone "comes highly recommended by [Mrs.] Clinton to him." According to the literal terms of that insert, that recommendation need not have come from any discussion between Mr. Nussbaum and Mrs. Clinton. Nor, according to the insert, did such a recommendation even necessarily come directly from Mrs. Clinton.

²² This particular formulation suffers from a vagueness that would render any prosecution for its falsity problematic. Even if Mr. Nussbaum knew of a recommendation by Mrs. Clinton, such knowledge is not tantamount to "know[ing] who brought Mr. Livingstone into the White House." HCGRO 6/26/96 Hearing at 57 (Nussbaum). Nevertheless, in light of the absence of evidence that Mr. Nussbaum had any substantial involvement in the hiring of Craig Livingstone or that he had a discussion with Mrs. Clinton regarding Mr. Livingstone, the OIC found no substantial evidence that this statement was false.