

FBI File Memorandum

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LIST OF ACRONYMS

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ACB	Access Control Branch
AUSA	Assistant United States Attorney
BI	Background Investigation
CIC	Criminal Investigative Command
CID	Criminal Investigation Division
DEA	Drug Enforcement Agency
DIS	Defense Investigative Service
DOI	Department of Interior
EASU	Executive Agencies Sub-Unit
EOB	Executive Office Building
E-PASS	Electronic Pass Access Security System
EOP	Executive Office of the President
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act
GJ	Grand Jury
GSA	General Services Administration
HCGRO	House Committee on Government Reform and Oversight
HHS	Health and Human Services
Int.	Interview
IRS	Internal Revenue Service
NEOB	New Executive Office Building
NGS	Non-Government Service
NPS	National Park Service
NSC	National Security Council
OEOB	Old Executive Office Building
OEPM	Office of Enlisted Personnel Management
OGA	Other Government Agency
OIC	Office of the Independent Counsel
OIG	Office of the Inspector General
OPR	Office of Professional Responsibility
OPS	Office of Personnel Security
PIC	Presidential Inaugural Committee
RNC	Republican National Committee
SIGBIU	Special Inquiry and General Background Investigations Unit

SJC Senate Judiciary Committee
TSD Technical Services Division
USACIDC United States Army Criminal Investigative Division Command
USSS United States Secret Service
WAVES Workers and Visitors Entrance System
WHOP White House Office of Personnel
WHPSO White House Personnel Security Office
WHS White House Staff
WMFO Washington Metro Field Office
302 Report of Interview

MEMORANDUM

MEMORANDUM

THIS MEMORANDUM CONTAINS GRAND JURY INFORMATION PROTECTED FROM DISCLOSURE BY FEDERAL RULE OF CRIMINAL PROCEDURE 6(e) AND INFORMATION PROTECTED FROM DISCLOSURE BY THE PRIVACY ACT

TO: Kenneth W. Starr
Independent Counsel

FROM: Rod J. Rosenstein
Associate Counsel

DATE: October 13, 1997

SUBJECT: Status Report on Investigation of the Acquisition of Federal Bureau of Investigation Background Investigation Reports by the White House Office of Personnel Security ("FBI Files" Matter)

I. INTRODUCTION

A. Overview

On June 21, 1996, the Special Division of the D.C. Circuit, acting at the request of the Attorney General, expanded the jurisdiction of the Office of the Independent Counsel ("OIC") to include the issue of whether Anthony Marceca committed a crime "relating to requests made by the White House between December 1993 and February 1994 to the Federal Bureau of Investigation for background investigation reports and materials." Order of June 21, 1996. The initial allegation, in substance, was that the White House Office of Personnel Security ("OPS") improperly obtained from the Federal Bureau of Investigation ("FBI") copies of previous background investigation ("BI") reports about persons who were not employed in and did not require access to the White House at the time the White House requested their reports. The

OIC's jurisdiction was expanded again on October 25, 1996 to include the issue of whether Bernard Nussbaum committed a crime "relating to statements he made on June 26, 1996 before the United States House of Representatives Committee on Government Reform and Oversight." Order of Oct. 25, 1996.¹

We adopted safeguards throughout this investigation to protect the privacy of persons whose background reports we reviewed, and we disclose information herein only insofar as it is important to a complete report of the activities of OPS and the information to which OPS had access. We include the names of the persons whose files contained information of investigative interest because it may be relevant to know their identities in order to evaluate the significance of the evidence that Marceca obtained and reviewed their background investigation reports.²

B. How the Matter Arose

The investigation known as the "FBI Files" matter began with a June 5, 1996 announcement by Congressman William Clinger, Chairman of the Committee on Government Reform and Oversight of the House of Representatives. *See, e.g., "White House Obtained FBI Data on Fired Travel Chief," Wash. Post, June 6, 1996, at A-4.* Chairman Clinger had

¹ This investigation was conducted with the assistance of many OIC employees. Among those who committed substantial time and effort to this project were Associate Counsel Steven M. Colloton, Stephen Kubiowski and Craig S. Lerner, and IRS-CID agents J. Donald Fort, Ronald Poplos, Kenneth L. Buck and Albert Burns.

² If this memorandum is publicly released for any reason, we anticipate that the names of any persons about whom substantive information is disclosed will be redacted so that the privacy of persons whose files were obtained improperly by the White House will not be infringed unnecessarily.

It should be noted that if Marceca were prosecuted for his handling of particular BI reports, it might be necessary to disclose the contents of those BIs in his criminal trial.

discovered that the White House had made a written request to the FBI on December 20, 1993 for previously-completed background investigation reports about Billy Ray Dale. The request was made by means of a form carrying the name of then-White House Counsel Bernard Nussbaum. The form listed "ACCESS (S)" as the reason for the request. The date of the request was seven months after Dale was fired, amid much publicity, from his position as Director of the White House Travel and Telegraph Office ("Travel Office").

The day after Chairman Clinger announced his discovery, the White House gave the FBI three boxes that had been archived by OPS and held in the custody of the White House Records Management Division. Two of the boxes contained a total of 333 files with typewritten names of persons who had not worked in the White House during the Clinton Administration, and certain other documents. (AL-DC-11415 - 11422) A few of the files carried the names of prominent Reagan and Bush White House staffers -- including James A. Baker III, former Reagan Secretary of State and Bush Chief of Staff; Anthony Blankley, press secretary to House Speaker Newt Gingrich; Marlin Fitzwater, former Bush press spokesman; and Kenneth M. Duberstein, former Reagan Chief of Staff. Most carried the names of lower-ranking persons not known to the general public. Most of the files contained copies of FBI summary background investigation reports that had been prepared to allow previous White House Counsels to review the suitability of White House passholders, along with cover transmittal letters. In some cases, FBI interview report forms (known as forms "FD-302") were attached to the previous reports. The files also contained copies of the request forms from OPS to the FBI. Some files -- including Fitzwater's -- contained no FBI reports. (FBI Bates No. B-1060 - 1062)

White House spokespersons stated that the reports had been requested by the White

House Office of Personnel Security (OPS) because the Secret Service had provided an outdated list of White House passholders that the OPS had used to request background reports for persons whom OPS assumed had remained on staff from the Bush administration as "holdover" employees. The White House characterized the incident as a "bureaucratic blunder." *E.g.*, "White House Admits Having Background Files," *Wash. Post*, June 8, 1996, at A-1. Among those quoted in the early press reports was Anthony Marceca, a civilian investigator with the Army Criminal Investigative Division who had been detailed to OPS from August 1993 until February 1994. *Marceca reportedly acknowledged that he had ordered files from the FBI, read them, and notified D. Craig Livingstone, the Director of OPS, if the files contained "derogatory information."* *Id.* Many members of the Congress and the public expressed skepticism about the explanation that the reports had been ordered as the result of a bureaucratic blunder.

FBI Director Louis J. Freeh ordered FBI General Counsel Howard Shapiro to conduct an expeditious investigation into the matter. During Shapiro's brief investigation, which concluded on June 14, 1996, the White House gave the FBI 71 additional OPS files, including files in the names of former Travel Office employees John Dreylinger and Barnaby Brasseux. Shapiro's report, which focused on the actions of the FBI, determined that the FBI had responded routinely to unsigned form memoranda requesting copies of previous background investigation ("BI") reports. Shapiro's final report identified a total of 408 requests for the BIs of persons who did not actually need access, and concluded that the status of 17 other requests was unresolved. *See Report of the FBI General Counsel on the Dissemination of FBI File Information to the White House*, June 14, 1996, at 25-26 [hereinafter "Shapiro Report"]. Shapiro found that the FBI routinely had processed White House forms requesting previous reports for decades, at least

since the Johnson Administration. *Id.* at 1. Although the research analysts processing the requests had noticed an increase in the volume of requests in late 1993, no one had questioned the propriety of the requests. *Id.* at 27-28. Shapiro concluded that FBI management had failed properly to supervise the dissemination of information from FBI files. *Id.* at 2.

Meanwhile, the OIC initiated an inquiry into the FBI files matter as part of its investigation into the circumstances surrounding the firing of Dale and the other Travel Office employees. Anthony Marceca and [redacted] appeared before the grand jury on June 11.

[redacted]

Subsequently, the OIC determined that the allegation that the White House 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 OIC would not conduct any further investigation into the matter. The Attorney General then decided to expand the OIC's investigation to include the matter. On Friday, June 21, the Special Division of the D.C. Circuit, at the Attorney General's request, expanded the Independent Counsel's jurisdiction, *inter alia*, as follows:

The Independent Counsel shall have jurisdiction and authority to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Anthony Marceca committed a violation of 18 U.S.C. § 1001 or any other federal criminal law, other than a Class B or C misdemeanor or infraction, relating to requests made by the

White House between December 1993 and February 1994 to the Federal Bureau of Investigation for background investigation reports and materials.

Order of June 21, 1996.

Both Houses of the Congress conducted interviews, depositions and hearings during the summer and fall of 1996.³ One of the mysteries upon which the Congress focused attention at the early stages was the question of who had hired Craig Livingstone to be the Director of OPS. Livingstone announced his resignation at a hearing of the House Committee on Government Reform and Oversight ("HCGRO") on June 26, 1996.

Also at the June 26 HCGRO hearing, former White House Counsel Bernard Nussbaum testified that he did not know who had brought Livingstone to the White House and that he had never talked with Mrs. Clinton about Livingstone. Transcript of Hearing, Comm. on Govt. Reform and Oversight, U.S. House of Representatives, 6/26/96, at 57, 282 [hereinafter "HCGRO Hearing"]. On July 18, Chairman Clinger reviewed the FBI Headquarters' file relating to Livingstone's background investigation and discovered an FBI "insert" (an unsigned memorandum) dated March, 1993. The insert stated, *inter alia*, that Nussbaum told an FBI agent that Mrs. Clinton had recommended Livingstone to him and that Mrs. Clinton had known Livingstone's mother for a "longer period of time." (AO-DC-4287) On October 25, at the request of the Attorney General, the Special Division expanded the Independent Counsel's

³ The House Committee majority issued an interim report on September 28, 1996, in which it noted that it had "yet to determine whether colossal incompetence or a sinister motive precipitated these events." "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. 3 (Sep. 28, 1996) [hereinafter "HCGRO Report"].

authority to include "whether Bernard Nussbaum committed a violation of 18 U.S.C. § 1621 or any other federal criminal law, other than a Class B or C misdemeanor or infraction, relating to statements he made on June 26, 1996 before the United States House of Representatives Committee on Government Reform and Oversight." Order of October 25, 1996.

Another central issue for the Congress and the news media was the existence of the alleged Secret Service lists that Marceca claimed he had used. Representatives of the Secret Service reviewed the names of former White House employees whose reports, according to the Shapiro report, were requested by the White House. The Secret Service determined that most of the persons were listed as "inactive" in its computer system on or before January 20, 1993.⁴ The Secret Service then announced that its computer system was not capable of producing an "outdated" list or a list that would wrongly show inactive former employees as active passholders. HCGRO Hearing, 6/26/96, at 65 (statement of Congressman Burton); SJC Hearing, 6/20/96, at 174 (Miller); Undercoffer HCGRO Dep., 7/10/96, at 10, 18; SJC Hearing, 6/28/96, at 290, 296-97 (Libonati); HCGRO Hearing, 7/17/96, at 48 (Libonati). A Secret Service audit report concluded, "There were no widespread flaws or system breakdowns which resulted in the WAVES system producing grossly inaccurate or outdated access lists."⁵ (720-DC-63) More

⁴ A person's status is changed to "inactive" in the Secret Service WAVES computer system when the person no longer may enter the complex by waving the pass in front of the electronic detector at the White House or EOB gates. (720-DC-58)

⁵ The Secret Service uses WAVES ("Workers Access and Visitor Entrance System") primarily to keep track of non-passholders who are permitted to access the White House. The electronic gates at the White House are controlled by the E-PASS computer system, which is regarded as the critical system for controlling passholder access. Changes in a person's pass status are entered into E-PASS and automatically passed to WAVES by the computer.

significantly, the audit report asserted, "There were three types of WAVES printouts: those listing inactive passholders; those listing active passholders; and those listing passholders whose status changed from active to inactive in a given month." (720-DC-60) Secret Service agents testified that a Secret Service list either would (1) state "Active" or "Inactive" or "A" or "I" beside each name, or (2) indicate in the heading if the list contained only active or only inactive passholders. HCGRO Hearing, 7/17/96, at 217-19 (Libonati); *id.* at 297 (Libonati and Undercoffer).⁶

Some legislators and commentators interpreted the Secret Service statements to mean that OPS could not have used a Secret Service list in the manner Marceca had described to order reports of persons who were not active passholders.⁷ This inference, albeit reasonable, was

⁶ The most direct testimony was as follows:

Mr. Flanagan. Even if Mr. Marceca had a list from you generated when Polk was President, it's going to say these folks are active or these people are inactive, period?

Mr. Undercoffer. That's correct.

Mr. Libonati. That's correct.

HCGRO Hearing, 7/17/96, at 297.

⁷ Although the testimony given by Secret Service employees in 1996 proved to be incorrect, it did not fall directly within our mandate and we had no evidence that it was willfully false. We therefore approved the Treasury Department Inspector General's request for our authorization to conduct an internal administrative investigation of the preparation of the Secret Service's testimony. Letter from John D. Bates to Valerie Lau, Sept. 27, 1996.

By letter dated April 16, 1997, the Treasury OIG notified us that it had closed the investigation because it was "unable to conduct a credible and independent investigation" as a result of the Secret Service's insistence that the OIG obtain access to Secret Service personnel
(continued...)

wrong. Marceca did use a Secret Service list that failed to distinguish between present and former passholders.

C. SUMMARY OF INVESTIGATIVE FINDINGS

1. The Office of Personnel Security

a. Background Reports of Former White House Personnel

We have determined that the Secret Service did produce misleading computer lists that included the names of former White House staffers, and that Anthony Marceca used the lists to request previous BI reports from the FBI. Marceca was conducting a project that had been described to him by Nancy Gemmell, an outgoing OPS employee, as the "Update Project." This project required OPS to create a file for each holdover employee and order copies of previous BI reports from the FBI to put in each file. The primary objective was to ensure that each employee had been the subject of a BI within the preceding five years. Livingstone also wanted his office to review each holdover employee's previous BI reports, to ensure that the employee was suitable for employment and so that Livingstone would be aware of any potential security problems. Livingstone OIC-302, 9/13/96, at 11. If a passholder's last BI was completed more than five years ago, OPS would arrange for the passholder to complete a new SF-86 ("Questionnaire for National Security Positions") and then ask the FBI to perform an updated BI.

The Secret Service reports that Marceca used were misleading because although Gemmell had requested and believed that she had received alphabetical lists of active passholders, the lists

⁷(...continued)

and records only through the Secret Service's Office of Inspection. The OIG notified us that it considered this to constitute "an unreasonable denial of access by the USSS" and planned to report the matter to the Congress. Letter from Valerie Lau to John D. Bates, April 16, 1997.

actually included both active and inactive passholders, with nothing to distinguish between the two groups. That was not consistent with Secret Service practice, because other reports produced by the Secret Service either included only active personnel or contained a column indicating whether each person was active or inactive.

Misleading printouts using the same format were produced for at least thirteen different groups of White House employees, including "White House Operations Personnel," the group of persons upon whom the initial publicity focused.⁸ The Secret Service printed the lists on June 10, 1993 at the request of Nancy Gemmell, who retired on August 13, 1993. Gemmell OIC-302, 7/29/96, at 1. Each list was restricted to persons with a particular "employer designation" in the Secret Service WAVES computer system, and a separate report was run for each employer designation. The employer designation represents the federal agency (such as GSA), White House office (such as NSC), or contractor (such as AT&T) with which the person is associated. Many White House staffers are given the employer designation White House Operations Personnel, sometimes abbreviated as "WHOP".

The Secret Service lists were *ad hoc* reports, in the sense that the Secret Service employee who produced them created a new computer program to run them, using an existing program as a template and modifying it to select the criteria for which records to include in each report. Gemmell assumed that each list included only active passholders who were connected with the agency in the caption of each list. In that sense, the lists were grossly overinclusive,

⁸ The Travel Office employees were classified by the Secret Service as White House Operations Personnel.

because they did not restrict pass status to active.⁹

OPS began the Update Project in late July 1993, and the previous reports for most groups of White House employees actually were ordered before Marceca arrived at OPS. The largest lists were left for Marceca -- White House Operations Personnel, National Security Council and most of General Services Administration. Although Gemmell used the Secret Service lists to obtain personal information about the employees that was required to order their previous reports from the FBI, she evidently did not rely exclusively upon the Secret Service reports, because there are former White House employees on the lists for whom Gemmell did not order previous BI reports.

When Marceca took over the project, he used the misleading lists to order previous reports for the persons who, according to the lists, held permanent passes -- and some who held temporary passes. Although the bulk of improper requests related to persons classified as "WHOP"-- the group of which Marceca ordered from letters Aa to Go -- he made similar improper requests for National Security Council ("NSC") and General Services Administration ("GSA") employees before he began with the WHOP group.

Documentary evidence demonstrates that Marceca sought advice from the agencies about

⁹ The lists also were underinclusive, because they did not include persons who worked for the same employer but whose "employer designation" entry in the WAVES computer database was not identical to the criterion used to run the report. For example, the report captioned "Exclusive Employer Directory for White House Operations Personnel" included persons for whom the employer field in the computer database held the acronym "WHOP," but not those for whom the field contained the words, "White House Operations Personnel." There are many such inconsistencies in the Secret Service WAVES computer system, as a result of which reports sorted by employer designation do not include all employees who should be associated with that employer designation. Stanley OIC-302, 10/4/96, at 7.

whether particular persons were still working at the White House only *after* OPS had acquired their previous reports from the FBI.¹⁰ Under Livingstone's signature, Marceca sent memoranda listing names of employees -- including private telephone company employees and General Services Administration workers -- to supervisory personnel. The memoranda listed only employees for whom BIs had not been conducted within the last five years. The memoranda requested that the recipient advise OPS whether or not the persons listed were still employed, and stated that each employee who remained would be required to submit a new SF-86. The new SF-86 would enable OPS to ask the FBI to perform an updated background investigation.

We have not found the critical portion of the Secret Service printout for White House Operations Personnel -- the portion containing the names between the letters Aarhus and Goldberg. However, we did recover an unused portion of that list, for names from Po through Z, and we recovered complete lists for other employer designations. The Secret Service computer system cannot produce a report as of a date in the past because the information in the computer system changes daily. Through extensive analysis of data from the Secret Service WAVES and E-Pass computer systems, however, we reconstructed, with a high degree of confidence, the Aa-Go portion of the list that Marceca used to order reports on previous White House staffers. *From that analysis, we concluded that the misleading Secret Service lists were used to make the improper requests to the FBI for previous BI reports of former White House passholders.*

In sum, Marceca's approach to the Update Project was as follows:

¹⁰ For some persons, the lists were missing biographical information needed to make requests. In some cases, Marceca contacted the employing office to request the information and learned that the person had departed.

- (1) Request previous BIs for all permanent passholders¹¹ on each Secret Service list,¹² without verifying whether or not those persons still required access to the White House.
- (2) Review each BI to determine whether it is more than five years old, and make note of any derogatory personal or political information in the BI.
- (3) Write a memorandum to the organization to which each Secret Service list pertains to inquire whether persons with BIs more than five years old are still working at the White House.
- (4) If a person with a BI more than five years old is still employed, have the person complete a new SF-86 and submit it to the FBI to conduct an updated background investigation.

Step (1) -- requesting reports of every permanent passholder on a six-month old list without first verifying that each person still needed to access the White House -- in retrospect seems dubious. The evidence, nonetheless, discloses that Marceca did precisely that. Furthermore, although a reasonable person who had completed step (3) for NSC and GSA might have reflected on the large number of persons on the Secret Service lists who were no longer at the White House and concluded that there was a fundamental problem with the lists, there is no evidence that it ever occurred to Marceca to question the understanding of the lists that had been imparted to him by Gemmell.

Having determined that the initial explanation offered by Marceca and Livingstone was proven credible by the existence of misleading Secret Service lists, we turned our attention to

¹¹ In some cases, Marceca also requested temporary passholders -- perhaps mistakenly.

¹² Marceca was unable to request reports for some persons because the Secret Service lists lacked one or more of the requisite items of information, *e.g.*, date of birth, place of birth, or Social Security number.

four central questions:

- (1) *Did Marceca, Livingstone, or anyone else realize at the time that OPS requested the reports, in 1993 and 1994, that the persons whose reports were ordered were no longer employed at the White House, or that some were Republican political appointees who no longer required access to the White House?*

A: Marceca knew in late 1993 or early 1994 that by using the Secret Service lists that Gemmell had given him, he was obtaining reports for persons who were no longer employed at the White House. There is some evidence that the permanent OPS employees -- Livingstone, Wetzl and Mari Anderson -- may have been aware that Marceca was obtaining unneeded reports and perhaps even that he was using an outdated list -- outdated in the sense that it had been printed earlier in the Clinton Administration. There is no evidence, however, that any of the OPS employees had contemporaneous knowledge that many of the reports Marceca was receiving were for political appointees from the Reagan and Bush administrations.¹³

- (2) *Did anyone ever read the FBI reports concerning persons who were not White House employees?*

A: Marceca read FBI previous reports for persons who were no longer at the White House, and attached post-it notes to some of the reports identifying derogatory information and Republican connections. The evidence suggests that Marceca was under the mistaken impression that the persons whose reports he read, including those with Republican connections, were still White House employees. Livingstone also may have read some of the improperly-requested reports. However, there is no evidence that Livingstone read the report of any high-profile former White House staff member.

- (3) *Was information from improperly-obtained reports used for any improper purpose, or disseminated beyond OPS?*

A: We have not found any evidence that any information from the reports was

¹³ If OPS had intentionally obtained reports for political appointees of previous Republican administrations, possible motives would be (a) to use the information in the reports for political advantage, or (b) to compare the derogatory information in the reports, such as previous drug use, to reports about Clinton Administration personnel.

used for any unlawful purpose or disseminated beyond OPS.¹⁴

(4) *Did anyone associated with OPS give false testimony when the allegations came to light in 1996?*

A: Some of the testimony that Marceca gave in 1996 about his state of knowledge and his procedure for handling previous reports in 1993 and 1994 was incomplete and misleading. There is no direct evidence that Marceca gave willfully false testimony.¹⁵ There is circumstantial

evidence, however, from which an inference of willfulness might be drawn.

b. Other Marceca Issues

Our investigation uncovered other information relating to Marceca that may be relevant to our evaluation of the evidence against him.

(1) Possible False Statements to the FBI During Marceca's BI

The FBI conducted a background investigation of Marceca in 1993. The investigation was authorized by Livingstone as part of Marceca's ambitious effort to obtain a political appointment with an Inspector General or U.S. Marshal or to extend his White House duty.

During the 1993 background investigation,

FOIA(b)(6)
FOIA(b)(7) - (C)

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

¹⁵ *If Marceca is not prosecuted, he should be granted immunity and questioned in great detail (with reference to the documentary evidence) about what he did at OPS, the statements that he made after the matter came to light, and whether anyone suggested to him how he should respond to questions about what he did with the files.*

FOIA(b)(6)
FOIA(b)(7) - (C)

fer

(2) Civil Deposition Testimony About Marceca Reading his File

In November 1994, Marceca filed a federal civil lawsuit for defamation against two women who had provided adverse information about him to the FBI during his 1993 background investigation. The complaint sets forth little detail about their comments. In a civil deposition in Texas on February 20, 1995, Marceca testified that he had read a few pages of his own background investigation on September 11, 1994, and that he had based the lawsuit on what he had read. Marceca testified that while he was visiting Livingstone at OPS, Livingstone turned around to take a phone call. Marceca then reached for a newspaper, and the BI report just

¹⁶ Marceca filed a defamation suit against the complainant in 1994, suggesting that he was willing to take on the burden of proving the charges false.

happened to fall off of Livingstone's desk. Marceca subsequently tried to obtain access to his background report from the FBI and the White House through a FOIA claim, and later a subpoena, but he was unsuccessful. In his deposition, Marceca claimed to recall little about the substance of the women's comments, and some of what he did recall is not accurate.

Livingstone acknowledges that he talked with Marceca about the problems turned up in Marceca's BI, as Livingstone says he did with any employee whose investigation turned up derogatory information. However, Livingstone has no recollection of Marceca reading his report; Livingstone was out of town on the date Marceca claimed the incident occurred; and it is highly unlikely that Marceca's BI report ever would have been sitting on Livingstone's desk in the manner that Marceca described. Hence, Marceca's testimony in the Texas deposition about how he came to read his own report is probably false.

It was generally understood that White House employees were not permitted to read their own background reports. The Privacy Act contains a provision making it a crime for a person who, by virtue of employment or official position, has access to Privacy-Act protected records and willfully discloses them to a person not entitled to receive them. 5 U.S.C. § 552a(i)(1). We found no reported case under this provision, and we have no evidence that Livingstone improperly disclosed the report to Marceca.¹⁷

2. Perjury Allegation Against Nussbaum

We have found no evidence, other than the FBI insert, to support the allegation that Nussbaum gave false testimony about the hiring of Craig Livingstone. Nussbaum testified on

¹⁷ *If Marceca is granted immunity, he should be questioned in detail about how he came to learn about the derogatory information in his own BI.*

June 26, 1996 that he had never discussed Livingstone with Mrs. Clinton. In a voluntary interview, Nussbaum told the OIC that he does not know who brought Livingstone to the White House and does not know of any relationship between Livingstone and Mrs. Clinton. The March 1993 FBI insert, however, contains one sentence stating that Nussbaum said that Mrs. Clinton had a personal relationship with Mrs. Livingstone and that Mrs. Clinton had recommended Craig Livingstone for his position in the White House.

We have found no evidence that Livingstone's mother actually had a personal relationship with Hillary Rodham Clinton. Of course, the accuracy of the sentence in the FBI insert is not dispositive of whether Nussbaum said it. Moreover, even if the FBI agent had erred in part or all of the sentence in the insert, it would not as a matter of law preclude us from proving that Nussbaum actually did speak to Mrs. Clinton about hiring Livingstone. But there is no evidence, apart from the insert, that Nussbaum talked with Mrs. Clinton about hiring Livingstone.¹⁸

The insert purports to reflect, in separate paragraphs, the comments of five persons interviewed over a three-day period, from March 1 through March 3, 1993. Such inserts are prepared as a routine part of background investigations, in which many persons who know the subject of the investigation are asked how long they have known him and whether they know anything that would reflect adversely on his character. The inserts, FBI 302 interview reports, and other relevant documents are forwarded to FBI Headquarters, where an FBI analyst collects and reviews all information generated during the background investigation. Reneghan OIC-302,

¹⁸ *We have not yet questioned Mrs. Clinton about whether she had any relationship with Livingstone or his family, whether she had any role in the decision to hire Livingstone, and whether she ever talked to Nussbaum about Livingstone. Mrs. Clinton should be asked about these issues.*

11/7/96, at 2; Wambach OIC-302, 11/5/96, at 1; Woods OIC-302, 3/26/97, at 1-2. If no adverse information is disclosed, the summary BI report that the FBI produces for the White House generally reports the total number of persons who were interviewed and states that all provided favorable comments and none disclosed any adverse information.

The former FBI agent whose typewritten initials appear on the insert, M. Dennis Sculimbrene, maintains that he always strived to write accurate reports. But Sculimbrene acknowledges that the procedure he followed in preparing inserts was highly informal. He often would contact a person by telephone, take no notes, and then type an insert summarizing the person's comments. Sculimbrene faced an unprecedented amount of work during the relevant time period, and he has no recollection of ever talking to Nussbaum about Livingstone. Sculimbrene therefore is unable to testify from personal recollection that Nussbaum said anything inconsistent with Nussbaum's testimony.¹⁹

Accordingly, because there is no evidence that Mrs. Clinton played any role in the decision to hire Livingstone and there is no witness to attest that Nussbaum said that she did, there is no substantial and credible evidence that Nussbaum's testimony was false.

The question of precisely who "hired" Craig Livingstone amidst the chaos of the beginning of the new administration is not definitively resolved. It appears that Livingstone's

¹⁹ Sculimbrene, who suffered brain damage in an accident in 1994, told the OIC that he is "pretty sure" that *Livingstone* told him that Livingstone's mother had a relationship with Hillary Clinton. Sculimbrene OIC-302, 9/4/96, at 2. That information does not appear in the FBI 302 that Sculimbrene prepared of his interview of Livingstone. Sculimbrene also told us that he may have *assumed* that the First Lady had a role in Livingstone's hiring because the First Lady in a previous Administration once insisted on hiring someone Sculimbrene believed was inappropriate for a particular job. *Id.* at 3.

first discussion with a White House Counsel attorney about the job was with Associate Counsel Cheryl Mills, probably during the first week of February 1993. After talking with Mills, Livingstone apparently went to OPS and began to make preparations to take over the office. Livingstone subsequently met with Associate Counsel William Kennedy, who was assigned to supervise OPS by Deputy White House Counsel Vincent Foster. Livingstone thought that Kennedy would be the decisionmaker, and Kennedy understood that Livingstone already had been designated for the job. Kennedy had to review Livingstone's BI, however, before making a permanent appointment. Furthermore, Kennedy understood that Livingstone really wanted to work in the Military Office. Foster contacted one of Livingstone's references at some point and probably ratified the decision to hire him.

II. KEY PLAYERS

A. White House Counsel's Office

1. Bernard Nussbaum

Bernard Nussbaum served as White House Counsel from January 20, 1993 through March 5, 1994. OPS reported to the Office of the White House Counsel. Nussbaum, however, had very little interaction with OPS. Nussbaum delegated the supervision of OPS to Deputy White House Counsel Vincent W. Foster, Jr., who in turn assigned that authority to Associate White House Counsel William Kennedy. Consistent with longstanding practice, the name of the White House Counsel appeared on all OPS forms sent to the FBI requesting information about the backgrounds of White House passholders.

2. William Kennedy

William Kennedy was Associate White House Counsel from February 10, 1993 through November 30, 1994. One of Kennedy's responsibilities was to oversee the operations of OPS and review background reports on Presidential appointees. Kennedy reviewed Craig Livingstone's background investigation and approved his appointment. Kennedy also reviewed suitability issues relating to non-Presidential appointees who had access to the White House. At Livingstone's request, Kennedy formally asked the Department of Defense to detail Anthony Marceca to OPS.

Kennedy was involved in a number of controversies before he left Washington. In May 1995, he sent his associates a personally-addressed form letter announcing his return to the Rose Law Firm. On the copy that Kennedy sent to Livingstone -- who also had been a subject of scrutiny by the news media, the Congress and the OIC -- Kennedy handwrote:

Craig --
Fuck 'em. Fuck 'em all.
Keep in touch. All best
wishes.

Bill K.

(OPS-46)

3. Cheryl Mills

Cheryl Mills became Associate White House Counsel in January 1993, and was promoted to Deputy Counsel in January 1997. According to Mills, she and Vincent Foster interviewed Livingstone for a position in OPS. Mills OIC-302, 11/12/96, at 2. Mills oversaw the operations of OPS until Kennedy was hired in February 1993. *Id.* at 3.

4. Vincent W. Foster, Jr.

Vincent Foster was Deputy White House Counsel from January 1993 until his death on July 20, 1993. Associate White House Counsel William Kennedy consulted Foster about serious suitability issues raised in FBI background investigations.

5. Christopher Cerf

Christopher Cerf was detailed to the White House Counsel's Office from the Office of Administration's General Counsel Office in May 1994 to assist Associate White House Counsel Beth Nolan. Nolan had assumed Kennedy's duties following his resignation. Cerf gradually took over full responsibility for supervising OPS during his detail. In December 1994, Cerf became an Associate White House Counsel and continued his duties as supervisor of OPS. In Cerf's capacity as supervisor of OPS, he dealt with Craig Livingstone on a regular basis. Cerf was aware that Livingstone was an unpopular braggart, but Cerf supported Livingstone when other

White House employees considered terminating him in 1995.²⁰ Cerf OIC-302, 9/25/96 at 2. Cerf was also aware that Livingstone was dissatisfied with his compensation and that he repeatedly threatened to resign. *Id.* at 3.

B. OPS

1. Craig Livingstone

David Craig Livingstone was Director of OPS from February 1993 through June 26, 1996.²¹ Livingstone had served as Director of Security for the Presidential Inaugural Committee ("PIC"), and long had been active in Democratic political campaigns. Livingstone was well known for his work as an "advance man," which involved planning campaign events and arranging audiences. Reames OIC-302, 9/19/96 at 2; Varney OIC-302, 11/14/96, at 1.²²

Prior to the Clinton campaign, Livingstone held a number of jobs, including doorman for various D.C. bars and restaurants; Operations Director for Hands-Across-America; Press Officer

²⁰ Cerf attended a meeting in early 1995 with Harold Ickes, Jane Sherburne and a fourth person from the Office of Management and Budget (whose name Cerf could not recall) at which someone recommended terminating Livingstone because of "vague" allegations. Cerf OIC-302, 9/25/96, at 2. Cerf told the OIC that he supported Livingstone because the allegations were not specific and because he believed Livingstone was loyal and was doing a competent job. *Id.*

Cerf also attended a short meeting in late 1995 with Beth Nolan and a senior Secret Service agent, at which the agent reported an allegation that Livingstone had talked to someone at a party about physical security at the White House. Cerf discussed the incident with Livingstone. Cerf OIC-302, 9/25/96, at 3.

²¹ Prior to the Clinton Administration, the head of the office was referred to officially as "Assistant to the Counsel to the President (Security)." Livingstone changed the title to "Director of White House Personnel Security." (OPS-60)

²² One of Livingstone's friends who also did campaign advance work described Livingstone as having the reputation as one of the best advance-men in the Democratic party. Jones OIC-302, 9/10/96, at 7; *see also* Bachar OIC-302, 9/10/96, notes (describing Livingstone as "good" at advance work).

for Farm Aid; Executive Assistant for Senator Timothy Wirth; City Coordinator for the U.S.-Soviet Public Summit; Publicist for Universal Pictures; and Public Relations Account Executive for Trahan, Burden & Charles, an advertising agency. (705-DC-00001774); Livingstone SJC Int., 6/19/96, at 3-4. Immediately before the Clinton campaign, he had been working for approximately one year for Charlene Drew Jarvis, a Washington, D.C. councilwoman, in a community relations capacity. Livingstone SJC Int., 6/19/96, at 4.

Livingstone first became active in politics in 1984, when he worked as an advance man for the Gary Hart presidential campaign and the Mondale/Ferraro presidential campaign. (705-DC-1776); Livingstone SJC Int., 6/19/96, at 3. In the following eight years, Livingstone continued to do periodic advance work for Democratic political campaigns and other Democratic initiatives, most notably the 1988 Al Gore presidential campaign during which -- according to his resume -- he "traveled daily with the Senator and coordinated activities with the U.S. Secret Service." (705-DC-1775) During the 1988 Democratic National Convention, he was responsible for coordinating DNC Chairman Paul Kirk's operations and meetings in Atlanta, Georgia. *Id.*

According to his resume, Livingstone worked as the "Senior Consultant to Counter-Event Operations" for the 1992 Clinton/Gore campaign from October 1991 through November 1992.²³ (705-DC-1774) Shortly after the election, Livingstone contacted Nancy Jacobson, a PIC financial officer, and told her that he would be interested in a position with PIC. Livingstone OIC-302, 9/16/96, at 1. Jacobson told him about the position of Director of Security Operations for PIC, which he understood was the most senior unfilled inaugural position. *Id.* As Director of

²³ In his resume, Livingstone states that he was responsible for "successfully deploying several of the infamous 'Pinochio' and 'Chicken George' media events." (705-DC-1774)

Security Operations, Livingstone was responsible for coordinating security for the Inaugural with the Secret Service and other federal law enforcement agencies. *Id.*

The circumstances of Livingstone's appointment as Director of OPS -- a major focus of the congressional hearings -- are addressed at length *infra*.

Livingstone maintains that he was not aware that OPS was improperly obtaining BI reports of political appointees from previous Administrations. Livingstone OIC-302, 9/13/96, at 14, 22-23; Answer by Craig Livingstone to Written Questions from Senator Joseph Biden, Jr., regarding 6/28/96 SJC Hearing, at 18.

As a result of the FBI Files fiasco, Livingstone now is generally regarded as -- at best -- an incompetent manager who shirked his duties. Certainly, although Livingstone had a reputation as an effective organizer of political events, there was nothing in his background or experience to suggest that he was qualified to manage an office that was responsible for an immense paper flow, and he had not demonstrated the type of character or responsibility that would qualify him to deal with sensitive law enforcement information. Furthermore, it is clear that his ambitions lay beyond OPS.

Livingstone nonetheless maintains that he did his best to get his job done under impossible circumstances,²⁴ given the unprecedented number of persons who obtained access to the White House, the cut in paid OPS staff, and the lack of concern about security on the part of other Clinton administration appointees. Livingstone OIC-302, 9/13/96, at 32. Under

²⁴ Employees of the FBI, Secret Service, and Department of State who worked with OPS observed that it was poorly managed.

Livingstone -- although due in part to pressure from the Congress and GAO -- OPS ultimately developed a computerized spreadsheet to track BIs, and there is no evidence that OPS was operating other than smoothly at the time the FBI Files matter broke in June 1996. The improvements in OPS's operations apparently were due largely to the work of Lisa Wetzl and Edward Hughes, young employees who first joined OPS as unpaid interns and then were hired by Livingstone to fill the Security Assistant job and promoted to be the Executive Assistant. (Wetzl replaced Mari Anderson as Executive Assistant, and Hughes replaced Wetzl.)

Former FBI agent and now best-selling author Gary Aldrich depicted Livingstone as well-intentioned, and placed the blame for what Aldrich viewed as a breakdown in the White House background investigation process instead on Livingstone's supervisors in the White House Counsel's Office -- particularly William Kennedy. In the draft of Aldrich's book, given to the FBI before the FBI Files matter came to light, Aldrich wrote:

It would be unfair of me to characterize every new Clinton person in a negative way, but quite frankly, *the ones I met that I thought were mature, experienced and level headed, weren't in charge of anything.* They were not in a position to influence, so any complaints to them would result in nothing more than a venting of frustration. *Craig Livingstone was in the process of becoming one of these people.* Admittedly, he had a long way to go, and although *he was growing into the job and had taken his responsibilities seriously,* he had no power, no budget, and no backing.

(AI-DC-8583) (emphasis added)

Livingstone says that he has been on unemployment compensation for the majority of 1997.²⁵ Livingstone OIC-302, 5/29/97, at 9. Since he left the White House, he has worked only

²⁵ At our May 1997 meeting, Livingstone said he was trying to secure a position with

(continued...)

a few assignments coordinating meetings. *Id.* According to his attorneys, Livingstone's legal defense fund -- which was created in the wake of the investigation of Vincent Foster's death -- raised less than \$7,500.²⁶ (BG-DC-86)

2. **Anthony Marceca**

Anthony Marceca has been employed as an investigator with Procurement Fraud Team of the United States Army Criminal Investigation Command ("CIC") since 1988. Marceca did occasional advance work for Democratic political campaigns during the 1980's and became acquainted with Livingstone. After Clinton was elected, Marceca volunteered to work with the Presidential Inaugural Committee ("PIC"). He took annual leave from his government job to do that work in December 1992.

Marceca was detailed to the United States Senate Select Committee on Indian Affairs during his first year with the Army. He received a performance rating of "unacceptable" for his probationary period and therefore was considered for discharge. However, because Marceca was on detail to the Senate, which gave him an exceptional rating, the CIC decided not to discharge Marceca.²⁷ HCGRO Hearing, 7/17/96, at 194-95. Senate Select Committee Chairman Dennis

(...continued)

Adler-Droz, a company run by a friend he has known since the 1984 Mondale campaign. Most of his work since leaving the White House has been on Adler-Droz projects. Livingstone OIC-302, 5/27/97, at 10.

²⁶ According to Livingstone's attorneys, they have received only \$7,500 for their entire representation of Livingstone, and no third party has indicated any intention to pay the balance. (BG-DC-86)

²⁷ Under government regulations, a probationary employee evidently must be discharged unless he receives a rating of "fully successful." HCGRO Hearing, 7/17/96, at 194. Accordingly, having determined that they could not discharge Marceca, the CIC found it

(continued...)

DeConcini, Co-Chairman John McCain and Chief Counsel Kenneth M. Ballen each personally signed an evaluation form rating Marceca exceptional in all categories relating to his work for the Select Committee from September 27, 1988 to June 16, 1989.²⁸ *Id.* at 197-98.

From August 18, 1993 until mid-February 1994, Marceca was detailed from the Army to work in OPS. One of his responsibilities was to create personnel security files for all holdover employees from the previous Administration. Marceca also ensured that new White House employees completed their SF-86 forms so that FBI background investigations could be conducted.

Before he began to invoke the Fifth Amendment, Marceca insisted that he must have inadvertently used a flawed Secret Service list to order previous BI reports for persons who had not worked in the Clinton Administration.

In the draft of former FBI agent Gary Aldrich's book, given to the FBI for review before the FBI Files matter erupted, Aldrich wrote that he met Marceca on September 16, 1993. At that time, Aldrich explains, the cautious background review process that had been in place during the Bush administration had broken down, and many Clinton administration staffers were not completing their background investigation forms in a timely manner or cooperating with FBI investigators:

[Marceca] explained that he had been brought in to assist

(...continued)

"necessary" to rate him as "fully successful." *Id.*

²⁸ Among the justifications for the exceptional ratings are that Marceca "has been asked to work on highly confidential matters because of his attention to detail and integrity" and that he "establishes and maintains accurate records of professional quality which are consistent with the Special Committee's standards." *Id.* at 197.

Craig, and to improve the efficiency of the Security Office. Within a few minutes I wondered if he didn't have another possible assignment. He was making disparaging remarks to Dennis and I about Craig and his operation. We had just met. Was he trying to draw us out, make us say things that he could take back to Craig? Was he trying to find out if the FBI guys were angry, the ones blabbing about the White House Counsel's mess.

* * *

Tony told us that, "The girls in the Counsel's Security Office had been loose and sloppy in their work, and were way behind -- no system -- disorganized." *Tony said that he had found everything to be chaos, mixed up.* He made no attempt to blame Craig, and I found that curious. Craig had been handed a perfectly running Security Office, and even extended one of the senior staff of the office from the Bush Administration on for about 4 months into the Clinton Administration. There was no excuse for it. It occurred to me that Counsel's Office might be trying to lay the blame on a couple of young staffers, when really, if they were not supervised, who's [sic] fault was that?

(AI-DC-8662) (emphasis added)

Livingstone and Marceca remained friendly after Marceca left the White House, speaking occasionally on the telephone. (CGE-54248, 54259, 54265)

3. **Mari Anderson**

Mari Anderson moved to Little Rock to work on the 1992 Clinton/Gore campaign, then moved to Washington and was hired by Livingstone to work on PIC. Anderson began working in OPS as a Staff Assistant on February 17, 1993. In August 1993, after Nancy Gemmell left, Anderson became the Executive Assistant. She was responsible for overseeing the day-to-day operations of OPS.

Anderson left OPS in late August or early September, 1994.

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

Livingstone and other OPS employees have stated that Anderson was unhappy with her job. Livingstone SJC Int., 9/20/96, at 22-23; Hughes OIC-302, 8/13/96, at 2; Wetzl OIC-302, 8/8/96, at 6.

(continued...)

4. Lisa Wetzl

Lisa Wetzl began working at OPS in June 1993 as an unpaid White House intern. She became a paid staff assistant in August 1993, upon Nancy Gemmell's departure. Livingstone promoted Wetzl to Executive Assistant in the fall of 1994, when Anderson departed. Wetzl left OPS in September 1995 to work in the Department of Defense as an assistant to the Secretary of the Army.

Wetzl did not work on the Update Project with Tony Marceca, but she had a general understanding about what the project entailed. SJC Hearing, 6/28/96, at 16. Wetzl says that she began work on the Update Project and discovered that Marceca had ordered unneeded FBI reports in 1994, after Marceca had left OPS.³⁰ *Id.* at 17-18; HCGRO Hearing, 6/26/96, at 46-48. She testified that when she looked at the Secret Service lists Marceca had been using to complete the Update Project, she immediately realized that the lists were outdated and appeared to contain

(...continued)

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

³⁰ Wetzl testified that she began working on the Update Project in the fall of 1994, after Anderson's departure, and that she found at that time that Marceca improperly had ordered previous BI reports. Our analysis of the evidence has determined, however, that Wetzl completed the Update Project for holdover White House staff employees in June 1994, before Anderson departed.

hundreds of names from past administrations.³¹ SJC Hearing, 6/28/96, at 17-18; HCGRO Hearing, 6/26/96, at 46-47.

5. Nancy Gemmell

Nancy Gemmell worked at OPS as an Administrative Assistant from 1981 until her retirement on August 13, 1993.³² She trained the new employees and was responsible for the Update Project. Gemmell initially planned to retire in June, then agreed to extend her employment until August. Although Gemmell and Marceca did not overlap, Gemmell spent a few hours one day in August explaining the work of the office to Marceca.

6. Jane Dannenhauer

Jane Dannenhauer was Director of OPS during the Nixon and Ford Administrations. She left at the start of the Carter Administration, then returned in the Reagan and Bush Administrations. HCGRO Hearing, 6/19/96, at 36, 38. Livingstone replaced her in the Clinton Administration. Dannenhauer overlapped briefly with Livingstone in February 1993. Dannenhauer, who viewed OPS as an unglamorous office that involved a great deal of paperwork, was not surprised at Livingstone's lack of interest in the OPS position. Dannenhauer OIC-302, 5/6/97, at 2-3, 6.

³¹ An OPS intern recalls pulling files from a list that Wetzl described as Clinton and Bush Administration personnel and putting them into a box for archiving. Mikulski OIC-302, 9/18/96, at 3. Each of the boxes that Wetzl sent to archives contains a handwritten note on the top stating that it was received by the Office of Records Management on December 12, 1994. (Boxes CF-214, CF-215)

³² On August 10, 1993, shortly before Gemmell departed and Marceca arrived, OPS requested the previous reports of Donald Belton Ayer. Ayer served as Deputy Attorney General in the Bush Administration, from 1989 until 1990. Ayer's file was not archived with Marceca's files. We found it in the OPS vault in 1996.

7. George Saunders

George Saunders began his career as an FBI agent in 1941. Since 1981, he has been employed as a contract employee with OPS, generally working three days a week. From 1993 until early 1996, Saunders worked in an office distant from the OPS office. Saunders OIC-302, 7/2/96, at 1-2. His responsibility was to review files of persons whose background investigations had turned up derogatory information. He sometimes would meet with such persons, then write a short memorandum recommending what to do about the issues raised. *Id.* at 1.

C. Other White House Personnel

1. Charles Easley

[Redacted]

[FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury]

2. Christine Varney

Christine Varney was White House Cabinet Secretary from January 1993 through October 1994. She talked with Livingstone about working in the White House Counsel's Office. Subsequently, Deputy White House Counsel Vincent Foster and Associate Counsel William Kennedy separately consulted Varney about Livingstone. Varney, who says she thought that Livingstone was seeking a clerical position, gave him a favorable reference. Varney OIC-302

[Redacted]

11/14/96, at 2-3.

D. Secret Service

1. Arnold Cole

Arnold Cole is an Assistant Special Agent in Charge at the White House Division for the United States Secret Service. Cole now supervises the Access Control Branch, which is comprised of three subsections: Workers, Appointments, and Visitors Entrance System ("WAVES"); Investigations; and Passes. Cole regularly saw Livingstone during Livingstone's tenure at the White House.

2. Maurice Craft

Maurice Craft is an agent with the Secret Service Uniform Division. Craft has been acting supervisor of the WAVES office since 1993.³⁴ Craft OIC-302, 7/30/96, at 1. The primary function of the WAVES Center is to control access to the White House by non-passholders. *Id.* The WAVES Center also produces for OPS, from the WAVES computer, reports listing passholders. *Id.* at 2. Craft had routine contact with Livingstone and other OPS employees concerning OPS WAVES report requests.

3. Jeffrey Undercoffer

Jeffrey Undercoffer is a Secret Service Special Agent who has worked in the Access Control Branch of the White House Division since January 1994. He became the Secret Service's regular point of contact for OPS requests for WAVES reports after that time. When the FBI Files matter first became a matter of public discussion, Undercoffer was the Secret Service

³⁴ The WAVES office fell under the Secret Service's Uniform Division until it was transferred to the newly-created White House Division in 1994. Craft OIC-302, 7/30/96, at 1.

agent most familiar with the WAVES system and he was tasked to investigate the system to determine whether the Secret Service computer could have produced that type of report that Marceca claimed to have used.

E. Federal Bureau of Investigation

1. M. Dennis Sculimbrene

FBI Special Agent Dennis Sculimbrene was based at the White House from January 1986 until April 1996. Sculimbrene OIC-302, 6/28/96, at 1. His primary responsibility was to interview White House employees who were either subjects or friends or associates of subjects of FBI background investigations. *Id.* Sculimbrene provided the results of his investigations to the FBI's Washington Metropolitan Field Office ("WMFO"), which forwarded them to FBI Headquarters, where analysts in the FBI's Special Inquiry and General Background Investigations Unit ("SIGBIU") prepared the summary memoranda that were provided to the White House.

Sculimbrene was hit in the head by an airplane propeller in January 1994. Sculimbrene OIC-302, 6/28/96, at 1. He returned to the White House in October 1994 to work on a limited duty status. *Id.* Because of his injuries, Sculimbrene has impaired vision and suffers from memory loss. *Id.* Sculimbrene was on leave from the FBI Files matter arose, and he resigned from the FBI in August, 1996. *See* "Many Notified After FBI 'Heads Up,'" *Wash. Post*, Aug. 2, 1996, at A-12.

2. Howard Shapiro

Howard Shapiro served as General Counsel to FBI Director Louis Freeh from August 1993 until 1997. Shapiro HCGRO Dep., 7/30/96, at 13-14. In June 1996, Freeh asked Shapiro to investigate the FBI's role in the FBI Files matter. Shapiro produced a report describing the

procedures by which the FBI provided previous background investigation reports to the White House and identifying the OPS files that the White House had returned to the FBI.

Shapiro also was responsible for resolving legal issues that arose between the FBI and the Congress during the course of the congressional investigations into the FBI Files matter. In July 1996, Shapiro learned that Chairman William Clinger planned to review Craig Livingstone's BI file and that the file contained an FBI insert stating that Nussbaum had said that Hillary Clinton had played a role in Livingstone obtaining his job in the White House. Shapiro notified the White House about the information and arranged for FBI agents to interview the agent who had written the insert.

III. WHO HIRED CRAIG LIVINGSTONE?

A. Livingstone's Hiring

1. Learning about the Opening and Consulting Sponsors

Livingstone states that he was working six or seven days a week prior to and during the Presidential Inauguration, and that he was exhausted. Livingstone OIC-302, 5/29/97, at 2. Immediately after the Inauguration, Livingstone began working on a five-person advance team for a Clinton Administration meeting at Camp David scheduled for late January 1993. The team was assembled to do the advance work on all "non-substantive" aspects for the Camp David meeting -- *e.g.*, food, lodging, and office supplies. Varney OIC-302, 11/14/96, at 1.

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Livingstone OIC-302, 9/13/96, at 2.

Livingstone recalls that he approached Eli Segal and asked him to sponsor Livingstone for employment at the Clinton White House. Answers by Craig Livingstone to Written Follow Up Questions from Chairman Orrin G. Hatch, SJC, Aug. 19, 1996, at 7. Livingstone did not know whether Segal did so.³⁷ *Id.* Livingstone knew Segal from his work on the Gary Hart and Bill Clinton presidential campaigns. *Id.* Livingstone never reported directly to Segal in either campaign. *Id.* Segal believes that Livingstone may have called him and asked Segal to sponsor him for a position in the Clinton Administration. Segal OIC-302, 6/4/97, at 2. A document produced to the OIC by the White House captioned "Presidential Transition Resume Routing Form" indicates that Segal agreed to sponsor Livingstone for a "Senior Level" position in the area of "Advance."³⁸ (705-DC-1767) Segal stated that the handwriting on the form is not his, but that he sometimes authorized applicants to use his name on such forms if he knew that they were

³⁶ Livingstone could not recall who mentioned the OPS Director position first. Livingstone OIC-302 9/13/96, at 2. Varney, for her part, did not think she would have any reason to be aware of the OPS Director position, so she assumed that Livingstone must have brought that position to her attention. Varney OIC-302, 11/14/96, at 2.

³⁷ On a White House copy of Livingstone's resume, someone handwrote at the top, "Sponsored by Eli Segal." (705-DC-1774) Livingstone also listed Segal as one of his references, along with Roy Neel, Kathy Garmezzy, Walton Chalmers, Paige Reefe, Fred Droz, Nancy Jacobson and Charlene Drew Jarvis. (705-DC-1778)

³⁸ The form also contains blocks for "Administration" and "Clerical" positions, but those blocks are not checked on Livingstone's form.

competent. Segal OIC-302, 6/4/97, at 2.

Varney told the OIC that she understood the OPS position Livingstone was pursuing to be an administrative, "paper pushing" type of job. Varney OIC-302, 11/14/96, at 2. She believed that the individual in that position would simply ensure that incoming Clinton staff completed their required paperwork for their background investigations. Varney never viewed the job as a "security" position. *Id.*

2. Meeting with White House Counsel's Office Employees

According to Livingstone, his next contact regarding the OPS position occurred shortly after the Camp David retreat. Livingstone OIC-302, 5/29/97, at 2-3. Within several days after the Camp David retreat, Livingstone recalls that Varney walked him to the White House Counsel's Office, where he saw White House Counsel Bernard Nussbaum for a brief period of time before he was introduced to Associate Counsel Cheryl Mills, who talked with him in some detail about the position. Livingstone does not recall whether he went directly from Nussbaum to Mills, or whether he saw Deputy Counsel Vincent Foster before Mills. Livingstone OIC-302, 5/29/97, at 3.

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In a later interview, Livingstone told us he first had a brief conversation with Nussbaum, who directed him to speak with Mills. Livingstone OIC-302,

9/13/96, at 2-3. Before meeting with Mills, Livingstone had completed some research and had some knowledge of the position. He is certain that he spoke to Mills about the position in OPS before he ever spoke to Foster about it. *Id.*

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During their conversation, Mills briefly described the OPS Director position to Livingstone and informed him that the current Director was not going to be retained in the Clinton Administration. Livingstone OIC-302, 9/13/96, at 3. Mills also informed him that a White House Counsel supervisor for OPS had not yet been chosen. *Id.* Mills told Livingstone that when a Counsel's office supervisor was assigned to OPS, Livingstone could make the case for his qualifications to that person. Livingstone OIC-302, 5/29/97, at 4. Livingstone subsequently went to the OPS office and met Dannenhauer, Gemmell, Betty Childs and Kari Johnson, all of whom still were working at OPS. Livingstone OIC-302, 5/29/97, at 4-5; Gemmell OIC-302, 5/8/97, at 2.

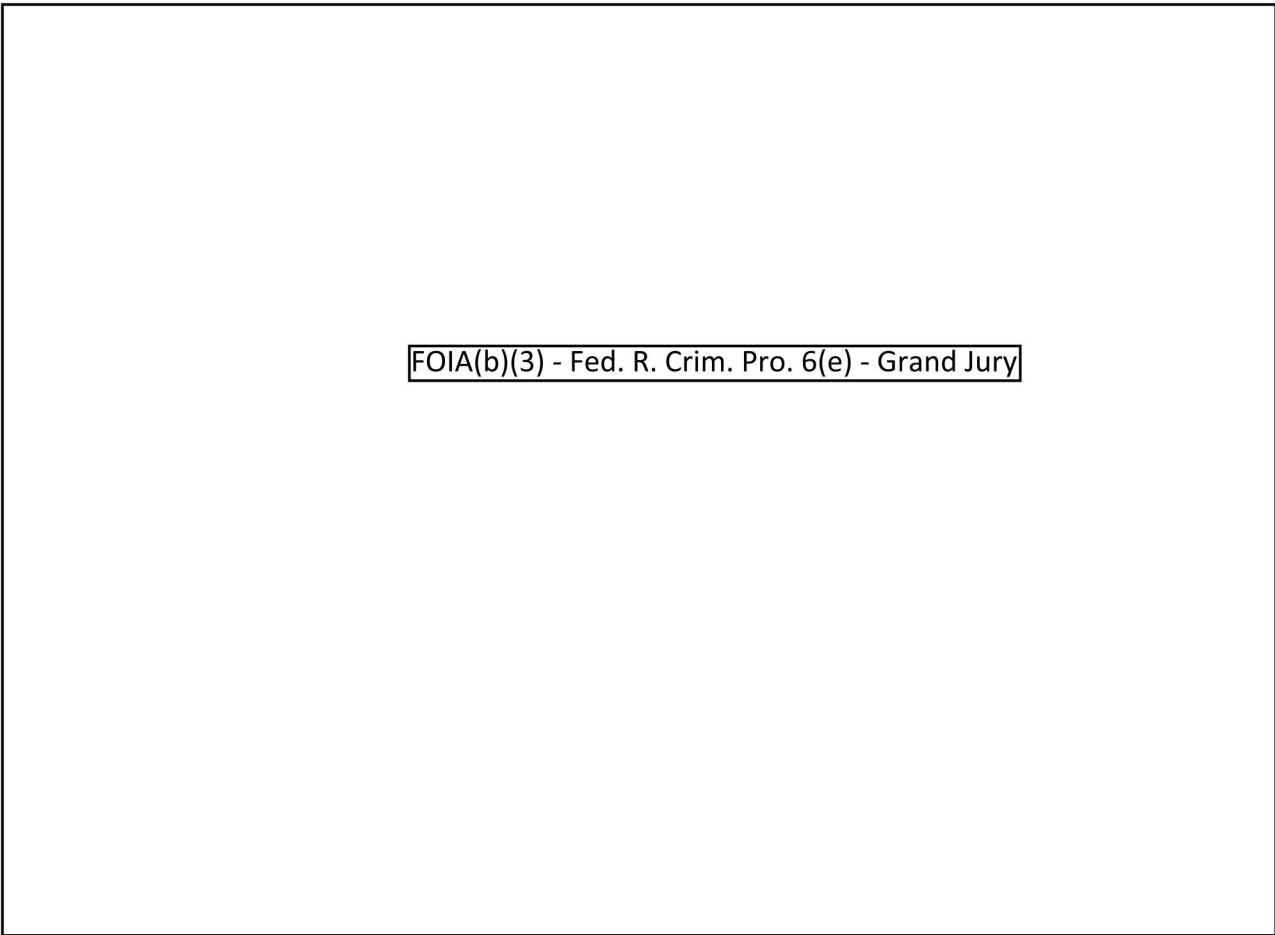
After his memory was refreshed with a memorandum that he wrote to Mills on February 8, 1993, Livingstone stated that he now has a vague recollection that Mills told him to report to OPS.³⁹ Livingstone OIC-302, 5/29/97, at 4.

Livingstone believes that his next contact about the Director position was with William Kennedy. Kennedy told Livingstone that he was being considered for the OPS Director position, subject to the successful completion of his FBI background investigation. Livingstone OIC-302, 9/13/96, at 3. In early interviews, Livingstone said that Kennedy told him to report to the White

³⁹ Although the memorandum is addressed to Mills, Livingstone does not recall whether Mills or Kennedy requested the letter. Livingstone OIC-302, 5/29/97, at 6.

House OPS to "get a lay of the land." *Id.* After his memory was refreshed with the Mills memorandum, however, Livingstone said that he probably was working in OPS before he met with Kennedy.⁴⁰ Livingstone OIC-302, 5/29/97, at 6.

Livingstone's most recent recollection -- that Mills talked to him about the OPS job *before* he met Kennedy -- is consistent with his earlier congressional testimony.⁴¹ After he spoke



⁴¹ Livingstone testified before the Congress as follows:

Mr. Livingstone. I don't know how it was in your campaign, but as campaigns evolve, some people get jobs, some people don't. I did advance, as I stated, as I recall it, and this might not be correct, but as I recall it, I spoke with Ms. Christine Varney who introduced me to people
(continued...)

to Kennedy, Livingstone had the impression that he had the job as Director of OPS, but understood that it was contingent on the completion of his background investigation.

Livingstone OIC-302, 5/29/97, at 6-7.

3. Mills' Recollection

Mills' recollection about Livingstone's application for an OPS position differs from Livingstone's on two significant issues: (1) the OPS position Livingstone was pursuing was a low-level position -- not a supervisory job;⁴² and (2) Vince Foster was present when she met with

(...continued)

in the Counsel's Office, one of which I recall was Ms. Cheryl Mills. I had a brief conversation with Ms. Mills about the job, and she described the job to me as largely administrative. She didn't think that she was going to be overseeing the office but someone very soon would be appointed. As I understand it, from my recollection, Mr. Kennedy was then appointed.

Mr. Davis. *You were on the job before he was appointed?*

Mr. Livingstone. *That is correct.*

Mr. Davis. *Who told you to come to work there?*

Mr. Livingstone. *That is a reasonable question, and I wish I had an adult answer to give you, but it was a long time ago. As I recall it, I was asked to report to Ms. Cheryl Mills' office at the first week or so of February.*

HCGRO Hearing, 6/26/96, at 214-15 (emphasis added).

⁴² Livingstone recalls that Mills described the job as an "administrative" position. HCGRO Hearing, 6/26/96, at 215.

A February 24, 1993 memorandum from Nussbaum, Foster and Kennedy to David Watkins explains that "the personnel in the Security Office below the Assistant to the President for Security (the 'Assistant') perform essentially clerical, not legal, functions and thus are not

(continued...)

Livingstone in her office.

According to Mills, sometime near the end of January or early in February 1993, Vincent Foster told Mills that he was going to offer Craig Livingstone one of the administrative positions in OPS. Mills OIC-302, 11/12/96, at 1-2. Mills says that she was under the impression that Livingstone would fill a vacancy for one of OPS's administrative assistants who had recently resigned. *Id.* at 2. Mills believed that this was the most junior position, the lowest paid with the least responsibility.⁴³ *Id.* Mills says she does not know how Foster got Livingstone's name. *Id.*

(...continued)

properly budgeted under this Office. The Assistant, because of his role in the clearance process, interacting with the FBI and other clearance agencies, is properly under this Office." (705-DC-3171)

⁴³ Notwithstanding Mills' insistence that she did not realize Livingstone would be running the office, a February 8, 1993 memorandum from Livingstone to Mills reveals that Livingstone clearly communicated to Mills his impression that he would be the head of the office. (OPS-197) In the memorandum, Livingstone advised Mills that he had "reviewed the White House Security Offices as requested," and was reporting his "findings." *Id.* Livingstone announced that Gemmell would "stay on in her role as executive assistant *and report to me.*" *Id.* (emphasis added). Livingstone further stated that Jane Dannenhauer "would remain on *as an advisor to me* through March 1." *Id.* (emphasis added). He explained that retaining Dannenhauer through March 1 "is necessary as I will need 2-3 weeks to receive my security clearance." *Id.*

Furthermore, Livingstone accounted for each of the remaining two staff positions, in addition to Gemmell's, in the four-person office. He wrote that one of the assistants in the office was retiring and that "Edgar Bueno of your office would like to fill one of these positions," and attached a resume for Mari Anderson, "who I would like to bring in on the other position." *Id.*

Finally, Livingstone referred Mills to an attached draft letter which he proposed be sent from Mills to Dannenhauer. The letter stated, in relevant part:

Please inform your staff of the following

- (1) Effective February 8, 1993, Craig Livingstone shall serve as Director of the office of White House Security; Jane

(continued...)

at 2. However, Mills recalls that Foster checked with Christine Varney for a reference on Livingstone. *Id.* Mills recalls that she and Foster interviewed Livingstone in her office for the OPS job.⁴⁴ Mills OIC-302, 11/12/96, at 2.

Mills was aware when she and Foster met with Livingstone that Dannenhauer would be resigning soon. Mills subsequently had frequent contact with Livingstone because he was the senior Clinton administration appointee in OPS. *Id.* at 2. However, she says that she assumed

(...continued)

Dannenhauer shall continue on as advisor to Mr. Livingstone through March 1, 1993 whereupon, it is expected she will submit her resignation.

(OPS-200) One copy of the memorandum may contain Mills' handwritten notes. *See* HCGRO Report, at n.127.

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that someone other than Livingstone would be hired to assume the OPS Director position. *Id.*

Mills was aware that Livingstone viewed the OPS position as temporary and hoped to become Director of the White House Military Office. Mills OIC-302, 11/12/96, at 2. Mills says that Livingstone was her liaison in OPS because he was the only employee in the office hired by the Clinton administration. But Mills insists that she had no idea how Livingstone came to be Director of OPS. *Id.* at 2-3.

4. Foster Checks with Varney about Livingstone's Qualifications

Consistent with Mills' recollection, Varney remembers *Foster* calling her and asking whether Livingstone was capable of handling a position in the White House Counsel's Office. Varney OIC-302, 11/14/96, at 3. Varney had a couple of previous conversations with Livingstone about the job, and understood that it was a clerical position paying less than \$40,000. *Id.* at 2. Varney understood that it would involve ensuring that each incoming Clinton staffer completed the required paperwork for a background investigation, and providing that information to the FBI. *Id.* Varney did not think of the position as involving "security" matters. *Id.* When Foster asked about Livingstone, Varney told Foster that Livingstone was suitable for that type of job. Varney could not recall whether her discussion with Foster took place after Livingstone already was working in the White House. *Id.* at 2-3. She believes that Livingstone called later to thank her for serving as a reference. *Id.* at 3.

5. Kennedy's Recollection

Kennedy maintains that Livingstone already was in place as the head of OPS when

Kennedy arrived at the White House.⁴⁵

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Kennedy recalls that Livingstone was the Acting Director and that Foster said he was a candidate to hold the job on a permanent basis:

I arrived the first week in February and went on the payroll on February 10, I believe. When I arrived, Craig was acting as Acting Director of the Office of White House Personnel Security. I was informed by Mr. Foster that that was the position he was under consideration for. I don't know who told Mr. Foster that or on what basis.

HCGRO Hearing, 6/26/96, at 58-59.

⁴⁵ Dannenhauer recalls meeting with Kennedy to discuss OPS without Livingstone. Dannenhauer OIC-302, 5/6/97, at 2. Because Livingstone was not at the meeting, Dannenhauer assumes that the meeting occurred before Livingstone joined OPS.

Edgar Bueno, a paralegal in the White House Counsel's Office who was friendly with Livingstone, also thinks that Kennedy started working at the White House before Livingstone. Bueno OIC-302, 5/27/97, at 4.

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According to Kennedy, Livingstone's status at OPS was probationary until his FBI background check could be completed. HCGRO Hearing, 6/26/96, at 172.

As set forth in detail *infra*, there are several contemporaneous documents that support Kennedy's recollection that Livingstone already was slotted to run OPS before Kennedy arrived at the White House.⁴⁶ Also, the insert that FBI Special Agent Dennis Sculimbrene wrote in connection with Livingstone's background investigation in early March, 1993 -- the same insert that reports the interview of Nussbaum -- states that Kennedy said that he did not hire Livingstone. (AO-DC-4287)

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In Livingstone's SF-86, which is dated February 17, 1993, Livingstone stated that he had been employed in "White House Security" since "1/93." (AO-DC-4379) More significantly, Livingstone wrote a memorandum to *Mills* on February 8, 1993, discussing the OPS personnel and attaching a draft announcement of Livingstone's appointment as Director. (OPS-197 - 200)

6. Kennedy Checks with Varney about Livingstone's BI

The FBI submitted a partial background investigation summary report on Livingstone to the White House on March 5, 1993. It is common for the FBI to submit such partial reports if adverse information is discovered. Sculimbrene interviewed Livingstone again on March 12, and the FBI's final report was submitted on March 16.

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Varney

believes that she spoke with Kennedy as they were walking between buildings on their way to a meeting. Varney OIC-302, 11/14/96, at 3. According to Varney, Kennedy described Livingstone's position as a clerical/administrative job within the White House Counsel's Office. *Id.* Varney recalls advising Kennedy that she thought Livingstone was acceptable for the position as described. *Id.* Kennedy recalls talking with Varney about "issues . . . which were of concern to me." Kennedy SJC Int., 9/17/96, at 13. Varney says that Kennedy did not tell her about any problems that had arisen in Livingstone's BI. Varney OIC-302, 11/14/96, at 3. Varney told Kennedy that Livingstone could handle the job. *Id.* Kennedy recalls that Varney told her that Livingstone "had been of good service in the campaign, that he was a credible, competent individual, that she had every faith in him, and that she believed he should be retained in that position." Kennedy SJC Int., 9/17/96, at 13.

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7. Documentary Evidence Relating to Livingstone's Hiring

On February 8, 1993, Livingstone wrote a memorandum to Cheryl Mills summarizing his review of OPS. The memorandum states that it is being provided "as requested." (OPS-197 - 200) Livingstone stated, *inter alia*, that Jane Dannenhauer and Nancy Gemmell would be staying on at OPS for a short period of time and reporting to Livingstone. *Id.* Livingstone also referred

Mills to an attached draft letter which he proposed be sent from Mills to Dannenhauer. The draft stated in relevant part:

Please inform your staff of the following

- 1) Effective February 8, 1993, Craig Livingstone shall serve as Director of the office of White House Security; Jane Dannenhauer shall continue on as advisor to Mr. Livingstone through March 1, 1993 whereupon, it is expected she will submit her resignation.

Id. (OPS-200) This document leads to the conclusions that Livingstone was assigned to OPS on or before February 8, 1993, and that someone told Livingstone, no later than February 8, that he would become the Director of OPS. The document also strongly suggests that Mills was aware that Livingstone expected to run OPS.

On February 17, 1993, Livingstone sent a two-page signed memorandum to Kennedy describing the functions of the Security Office, with the reference "White House Security Update." (705-DC-4114 - 4115) The memorandum is addressed to Kennedy as Associate White House Counsel, but no title appears under Livingstone's name. There is only one section, captioned "I. DUTIES OF THE WHITE HOUSE SECURITY OFFICE." The memorandum lists thirteen different duties, including the following:

Process security papers in function [sic] with obtaining clearances for Presidential employees and White House complex staff members.

Handle daily contact with the Federal Bureau of Investigation.

Work with the Internal Revenue Service as another part of the security clearance procedure.

Work with the United States Secret Service in processing applicants for access and White House passes.

Maintain clearance process for White House volunteer/intern program.

Initiate and maintain security interview process on both staff applicants and volunteer/interns.

Initiate, through the National Archives, the FBI investigations of former President's support staff (including updates every five years) in order for them to have access to classified papers of the particular ex-President.

Maintain a five-year update program for all employees required under E.O. 10450.⁴⁷

On February 18, Kennedy sent a memorandum to Foster attaching Livingstone's memorandum and stating, "The result of all of those functions is that the office moves much paper. I need to discuss this subject with you when you have time." (705-DC-3185 - 3187)

Although Livingstone was working in the Personnel Security Office long before February 17, there is documentary evidence suggesting that the position of Director was not definitively resolved. A February 18 memorandum from Michael Whouley to Bernard Nussbaum, carrying the reference line, "Assistant to the Counsel for the President (Security)," recommends that Nussbaum consider Jacqueline Dinwiddie, who had served in that position during the Carter Administration, to replace Dannenhauer. (OPS-184) A handwritten note at the bottom of the page suggests that Nussbaum referred the memorandum to Kennedy. (OPS-183)

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Whouley's memorandum is not necessarily evidence that the OPS job was open as of February 18. Whouley was working in Presidential Personnel with Dinwiddie, who he understood needed a few more years of government service in order to be eligible for a

⁴⁷ Executive Order 10450, first adopted by President Eisenhower in 1953, requires background investigations for all federal civilian officers and employees. Exec. Order No. 10450, 18 F.R. 2489, 1953 WL 5976 (April 27, 1953).

government pension. Whouley OIC-302, May 20, 1997, at 1. Whouley says that any one of 20 to 30 of the approximately 64 employees working for him at the time could have authored the memorandum, and that Whouley had no personal knowledge about the opening in OPS.

Whouley does not recall seeing the memorandum, but believes that he authorized it. *Id.* at 1-2.

Dinwiddie says that she needed only 18 more days of federal service to be vested for a government pension. Dinwiddie OIC-302, 5/29/97, at 1. Dinwiddie says that she did not seek out the OPS job, and recalls hearing someone in her office comment about a job in OPS only once in the spring of 1993. *Id.* at 2. She never heard anything else about a job in OPS, and she never saw the Whouley memorandum. *Id.*

On February 22, Kennedy sent a memorandum to Nussbaum and Foster reporting a conversation Kennedy had with Livingstone. (OPS-182) Kennedy's memorandum unmistakably envisioned that Livingstone would run OPS. Kennedy noted that Gemmell would remain at least until May, and that Livingstone "must have two people besides himself in the office, *he cannot operate it with less.*" *Id.* (emphasis added). Kennedy further noted that Livingstone "is willing to accept the job at a salary of \$45,000, although reserving the right to look for something better, such as becoming Director of White House Military Affairs for which he is apparently being considered. . . . There is probably a good chance this office will lose Mr. Livingstone." *Id.* Kennedy then sent a memorandum to Nussbaum on February 23, describing the functions of the Security Office, consistent with Livingstone's February 17 memorandum. (OPS-199)

Meanwhile, the Counsel's Office was negotiating its budget with the Office of Management and Administration. By memorandum dated February 16, 1993, David Watkins

authorized 28 slots with an annual budget of \$1.1 million. (OPS-176)

On February 24, Nussbaum, Foster and Kennedy responded to Watkins, taking issue with the White House Counsel's allocation and noting that their proposal to spend just \$91,000 on the three Security Office employees, including \$45,000 for the head of the office, represented a savings over the Bush Administration. (OPS-175) The memorandum states that the Bush Administration operated the Security Office with four and a half positions and a salary budget of \$188,000, whereas Nussbaum was proposing to operate it with only three employees -- the "Assistant" and two "junior assistants," and a budget of \$91,000. *Id.*

A memorandum from Watkins to Nussbaum concerning the fiscal year 1994 budget, dated March 1, 1993, requests that Nussbaum notify Watkins when Nussbaum has "identified the new staffer to fill Ms. Dannenhauer's position" as "Assistant to the Counsel to the President for Security." (705-DC-3277) The memorandum notes that the salary for the position will be reduced from \$70,255 to \$42,000. *Id.*

FBI Special Agent Dennis Sculimbrene's "insert" relating to Livingstone's BI, which reports on interviews of four persons in addition to Nussbaum, contains significant information about Livingstone's tenure in OPS. Lori Stallings, an employee of the White House Office of Personnel, provided the following information:

[T]he appointee is listed on the rolls with the EOP in the Office of the Counsel, but is not officially employed at the White House Office as a Security Assistant to the Counsel to the President⁴⁸ at

⁴⁸ Livingstone is identified in Sculimbrene's 302 report of a March 3, 1993 interview as a "Security Assistant." (OPS-4650) The Clinton Administration in early 1993 referred to the head of OPS as "Assistant to the Counsel for the President (Security)," which might yield a similar short title. (OPS-184) However, the term "Security Assistant" also has been used to describe the

(continued...)

this current time (March 4, 1993).⁴⁹ He began work on a volunteer basis about 5 weeks ago, on a temporary/part time basis. She said that these are unofficial records, and official records would not be available for an indefinite period.

(AO-DC-4287) Kennedy gave the following qualified recommendation:

[H]e has known the appointee since he arrived himself, to take over the office responsibilities that he currently handles. *He did not hire the appointee, and was aware that the appointee may not stay in his current position.* He was aware that the appointee was attempting to head the Military Office. Kennedy said that if the appointee stays in his current position, he would recommend his access to the complex, based on the understanding that he makes such recommendation on the short period of time that he has known the appointee.

Id. (emphasis added).

Nussbaum and Foster responded to Watkins' March 1 memorandum on March 9, 1993 -- after the FBI had submitted its first Livingstone BI report but before the second. Their memorandum states that "Craig Livingstone was hired in February as Assistant Counsel to the President for Security with a salary of \$45,000, not \$42,000 as originally budgeted."⁵⁰ (705-DC-3172) Kennedy then wrote to Watkins on March 10, 1993, requesting that the employment start dates be set for Livingstone at February 8, 1993 -- prior to Kennedy's start date -- and for Anderson at February 15, 1993. (705-DC-1769) The memorandum explains that "Mr.

(...continued)

junior staff of OPS. See Sherburne SJC Dep., 9/9/96, Ex. 7, at p. 1. Gemmell described herself as an "administrative assistant." Gemmell SJC Int., 6/26/96, at 2.

⁴⁹ *This date is inconsistent with the introductory paragraph of the insert, which states that the interviews all occurred between March 1 and March 3, 1993.*

⁵⁰ The title of the office was changed during the Clinton Administration from "White House Security Office" to "Office of Personnel Security," and the title of the head of the office was changed from "Assistant to the President" to "Director." (OPS-60)

Livingstone and Mrs. Anderson have been on the job and working since the start dates indicated above while the budget parameters were being resolved." *Id.* (705-DC-1769)

Finally, a "Notification of Personnel Action" form with an approval date of March 11, 1993, states that Livingstone has been placed on the payroll retroactively to February 8, 1993 as "Assistant to the Counsel to the President (Security)." (705-DC-1769)

There is no apparent reason why Livingstone intentionally would give an account of the circumstances of his hiring that is inconsistent with the accounts of Mills and Kennedy. Anyone involved in hiring Livingstone, on the other hand, might now have an incentive to minimize their role in the decision. What is most significant for our investigation is that no one in the White House chain of command states that Hillary Clinton or Bernard Nussbaum had any part in the decision.⁵¹ Foster, of course, is not available for questioning.

B. Allegations about Hillary Clinton's Role

1. Gary Aldrich

According to former FBI Special Agent Gary Aldrich, *Kennedy* discussed Livingstone's suitability with Aldrich during a car ride to Washington National Airport in late February or early March 1993.⁵² Aldrich OIC-302, 11/25/96, at 4. Aldrich says that Kennedy told him that

⁵¹ Nussbaum described the experience of arriving at the White House with Foster on January 20, 1993, to find the phones ringing off the hook and no employees to answer them; he found the transition a "crazy" way to run a government. Nussbaum OIC-302, 10/3/96, at 7.

⁵² Aldrich believes that he had never heard of Livingstone before the conversation with Kennedy, and that the discussion took place shortly *before* Sculimbrene received the request to conduct Livingstone's background investigation. Aldrich OIC-302, 10/1/96, at 1. That would place the conversation in mid-February.

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(continued...)

although there were problems in Livingstone's background, his hiring was a "done deal" because Mrs. Clinton wanted him for the job.⁵³ *Id.* at 2. Aldrich testified that the conversation proceeded as follows:

And so we took my car from 17th Street and drove to National Airport.⁵⁴ On the way, [Kennedy] asked me what kind of person would be suitable for taking the position that Jane Dannenhauer had occupied, what kind of person would the FBI want to see in that slot as Director of Security. And I told him -- remembering who Jane Dannenhauer was, I told him it would have to be somebody squeaky clean, meticulous, careful, discreet, mature, someone with a depth of understanding of security issues -- how to work with the FBI, paper flow all those kinds of functions.

And he said to me, well, what if I've got a fellow, Craig Livingstone, who we want to put in there? What if he had some character issues?

I said -- to the best of my recollection, I said something like, well, talking

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⁵³ The analysis of the allegation against Nussbaum -- *i.e.*, regardless of whether the allegation is true, did Nussbaum ever say it? -- could equally be applied to Kennedy. Since Aldrich would testify that he heard it from Kennedy, there would be a stronger case against Kennedy than Nussbaum, against whom there would be no eyewitnesses. Furthermore, if both Nussbaum and Kennedy testified falsely when they denied that Hillary Clinton had played a role in the decision to hire Livingstone, then arguably there would be greater justification to bring a perjury case against Kennedy, who played a central role in the decision to hire Livingstone. *In the absence of any direct evidence that Mrs. Clinton actually did play a role in the hiring decision, however, we find no basis to open a criminal investigation of Kennedy.*

⁵⁴ In the draft of Aldrich's book, provided to the FBI on January 11, 1996, states that Kennedy raised the proposal to appoint Livingstone on two separate occasions: once during their first meeting on February 22, at which time Aldrich knew nothing about Livingstone, and again during the ride to the airport. (AI-DC-8577 - 78) The published version discusses both meetings without mentioning Livingstone. Aldrich, *Unlimited Access* 57-61 (1997). However, the published version does state that Kennedy solicited Livingstone's opinion about Livingstone, and that Kennedy said that Mrs. Clinton wanted Livingstone for the job. *Id.* at 36.

hypothetically?

And he said, yes.

I said, well, it would be hard, because the FBI would probably be comfortable with someone who had a squeaky clean background and who experience -- I asked him what Craig Livingstone's experience in the area of security was. I don't recall that he told me he had any. I asked about his education. Likewise, there didn't seem to be any background in this area.

And I said, well, you know, the FBI will try to work with whoever you select for that position. I know FBI Headquarters will try to work with whoever you select.

And he said, well, it doesn't matter anyway; it is a done deal. Hillary wants him, or the First Lady wants him, for that slot. I believe he said Hillary, Hillary wants him for that slot.

And my reply was, well, why are we having this conversation?

Aldrich HCGRO Dep., 7/18/96, at 31-32 (emphasis added). The January 11, 1996 draft of Aldrich's book suggests that Aldrich was not certain whether Kennedy was serious about Mrs. Clinton's interest in Livingstone: "*I didn't know if he was pulling my leg or not*, but, on the off chance that he was serious then it was time to get out of the conversation." (AI-DC-8579) (emphasis added)

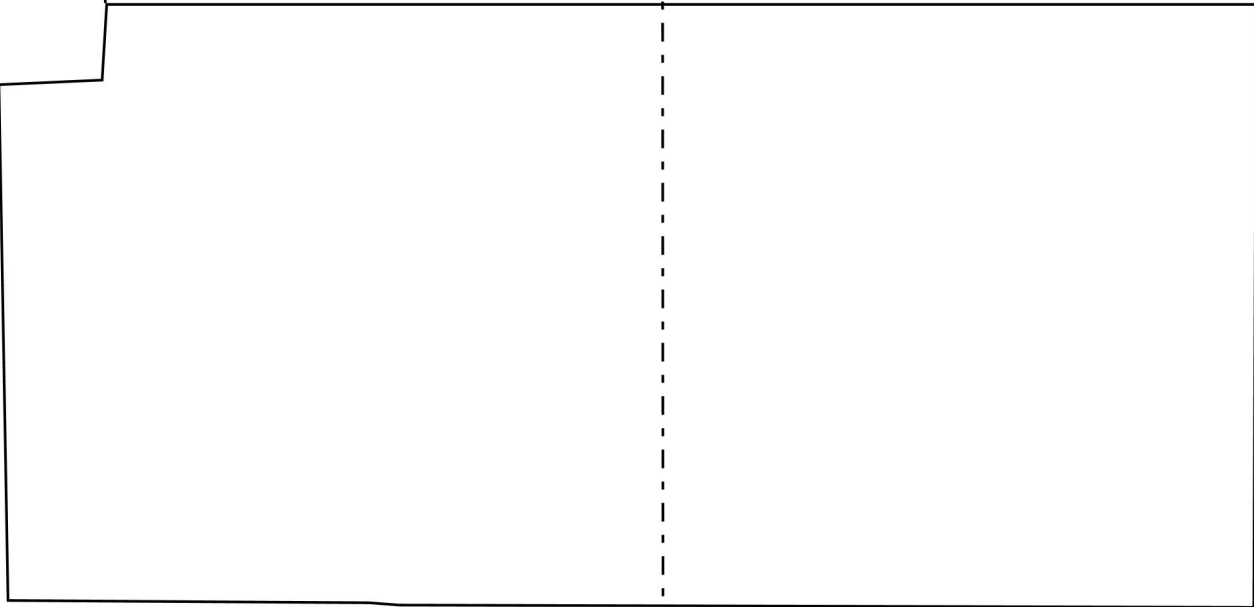
Aldrich's book does not state that Livingstone's mother knew Mrs. Clinton.⁵⁵ In the draft that Aldrich provided to the FBI in January 1996, however, Aldrich described Livingstone as "a young man whose mom had worked for Hillary Clinton." (AI-DC-8577) Another portion of the draft, also omitted from the final version, describes Livingstone as follows:

⁵⁵ The published version of the book states: "Livingstone was extremely close to the Clintons. He would have known [Vincent] Foster and his family well." Aldrich, *Unlimited Access*, at 78. *We are not aware of any evidence that Livingstone was extremely close to the Clintons or that he knew Foster and his family well.*

Livingstone was a close personal friend of both Bill and Hillary Clinton, and his mother had worked for Hillary for years. He was the one who identified Foster's body. He was one of the first to arrive to console Mrs. Foster and assist the Foster family. *If anyone might know the reasons for his depression, and what was going on with the Clintons and the Fosters, I knew it might just be Craig Livingstone.*

(AI+DC-8653) (emphasis added)

Aldrich believes that Livingstone told him that his mother had worked for Hillary Clinton in Little Rock. Aldrich OIC-302, 11/25/96, at 4. Aldrich also recalls that Sculimbrene told him that Sculimbrene had heard that Livingstone's mother knew Hillary Clinton. *Id.* at 5. However, Aldrich is certain that before Sculimbrene told him, he had heard from someone else -- probably Livingstone -- that there was a connection between Livingstone's mother and Mrs. Clinton. *Id.*



In his book, Aldrich relates that the trip to the airport occurred subsequent to his first meeting with Kennedy, and Aldrich sets the date of the first meeting as February 22. Aldrich,

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Livingstone recalls that both of the FBI agents told him they had told Kennedy that they could work with Livingstone. Livingstone OIC-302, 5/29/97, at 6.

Unlimited Access 57 (1997).⁵⁷ The FBI transmitted a preliminary BI report about Livingstone to Nussbaum on March 5, 1993, and a final report on March 16. (OPS-4655, 4657) Accordingly, if Kennedy's conversation with Aldrich took place after Kennedy reviewed Livingstone's BI report, it must have been later than March 5, 1993.

2. Dennis Sculimbrene

Like Aldrich, former FBI Special Agent Dennis Sculimbrene also recalls discussing Livingstone's suitability with Kennedy. According to Sculimbrene, this discussion probably occurred during the course of Livingstone's background investigation; Sculimbrene speculated their conversation was prompted by Kennedy's receipt of an interim report identifying suitability issues with Livingstone's background.⁵⁸ Sculimbrene OIC-302, 9/4/96, at 3. Sculimbrene believes that Kennedy had concerns about Livingstone's suitability. *Id.*⁵⁹ Kennedy asked Sculimbrene if he could work with Livingstone, and Sculimbrene responded that he could work with anyone, but Livingstone would not be his first choice. *Id.* Sculimbrene then suggested the name of Jackie Dinwiddie, who had held the OPS Director position under President Carter. *Id.*

⁵⁷ The book relates that Kennedy told Aldrich that Livingstone's hiring was "a done deal" because "Hillary wants him," *id.* at 36, but does not mention that the discussion took place during the ride to the airport, *id.* at 57-59.

⁵⁸ When asked about the circumstances under which this conversation occurred, Sculimbrene was unsure: "It could have possibly been during the conversation when I went to Bill Kennedy to talk to him about, you know, an employee or maybe during Bill Kennedy's own background investigation when I went to interview him about his own case" Sculimbrene SJC Int., 6/19/96, at 61-62.

⁵⁹

FOIA(b)(6)
FOIA(b)(7) - (C)

Kennedy implied that Kennedy had no choice in the matter and was "stuck" with Livingstone, but Kennedy did not attribute that decision to the President or Mrs. Clinton.⁶⁰ *Id.*

In Sculimbrene's June 19 Senate deposition, which evidently was the source for the newspaper article that generated the question posed to Kennedy and Nussbaum about Hillary Clinton's role during the June 26 House hearing, Sculimbrene vacillated about whether Kennedy expressly told him that Mrs. Clinton had played a role in the hiring of Livingstone. The deposition transcript suggests that the testimony evolved in a confusing manner. Sculimbrene was asked if there was anyone whom he would recommend the Senate investigators contact, and he listed by name a number of former OPS employees, then offered the following:

Mr. Sculimbrene. I would also talk to -- I just thought of this. Let me think if I can remember her name.

She worked for Jimmy Carter. That is how far back I go. Let me see if I can remember her name. She is an older lady. I hope she is still alive, but she ran the office before Jane Dannenhauer did, and she was a very ethical person.

She wanted this job, and I tried to get -- I tried to get her this job. I spoke to Bill Kennedy about this woman. She worked on the -- she worked on the Clinton administration transition.

Jackie Dinwiddie. Jackie Dinwiddie, D-i-n-w-i-d-d-i-e.

* * *

I went to Bill Kennedy, and I told Bill Kennedy about her, and he kind of poo-pooed it, and then *somebody told me that he really didn't like Craig Livingstone, but he was stuck with her [sic]*

⁶⁰ Recall that Aldrich specifically remembers explaining that Livingstone's position as Director was a "done deal" because Hillary Clinton wanted him in that slot. Sculimbrene emphasized to the OIC that Kennedy *did not say* that President Clinton or Hillary Clinton wanted Livingstone for the OPS Director position. Sculimbrene OIC-302, 9/4/96, at 3. Sculimbrene *inferred* that someone "higher up" than Kennedy wanted Livingstone hired, given Kennedy's implication that he was stuck with Livingstone. *Id.*

because you know who wanted him there, meaning the First Lady.

* * *

Mr. Hubbard. Now, you said Craig Livingstone had this job because who wanted him to have the job?

Mr. Sculimbrene. Mrs. Clinton is apparently a friend of Craig's mother.

Mr. Yoo. Mrs. Clinton is a friend of Craig's mother?

Mr. Sculimbrene. Yes. *And that is why Bill Kennedy told me he was stuck with Craig.*

* * *

Mr. Yoo. Let me ask you, though, do you have any -- *do you remember any conversations where you were told that Mr. Livingstone got this job because he was connected with Mrs. Clinton?*

Mr. Sculimbrene. Yes. *Kennedy told me that.*

Mr. Yoo. Bill Kennedy told you that?

Mr. Sculimbrene. Yes, because Kennedy asked me whether we should keep him.

Mr. Yoo. Do you remember what was said? Do you remember the exact words?

Mr. Sculimbrene. No. The exact words, no. The word "stuck" stays -- the word "stuck" sticks in my mind; that he was stuck with him.

* * *

Mr. Hubbard. Now, when Mr. Kennedy made this statement, did he use either the name "Hillary Clinton" or "Hillary Rodham Clinton" or "the First Lady"? Did he designate her or did you infer from what he said that he was referring to Hillary?

Mr. Sculimbrene. *Perhaps I inferred that he was talking about the First Lady, but I think I was correct in my inference.*

Mr. Hubbard. And on what basis would you say that?

Mr. Sculimbrene. Well, *why would he keep -- why would he keep this person here that I don't think he personally liked?* I don't think he thought he had the qualifications. He knew -- he knew of his -- he knew of the problems in his background investigation. He asked me when I kind of refused to answer the question whether he should be hired there, and then when I tried to supply a new person, it seemed to me like -- here, I will lay it right on his lap. Here is the perfect person to solve your problems, and the answer to that is, well, I really can't do it because you know who wants him there. Now, that is an inference. *That is an inference.*

Mr. Larkin. Did Craig ever make any reference to the fact of how he came there?

Mr. Sculimbrene. Yes. Now, Craig did tell me that his mother --

Mr. Larkin. Was what?

Mr. Sculimbrene. -- knew Hillary Clinton.

Mr. Larkin. He said --

Mr. Sculimbrene. Yes, he did tell me that, but Craig told me several things that were not true.

* * *

Mr. Yoo. What day did -- do you remember when Mr. Livingstone made that comment to you about her [sic] mother.

Mr. Sculimbrene. This was during my several interviews with him in the process of doing his background investigation.

Sculimbrene SJC Int., 6/19/96, at 58-65 (emphasis added). In a subsequent interview with the OIC, Sculimbrene confirmed that he *inferred* that Mrs. Clinton was responsible for hiring Livingstone, and that Kennedy did *not* tell him that. Sculimbrene added that he is not certain that Livingstone ever told him that Mrs. Clinton knew Mrs. Livingstone.⁶¹ Sculimbrene OIC-

⁶¹ Although Sculimbrene has no recollection of any discussion with Aldrich regarding

(continued...)

302, 9/4/96, at 2-4.

C. Nussbaum Perjury Expansion

On October 25, 1996, the United States Court of Appeals for the District of Columbia, Special Division, granted the application of the Attorney General ("AG") to expand the OIC's jurisdiction to investigate whether Bernard Nussbaum testified truthfully during his June 26, 1996 appearance before the House Committee. The AG's application was based on a facial inconsistency between portions of Nussbaum's testimony before the House Committee and a document prepared by Agent Sculimbrene in March 1993 summarizing an interview with Nussbaum during Craig Livingstone's background investigation.

Specifically, during the June 26 HCGRO hearing on the FBI Files matter, Congressman Horn asked former Associate White House Counsel William Kennedy whether Hillary Clinton wanted Craig Livingstone at the White House. Kennedy testified, "I can state that I have never discussed Mr. Livingstone with Mrs. Clinton in any way, shape or form." HCGRO Hearing, 6/26/96, at 282. Nussbaum immediately added "Nor did I." *Id.* Furthermore, when Chairman Clinger directly asked Nussbaum if he knew who hired Craig Livingstone, Nussbaum answered, "I don't know who brought Mr. Livingstone into the White House." *Id.* at 57.

According to the March 1993 insert that later came to light, Nussbaum stated that Livingstone "had come highly recommended to him by HILLARY CLINTON, who has known his mother for a longer period of time." (AO-DC-4287)

(...continued)

Livingstone's connection with Hillary Clinton, Sculimbrene volunteered that he may have been the source for Aldrich's assertion about the connection. Sculimbrene OIC-302, 9/4/96, at 4.

1. Special Agent Sculimbrene's 1993 insert

According to the FBI insert, Agent Sculimbrene interviewed five persons in connection with Craig Livingstone's background investigation between March 1 and March 3, 1993.⁶²

Among those interviewed were Livingstone's superiors, Nussbaum and Kennedy. At some point thereafter, Sculimbrene prepared the "insert" -- a single document consisting of brief summaries of five interviews. Sculimbrene OIC-302, 9/4/96, at 2.

The insert summarizing Sculimbrene's interview of Nussbaum is not signed or dated, and there are no underlying notes. The relevant paragraph states in its entirety as follows:

BERNARD NUSSBAUM, Counsel to the President, advised that he has known the appointee for the period of time that he has been employed in the new administration. *He had come highly recommended to him by HILLARY CLINTON, who has known his mother for a longer period of time.* He was confident that the appointee lives a circumspect life and was not aware of any illegal drug or alcohol problems. He said that the appointee will work at the White House on security matters. He said that in the short period of time that the appointee has worked for him he has been completely satisfied with his performance, conduct and productivity.

⁶² In July 1996, FBI General Counsel Howard Shapiro notified the White House about the March 1993 insert in Livingstone's background file. The White House then disseminated the information to persons within and connected to the Administration, including Nussbaum's attorney. The FBI then permitted Chairman Clinger to review the file, after which Chairman Clinger publicized the existence of the insert. By communicating the information to the White House and failing to notify the OIC that he was doing so, Shapiro precluded the OIC from interviewing potential witnesses about the circumstances of Livingstone's hiring before they learned about the insert. Shapiro also sent FBI agents to interview Sculimbrene about the insert.

We wrote to Shapiro expressing our displeasure, but we determined that his conduct did not constitute a potential crime within our jurisdiction. Accordingly, we authorized the Justice Department's Office of Professional Responsibility ("OPR") to conduct an internal investigation of the matter. OPR concluded its investigation in March 1997 and publicly released a summary report in which it concluded that Shapiro did not engage in professional misconduct, but did exhibit poor judgment in notifying the White House about the insert and authorizing the interview of Sculimbrene.

He recommended the appointee for continued access in his current capacity.

(AO-DC-4287)

Sculimbrene does not recall having interviewed Nussbaum about Livingstone.⁶³

Sculimbrene OIC-302, 9/4/96, at 2. However, Sculimbrene believes that the statements he attributed to Nussbaum in the insert were accurate, because he would have had no reason to report them in the insert unless Nussbaum had made them. *Id.* at 2-3; Sculimbrene FD-302, 7/16/96 at 2. Sculimbrene speculated that Livingstone may have made up the story that his mother knew Mrs. Clinton, and that Nussbaum was simply repeating the rumor. Sculimbrene OIC-302, 9/4/96 at 3.

Although Sculimbrene states that he always wrote accurate reports, he has no recollection of interviewing Nussbaum.⁶⁴ Sculimbrene does vaguely recall hearing from *Livingstone* during a

⁶³ Jennifer Esposito, one of the FBI agents who interviewed Sculimbrene in July 1996 about the Livingstone insert, told the SJC that Sculimbrene "said *he did recall having talked to Mr. Nussbaum at some point in time*, and he had told him that Craig Livingstone was recommended by Hillary Clinton or something and that -- you know, he assumed it was during this interview because he had it in his interview report." Esposito SJC Int., 9/6/96, at 7 (emphasis added). We questioned Esposito about this and she confirmed that Sculimbrene did *not* recall having talked to Nussbaum about Livingstone. Esposito explained that the Senate interview took place almost two months after the Sculimbrene interview, and she did not use her notes to refresh her memory during the Senate interview. Esposito OIC-302, 3/20/97, at 1. Esposito's notes corroborate her FD-302, which is consistent with Sculimbrene's statement to the OIC that he does not recall the Nussbaum interview. *Id.* at 1-2.

⁶⁴ Sculimbrene suffered a serious head injury when an airplane propeller hit him in the head in January 1994. He was hospitalized and unable to work for several months. Sculimbrene OIC-302, 6/28/96, at 1. In October 1994, Sculimbrene returned to work at the White House on a limited duty status. *Id.* Sculimbrene advised the OIC that, because of his injuries from the propeller accident, he has impaired vision and suffers from memory loss. *Id.* He resigned from the FBI in Fall of 1996.

background interview that Livingstone's mother was a friend of Mrs. Clinton.⁶⁵ Sculimbrene FBI-302, 7/16/96, at 1; Sculimbrene OIC-302, 9/4/96, at 2. That information is not in Sculimbrene's signed 302 reporting on Livingstone's BI interview. (AO-DC-4264 - 4266)

When asked why there were no underlying notes for the 1993 insert, *Sculimbrene explained that he routinely did not take notes when interviewing associates of the appointee during a background investigation.* Sculimbrene OIC-302, 9/4/96, at 2. If the interview was conducted in his office or by phone, if there were no inconsistencies with the SF-86, or if the interview was totally unremarkable, it was Sculimbrene's practice to type up the insert without any notes. *Id.*

Although there are no notes to corroborate the accuracy of Sculimbrene's insert, the OIC has located one additional piece of documentary evidence wherein Sculimbrene repeats his assertion -- albeit nearly three years later after he wrote the insert -- that Hillary Clinton knew Livingstone's mother. On January 11, 1996, Sculimbrene wrote a memorandum to Supervisory Special Agent Brad Wambach concerning the role of the FBI's White House Liaison Office in the background investigation process. (753-DC-21) In the memorandum, Sculimbrene briefly describes Livingstone as follows:

LIVINGSTONE is a political appointee. His mother and MRS. CLINTON are personal friends.

Id. at 4.

⁶⁵ In Sculimbrene's interview with the OIC, he stated that he is "pretty sure" that Livingstone told him Hillary Clinton knew his mother, but Sculimbrene added that he does not specifically recall Livingstone making that statement. Sculimbrene OIC-302, 9/4/96, at 2.

2. **Craig Livingstone**

a. **Livingstone's Relationship with the Clintons**

A number of persons who worked with Livingstone said that he tended to inflate his importance and that he tried to create the impression that he was close to the Clintons. Aldrich OIC-302, 10/1/96 at 3; Cerf OIC-302, 9/25/96, at 2; Dowdell OIC-302, 8/23/96, at 1; Striebling OIC-302, 9/8/96, at 4; Spiegel OIC-302, 8/23/96, at 3. Some of the OPS interns were under the impression that Livingstone had some personal connection to the Clintons. Spiegel OIC-302, 8/23/96, at 3. One intern recalls that Livingstone claimed to be on friendly terms with President and Mrs. Clinton, but the intern did not believe him. Mikulski OIC-302, 9/18/96, at 5. Another remembers being given a tour of the White House West Wing by Livingstone when, by chance, they came upon Mrs. Clinton. She gave Livingstone a friendly wave and said "Hi, Craig" in a familiar manner. Gibson OIC-302, 8/17/96, at 4. Livingstone told the intern that he was personally acquainted with the Clintons. *Id.*

Livingstone admits that he may have told various White House employees that the President and Mrs. Clinton had played a role in the decision to hire him, although he had no knowledge whether this was true. Livingstone OIC-302, 9/13/96, at 6. Livingstone says that he may have made such statements for two reasons. First, he assumed that the President and First Lady *were* involved in hiring decisions. Livingstone was under the impression that the President and Mrs. Clinton had to "sign off" on all hiring decisions, and he believed that Hillary Clinton had a direct role in personnel decisions, possibly because he knew about her past relationship with employees of the White House Counsel's Office. *Id.* Second, Livingstone may have told other OPS employees that the President and Mrs. Clinton had placed their confidence in him in

an effort to impress upon them the importance of the OPS job and the sensitivity of the information they were charged with protecting. *Id.*

Livingstone does not recall ever telling Aldrich or Sculimbrene that the President or Mrs. Clinton played a role in the decision to hire him, but he acknowledged that it is possible that he did so. Livingstone OIC-302, 9/13/96, at 6.

b. Hillary Clinton's Relationship with Livingstone's Mother

When asked to speculate about any basis upon which Sculimbrene could have formed the impression that Livingstone's mother had a relationship with Mrs. Clinton, Livingstone said that the only possible explanation he could come up with was that Livingstone had assisted President Clinton's mother, Virginia Kelly, and her bridge club by arranging transportation to and from and lodging during the Presidential Inauguration in January 1993. Livingstone OIC-302, 9/13/96 at 5. One of the other members of the bridge club sent Livingstone a letter of appreciation after the Inauguration. *Id.* Livingstone's role in assisting Mrs. Kelly *could* have been a basis upon which someone erroneously concluded that Livingstone had a previous family connection to the Clintons.

An OIC-302 from an interview of Anthony Marceca conducted by this office in October 1994 reports that Marceca said that Livingstone "became acquainted with the Clintons and involved in the Clinton campaign because of his prior association with" Carla Reames, who is "a very close friend of the Clinton family, in particular, Mrs. Clinton."⁶⁶ Marceca OIC-302, 10/18/94, at 1. Reames confirmed that she is a friend of the Clintons, and added that her mother

⁶⁶ The OIC interviewed Marceca about Livingstone as part of its investigation of what happened to the documents in Vincent Foster's office after his death.

also knows the President.⁶⁷ Reames OIC-302, 9/19/96, at 3. However, Reames told us that she did not introduce Livingstone to the Clintons, she does not know how he got his job in the White House, and she does not recall ever telling Marceca that she was Livingstone's connection to the Clintons.⁶⁸ *Id.*

3. Bernard Nussbaum

Nussbaum testified at the House hearing, consistent with his deposition, that he did not know who first brought Livingstone to the White House:

Mr. Nussbaum. Mr. Chairman, let me tell you, I asked Mr. . . . Mr. Foster had to make a determination, had to make a determination, since this person was reporting to him, whether this person was obviously, you know, competent to do that position. Mr. Foster obviously, you know, obviously made such a determination because if he would have made another determination he would have come to me and we would have gotten rid of him. So I -- but the answer to your question is, Mr. -- precisely who brought him into the White House, I do not know.

HCGRO Hearing, 6/26/96, at 57-58. Nussbaum testified only briefly about whether Mrs. Clinton played a role:

Mr. Horn. Let me read from a story in today's Washington Times. Tell me if this is true or false. It says, "Mr. Kennedy kind of poo-pooed objections to Mr. Livingstone." "Mr." -- and tell me the right pronunciation, "Skelenbrenny, an FBI agent, told Senate investigators, "he didn't like it he was stuck with him [Mr. Livingstone] because you know who wanted him there, meaning the First Lady, Mr.

⁶⁷ Reames, who worked on the 1992 campaign, uses Hillary Clinton as an employment reference and is on a first name basis with President Clinton. Reames OIC-302, 9/19/96, at 2-3.

⁶⁸ Reames is a good friend of Marceca. Reames OIC-302, 9/19/96, at 1. Reames, Marceca and Livingstone have worked together on Democratic presidential campaigns, and Reames attended Marceca's son's wedding in September 1996. Reames OIC-302, 9/19/96, at 1-3.

Skelenbrenny said."

In a July 1993 report, the White House acknowledged that the Travel Office firings were a mistake, that high-level officials as they planned action against the Travel staffers -- now, you as a partner of hers in the Rose Law Firm, the question is, to what degree was the First Lady protecting Mr. Livingstone? Is this an inaccurate article or what?

Mr. Kennedy. With all due respect, I would like to have a copy of that article to respond to. Leaving the article to one side for the moment, I can state that I have never discussed Mr. Livingstone with Mrs. Clinton in any way, shape or form.

Mr. Nussbaum. *Nor did I.*

HCGRO Hearing, 6/26/96, at 282. Nussbaum repeatedly has stated that he did not make the statements attributed to him in the insert. When the insert was publicly disclosed on July 25, 1996,⁶⁹ Nussbaum issued a public statement insisting that he "never told FBI Agent Sculimbrene, or anyone else, that the First Lady recommended Craig Livingstone for his position in the White House or that the First Lady knew Livingstone's mother." (705-DC-4724) Nussbaum further stated that he "never knew or heard any such things." *Id.*

Nussbaum told the OIC that he does not recall talking to Sculimbrene in March 1993, although he acknowledged that it is possible such an interview occurred. Nussbaum OIC-302, 10/3/96, at 2. Nussbaum states that he knew nothing about Livingstone at the time, and hence could not have provided any information about how Livingstone got his job. *Id.* Nussbaum has a vague recollection of meeting the FBI Agents assigned to the White House, although prior to the congressional hearings held in the summer of 1996, he would not have remembered their

⁶⁹ Nussbaum's attorney had been notified in advance of the public release by White House lawyers who had received a "heads up" notification from FBI General Counsel Howard Shapiro. Shapiro SJC Int., 7/29/96, at 12; Nussbaum OIC-302, 10/3/96, at 7.

names or recognized their faces. *Id.* Nussbaum also recalled receiving telephone calls or visits from various individuals -- including FBI agents -- about job references while he worked at the White House. *Id.* at 2-3. He cannot remember any specific calls or visits given the vast number of persons who used him as a reference. *Id.* at 3.

Nussbaum believes he saw Livingstone no more than two to four times during Nussbaum's tenure at the White House, and he had no direct, official dealings with Livingstone. *Id.*⁷⁰ Nussbaum may have had one or two conversations with Livingstone, but he cannot recall anything that was discussed. *Id.*

Nussbaum insists he has no knowledge of any member of Livingstone's family having a relationship with Mrs. Clinton, and Nussbaum cannot recall ever hearing about such a relationship. *Id.* Nussbaum acknowledged that there was a "general perception" within the White House that Mrs. Clinton was a "major force" with respect to personnel and policy decisions. *Id.* However, he asserts that he had no direct knowledge suggesting this to be the case. *Id.*

4. Gloria Livingstone

Craig Livingstone's mother, Gloria Livingstone, also issued a public statement after the Sculimbrene insert was publicly disclosed. She stated that she and Mrs. Clinton "are not, and never have been, personal friends." Gloria Livingstone further stated that she "do[es] not know Hillary Rodham Clinton, . . . ha[s] never met Mrs. Clinton, and . . . ha[s] never spoken with Mrs. Clinton." (705-DC-4725)

⁷⁰ One intern reported that Nussbaum was a regular caller for Livingstone. Aslaksen OIC-302, 8/22/96, at 2.

Mrs. Livingstone told the OIC that she has never met the President or Mrs. Clinton. G. Livingstone, OIC-302, 9/11/96, at 1. She saw the President and Mrs. Clinton at the White House a couple of years ago when Mrs. Livingstone assisted in decorating the White House for Christmas. *Id.* However, according to Mrs. Livingstone, the Clintons simply stayed to take a photograph with Mrs. Livingstone's group (about 50 in number) and immediately left for another event. Mrs. Livingstone was not introduced to the Clintons, nor did she speak with them at the photo session. *Id.*

Mrs. Livingstone added that she never asked her son who hired him, nor did he ever volunteer that information. G. Livingstone OIC-302, 9/11/96, at 2. She stated he simply told her that he had been hired to work at the White House. *Id.* The only information she received concerning how her son was hired has come from congressional hearings.⁷¹ *Id.*

5. Francis Sobol

One of the other persons listed as an interviewee in Sculimbrene's insert was Francis Thomas Sobol, a long-time attorney with the Department of Education who was detailed to the Office of the White House Counsel during the Bush Administration and remained until September 30, 1993.⁷² Sobol OIC-302, 11/12/96, at 1. Sobol knew Sculimbrene, but does not recall ever being interviewed by him about the background of Livingstone or any other employee of the White House Counsel's Office. *Id.* at 3. Sobol saw Aldrich frequently and recalls being

⁷¹ At the conclusion of her interview, Mrs. Livingstone volunteered that she is a Republican and is opposed to abortion. G. Livingstone OIC-302, 9/11/96, at 1.

⁷² Francis Sobol was detailed from the Department of Education to the White House Counsel's Office from January 1992 through June 1992, and from October 1992 through September 1993. Sobol OIC-302, 11/12/96, at 1.

interviewed on two or three occasions by Aldrich, but never about Livingstone. *Id.*

Sobol says that a sentence in the insert stating "he has known the appointee as a co worker in the same office for about a month" is not accurate because Sobol did not consider Livingstone to be a co-worker. *Id.* at 4. Although Sobol and Livingstone both were attached to the White House Counsel's Office, they were not physically located in the same place.

D. Analysis of the Allegation against Nussbaum

Given the absence of evidence that Mrs. Clinton had any relationship with Livingstone's mother or had any role in his hiring,⁷³ the statements in the 1993 report cannot be proven true.⁷⁴ Thus, the only conceivable prosecution of Nussbaum would be based on the theory that he was lying when he denied in 1996 that he ever had made the 1993 statement -- regardless of whether it was true in 1993.⁷⁵

Because Sculimbrene has no memory of the Nussbaum interview and the insert does not refresh his memory of it, Sculimbrene cannot testify about what Nussbaum said. *See* Fed. R. Evid. 602. Accordingly, the statements in the insert would be admissible in a criminal trial only if there is a basis to admit the insert. We consider below both the admissibility of statements in the insert as a matter of law, and the evidentiary weight that the insert would carry. We believe

⁷³ *Mrs. Clinton has not been questioned.*

⁷⁴ If the assertions in the insert were true, a prosecution of Nussbaum might be brought based upon the theory that he lied in 1996 to cover up Hillary Clinton's role in the 1993 hiring of Livingstone. Absent evidence that the insert is true, however, there can be no perjury prosecution for Nussbaum's testimony to the Congress.

⁷⁵ The 1993 statement about Mrs. Clinton probably was not legally material at the time it allegedly was made. The issue clearly was material, however, at the congressional inquiry and in the OIC investigation in 1996.

that there is a substantial probability that the insert would not be admitted, and in any event, it would carry little evidentiary weight.⁷⁶

1. Admissibility of the Statements in the Insert

The insert is hearsay because it is an out-of-court statement that would be offered to prove the truth of the matter asserted -- *i.e.*, that Nussbaum *said* that Livingstone had a connection to Mrs. Clinton. The underlying assertion -- that Livingstone had a connection to Mrs. Clinton -- is not hearsay because it would not be offered for its truth. If Sculimbrene were able to testify from personal recollection that Nussbaum made the statement, the testimony would be admissible as a statement of a party opponent under Fed. R. Evid. 801(d)(2). In its present form, however, the statement does not qualify for admission under Rule 801(d)(2) because the insert is *Sculimbrene's* statement, not Nussbaum's.

The only feasible hearsay exception is Rule 803(5), which provides for the admission of a recorded recollection. By its terms, Rule 803(5) imposes two requirements: (1) the document must concern "a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately," and (2) the document is "shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly." Fed. R. Evid. 803(5); *See also Goings v.*

⁷⁶ In 1993, an FBI agent named H. Gary Harlow was working in the White House along with Aldrich and Sculimbrene. Agent Cecilia Woods joined them in the summer of 1993 to help deal with the backlog of work. Woods OIC-302, 3/27/97, at 4.

Harlow was fired by the FBI in 1995 for creating false interview reports that reflected that he had interviewed persons in the course of background investigations, when in fact he had not spoken to the purported interviewees. Renaghan OIC-302, 11/7/96, at 1; see also "Former FBI Man Pleads Guilty to Stealing," Wash. Times, Mar. 2, 1996, at A-10.

United States, 377 F.2d 753, 760 n.8 (8th Cir. 1967) ("[T]he admissibility of such an exhibit is safeguarded by the requirements that (1) the witness acknowledge the document as accurate, and (2) that it be prepared contemporaneously with the events." (quotation marks omitted)).

This is an extreme case because Sculimbrene has no recollection even of conducting the interview or preparing the insert, let alone the details of the conversation. We thus would have to rely upon his testimony that he always prepared such inserts correctly and promptly.

We did not find any case addressing this particular situation,⁷⁷ although there is some case law that would support the admission of a document in arguably comparable circumstances. The best case pre-dates Federal Rule of Evidence 803(5). In *McGarry v. United States*, 388 F.2d 862, 869 (1st Cir. 1968), the court affirmed the district court's admission of an IRS agent's memorandum as a past-recorded recollection, although the agent "had no memory of the conversation [with the defendant] which led to the memorandum. Nor was his memory refreshed by reading it." The dicta thus suggests that the agent did not recall the conversation, as in our case. However, the witness in *McGarry*, "on four occasions during the trial, testified that the memorandum was true and correct as of the date of its making." *Id.* It is not certain, given his serious head injury, that Sculimbrene credibly could provide such testimony. In *United States v.*

⁷⁷ There are cases in which the report of a law enforcement agent is admitted although the agent forgets the substance of the report -- the normal circumstance under which Rule 803(5) is employed. See *United States v. Picciandra*, 788 F.2d 39, 44 (1st Cir. 1986) (affirming district court's decision to admit DEA agent's report; "the passage of time caused [the] DEA Agent ... to substantially forget the content of his ... report so that he could do no more than authenticate the report, and the court admitted the report under the past recollection recorded exception"); *United States v. Marshall*, 532 F.2d 1279, 1285-86 (9th Cir. 1976) (affirming district court's admission of police chemist's report; "although the chemist has no independent recollection of the results of the tests he performed, his analyzed evidence report, which was both acknowledged by him to be accurate and prepared contemporaneously with the conducting of the relevant tests, was properly ruled admissible by the district court judge as a past recollection recorded").

Sawyer, 607 F.2d 1190, 1193 (7th Cir. 1979), the court affirmed the admission of an IRS Agent's report where the "agent testified that he no longer had a recollection of the conversation and that the history sheet was prepared immediately after the conversation." In that case, "the agent's testimony tended to show that both the original notation and its later transcription to the referral report were accurate." *Id.*

Nussbaum's lawyers are certain to argue that the report is so lacking in any "indicia of reliability," *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980), that it should not be admitted into evidence. As the Seventh Circuit observed in *United States v. Schoenborn*, 4 F.3d 1424, 1429 (7th Cir. 1993), "[t]he touchstone for admission of evidence as an exception to the hearsay rule has been the existence of circumstances which attest to its trustworthiness." *Id.* at 1429 (quoting *United States v. Williams*, 571 F.2d 344, 350 (6th Cir. 1978)).

Here, the trustworthiness of Sculimbrene's insert is supported by the "presumption of regularity" that attaches to "official acts of public officers," *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926), and by Sculimbrene's testimony that he sought to report information accurately during the course of his duties. Yet there is evidence that might give a trial judge pause, including the following: Sculimbrene does not have any recollection of speaking to Nussbaum; he does not have any recollection that Nussbaum told him that Mrs. Livingstone knew Mrs. Clinton; he did not sign the insert; he did not take any notes of his conversation with Nussbaum; there is no independent evidence that Nussbaum told Sculimbrene that Mrs. Livingstone knew Mrs. Clinton; and there is no apparent reason why Nussbaum would have made such a statement. In short, it might seem unfair to admit the insert against Nussbaum, especially in light of the fact that Sculimbrene cannot be effectively cross-examined about the

creation of the insert.⁷⁸

2. Evidentiary Weight

Assuming the insert were admitted, its evidentiary weight would be questionable. First, Sculimbrene does not recall conducting the interview, and therefore cannot attest that the summary is accurate. Second, Sculimbrene recalls another person making a similar statement,⁷⁹ but not Nussbaum, creating a possibility that the insert is mistaken. Third, Sculimbrene's practice in conducting BI interviews for inserts was relatively informal, introducing the possibility of error even if the agent were acting in good faith. The evidence that another person -- Frank Sobol -- listed in the insert does not recall the interview and questions its accuracy reinforces this problem. The insert was a routine, pro-forma document that was of little significance to the background investigation, and the statement concerning Hillary Clinton was of no significance to the background investigation and was not reflected in the summary BI

⁷⁸ For the admission of hearsay to comply with the Sixth Amendment, the witness must be unavailable and the statement must bear "sufficient indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980); cf. Fed. R. Evid. 804(a)(3) ("unavailability as a witness" includes situations in which the declarant "testifies to a lack of memory of the subject matter of the declarant's statement"). "Reliability can be inferred without more in a case where the document falls within a firmly rooted hearsay exception." *Roberts*, 448 U.S. at 66. It is well-established that the past-recorded recollection exception to the hearsay rule is precisely such a "firmly rooted hearsay exception." See *Hatch v. Oklahoma*, 58 F.3d 1447, 1467 (10th Cir. 1995) ("The exception for past recorded recollections is clearly a firmly rooted hearsay exception."); 3 Wigmore, § 736, at 70 (3d ed.) ("It cannot be doubted that the use of a recorded past recollection . . . now occupies a firm and unassailable place in our practice and doctrine."). Because documents admitted under Rule 803(5) are deemed reliable, there generally is no Confrontation Clause issue. See *Picciandra*, 788 F.2d at 43 (characterizing a Confrontation Clause challenge to hearsay testimony admitted pursuant to Rule 803(5) as "scraping the bottom of the barrel"). But see *United States v. Nelson*, 603 F.2d 42, 46 (8th Cir. 1979) ("[T]he confrontation clause and the hearsay rule cannot be regarded as coextensive in every case.").

⁷⁹ Sculimbrene told the OIC that he "vaguely" recalled Livingstone telling him that Livingstone's mother knew Hillary Clinton. Sculimbrene OIC-302, 9/4/96, at 3.

report that the FBI prepared.⁸⁰ Fourth, there is no other evidence to corroborate the truth of the statement attributed to Nussbaum in the insert. It would be very difficult to prove that Nussbaum is lying when he denies having made an erroneous statement that was of no consequence when it was made. Finally, the document itself would not be admitted into evidence. Under Rule 803(5), the memorandum may only be read into evidence by its proponent. Counseling in favor of reliability would be only Sculimbrene's insistence that he always wrote accurate information in his reports.

⁸⁰ Sculimbrene told SJC investigators that he would not have included Livingstone's assertion that he knew Mrs. Clinton in Livingstone's 302. Sculimbrene explained, "That's an agent's call. And since I really didn't know whether it was true or not, it was more or less irrelevant." Sculimbrene HCGRO Dep., 7/15/96, at 59.

IV. OPS OPERATIONS

A. Procedures for Issuing White House Passes

When a new administration took office, one of its first priorities was to obtain temporary passes for all new White House employees.⁸¹ Until employees receive such a pass, they must be specifically authorized to enter the complex through the WAVES office each time they visit, or they may be placed on an "access list" which permits them to enter repeatedly for up to thirty days but requires them to stop at the gate and display a driver's license or other identification to the Secret Service officer. With a temporary pass, an employee can enter at will.

If it became clear that a person would be a permanent White House employee or would otherwise require long-term access to the White House, OPS could initiate the process to obtain a permanent pass. Friedline OIC-302, 7/30/96, at 2. The Secret Service would issue a permanent pass if the White House provided an FBI full-field background investigation report and the Secret Service was satisfied, upon reviewing the report and checking relevant law enforcement databases, that the person posed no danger to the President. *Id.*

The new administration also would need to reissue new passes to "holdover" employees who would be continuing their jobs at the White House. Stanley OIC-302, 7/30/96, at 1. Holdovers are career employees -- not political appointees -- who tend to work through several administrations. *Id.* Once the Secret Service identified which holdover employees would remain, it would set appointments to secure new photos and reprocess their passes. *Id.*

⁸¹ Before issuing a temporary pass, the Secret Service would be notified by OPS what access was required, and biographical information about the employee. Friedline OIC-302, 7/30/96, at 2. The Secret Service also received and reviewed a completed name check from the FBI. *Id.*

Processing pass requests for new White House employees took priority over reissuing passes for holdover employees.⁸² Gemmell OIC-302, 7/29/96, at 7; Gemmell SJC Int., 6/26/96, at 97; Stanley OIC-302, 7/30/96, at 1.

The process of issuing new passes to persons who held passes in the previous administration was known to the Secret Service as the "pass reissue" project. HCGRO Hearing, 7/17/96, at 281 (Cole). The Secret Service typically would set a "cutoff date" at which time persons without temporary or permanent passes issued during the new administration would be denied access to the White House. *Id.*; Cole OIC-302, 6/26/96, at 2-3. In the case of the Clinton Administration, the original planned cut-off date was October 31, 1993 -- although it was changed to a later date. *Id.* Permanent passes issued prior to January 20, 1993 automatically would be deactivated on that date.

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Friedline OIC-302, 7/30/96, at 2. The White House might be concerned about employment suitability issues that might not create any physical threat to the

⁸² The holdover employees -- unlike new employees -- had already been cleared for access by the Secret Service during a prior administration and hence did not present immediate security concerns. Also, additional holdover employees can be expected to depart before the paperwork is processed for new employees, leaving fewer BIs to review the longer the project is postponed.

President -- for example, failure to pay Social Security taxes. On the other hand, the Secret Service may consider an issue to represent a potential threat to the President although the White House does not consider the issue a bar to employment -- for example, recent drug use.

After a person is approved for a permanent pass by the Secret Service, the Secret Service notifies the person and he or she must come to the Access Control Branch to have a photograph taken and obtain the pass. Friedline OIC-302, 7/30/96 at 2.

During 1993, the Access Control Branch was busy issuing temporary passes to new employees, reissuing new passes to holdover employees, and ultimately issuing permanent passes. Stanley OIC-302, 10/4/96, at 1. As a result of delays in the White House, Clinton Administration employees did not begin to receive permanent passes until late 1993. See GAO Report, "Personnel Security: Pass and Security Clearance Data for the Executive Office of the President," Oct. 19, 1995; at 21, 28 (705-DC-4635 - 4673); [hereinafter "GAO Report"]; Cole OIC-302, 6/26/96, at 6; Cole HCGRO Dep., 7/10/96, at 18; Stanley OIC-302, 7/31/96, at 3. This delay prompted the Congress to initiate an investigation by the General Accounting Office.⁸³ See generally GAO Report.

B. OPS's Role

The functions of the Office of Personnel Security (known as the White House Security Office prior to the Clinton Administration) were primarily administrative in nature, involving the coordination of paperwork -- *i.e.*, ensuring that new White House employees filled out the forms necessary to enable the FBI to complete a background investigation and monitoring the flow of

⁸³ Representatives from GAO met with Chris Cerf, Craig Livingstone and Charles Easley to review OPS's role in the Secret Service pass process. Cerf SJC Int., 9/17/96, at 25-27. The GAO was responsible for evaluating the efficiency of the pass process. *Id.*

paper between the White House Counsel's Office and other federal agencies.⁸⁴ Consistent with his understanding of the role of the prior OPS Director, however, Livingstone also viewed it as part of his job to identify and keep track of problems in the backgrounds of White House passholders. Livingstone OIC-302, 9/13/96, at 11. In a May 30, 1995 e-mail to White House Counsel Abner Mikva advocating a pay increase, Livingstone wrote:

I strongly believe that my level of work reviewing IRS records, *adjudicating FBI backgrounds*, conducting intake security interviews and *developing corrective plans of action for individuals with problems that can be made right* -- demonstrates that I am well deserving of a pay increase to 65K.

HCGRO Hearing, 7/17/96, at 283 (emphasis added).⁸⁵

OPS also was charged with recreating or updating files for holdover employees.⁸⁶ This project was necessary because all the White House files for holdover employees were archived pursuant to the Presidential Records Act prior to the new administration's arrival. *See* 44 U.S.C. §§ 2201-2207. Consequently, the new administration had no information about the backgrounds of holdover employees and no ability to determine which employees needed new background investigations.

⁸⁴ In 1994, a new database was created for OPS to keep track of the steps each employee had to take to obtain a permanent pass. SJC Hearing, 6/26/96, at 246-48.

⁸⁵ Livingstone did not get the raise. On August 28, 1995, he again e-mailed Mikva, requesting that his salary be raised from \$57,000 to \$70,000. HCGRO Hearing, 7/17/96, at 284. On October 1, 1995, Livingstone's salary was increased to \$63,750. He had begun in 1993 at \$45,000. (OPS-182; 705-DC-1691, 1699, 1702, 3173)

⁸⁶ This project was different from the Secret Service's pass reissue project. Cole OIC-302, 6/26/96, at 5. The Secret Service kept files on holdover employees who were retaining permanent passes, and already had approved their backgrounds. Hence, the Secret Service did not need to review the reports of holdovers in order to authorize new permanent passes.

The process each administration followed to recreate or update its background files for holdover employees consisted of four steps:

- (1) OPS would obtain from the Secret Service a current list of passholders with access to the White House complex;
- (2) OPS would request from the FBI copies of the previous background reports for all individuals named on the list;
- (3) The Director of OPS would review the previous background reports to ascertain the date of the last background check and bring any derogatory information to the attention of the White House Counsel's Office; and
- (4) OPS would send a new SF-86 to be completed by holdover employees as they came due for an update investigation. Holdover employees would need an update investigation after every five years.

See Written Statement of C. Boyden Gray, 6/26/96, at 7-10. Once OPS received previous background reports, it was responsible for organizing and maintaining those reports.

Testimony by former OPS Director Jane Dannenhauer confirms that OPS functioned similarly in previous administrations:

Our Security Office, with a staff of five, was responsible for providing, through Secret Service, clearance into the White House complex, all White House personnel and all other permanent staff of support offices, such as records management, correspondence, communications, telephone operators, and other offices that continue operation from administration to administration.

At the beginning of the new administration, the major thrust obviously is to clear all new White House personnel. They, along with the prospective presidential appointees, have the very highest priority in our clearance process. Prior to January 20, 1981, the focus was on providing the names of the new staff members to Secret Service along with the FBI check information to allow admittance to the complex on the appointed day.

After January 20 and for several months thereafter, the White House Security Office was consumed with the collection of standard form 86, completed and signed, from the proposed presidential appointees and new White House staff members for the FBI to complete the background investigations as expeditiously as possible.

Later in the first year of the new administration, as time permitted, we started the process of restructuring the files on support personnel. Although this project was not a priority, it was necessary to have the prior FBI reports of these current employees in order to implement the policy of updating background investigations on a 4-year cycle that was the policy at the time.

The reason this project was not a top priority was the fact that these employees had completed background investigations and held permanent passes. In this connection, we requested and received from the FBI copies of these previous reports. These reports were placed in our vault, and the dates of completion recorded in a log to determine when to begin the 4-year update in each case.

Each previous report received from the FBI was reviewed by me and sent to the deputy counsel and counsel if an earlier update might be indicated. In this manner, counsel was aware of any possible problems with the existing personnel as well as with new personnel.

This update process continued throughout each administration of which I was a part and included only those employees currently working at the White House.

HCGRO Hearing, 6/19/96, at 36-38 (emphasis added).

Although the volume of passholders increased dramatically from the Bush Administration to the Clinton Administration, Livingstone's attention was directed in part to advance work outside of OPS, and Livingstone had only two full-time assistants (not including Marceca), whereas Dannenhauer had employed three assistants. Livingstone noted in an August 2, 1993 memorandum to Kennedy that as of that date, the OPS budget had been reduced from \$163,000 to \$91,000. (OPS-60) Dannenhauer had received a salary of \$62,000, and her Executive

Assistant, Gemmell, had received \$52,000. In contrast, Livingstone received \$50,000 and his Executive Assistant, Anderson, was paid \$24,000. (OPS-60)

C. Congressional Scrutiny and GAO Review

White House passes were the subject of considerable media and congressional scrutiny in 1993 and 1994.⁸⁷ In mid-1993, in the wake of the Travel Office firings, news emerged that a number of friends of the President held White House passes. *E.g.*, "White House May Clamp Down on Passes," *Wash. Post*, July 9, 1993, at A-19. In late July, Congressman Frank R. Wolf wrote to White House Chief of Staff Mack McLarty inquiring about reports that non-government employees were holding White House passes, and asking whether changes had been made in the process for obtaining access to the White House. (OPS-14)

In March 1994, question about the delays in issuing permanent White House passes for Clinton Administration staff members garnered substantial attention when it was disclosed that many White House employees (including press spokesperson Dee Dee Myers) had failed to complete the paperwork required to obtain permanent passes and that friends and allies of the President enjoyed regular access to the White House although they were not employed by the government and therefore not subject to conflict of interest rules. *E.g.*, "Government Off the Books," *U.S. News & World Report*, Mar. 28, 1994, at 28; "After Year, 15 White House Aides Have Yet to Receive Security Clearances," *Wash. Post*, Mar. 11, 1994, at A-10; "100 on White House Staff Lack Clearance," *Wash. Post*, Mar. 14, 1994, at A-5. Congressman William Clinger asked the General Accounting Office ("GAO") to review White House procedures for issuing

⁸⁷ Even before President Clinton took office, reports had surfaced that the FBI was not being given sufficient time to complete background investigations. "Background Checks Spur FBI Complaint," *Wash. Post.*, Jan. 5, 1993, at A-7.

passes and granting security clearances.⁸⁸ GAO Report, at 1. GAO issued its report on October 19, 1995. *Id.*

GAO, after obtaining a substantial amount of information from OPS, analyzed 638 persons who had entered on duty between January 20, 1993 and September 16, 1994 and had become permanent employees of five offices in the Executive Office of the President: the White House Office; the Office of the Vice President; the Office of Policy Development; the Office of Administration; and the Office of National Drug Control Policy. *Id.* at 2 & n.3. GAO found that only two permanent passes were approved prior to September 20, 1993, and that 250 of the 400 staff entering on duty in 1993 took more than 300 days to receive approval for permanent passes. *Id.* at 21. In 1994, the speed improved considerably, and only 1 of 104 staffers who entered on duty took more than 300 days. *Id.* The White House attributed the 1993 delays to "operational and administrative inefficiencies" and the large number of staffers who entered on duty in 1993. *Id.*

On March 14, 1994, the White House Chief of Staff issued a directive requiring every staffer to complete an SF-86 within 30 days of entering on duty. *Id.* at 22. Public Law 103-329, adopted on September 30, 1994, provides that effective October 31, 1994, an employee of the

⁸⁸ In late 1994, Congressman Newt Gingrich announced that many White House staff members had used drugs before joining the Clinton Administration. *E.g.*, "Gingrich Takes Aim at Clinton Staff," *Wash. Post*, Dec. 4, 1994, at A1. The issue was not a new one; speculation had begun early on about what Clinton staffers, presumably more likely than their predecessors to have taken drugs in the recent past, would do in response to questions about drug use on official government forms. *E.g.*, Stephen Rodrick, "Joint Chiefs: Drugs and the Young Clintonite," *New Republic*, Feb. 22, 1993, at 16 ("You conjure up images of the FBI knocking down your best friend's door and putting her under the hot lights until she squeals about your prized high school possession: the graphite bong. You have to make a decision: To lie, or not to lie?"). It would be reasonable to assume that concern about responding to such questions -- in addition to the press of other business -- would cause some staffers to procrastinate before submitting SF-86 forms.

Executive Office of the President must be placed on leave if the person fails to complete an SF-86 within thirty days or if the person's background investigation is not forwarded to the Secret Service within six months after the person commences employment. PL 103-329, 1994 HR 4539, § 632(a).

GAO also found that in 1993, the FBI failed in 66% of the 402 investigations to meet its goal of completing the BI within 45 days of its initiation. GAO Report, at 25. In 1994, the FBI failed in 87% of cases to meet the 45-day goal. *Id.* In late 1994, the FBI raised its goal to 60 days. *Id.*

Of the 638 persons studied by GAO, 188, or 29%, were no longer employed in the positions they originally had held. *Id.* at 30. The FBI completed BIs for 43 persons who never received permanent passes. *Id.* at 31. Thirty-three persons departed after a BI had been completed but before a pass was issued; and five departed after the BI was initiated but before it was completed. *Id.* at 32. In five cases, a BI was both initiated and completed after the employee had departed.⁸⁹ *Id.*

D. OPS Organization Under Craig Livingstone

1. Livingstone's OPS Team

Livingstone reported to work at OPS on or about February 8, 1993. Mari Anderson, whom he had earlier hired to work as his staff assistant, arrived a week later. Jane Dannenhauer, former Director of OPS, and Nancy Gemmell, Dannenhauer's Executive Assistant, remained at OPS to assist Livingstone during the transition. Dannenhauer stayed for only a few weeks after

⁸⁹ The White House explained that three of these persons needed BIs because they might need passes in other capacities. *Id.* The other two were not explained. *Id.*

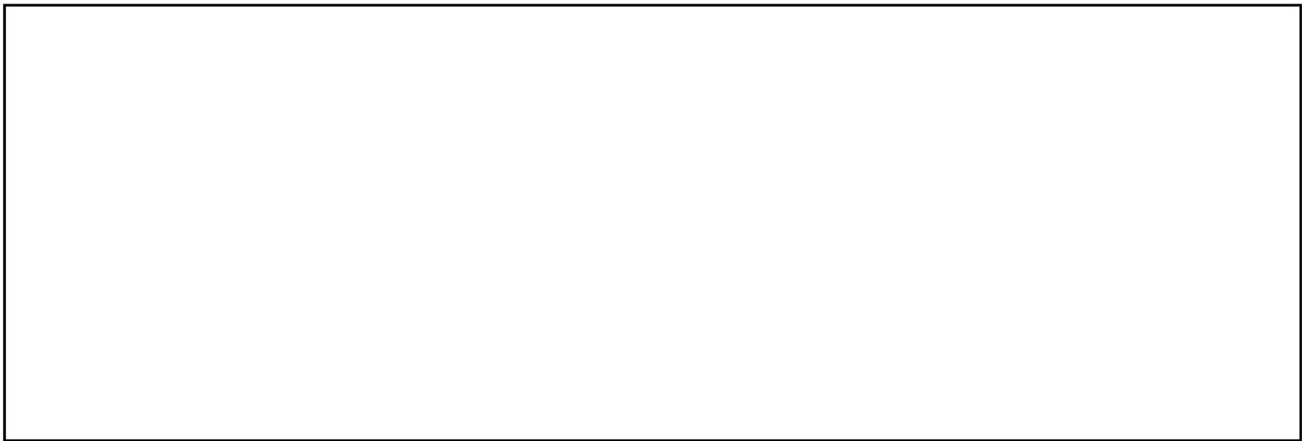
Livingstone's arrival. Gemmell remained until August 1993, when she retired. Anderson OIC-302, 8/24/96, at 2; Gemmell SJC Int., 6/26/96, at 2-3.

Apart from the departing employees from the previous administration, Livingstone had only five employees and one contractor on his payroll during his entire tenure as Director of OPS:⁹⁰ Mari Anderson, who started as a staff assistant (February 1993) and later was promoted to Executive Assistant (August 1993 through September 1994); Lisa Wetzl, who started as an unpaid intern (June 1993), then was hired as a staff assistant (August 1993) and later promoted to Executive Assistant (September 1994 through September 1995); Edward Hughes, who started as an intern (February 1994), was subsequently hired as a staff assistant (April 1994) and later promoted to Executive Assistant (September 1995 through June 1996); and Jonathon Denbo, who served as an intern (June and July of 1994), then returned to college and later was hired as a salaried staff assistant (September 1995 to June 1996); and George Saunders, a holdover contractor who continued to work as a part-time consultant, reviewing BIs and interviewing employees about suitability issues.

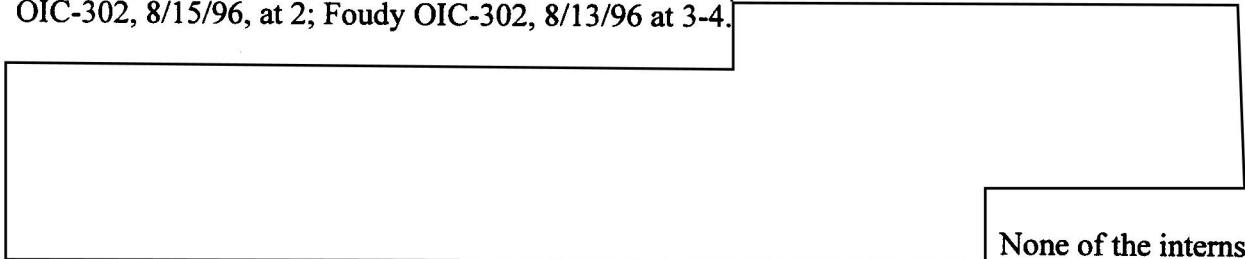
In addition to the salaried employees, OPS employed many unpaid interns. Interns had not previously been employed at OPS. HCGRO Hearing, 6/19/96, at 188. There were three to four formal intern sessions a year at the White House, and OPS generally had two interns each session. Livingstone SJC Int., 6/19/96, at 11.

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⁹⁰ This number excludes Dannenhauer and Gemmell, who had been hired in previous administrations.



Anderson assigned work to the interns. Anderson OIC-302, 8/24/96, at 5. The interns' primary duty was to file paperwork. Anderson OIC-302, 8/24/96, at 5; C. Allen OIC-302, 8/16/96, at 1; Aslaksen OIC-302, 8/22/96, at 2. Interns sometimes had other responsibilities, however, including answering the phone; photocopying; entering data into the computer; typing; and picking up WAVES lists. C. Allen, 8/16/96, at 1; Aslaksen OIC-302, 8/22/96, at 2; Colon OIC-302, 8/15/96, at 2; Foudy OIC-302, 8/13/96 at 3-4.



None of the interns recalls doing any typing at Marceca's request. An intern who overlapped with Marceca from September until December 1993 believes that Marceca typed his own FBI request forms. Ziskind OIC-302, 8/14/96, at 3.

In addition to interns who worked in OPS for an extended period, OPS also periodically received temporary assistance from White House volunteers. On occasion, White House volunteers were assigned to OPS to work on a particular project for a single day. Auode OIC-302, 9/6/96, at 2.

Before Livingstone became the Director, OPS had not directly employed detailees from other agencies.⁹¹ HCGRO Hearing, 6/19/96, at 187-88.

2. Livingstone's 92

A number of persons reported that Livingstone was a hands-off manager who spent a great deal of time outside the office or on the telephone in 1993. Foudy OIC-302, 8/13/96, at 4-5; Mills OIC-302, 11/12/96, at 3; Wetzl OIC-302, 8/12/96, at 5. Livingstone did a lot of work that did not fit in the job description of OPS, such as advance work for certain events at the White House. Cole OIC-302, 6/26/96, at 6.

3. Livingstone's Salary

Livingstone started at a salary of \$45,000, then received a raise to \$51,000 on October 10, 1993. (705-DC-3173; 705-DC-1693) Associate White House Counsel Chris Cerf, who supervised OPS from 1994 to 1995, was aware of Livingstone's limitations and unpopularity, and recognized that there was general dissatisfaction with Livingstone. Nonetheless, Cerf was a strong supporter of Livingstone because Cerf believed that he was loyal and he was doing a competent job.⁹² Cerf OIC-302, 9/25/96, at 2. On July 1, 1994, Cerf wrote a memorandum to

⁹¹ The White House Counsel's Office, however, did employ detailees who reviewed BIs of prospective political appointees. *See, e.g.*, Sobol OIC-302, 11/6/96, at 1-2.

⁹² It was Cerf who, *de facto*, approved Livingstone's top secret clearance. Prior to the Clinton Administration, there was no separate procedure by which White House employees received Top Secret security clearances; the White House Counsel's approval of a White House pass was construed to carry with it a Top Secret clearance. Cerf OIC-302, 9/25/96, at 5. Cerf implemented a new procedure which required EOP Security Officer Chuck Easley to review every OPS file to determine whether the person should receive a Top Secret clearance. *Id.*; Easley HCGRO Dep., 7/26/96, at 132. When Easley inquired about Livingstone, Cerf told him that he was not aware of any information that would preclude Livingstone from obtaining a security clearance, and Easley issued it without reviewing the file. Cerf OIC-302, 9/25/96, at 5;

(continued...)

Deputy Chief of Staff Phil Lader supporting Livingstone's request for a raise:

As you may know, Craig Livingstone has requested a well-deserved raise. Let me add my voice to the chorus of those who have weighed in to support his request. I have been detailed to Counsel's office to supervise White House Personnel security. *In my judgment, Craig is doing an extraordinary job under very difficult circumstances.* It would be an overwhelming setback if Craig's frustration over his salary contributed to a decision to seek employment elsewhere. I consider this to be a significant risk that we should be doing everything in our power to minimize.

Unfortunately, the request seems to have been lost in the shuffle somewhere. Is there anything that can be done to accelerate the process? While I am sorry to trouble you with a matter of this nature, I thought you might have a personal interest in light of your oversight responsibilities in the area of White House security.

(CGE-48622) (emphasis added).

On August 18, 1994, Associate Counsel Beth Nolan and Deputy Counsel Joel Klein wrote to Lader expressing their support for Livingstone's proposed raise:

As you are aware, a salary increase for Craig Livingstone, Director of White House Personnel Security, has been on hold for four months, since April 1994. We understand that this is part of a general hold on increases, but believe there are significant justifications for making an exception from the hold policy in Craig's case. We ask that Craig be given an immediate raise to \$60,000 per year.

Through Craig's extraordinary efforts, we have cleared up our backlog of White House passes. His work has been outstanding. He has accomplished this success under extremely demanding and difficult conditions.

With the backlog cleared, we still have significant work ahead, including numerous reinvestigations. The work of the White House Personnel Security Office is critical to the protection of the President and to the

(...continued)

Easley HCGRO Dep., 7/26/96, at 72; *see also* Cerf SCJ Int., 9/17/96, at 56-62. Easley then approved a Top Secret clearance for Livingstone on December 14, 1995. HCGRO Hearing, 6/17/96, at 173.

proper functioning of the White House. We know a problem it can be if inadequate attention is devoted to these critical responsibilities.

Craig has worked for 18 months at an inadequate salary. His predecessor earned \$62,000 per year and worked under much less trying conditions. We believe Craig should receive his salary raise immediately.

Memorandum from Klein to Lader, dated August 18, 1994. (CGE-48627)

Livingstone received a salary increase on January 8, 1995 to \$57,000, which was approved by White House Counsel Abner Mikva. (705-DC-1766, 1690) On May 30, 1995, Livingstone sent an e-mail memorandum to Mikva advocating an additional raise. HCGRO Hearing, 7/17/96, at 283. In the memorandum, Livingstone stated that he planned to continue a career in government service and contended that because his salary was below the pay schedule for a GS-14, it would be virtually impossible for him to obtain a GS-15 job. *Id.* The text of the memorandum does not suggest that Livingstone had any particular influence in the Administration. It reads, in part, as follows:

Greetings. Sir, thank you for your concern and continued support. I write to you this afternoon to follow-up our conversation of this past month concerning my salary. I am doing this at your suggestion and my continued frustration.

* * *

My predecessor made well over 60K with TWO additional staff. I strongly believe that my level of work reviewing IRS records, adjudicating FBI backgrounds, conducting intake security interviews and developing corrective plans of action for individuals with problems that can be made right -- demonstrates that I am well deserving of a pay increase to 65K. I base that on what other security officers make (in the complex) with far less work and responsibilities. I have done my best to be a good soldier. I am facing living pay-check-to-pay-check. The raise would change all that.

Id. Livingstone sent another memorandum to Mikva on August 29, 1995. *Id.* at 284. In that

memorandum, Livingstone wrote:

I hope to increase the present payroll by \$ 14k the bulk of which \$ 12.5k, would be used to adjust my salary to \$ 70k. The remaining \$ 1.5 k would bring my exec. assistant up to 30k.

I lost my exec. assistant [Wetzl] to a better opportunity last week.....

* * *

Finally, my situation has gone on for more than 2 1/2 years. I have seen this office through a few storms. The most recent GAO review had my office performance rated very good when compared to the career side of the EOP.⁹³

It would be wrong not to approve my request. Not just because I was promised but because I have demonstrated that I deserve it. I apologize for my tone but this is my last try to remain part of the team.

Livingstone received a raise to \$63,750 effective October 1, 1995. (705-DC-1764, 1691) He was still pursuing his request for a raise to \$70,000 when the FBI Files matter arose in May 1996.

Jodie Torkelson, Assistant to the President for Management and Administration, wrote a memorandum in May 1996 stating that "Livingstone's at it again" and explaining, "I'd like to kill [the request] before I leave." (CGE-53840).

4. OPS's Physical Premises

OPS was located in Room 84 of the Old Executive Office Building. An adjoining room, accessible only through a vault door inside Room 84, held most of the FBI background files.

These files were stored alphabetically in two large cabinets containing rotating bins.

Livingstone HCGRO Dep., 6/14/96, at 38. The door to the vault was equipped with a combination lock. Visitors generally were not permitted to remain in either Room 84 or the vault

⁹³ Livingstone evidently was adverting to the recently-completed GAO report, which was issued formally on October 19, 1995.

unless an OPS employee was present. Filippelli OIC-302, 10/11/96, at 1. Nor would interns or volunteers be left in the OPS office unsupervised. Gemmell SJC Int., 6/26/96, at 9. However, according to former Agent Sculimbrene, during 1993 there were occasions when the door to Room 84 was open and no one was inside. Sculimbrene OIC-302, 9/4/96, at 6.

The OPS outer office was small and cramped, measuring approximately 20' by 20'. Livingstone SJC Int., 6/19/96, at 10. Upon entering the office, in early 1993 Mari Anderson's desk was on the immediate right; Nancy Gemmell's desk was on the immediate left; Craig Livingstone's desk was in the far right corner surrounded by partitions; and two small desks for interns were located in the far left corner, along with a photocopying machine. Anderson OIC-302, 8/24/96, at 5; Gemmell OIC-302, 7/29/96, at 1. There was also a large table with typewriters on it in the vault, which was accessible through a door on the right side of the OPS office. Gemmell OIC-302, 7/31/96, at 1-2. Gemmell sat at a table in the vault for a short time prior to her retirement. Anderson OIC-302, 8/24/96, at 5. After Gemmell left in August 1993, Anderson took Gemmell's desk, Wetzl took Anderson's desk, and Marceca and the interns occupied the desks in the far left corner of Room 84. *Id.*

5. Transition Period

Early 1993 was a "chaotic" period for OPS. Gemmell OIC-302, 7/29/96, at 3. There was a heavy volume of new Clinton appointees and employees who needed access to the White House, in addition to a heavy volume of prior administration employees who were leaving the White House and needed to turn in their passes. *Id.* The Health Care Reform project involved a large number of volunteers for whom OPS had to arrange access. Stanley OIC-302, 7/30/96, at 3.

V. ANTHONY MARCECA'S DETAIL AND RESPONSIBILITIES

A. Marceca's Detail to OPS

1. Marceca's Relationship with Livingstone

Livingstone first met Marceca in 1984, while they were working on the Gary Hart presidential campaign.⁹⁴ Livingstone OIC-302, 9/13/96, at 3; Marceca HCGRO Dep., 6/18/96, at 23. During the following eight years, their contact was sporadic: in 1984, they worked together on the Mondale/Ferraro presidential campaign; from 1986 through 1987, they both worked for the Senate and saw each other occasionally; in 1988, Livingstone hired Marceca to do some advance work for the Al Gore presidential campaign; and from 1988 through 1992, they lunched together two or three times a year. Livingstone OIC-302, 9/13/96, at 3-4; Marceca HCGRO Dep., 6/18/96, at 25-30.

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Marceca maintained his contact with Livingstone through the 1992 presidential election.

⁹⁴ Dennis M. Casey, a Democratic campaign consultant who worked on the 1984 Presidential campaign of Senator Gary Hart in Pennsylvania, recalls that Livingstone and Marceca wanted to gather information about "peccadilloes and vulnerabilities" of labor leaders and public officials who supported Hart's primary opponents. D. Casey HCGRO Dep., 6/20/96, at 5-6.

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⁹⁵ In a 1994 OIC interview, Marceca stated that he considered Livingstone to be "one of his closest friends." Marceca OIC-302, 10/18/94, at 2.

After the 1992 election, Marceca met with Livingstone at PIC headquarters. Marceca HCGRO Dep., 6/18/96, at 35. According to Livingstone, Marceca reached out to him and indicated that he wanted to help with the Inauguration in any way that he could. Livingstone OIC-302, 9/16/96, at 2. Livingstone then asked Marceca if he wanted to work as a volunteer with PIC Security. *Id.* Marceca said he did, and Livingstone offered him the position of security coordinator. *Id.* As security coordinator, Marceca assisted in arranging access to various Inaugural events. *Id.*; Marceca HCGRO Dep., 6/18/96, at 35. Livingstone was Marceca's direct supervisor. Livingstone OIC-302, 9/16/96, at 36. Marceca's stint as security coordinator ended with the Inauguration. *Id.* at 40. Marceca took annual leave from January 11 to January 22, 1993.⁹⁶ (715-DC-813, 816)

2. The White House Requests Marceca's Detail

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OPS staffing had been cut, and the office had substantially more work than it did in the previous administration. Livingstone OIC-302, 9/13/96, at 8; (705-DC-3171).

Livingstone realized in February 1993 that OPS needed help, and he thought of Marceca.⁹⁷ *Id.*

⁹⁶ An OIC-302 of an interview with Marceca on October 18, 1994 states that Marceca took annual leave for 6 to 8 weeks to assist Livingstone at the White House, before his detail was arranged. Marceca OIC-302, 10/18/94, at 1. We have found no evidence that Marceca worked at the White House before his detail was approved. Marceca did take annual leave to work at PIC prior to the inauguration, which the OIC-302 does not mention. *Id.* It is possible that the OIC-302 confused where Marceca had worked during his leave.

⁹⁷ Marceca had already approached Livingstone just after the Inauguration about how he could obtain a detail to the National Security Council at the White House. Livingstone was working in OPS at the time. According to Marceca, in late February 1993:

(continued...)

Sometime in February or March 1993, Livingstone spoke with Associate White House Counsel William Kennedy about the possibility of having Marceca detailed to OPS. Kennedy HCGRO Dep., 6/18/96, at 28; Livingstone OIC-302, 9/13/96, at 9. Livingstone informed Kennedy about Marceca's investigative credentials and his willingness to help out. Kennedy HCGRO Dep., 6/18/96, at 28, 31. Kennedy agreed that if Livingstone wanted Marceca, the White House would try to get him. *Id.* at 28. Kennedy explained that he was willing to request the detail simply on the strength of Livingstone's request; Kennedy had no personal relationship with Marceca:

I was responding to Craig's request. I didn't know Tony Marceca from Adam. Okay? Period.

I mean, I had -- until Craig said, I need help -- which I knew -- and I have someone in mind, I had never heard of this individual. Okay?

Craig, who I had confidence in, comes and says, I think this guy is a good hand. I don't know how to answer it any better than that.

Kennedy HCGRO Dep., 6/18/96, at 35.

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(...continued)

Mr. Livingstone stated that he would check on the National Security Council possibility. He did so, got back to me a couple of weeks later, and said that he did not think it was possible, but he suggested that there might be a possibility of my working in his office.

Marceca HCGRO Dep., 6/18/96, at 40.

⁹⁸. On August 22, 1996, the Washington Times reported that the file of Marceca's

(continued...)

[REDACTED]

Livingstone contacted Marceca in March 1993 and told him that OPS had received permission to detail someone to the office. Marceca HCGRO Dep., 6/18/96, at 43. Livingstone recommended that Marceca send him a resume, *Id* He also explained to Marceca that the position he had in mind would be a "clerical-type position going over people's background reports and making files and collating information," a job which "did not involve investigations." *Id.*

[REDACTED]

(...continued)

supervisor, David Allen, had been ordered improperly by OPS in October 1994. "Marceca Boss's FBI File Checked," *Wash. Times*, Aug. 22, 1996, at A1. We located the original file and interviewed Mr. Allen on the day the article appeared and determined that the allegation in the newspaper article was unfounded. Mr. Allen had filed an application to be a White House volunteer on August 12, 1994. (OPS 11490) Allen filed the application because he was seeking an appointment as an Inspector General, and because he was willing to do volunteer work for Livingstone. Allen OIC-302, 8/23/96, at 4.

Allen told us that he had been contacted by the Washington Times reporter, and had told the reporter that he did not apply for any political appointment from the Clinton Administration. Allen OIC-302, 8/23/96, at 1. But Allen quickly cut off the conversation without mentioning that he *had* applied for a position as an Inspector General and had filed an application to be a volunteer. On the morning that the article appeared, Allen telephoned the White House and requested to speak to the person responsible for dealing with the FBI Files matter. His call was routed to someone's voice mail and he left a message about the matter. Allen told us that he reached out for the White House because he knew that the story was false. *Id.* at 6.

Allen's file, housed in OPS, reveals that on August 11, 1994, he completed an SF-86, which includes an Authorization for Release of Information. (OPS 11496 - 11509) Allen also signed a form memorandum stating that it "confirms in writing your express consent for the Federal Bureau of Investigation to investigate your background or conduct appropriate file reviews in connection with the consideration of your application for employment." (OPS 11494) Allen's application included his resume, which indicates that he was seeking a position as an Inspector General. (OPS 11554)

[REDACTED]

This was the extent of Kennedy's contact with Marceca prior to the beginning of his detail in August 1993.¹⁰⁰

Early in April 1993, David Allen finally received a call from Kennedy concerning Marceca. Allen formed the impression that Kennedy did not know Marceca, based on the questions he asked. Allen OIC-302, 8/22/96, at 2-3. Kennedy inquired about Marceca's qualifications for the job, such as his integrity, honesty and work habits. *Id.* at 3. Allen gave him a good recommendation. Then, on his own initiative, Allen followed up on April 6, 1993 with a recommendation letter to Kennedy praising Marceca and strongly supporting his detail.¹⁰¹ *Id.*

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¹⁰⁰ Marceca says that he does not remember speaking with Kennedy prior to April 1993:

Q: This letter is dated April 5th, 1993. Did you have any conversations with Mr. Kennedy, who is the author of this letter, prior to that date?

A: I don't recall.

Marceca HCGRO Dep., 6/18/96, at 45.

¹⁰¹ Allen advised the OIC that he and Marceca had developed a personal relationship, although Allen qualified this by noting that they did not socialize. Allen OIC-302, 8/22/96, at 2.

There is a distinct suggestion of a "quid pro quo" underlying Allen's recommendation letter. Once Marceca's detail began, Marceca was able to introduce Allen to people in the White House. On one particular occasion, Livingstone took Allen to Presidential Personnel and introduced him to Rosalind Grey, the Director of that office. *Id.* at 3. Allen spoke with Grey regarding Inspector General positions, and he gave Grey his resume. *Id.* at 3-4. Allen interviewed for two such positions in August 1994, but nothing resulted from either interview.

(continued...)

Allen described Marceca as a:

sound and logical thinker, capable of handling any number of critical and sensitive missions at one time. He is equally comfortable in directing CID agents conducting a major investigation or in briefing senior leaders. Mr Marceca is always *the master of every situation*. His *professional competence*, *can do attitude* and *attention to detail* have contributed to the smooth functioning and efficiency of the Major Procurement Fraud Unit, United States Army Criminal Investigation Command.¹⁰²

(...continued)

Id. at 4.

During Marceca's detail to the White House, Allen visited on several occasions. Through his visits, he developed a relationship with Livingstone, who had lunch with Allen and gave him tours of the White House. Livingstone introduced Allen to the White House Personnel Office, and told them to keep Allen in mind if there were any openings for Inspectors General. Allen OIC-302, 8/22/96, at 3. Allen says he was asked to apply for a position as a political Inspector General, but he was interested only in career positions. Allen was interviewed for Inspector General positions in two federal agencies -- the Social Security Administration and the Department of Education -- in February and March of 1995, but did not get either job. *Id.* at 4.

¹⁰² Given the substantial evidence that Marceca did not live up to Allen's glowing recommendation letter, we questioned Allen about the accuracy of its representations. Allen stated that after Marceca's first year on the job, Allen determined that Marceca did not meet the qualifications for his position. Allen therefore gave Marceca a poor evaluation and recommended that he be terminated. Marceca had been detailed to the United States Senate, however, and his probationary period expired during the detail. When Marceca returned, Allen recalls that it was too late to terminate him without good cause. Allen OIC-302, 8/22/96, at 2.

Allen was told to work with Marceca, and Allen arranged for Marceca to receive extensive training to raise his qualifications. *Id.* Allen maintains that Marceca was a "quality" agent by 1993, but acknowledges that Marceca had problems documenting his investigative efforts and keeping focused on his work. *Id.*

Marceca's front-line supervisor was James Robinson. Robinson told us that Marceca sometimes embellished facts in order to make a case, and then would be unable to support the facts with evidence. Robinson OIC-302, 8/28/96, at 1. We showed Robinson copies of evaluations of Marceca for 1991, 1992 and 1994, signed by Robinson and rating Marceca's performance as superior. *Robinson explained that agents almost always receive superior ratings.* *Id.* Robinson was demoted as a result of personal problems after Marceca returned from

(continued...)

(715-DC-2193) (emphasis added). In the letter, Allen predicted that there would be difficulty getting the detail approved:

I unhesitatingly recommend that this fine individual be selected for detail to the White House staff. *Do not be dissuaded should the military leadership of CID object to the detail of Mr. Marceca.*

Id. (emphasis added).

On April 13, 1993, Kennedy wrote to Secretary of Defense Les Aspin to formally request the detail of Marceca to OPS. In support of the detail, Kennedy stated, "We have learned of Agent Marceca's *unique investigative abilities* and background and would greatly appreciate his full-time assistance here." (BA-DC-467 (emphasis added)) Kennedy requested that Marceca be detailed to OPS for a six-month period on a nonreimbursable basis.¹⁰³ Kennedy could not recall whether he personally wrote this letter, or if Livingstone drafted it for his signature.¹⁰⁴ Kennedy

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OPS, and Marceca got his job. *Id.* at 3. Robinson believes that Marceca played an active role in arranging his demotion. *Id.*

After Marceca returned from his detail, Robinson and Allen gave him a superior performance rating. Among the justifications was Marceca's "[o]utstanding performance while serving as a member of the White House Personnel Security Office." HCGRO Hearing, 7/17/97, at 204. The evaluation states that Marceca "[e]liminated a six month backlog of Full Field Background Investigations and completed re-investigations of permanent White House staff." *Id.* The report concluded that Marceca showed "[c]lear potential for positions of greater responsibility." *Id.* Marceca identified himself in one of his evaluations as "Assistant Director for White House Security." *Id.* at 205.

¹⁰³ When a detail is on a non-reimbursable basis, the detailee's agency continues to pay the detailee's salary even though the detailee is working for another agency. In a reimbursable detail, the agency that requested the detail pays the detailee's salary to the detailee's home agency.

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(continued...)

HCGRO Dep., 6/18/96, at 33.

3. Lockett Objects to Marceca's Detail

The military leadership of CID shared neither Allen's extravagant view of Marceca's qualifications nor his desire to send Marceca on the detail. Allen's supervisor, Colonel Carl Lockett, opposed Marceca's proposed detail based in part on Marceca's existing caseload. Lockett OIC-302, 4/3/97, at 2; Kinoshita OIC-302, 9/17/96, at 1. Lockett further believed that if an Army employee were to be detailed to the White House, it should be an agent from the Protective Services Unit, not a white collar criminal investigator. Lockett OIC-302, 4/4/97, at 1-2. *Lockett also believed that Marceca did not have the proper demeanor for a White House detail, but he did not communicate this concern to the White House. Id.* at 3-4.

After discussing the matter with Allen, Lockett had a telephone conversation with Livingstone. Lockett OIC-302, 4/4/97, at 2. Livingstone told Lockett to discuss the matter with a person Lockett understood to be the third-ranking attorney in the White House Counsel's Office. Lockett remembers the person's name as "Powell."¹⁰⁵ *Id.* Lockett had two conversations with "Powell," expressing his view that the Army should be permitted to select the person to send

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¹⁰⁵ The person to whom Lockett spoke most likely was Kennedy.

on detail. In the second call, "Powell" was forceful, advising Lockett that the decision had been made and the White House wanted Marceca. *Id.* at 2-3.

4. DOD Objects to Marceca's Detail

Kennedy's request to the DOD for Marceca's detail was not unusual. Previous administrations routinely had requested details of specific numbers of DOD personnel for set time periods. Gorelick OIC-302, 10/21/96, at 2. However, the White House generally did not select people for details by name unless a particular person had certain skills needed by the White House. *Id.*

At the time of Kennedy's request, Jamie Gorelick was General Counsel for the DOD, a position she occupied from May 1993 through March 1994. The Office of General Counsel was not formally involved in the review or approval of employee details to the White House, although it would be consulted if the request raised a legal issue. Gorelick OIC-302, 10/21/96, at 1. Gorelick recalls, however, that she occasionally was contacted by the White House Counsel's Office if it needed help in getting DOD personnel detailed to the White House. *Id.* Gorelick regularly dealt with either Kennedy or Associate White House Counsel Beth Nolan concerning such details. *Id.* at 2.

Gorelick and two other DOD witnesses have no recollection of reviewing or approving Marceca's detail. Gorelick OIC-302, 10/21/96, at 2; Sherfield OIC-302, 10/23/96, at 2; Gilliat OIC-302 10/31/96, at 2. However, the documentary evidence gathered by the OIC discloses the internal process of the request. Shortly after the April 13 detail request was received, the Office of Enlisted Personnel Management ("OEPM") at the DOD distributed manpower evaluation request forms to five divisions within the DOD. The divisions then evaluated the benefits of

Marceca's proposed detail to the White House. Three criteria had to be met:

- (1) The detail must promote the increased effectiveness of the U.S. Government or produce more economical use of Government resources;
- (2) The detail must be in furtherance of specifically identifiable interests of DOD.
- (3) Nonreimbursable detailees must perform function consistent with those for which DOD funds are appropriated, and the greatest benefit of the detail must incur to the DOD.

Sekula OIC-302, 11/27/96, at 1. The concurrence of a majority of the divisions was necessary to approve the detail. *Id.*

Two of the divisions -- the Office of the Comptroller and the Office of the Army -- concurred with the request for Marceca's detail. (BA-DC-471, BA-DC-473) Another division concurred with the detail but did not feel strongly about it either way. (BA-DC-470) The remaining two did not concur with the request, citing budgetary constraints, the absence of any need for DOD skill and the lack of any benefit to the DOD. (BA-DC-472, BA-DC-474)

On May 12, 1993, the OEPM prepared a memorandum summarizing the DOD evaluation of Marceca's detail and recommending that the detail be disapproved. (BA-DC-468) Attached to the memorandum was a draft letter to the White House Counsel's Office for the signature of Nicolai Timenes, Jr., Principal Director of Military Manpower & Personnel Policy at the DOD.

The draft stated, *inter alia*:

As you know, the Department of Defense is undergoing major personnel reductions. These reductions are forcing us to take a more critical look at every requirement for personnel. It appears this position does not require expertise generally unique to the Department.

(BA-DC-469) The draft was never sent.

5. Marceca's Detail Approved

On June 22, 1993, Kennedy sent another written request for Marceca's detail to OPS for a six-month period. This time, the letter was directed to Colonel Michael Sherfield, Executive Secretary to the Secretary of Defense. Kennedy explained that this subsequent letter was another attempt to break through the bureaucracy to arrange Marceca's detail. Kennedy HCGRO Dep., 6/18/96, at 38.

As was the case when the DOD received the April 13 Kennedy letter, the OEPM again distributed manpower evaluation request forms to the same five DOD divisions that had previously reviewed Marceca's proposed detail. And the result was also the same -- each division reported that its position on Marceca's detail remained unchanged. On July 21, 1993, the OEPM prepared another memorandum recommending that Marceca's detail be disapproved. (BA-DC-466) The memorandum was signed by Colonel Kenneth Deutsch, Director of the OEPM, on July 22, 1993.

The OEPM changed its position about its disapproval recommendation during the next two weeks. On August 4, 1993, OEPM executed a revised memorandum approving Marceca's detail to OPS for six months on a nonreimbursable basis. (BA-DC-456) This memorandum was prepared by Gloria Sekula, Management Analyst in the OEPM, for Deutsch's signature. Sekula OIC-302, 11/27/96, at 1-2. The memorandum noted that "[t]he General Counsel strongly supports the request" and that "[t]he Army concurs with the request." (BA-DC-456) That same day, Robert Alexander, Deputy Assistant Secretary to the Secretary of Defense, sent Kennedy a letter approving his "June 22 request to detail Special Agent Anthony B. Marceca for 6 months on a nonreimbursable basis." (BA-DC-464)

Sekula advised the OIC that her reference to the General Counsel's support was based on a short handwritten note from Gorelick to Sherfield which she found in the Marceca file. Sekula OIC-302, 11/27/96, at 1-2. That note stated in its entirety as follows:

General Sherfield -- I spoke with White House Counsel's Office: this is
something we should do for them (-- for six months only)
Jamie

(BA-DC-462) The note was undated. Gorelick has no recollection of the note.¹⁰⁶ Gorelick OIC-302, 10/21/96, at 4. Sherfield, who stated that his office routinely processed hundreds of requests for DOD support, also has no recollection of the Marceca detail. Sherfield OIC-302, 10/23/96, at 2.

Shortly after Gorelick wrote her note, Colonel George J. Kinoshita, Deputy Chief of Staff for the CID, received word that Marceca's detail had been approved by the DOD. Kinoshita OIC-302, 9/17/96, at 1. Accordingly, he ordered Colonel Lockett to detail Marceca to OPS notwithstanding Lockett's objections. *Id.*¹⁰⁷ On August 6, an employee of the Chief of Staff's Office called Allen and told him that Marceca's detail had been approved and that Marceca should report to the White House as soon as possible. (715-DC-2158)

¹⁰⁶ Gorelick was interviewed by the OIC on October 21, 1996. She advised the OIC that, in preparation for her interview, she reviewed all available documents relating to Marceca's detail. She stated that even after reviewing these documents, she had no recollection of having played any role in arranging or influencing Marceca's detail to the White House. Gorelick OIC-302, 10/21/96, at 1.

¹⁰⁷ Kinoshita advised the OIC that prior to Marceca's detail, he had never personally met Marceca. Kinoshita 302, 9/17/96, at 1. Kinoshita received a "letter of appreciation" from Craig Livingstone, because Marceca felt Kinoshita was personally responsible for approving his detail. *Id.* at 2. (705-DC-171)

B. Marceca's Detail Ends

1. Attempts to Extend Marceca's Detail

Marceca's six-month detail ended on February 11, 1994.¹⁰⁸ On March 3, 1994, Kennedy wrote the DOD to request six-month extension of Marceca's detail. To justify a six-month extension of Marceca's detail, a letter from Kennedy was prepared:

As the Office of the White House Personnel Security undertakes to complete its ongoing review of the several hundred military personnel assigned to the Executive Branch,¹⁰⁹ Special Agent Marceca's experience was proven invaluable. His specific expertise in reviewing and screening potential candidates greatly facilitated this process and assisted the office in meeting pending deadlines at the White House Military Office.

(715-DC-277) The letter was signed by Livingstone in Kennedy's name.¹¹⁰ Livingstone OIC-

¹⁰⁸ Marceca's computer disks contain this draft letter to Kennedy:

Dear Bill:

I want to thank you for the allowing me to be detailed to the White House. This has been a rare opportunity and a very great honor to have served in the Clinton Administration. This detail was a privilege few people in my profession will ever enjoy, and for these and many other reasons, I am very grateful to you. I believe I prepared all my life for this opportunity, but I never expected to realize the dream. If there is anyway at any time in the future that I can assist you or do anything for you, or this administration, I would be very honored and delighted to be asked.

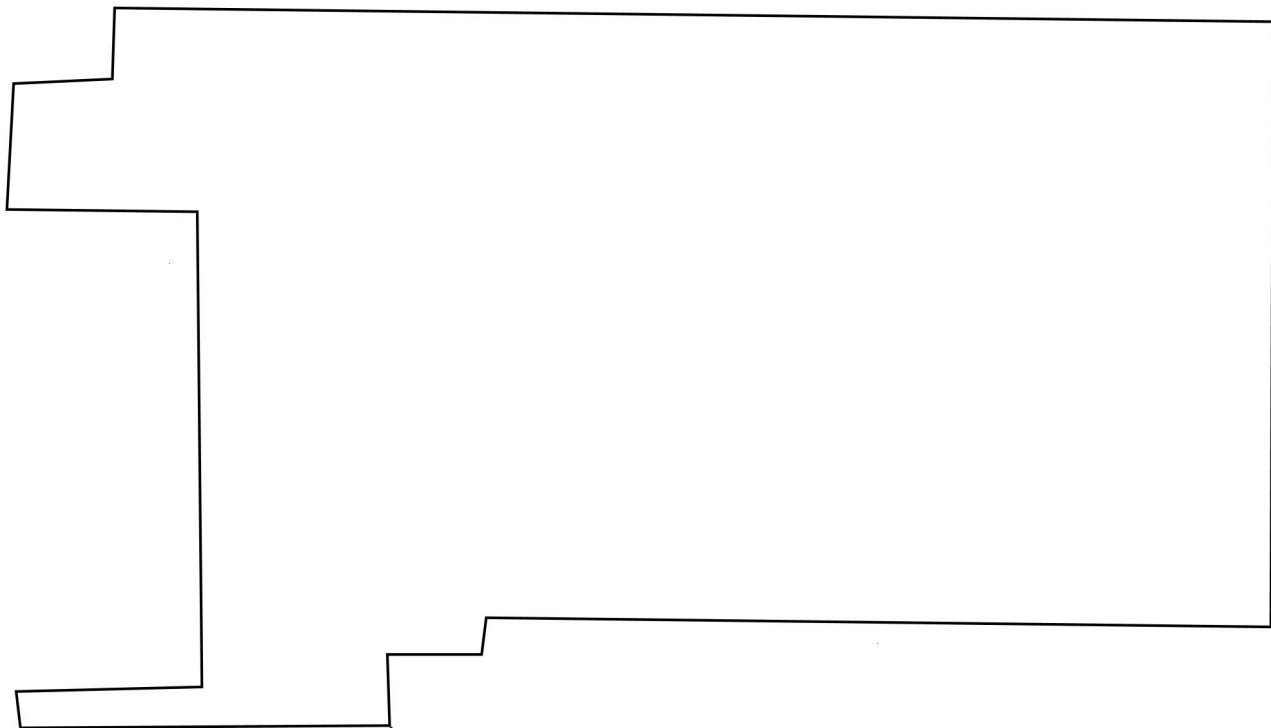
Again, thank you for your confidence in me.

(706-DC-47) Marceca's computer disk indicates that the document was saved on February 11, 1994. (706-DC-6)

¹⁰⁹ There is no evidence that Marceca ever worked on military personnel, except to the extent that they were detailed to the NSC. Livingstone says that it was originally expected that Marceca would assist with military personnel. Livingstone OIC-302, 5/29/97, at 8.

¹¹⁰ FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

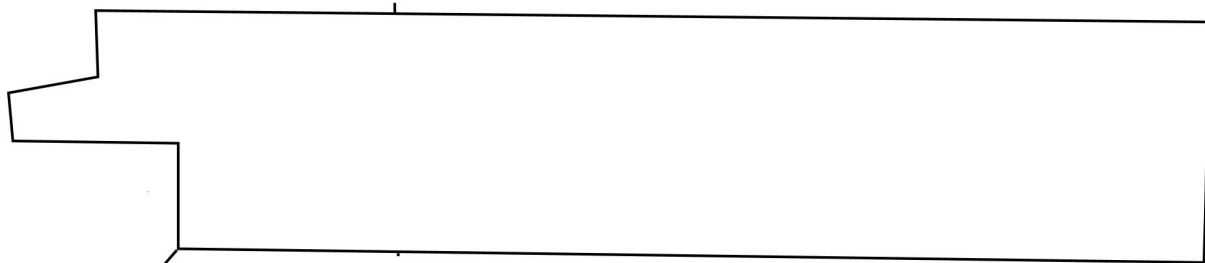
(continued...)



Accordingly, Livingstone wrote the DOD on March 17, 1994 to withdraw the extension request. He provided no explanation for its withdrawal:

The Office of White House Personnel Security requested on March 3, 1994 that Special Agent Anthony B. Marceca, of the U.S. Army Criminal Investigative Division Command (USACIDC), be allowed to complete a six month detail at the executive level. That request is now respectfully withdrawn.

(BA-DC-479)



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According to Livingstone, Marceca wanted to stay on at the White House:

Q: When Mr. Marceca's detail was up, did he discuss with you the status of the Update Project?

A: I think Tony said something along the lines, he would like to stay and help out and finish it, something along those lines.

Q: But that obviously didn't happen, since he only made it up to G?

A: Yes. That is the extent, I think, of our conversation on it.

Q: Why did he leave?

A: I think Tony would have like to have stayed, but -- . . . it was a 6 month detailee [sic] which was not renewed.

Livingstone HCGRO Dep., 6/14/96, at 60.

Livingstone also remembered talking to Kennedy about whether or not to renew Marceca's detail. *Id.* at 61. According to Livingstone, Kennedy told him that he was not going to renew Marceca's detail because of "some unresolved issues" in Marceca's background investigation. *Id.*

For his part, Marceca testified that he never talked to anyone about extending his detail, nor did he remember anyone trying to do so on his behalf:

Q: Okay. Why did you leave when you left the White House?

A: My detail ended.

Q: Did you try to get your detail extended?

A: As I understand my agency, the only conversation I recall -- no.

Q: Do you know if anyone tried?

A: Not that I recall.

Q: Do you know if anyone else tried to get your detail extended?

A: I don't think they did.

Marceca HCGRO Dep., 6/18/96, at 150. Marceca also stated that never saw Kennedy's letter of March 3, 1994.

Q: This is a document that purports to request to extend your detail for another term. Were you ever told any reason why your detail couldn't be extended by the White House?

A: The fact that my detail was ended was -- I was advised by my personnel office, Betty Bray, that my detail was ending on the date that it was ending. I thought that it was ending on March 1, but I was told by Betty Bray that the detail was ending on the pay period that it ended. That's all the conversation that I had. If that document is accurate, I was unaware of that document.

Id. at 151.

2. Marceca Volunteers to Work at the White House

After Marceca's detail expired, he maintained his contacts with Livingstone and OPS. He agreed to come to OPS on successive Saturdays on a volunteer basis to complete the Update Project,¹¹¹ but this plan was abandoned when Marceca was sent on detail to Canada shortly after

¹¹¹ Marceca testified that before his departure, there was a meeting with Livingstone, Anderson and Wetzl at which they planned to work on successive Saturdays to complete the Update Project. *Id.* at 153.

he returned to the Army. Marceca HCGRO Dep., 6/18/96, at 153.¹¹² When Marceca returned, he was named acting Special Agent in Charge of the Washington D.C. Fraud Team and did not have time to work on the Update Project. *Id.*

Marceca on occasion volunteered to work on the "Comments" line in the White House Correspondence Office, answering telephone calls from citizens. Answers by Craig Livingstone to Written Questions from Senator Joseph Biden Jr., Aug. 19, 1996, at 16; Livingstone OIC-302, 9/13/96, at 25-26.¹¹³ Marceca sometimes stopped at the OPS office to say hello to the employees. Wetzl OIC-302, 8/8/96, at 4. Marceca had a temporary volunteer pass for this work, which, like all pass requests, had to be processed by OPS. *Id.* Livingstone did not know whether Marceca continued to have pass access to the White House after his detail ended, nor could he recall any conversations with anyone at the White House or Secret Service regarding any need for Marceca to have continued access. Livingstone OIC-302, 9/13/96, at 25-26.

At some point in September 1994, Marceca and Wetzl went to Room 23 of the OEOB, the Access Control Branch for the Secret Service, to obtain a volunteer badge for Marceca. Friedline OIC-302, 7/30/96, at 5; Stanley OIC-302, 7/30/96, at 4-5. Janet Friedline, a Personnel Security Specialist who worked for the Access Control Branch at that time, recalls that Marceca had not yet turned in his temporary staff pass when he and Wetzl came by to obtain a volunteer

¹¹² Before Marceca left, he met with Livingstone, Anderson and Wetzl to discuss the completion of the Update Project. According to Marceca, all four of them were supposed to work on the Update Project on Saturdays. Marceca HCGRO Dep., 6/18/96, at 153.

¹¹³ Marceca was apparently a friend of the Director of the Comments Line, Jamie Williams. Wetzl OIC-302, 8/12/96, at 4.

pass. *Id.* Friedline assumed that Marceca would be doing volunteer work for OPS.¹¹⁴ *Id.*

Margaret Stanley, another Personnel Security Specialist, made the same assumption. Stanley OIC-302, 7/31/96, at 5. There is no evidence that Marceca ever returned to work in OPS.¹¹⁵

C. Marceca's Responsibilities at OPS

[Redacted]

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¹¹⁴ Marceca's volunteer badge was canceled in May 1995, before it was due to expire. Friedline OIC-302, 7/30/96, at 5.

¹¹⁵ Both Marceca and Allen signed Personnel Action Information Sheets on August 12, 1994, in connection with their employment as volunteers in the White House Personnel Security Office. Craig Livingstone signed the forms as the Requesting Official, approving White House Volunteer badges effective September 1, 1994 through December 30, 1994. OPS requested a pass from the Secret Service for Marceca on September 1, and for Allen on October 12.

On August 17, 1994, Wetzl faxed Volunteer Agreements to Marceca and Allen, with a request that each of them fill out an agreement and return it.

¹¹⁶ [Redacted]

(continued...)

[Redacted]

HCGRO Hearing, 6/26/96, at 37-38; Marceca 302, 6/10/96, at 2.

1. SF-86 Project

Marceca's first priority was to process SF-86 forms for new White House employees who needed regular access to the White House complex. HCGRO Hearing, 6/26/96, at 37. He testified that when he began his detail at OPS, the backlog of SF-86s he was responsible for processing was approximately 2-1/2 feet high. Marceca HCGRO Dep., 6/18/96, at. 83, 93. In internal memoranda, Marceca referred to himself as "SF-86 Commander." (706-DC-201)

Upon receiving an SF-86, Marceca would first compare the name on the SF-86 to a computer list of names in the OPS vault, to determine whether the person already had been approved for a permanent White House pass. Marceca HCGRO Dep., 6/18/96, at 83. According to Marceca, this computer list named "former White House staff, contractors, groundskeepers" and others who needed access to the White House. *Id.* at 84. Marceca described this list as being "green and white striped paper, computer paper" with "quite a number of sheets attached, and they were folded over." *Id.* at 86. He also remembered that "it did have holes on the edge," but he was not sure about its width. *Id.* at 86-87. If the person's name was on the list, Marceca would search for an existing file for the person. *Id.* at 85.

[Redacted]

Marceca

(...continued)

[Redacted]

HCGRO Dep., 6/18/96, at 63, 83-86. If there was an existing file folder for a person named on the list, but the previous background investigation had been conducted more than five years before, Marceca would request a reinvestigation. Marceca HCGRO Dep., 6/18/96, at 71.

Whenever he received a new SF-86 for a reinvestigation, Marceca would compare it to the previous FBI background investigation to determine whether there were any inconsistencies.

He explained his review process as follows:

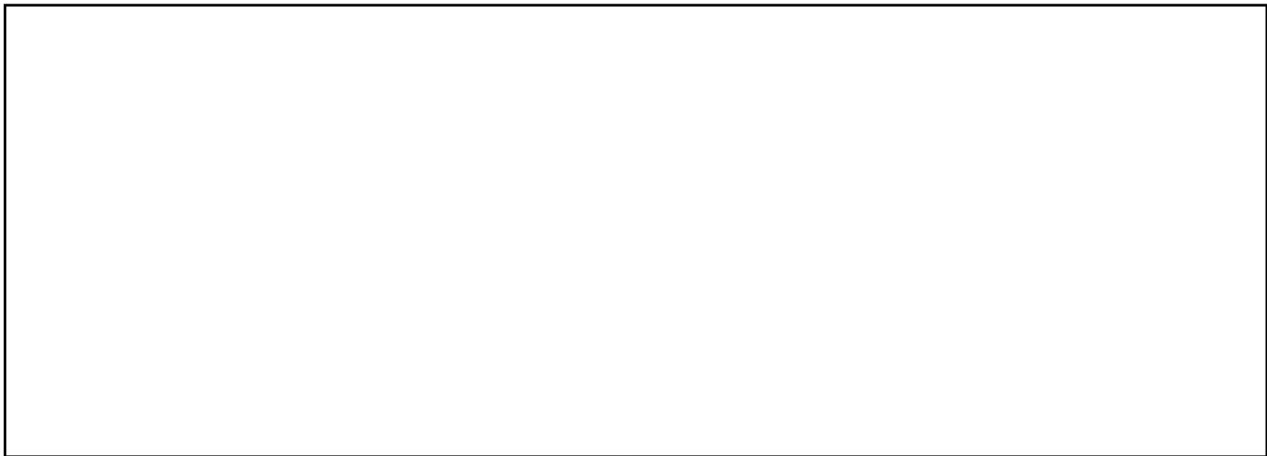
If I would look at a report in depth, it would have an SF-86 attached to it, okay? And I would be looking for any FBI report, instances of travel as one of the things, and I would be looking to see if they put that travel on the SF-86. I would be looking for work, jobs that they had, and I would see if they would correspond with the SBIs [sic]. So for that, to accomplish that, I had to read both of these documents and assimilate the two, and that is what I did.

Marceca HCGRO Dep., 6/18/96, at 128. *See also* Marceca HCGRO Dep., 6/18/96, at 71-72, 86.

2. Temporary Access Project

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(continued...)



Gemmell provided further information about this project. According to Gemmell, the access lists generated by the Secret Service would include the person's name, the type of access -- e.g., White House complex, OEOB or NEOB -- and the duration of that person's access.

Gemmell SJC Int., 6/26/96, at 9-10. The purpose of the weekly access list was to enable new White House employees to "gain entrance into the White House complex their first few days of employment until they were in such a position to be issued a temporary pass." *Id.* at 10.

Gemmell explained that OPS normally processed these access requests on a weekly basis, although during the transition they received them almost daily. *Id.* at 10-11. The Secret Service generated the access lists routinely and placed a copy in OPS's box at the Access Control Branch (called the Technical Services Division in 1993) for pick-up, unless OPS specially requested a special report. *Id.* at 11-12. Secret Service employees Margaret Stanley and Janet Friedline were responsible for generating access lists. *Id.* at 12.

3. The Update Project

Marceca's last priority was to recreate personnel security files for holdover employees and

(...continued)

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determine when they were due for updated BIs.¹¹⁸ In performing the Update Project, Marceca referred to a computer printout listing employees of certain White House offices. HCGRO Hearing 6/26/96, at 39. Marceca worked through the computer list for each office. *Id.* at 193-194. If OPS did not have a file for a person on the list, Marceca would create a new file and then fill out a pre-printed form addressed to the FBI Liaison requesting a copy of that person's previous background report. *Id.* at 39. That form -- referred to during this investigation as the "Nussbaum" form -- included a space for OPS to list the purpose of the request. *Id.* In that space, Marceca typed "ACCESS," which meant that the person named was requesting access to the White House complex. *Id.* Following the word "ACCESS," Marceca typed a code that appears to correspond to the office or group with which the person was associated. For example, "S" was the internal OPS designation for White House Staff; "R" was the designation for Residence staff; "N" was the designation for National Security Council; "A" was the designation for AT&T; and "G" was the designation for General Services Administration. *See* Marceca HCGRO Hearing, 6/26/96, at 39, 41.

a. Marceca Reviews the Previous Background Investigation Reports

After Marceca received a person's previous background reports from the FBI, he would review them to determine (1) the date of the person's last investigation and (2) the office for which that person worked. Marceca recounted this process as follows:

¹¹⁸ OPS files were color-coded according to the office with which the employee was associated. Gemell SJC Int., 6/26/96, at 23-24. (OPS-2164) The files of top-level Presidential appointees were maintained in a safe in the outer office.

Q: Okay. When the SBI's¹¹⁹ came back from the Nussbaum forms where you check "copy of previous report," did you read those previous report --

A: The SBIs?

Q: The SBIs.

A: When the previous reports came back on my name checks, I would get those SBIs and look for the office, and I would look for the last date of investigation.

Q: What do you mean by "office"?

A: I would look -- I would look at the SBI, and it would generally describe, hey, you know, this person worked at the Office of the Vice President, okay? Well, that triggers immediately to me the Office of Vice President, and that was done in 1989, that unless this person has been place in another position, which a lot of them were, that it is likely that this person was not here. So I would -- I would make every attempt to find out if this was a person that was here. Now, if I found that the person was still here, and their investigation was within the last five years, this thing went in the folder and nothing more was done about it.

* * *

Q: Okay. And had you looked at all of those background -- those SBIs before putting them in the dead --

A: I looked at them for previous investigations, the date of previous investigation, and looked at them for the office that they would work in so that I could identify who should get a new SF-86.

Marceca HCGRO Dep., 6/18/96, at 118-19, 126. If during this process Marceca determined that an individual was no longer at the White House, he would place that person's previous

¹¹⁹ Marceca evidently used the term "Secret Background Investigation," or SBI, to describe the BIs. *See, e.g.*, Marceca HCGRO Dep., 6/18/96, at 117.

background report in his "dead file." *Id.* at 119. Marceca also explained that he needed to read the BIs in some cases in order to determine in which office the person worked:

A: In that background SBI from the FBI was generally the office that the individual worked in at the White House. *We had nothing to tell us what office they worked in.*

Q: Right.

A: I reviewed the background investigation to find out where the last office that they worked in. *Some of the SBIs came back and I couldn't even tell, they were so generic, that I couldn't even tell where they worked. They just said "White House staff."*

Marceca HCGRO Dep., 6/18/96, at 70-71 (emphasis added). This reflects the information vacuum in which Marceca evidently was operating when he began requesting previous reports from the Secret Service's list of passholders categorized as White House Operations Personnel: Marceca assumed that all the persons on the list had access to the White House, but he didn't know where to find them.¹²⁰ In fact, most of them had not been in the White House for at least a year.

As will be discussed in detail *infra*, physical evidence suggests that Marceca read each previous BI in detail in a search for derogatory information -- not merely to locate the person and find his or her last BI date -- when he received it from the FBI. However, Marceca in his testimony implied that he would review the previous background reports for derogatory information *only* if he had received a new SF-86 form from holdover employees who were due for a reinvestigation:

¹²⁰ Marceca explained his assumption as follows: "I believed that everybody on that list had legitimate access unless I could establish that they were no longer on the access list." Marceca HCGRO Dep., 6/18/96, at 111-13.

Q: Okay. I think on questioning earlier you said that you looked at the reports, and I think you had said that you spotted some problems?

A: Correct.

Q: Can you tell me what you were reading when you were spotting problems?

A: Okay. *If I would look at a report in depth, it would have an SF-86 attached to it, okay?* And I would be looking for any FBI report, instances of travel as one of the things, and I would be looking to see if they put that travel on the SF-86. I would be looking for work, jobs that they had, and I would see if they would correspond with the SBIs. So for that, to accomplish that, I had to read both of these documents and assimilate those two, and that is what I did.

Q: And did you do that to all documents as you got them back from the FBI that you ordered previous reports on?

A: If -- the only -- as I said before, *the only way I would do that is if I had an SF-86.* Now, if somebody came back and I could not find where they worked in the White House, okay, if they were previous employees, previous White House employees and not with this new administration, as I said, they would go in the dead file. Did I look at those things? *I didn't waste my time looking at those, other than trying to find out the last date of investigation.* But did I review those? No, I didn't. I would have fallen asleep.

Marceca HCGRO Dep. 6/18/96, at 128 (emphasis added).¹²¹

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¹²¹ Similarly, Marceca wrote in his June 9, 1996 declaration:

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

(continued...)

b. Marceca's Knowledge about the Accuracy of the Computer List

Marceca told the House Committee that the computer list he worked on for the Update Project was left for him in the OPS vault by Nancy Gemmell, a former OPS employee who retired days before Marceca's arrival at the White House. On August 9, 1993, just prior to the official start of his detail, Marceca met with Gemmell at OPS to get a briefing about his responsibilities, including the Update Project. During this meeting, Marceca first learned that the computer list to be used in connection with the Update Project was generated by the Secret

(...continued)

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

(705-DC-4490 - 4493)

¹²² In his declaration, Marceca stated:

As part of my consistent practice for the Update Project, I did not deliver the files or FBI Previous Reports to the head of the Office of Personnel Security, Craig Livingstone. I only delivered the files that I created in the course of the Update Project for Mr. Livingstone's review if I discovered what I believed to be inconsistencies in an individual's paperwork.

As best as I recall, there were only three files that I reviewed in the course of the Update Project that I delivered for Mr. Livingstone's review. To the best of my recollection, none of these files were of former high-ranking Bush or Reagan Administration officials My recollection is that one of the individuals involved worked for the General Services Administration, one worked for the telephone company, and one was a grounds keeper [sic].

(705-DC-4490 - 4493)

Service:

Q: And why do you believe the list came from the Secret Service?
How do you know it came from the Secret Service?

A: I was under the understanding from a conversation when Nancy briefed me that those were where the office got their list.

Q: Did you have a discussion with the Secret Service about the list?

A: No, I didn't.

Marceca HCGRO Dep., 6/18/96, at 65. See also HCGRO Hearing, 6/26/96, at 106.

Marceca acknowledged that he obtained the background investigations of many Bush White House officials while working on the Update Project. Marceca HCGRO Dep. 6/18/96, at 75. However, Marceca explained that he was just doing his job in requesting these files and had no reason to question whether any given person on the computer list was properly named as needing access to the White House:

Mrs. Collins: Mr. Marceca, why did you request so many files from the FBI?

Mr. Marceca: Ma'am, I was going down the list that I had of people that I understood were on the access list and that they were supposed to be allowed access to the White House, and I understood that I was to create files, recreate files on everybody on that list. I had no knowledge that there was no one -- when I started that list, I had no knowledge that there was anybody on that list that was not supposed to have access to the White House.

* * *

Mr. Peterson: And so these press accounts that talks about there were all these obvious names on there, at least to you this wasn't obvious? This was a list of people that you were told to check out and you were just going through and doing your job?

Mr. Marceca: Yes, sir. Long after the fact, when the files were collected and you put them all in a row, then it looks like something else. But at the

time, in the file, I was unaware that I was pulling people -- 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.

HCGRO Hearing, 6/26/96, at 61, 163.

Marceca Dec.,

6/9/93, at 2; Marceca HCGRO Dep., 6/18/96, at 73, 145.

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Marceca Dec., 6/9/96, at 2. However, Marceca professed to have little

awareness of political appointees:

Q: Did Mr. Livingstone ever discuss the White House Travel Office matter with you?

A: No.

Q: Did you have any conversations with Mr. Livingstone about Harry Thomason?

A: I'm sorry, the name again?

Q: Harry Thomason.

A: No.

Q: So I am going to assume the next question, did you ever see Harry Thomason in the office while you were in the White House?

A: I don't know who that is.

Q: So if he were there, you wouldn't recognize him?

A: I don't know who it is.

Q: Okay. He is a very close friend of the President and a Hollywood

producer that did have access to the White House and a pass. There was a lot of press about the fact that he had access and a pass after the firings. Does that give you any basis to recognize the name?

A: *I don't know Mr. Whatever, Thomason, or Thomalson or whatever his name was.*

Q: Okay. Also, before the name "Marlin Fitzwater" is the name "Tony Blankley." Do you recall seeing the name "Tony Blankley" on the list that you were working from? Anthony Blankley, I believe it is.

A: No, I didn't.

Q: Kenneth Duberstein?

A: *I don't recall the name.*

Q: Did you know who Tony Blankley, Anthony Blankley, was at that time?

A: *I apologize to Anthony. I didn't know who he was.*

Q: Did you know who Kenneth Duberstein was at that time?

A: I did not.

Q: And can you describe if you saw Marlin Fitzwater and what brought your attention to his name on the list, if anything? Did you see Marlin Fitzwater's name on the list while you were doing the update?

A: If I had seen Mr. Marlin Fitzwater's --

Mr. Muse. Her question was did you see it --

BY MS. OLSON:

Q: Did you see it or recognize it on the list while you were doing this?

A: It did not jump out to me at the time.

- Q: When you wrote your [June 9, 1996] statement, what was the purpose then of mentioning Mr. Fitzwater in particular?
- A: Because when I wrote the statement, I was aware that allegations were out there that I had requested illegally or some sort files, and the reason I put that in there was I didn't know how I could request files illegally when I believed that these folks still had access.
- Q: Is it true --
- A: And he was my example.¹²³
- Q: Is it true that that didn't mean that at the time you believed Marlin Fitzwater one way or the other had access; is that true?
- A: I believed that everybody on that list had legitimate access unless I could establish that they were no longer on the access list.

Marceca HCGRO Dep., 6/18/96, at 111-13 (emphasis added).

Marceca testified that he first realized "by like mid-December" of 1993 that certain persons appearing on the computer list no longer required access to the White House. Marceca explained how he learned about the problems with the list as follows:

I would type up a list of names of -- by like mid-December, I was not progressing very quickly down the alphabet and there was a number of names that were still there, and, as I recall, I was early into the alphabet, and so other than the SF-86, the occasional SF-86 that would check it off. When I say "occasional," that may be the wrong term but the SF-86s I went through.

But the overall project looked like it was not being accomplished very well. So I began to make lists of names, maybe a dozen names on a sheet of paper. *Generally, I typed those up on the typewriter and I started to systematically circulate those to various offices in the White House, okay? Such as GSA, the grounds, telephone company, and I asked those folks to*

¹²³ The name of Fitzwater, one of the most recognizable persons on the Wetzl archive lists, appeared in the early newspaper stories about the FBI files. *E.g.*, "White House Got 338 FBI files after Dale's," *Wash. Times*, June 8, 1996, at A-1.

*tell me if those people are here, or if they have gone. Okay?*¹²⁴ And I would get those -- I would get -- I would then go back the next week and some of those lists would say, oh, one name is on here and the rest of them we don't know anything about. So that one name that was on there, I would then immediately take that file, that name, and I would order up -- I'd look in the file to find out if there was a file. If there was no file, I would immediately order up their SBI, Okay?

Now what that told me, I found a person who is definitely a holdover. In some cases those folks, the GSA would tell me this person is still here, but these people with GSA, two or three people with GSA left in '87 and they are no longer here. *So I would go back to the file then and I would check off the list and I would not call for an SBI [secret background investigation] because I knew they were not there.*¹²⁵ Okay?

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.

Marceca HCGRO Dep., 6/18/96, at 99-100. However, Marceca had provided facially inconsistent testimony on this point in response to an earlier question in the same deposition:

Q: All right. Did there come a time when you found out that there were people who were not properly on those lists?

A: Not to my knowledge, from the time I left, no.

Q: From the time you left?

A: To the time I left, no.

Marceca Dep., 6/18/96, at 73. In a subsequent hearing, Marceca again testified that he changed his procedures after he realized that there were problems with the list that he was using:

¹²⁴ The evidence shows that Marceca ordered background reports using the misleading Secret Service lists *before* checking with GSA, the grounds or the telephone company. He checked with those agencies only *after* he had received responses from the FBI, and only for persons who did not have current BIs. *E.g.*, AL-DC-12916 - 921.

¹²⁵ The evidence suggests that this never happened. Marceca ordered previous reports of GSA employees directly from the Secret Service computer report.

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.*

HCGRO Hearing, 6/26/96, at 285-86 (emphasis added). We do not know what Marceca meant when he said that he "changed" his approach. We have found no evidence that Marceca stopped using the misleading lists. In fact, he began ordering the reports of former Reagan and Bush White House Staff employees only in December 1993, and he continued, roughly in alphabetical order, until his detail ended in February 1994. Moreover, there is no evidence to support Marceca's testimony that he would order previous reports only "if all else failed," *i.e.*, only after checking to find out whether the person was still in the White House.

4. Marceca's Status Reports

One of the computer disks Marceca produced to the OIC contains two status reports that he sent to Livingstone documenting his work. The first, carrying a computer date of December 21, 1993, is captioned "Status Report of SF-86/BI Activity." (706-DC-160) It is divided into three sections: "SF-86"; "TAX CHECK REQUESTS"; and "RE INVESTIGATIONS OF WHITE HOUSE STAFF." The SF-86 section reports that 16 forms were in process; 80 were complete and ready to be sent to the FBI; and 30 would be sent "today." The memorandum states that "30 per week have been sent to FBI as agreed for last 5 weeks." *Id.* The Tax Check section reports that 7 tax check requests were ready to be sent to the IRS; 27 were sent on December 17; 52 were sent on December 10; and 30 were sent on December 3.

The final section of the memorandum documents that status of previous report requests and reinvestigations. The entire section reads as follows:

GSA; AT&T; NSC; FBI; CIA; CREDIT UNION; COMPLETED FOR 1988 AND OLDER.

RESIDENCE; WITHIN FOUR PERSONS, OF COMPLETION FOR 1988 AND OLDER BI'S.
(TEMPORARY CHRISTMAS HELP HAS CONTINUED TO BRING IN
ADDITIONAL SF-86'S)

WHITE HOUSE STAFF; 50 REQUEST FOR BACKGROUNDS WERE SENT THIS WEEK AND
AND THE PREVIOUS 3 WEEKS TO FBI.

50 REQUEST FOR BACKGROUNDS ARE AWAITING TO BE SENT
NEXT MONDAY TO FBI.

(WE ARE AT THE "D" WITH THIS PROJECT).

NEXT WEEK; 1 JAN 94, R INVESTIGATION BEGINS ON GSA; AT&T; NSC; CREDIT
UNION; AND WHITE HOUSE STAFF, FOR BI'S WHICH EXPIRE IN 1989.

(706-DC-160) The second memorandum is captioned "2ND STATUS REPORT OF SF-86/IRS
ACTIVITY FROM 12/20/93 TO 1/28/94." (706-DC-11) It is broken into three sections as was
the earlier memorandum. The section dealing with the Update Project reads as follows:

GSA; AT&T/C&P; RESIDENCE; CREDIT UNION; UPDATING FOR 1989 IN PROCESS.
22 SF-86 PACKETS HAVE BEEN DISTRIBUTED FOR COMPLETION.

WHITE HOUSE STAFF UPDATE: 43 REQUEST FOR PREVIOUS BAKGROUNDS WERE SENT
THIS WEEK.

50 EACH FOR THE PREVIOUS 5 WEEKS TO FBI.

50 REQUEST FOR BACKGROUNDS ARE AWAITING TO BE SENT
NEXT MONDAY TO FBI.

250 REQUESTS FOR PREVIOUS REPORTS SENT DURING THIS REPORTING PERIOD.

(WE ARE AT THE "F" WITH THE STAFF UPDATE PROJECT).

(706-DC-11) This memorandum carries a computer date of January 28, 1994. (706-DC-6)

VI. FBI HANDLING OF OPS REQUESTS

A. General Procedures

FBI policy and procedures for completing background checks for the White House had changed little since the 1960s.¹²⁶ Between 1993 and 1996, the White House initiated a request for information for FBI files by submitting one of four forms that were in regular use. Report of the FBI General Counsel on the Dissemination of FBI File Information to the White House, 6/14/96, at 14 [hereinafter "Shapiro Report"]. These forms corresponded with requests from OPS; from the White House Counsel's Office; from the Office of Administration of the Executive Office of the President; and from the National Security Council. Shapiro Report at 14; Carner OIC-302, 9/24/96, at 1.

The forms sent to the FBI by OPS were sent under the typed name of the White House Counsel -- Bernard Nussbaum, from 1993 to 1994 -- without the Counsel's signature or any identification of the person who had filled out the request form. Shapiro Report at 14. FBI staff understood that the name on the form typically was not the actual requester. *Id.* at 15.

The request forms were picked up at the White House by FBI couriers and delivered each workday, between approximately 2:30 pm and 3:00 pm, to the Special Inquiry and General Background Investigations Unit ("SIGBIU") of the FBI's Personnel Division. Shapiro Report at 15; Carner OIC-302, 9/24/96, at 1; George OIC-302, 9/24/96, at 2. If the request required the mobilization of FBI field resources in order to conduct a full field investigation, a limited update or an expanded name check, the forms were retained by the SIGBIU and a background

¹²⁶ The FBI performs a range of background investigations, including Name Checks, Expanded Name Checks, Full Field Investigations (Levels I, II, and III and Five-Year Reinvestigations), Limited Update Investigations, and Limited Inquiries. (OPS-86 - 93)

investigation was initiated. Shapiro Report at 15; George OIC-302, 9/24/96, at 2.

If the form requested information from FBI records, such as copies of previous reports or a name check, the Executive Agencies Sub-Unit ("EASU") of the Executive Agencies, Personnel and Administrative Support Unit of the Information Resources Division of the FBI, was notified to pick up the request for processing. Shapiro Report at 15-16; George OIC-302, 9/24/96, at 1.

The steps taken by EASU in processing a request depended on the type of information requested. In the case of a request for copies of previous background reports, an FBI file number relating to the subject of the request was obtained either from the SIGBIU or from a check of FBI central indices. Shapiro Report at 18. The relevant background report information was then retrieved from FBI files, copied and sent to an FBI research analyst who checked to make sure all the requested pages had been pulled.¹²⁷ Shapiro Report at 18; George OIC-302, 9/24/96, at 3.

The copied information was attached to the original OPS request form, which was stamped to indicate the number of attachments, and returned to the White House in a sealed envelope by the next outgoing FBI courier. Shapiro Report at 18-19; George OIC-302, 9/24/96, at 3. Any original document in the FBI's files that was copied for transmittal to the White House was stamped on the back showing the identity of the agency requesting the record, the date the request was received, the date of the dissemination, and the initials of both the research analyst and the person who retrieved the records. Shapiro Report at 19; George OIC-302, 9/24/96, at 2.

At no time were original documents or raw data provided.¹²⁸ *Id.*

¹²⁷ If no file number could be located, the request form would be returned to the White House with "No Record" stamped on the form. George OIC-302, 9/24/96, at 2.

¹²⁸ The name check process was more involved. When a request for a name check was

(continued...)

B. Volume of OPS Requests in 1993

Near the end of 1993, OPS made an unusually large request for previous background reports.¹²⁹ George OIC-302, 9/24/96, at 3; Larson OIC-302, 9/26/96 at 3. According to Janice George, one of the two research analysts who handled requests from OPS during 1993, OPS requested more than two-hundred previous reports in December 1993. George OIC-302, 9/24/96, at 3. In George's experience, the White House typically requested only fifteen to twenty previous reports every month or so. *Id.* The December 1993 request was the largest she had ever seen. *Id.* at 4. She noted, however, that no one in the EASU thought much about the requests,

(...continued)

received, the file assistant made four copies of the request and distributed them to three other FBI units. Shapiro Report at 19. These units, together with the EASU, checked the name against four different computer databases and the FBI central indices. *Id.* These databases provided information on criminal histories, arrest records, and outstanding warrants, as well as specialized information relating to organized crime, terrorism, and foreign counterintelligence. *Id.* The file assistant gathered the relevant files and computer printouts and forwards the information to the research analyst assigned to the case. *Id.*

If no derogatory information was found, a summary memorandum to that effect was sent directly to OPS by the FBI research analysts. Carner OIC-302, 9/24/96, at 2; Larson OIC-302, 9/27/96, at 1. If derogatory information was located, the research analysts notified the EASU supervisor by memorandum. *Id.* The EASU supervisor then would prepare an attachment to the background request which described the particular derogatory information, and the information would be delivered to the White House by courier. Carner OIC-302, 9/24/96, at 2; Larson OIC-302, 9/27/96, at 2. The FBI merely passed on the information; it made no recommendation to the White House when derogatory information was located. Carner OIC-302, 9/24/96, at 2.

¹²⁹ When the Clinton Administration began in 1993, there were a substantial number of OPS requests for new background investigations, but the EASU did not regard this volume as unusual given the number of newly hired White House employees. Carner OIC-302, 9/24/96, at 3. While Craig Livingstone was OPS Director, the EASU received a substantial number of duplicate background requests from OPS. Carner OIC-302, 9/24/96, at 3; George OIC-302, 9/24/96, at 4; Larson OIC-302, 9/26/96, at 3. Duplicate background requests rarely occurred when Jane Dannenhauer headed OPS. *Id.*

other than that the volume was high. *Id.* George said that as of December 1993, OPS had not requested previous reports for several months, and hence she thought that they might be trying to clean up their backlog. *Id.*

Peggy Larson, the EASU supervisor, recalled that because of the flood of OPS requests in December 1993, she went to her Unit Chief, Vernon Thornton, to request overtime for George.¹³⁰ Larson believes that she and Thornton may have discussed the fact that OPS was starting their updating later than normal, but they did not question the legitimacy of the OPS requests. *Id.*

Livingstone was aware that the FBI had a personnel problem with the volume of requests being sent by OPS based on a conversation he had with an FBI supervisor. Livingstone OIC-302, 9/13/96, at 12. Livingstone does not recall specifically when this conversation took place. Livingstone's understanding was that OPS should focus on full-field investigations and reduce the paperwork going to the FBI. *Id.* at 12-13. He did not associate the conversation with too many requests for FBI previous reports. *Id.* at 13.

Marceca recalled that the FBI contacted OPS in December 1993 about the high volume of requests for previous reports. Marceca HCGRO Dep., 6/18/96, at 73. Livingstone told Marceca that he met with the FBI regarding that issue. *Id.* at 73-74. Based on his conversation with Livingstone, Marceca understood that he was to limit the number of request for previous investigations to "something like 50 previous investigations or 30 previous investigations" per week. *Id.* at 74. Marceca's written status reports to Livingstone for December and January reveal that he was forwarding 50 requests each week. (706-DC-150; 706-DC-11)

¹³⁰ At the time, Sherry Carner, the other research analyst who worked with George, was on leave for several weeks. Larson OIC-302, 9/26/96 at 3.

There is no evidence that anyone in the FBI recognized that the some of requests made by OPS during 1993 were inappropriate. The EASU employees who handled these requests were career employees with many years of experience.¹³¹ They treated all requests as legitimate. Carner OIC-302, 9/24/96, at 3; George OIC-302, 9/24/96, at 5; Larson OIC-302, 9/26/96, at 2.

Nevertheless, OPS's request for a previous report on James Baker did catch the eye of the EASU unit. Sherry Carner, one of the two research analysts who handled OPS requests in 1993, told the OIC that she did not pay much attention to individual names, but did recall seeing James Baker's name on one request. Carner OIC-302, 9/24/96, at 3. She did not believe anything was wrong with the request, because she assumed that the former Secretary of State required access to the White House. *Id.*

Janice George, the other research analyst who worked with Carner, remembered Carner mentioning Baker's file, not because Carner thought the file had been improperly requested, but because Baker's name was one Carner recognized. George OIC-302, 9/24/96, at 5. George advised the OIC that she too did not believe the request was necessarily inappropriate, since there could be many reasons why Baker might need access to the White House. *Id.*

¹³¹ Sherry Lea Carner first started working for the FBI in 1965. She was assigned to the EASU as a clerk in 1966, and ten years later she was promoted to research analyst, her present position. Carner OIC-302, 9/24/96, at 1.

Janice George has worked for the FBI for approximately 28 years. She worked as a research analyst in the EASU from January 1990 through March 1996. George OIC-302, 9/24/96, at 1.

Peggy Jean Larson has served as Carner and George's supervisor in the EASU since 1992. Larson has been employed by the FBI for forty years, the last twenty-four in the EASU. Larson was a research analyst from 1972 through 1992, when she became the EASU supervisor. Larson OIC-302, 9/27/96, at 1.

VII. THE UPDATE PROJECT: PURPOSES AND PROCEDURES

A. Purpose of the Update Project

"Update Project" was the term used to describe the process of creating new OPS files for holdover White House passholders, obtaining copies of previous BI reports for those persons, and ensuring that new background investigations were conducted every five years. This procedure had been followed during the Carter to Reagan and Reagan to Bush transitions. Gemmell SJC Int., 6/26/96, at 4.

In conducting the Update Project, OPS relied on lists produced by the Secret Service computer system, rather than any White House list, because the information from the Secret Service computer was thought to be more complete. HCGRO Hearing, 6/19/96, at 114-15. White House lists are incomplete during transitions, and do not include all of the Residence staff, GSA employees, and employees of private contractors such as AT&T and Diversified Reporting Services. *Id.* at 115. The Secret Service lists include all persons who have passes permitting them to access the White House, regardless of where (or even whether) they are employed.

During the first year of the Clinton Administration, there was a large volume of new employees who needed White House passes. It has been described as a chaotic time period.¹³² Gemmell OIC-302, 7/29/96, at 3; Ziskind OIC-302, 8/14/96, at 2. The Update Project was not a high priority, and the White House staff was to be left for the end of the Update Project, because much of the staff ultimately would depart the White House and therefore there would be no need to create files for them. Gemmell OIC-302, 7/29/96, at 3.

¹³² OPS was disorganized, according to a number of persons who worked there, and was outdated in its failure to make use of computers. *E.g.*, Aslaksen OIC-302, 8/22/96, at 2.

An OPS intern who worked from January until April 1994 recalls that the office was under considerable pressure to eliminate a huge backlog of paperwork required to approve passes for White House employees. Aslaksen OIC-302, 8/22/96, at 2. Newspaper articles at that time faulted the White House for failing to obtain permanent passes for permanent White House employees. *See supra* § IV.C.

The initial priorities for OPS were processing the paperwork to obtain full-field investigations and permanent passes for permanent Clinton Administration personnel; obtaining temporary passes for new personnel; renewing temporary passes when they expired; and monitoring the "access list" of volunteers and other persons who were permitted to enter the White House after showing a driver's license or other identification to a Secret Service agent at the White House gates. The Update Project -- reviewing the BIs of holdover employees who already had been approved by the Secret Service and the White House to hold passes -- was not a priority.

The term "Update Project" had continuing significance in OPS beyond the initial matter of obtaining current BIs for holdover employees. The term was used to describe an ongoing process of obtaining an updated BI for every passholder within five years of the date of the most recent BI. At the time that OPS closed in 1996, "Update Project" information was maintained in a black three-ring binder. (OPS-1495) The binder contains lists of passholders broken down by the White House office with which they are associated. Each page has a column for the person's name, a column for the date of the person's last BI and a column titled "Update Due." The latter column contained a date five years subsequent to the last BI date. (OPS-1495)

B. Obtaining the Secret Service Lists

In early June 1993, Gemmell requested that the Secret Service provide lists of active passholders from the WAVES computer system including information not in the reports regularly received by OPS.¹³³ The special lists would need to include each active passholder's full name, date of birth, city and state of birth, and social security number. Gemmell SJC Int., 6/26/96, at 50. This information was required because OPS needed to include it in "previous report" request forms that would be sent to the FBI as part of the Update Project. Gemmell believes that she made the request orally to Margaret Stanley or Janet Friedline, employees of what was then known as the Access Control Branch ("ACB") of the USSS Technical Services Division ("TSD").¹³⁴ Gemmell does not recall any details of her request. HCGRO Hearing, 6/19/96, at 95. Friedline and Stanley do not recall any such request. Friedline OIC-302, 7/30/96, at 3; Stanley OIC-302, 7/30/96, at 3-4.

At that time, TSD was located Room 23 of the OEOB, on the same floor as OPS. The ACB did not actually print reports from the WAVES computer. Such reports were printed by the WAVES office, which fell under the Uniform Division of the Secret Service. The WAVES office was located in the basement of the OEOB.

¹³³ Gemmell, who had worked in OPS since 1981, was the last holdover OPS employee to depart. Gemmell OIC-302, 7/31/96, at 1. She retired on August 13, 1993. At the time that Gemmell left, Livingstone was running the office, Anderson was the Executive Assistant, and Wetzl was in the process of becoming a permanent employee. A number of unpaid interns, including Wetzl, had worked in OPS. Gemmell OIC-302, 7/29/96, at 2.

¹³⁴ The ACB and the WAVES office were joined in the newly-created White House Division of the Secret Service in 1994. Cole OIC-302, 6/26/96, at 4. The Secret Service reorganized the structure of the White House Division to better coordinate access to the White House. Craft OIC-302, 7/30/96, at 1.

As is discussed in detail *infra*, the WAVES reports Gemmell received from the Secret Service in June 1993 included both active and inactive passholders, without distinguishing between the two groups. Gemmell did not realize that the Secret Service computer system was capable of printing the names of inactive passholders. Gemmell SJC Int., 6/26/96, at 55.

C. Chronology of Requests

There are several methods to track the chronology of the OPS requests for previous reports. First, OPS stamped the date at the top of each form before sending it to the FBI. The FBI then stamped the date at the top of each form it received, and stamped another date at the bottom of each form when it was returned, with any previous reports attached, to the White House.¹³⁵ OPS thus received back the original forms with three original date stamps.

Furthermore, Marceca kept lists of "previous reports received" for many of the reports that he got back from the FBI.

Our analysis of the chronology of the requests reveals that reports of persons in the various offices generally were ordered in the following dates and in the following order:¹³⁶

<u>CODE</u>	<u>OFFICE</u>	<u>DATES FBI RECEIVED REQUESTS</u>
NA	National Park Service	7/30/93
A	AT&T	8/2/93
T	C&P Telephone	8/3/93
CI	CIA	8/4/93
D	Diversified Reporting	8/5/93

¹³⁵ The FBI maintained a database in which it recorded the "date received" and "date returned." The data set forth in this memorandum are compiled from information from the FBI computer database and data input into our computers by our staff. They are not audited figures, and may not be entirely accurate. *The precise figures are not material to our conclusions about what Marceca did or to the analysis of his criminal culpability.*

¹³⁶ This list is not all inclusive; it represents recognizable series of requests.

M	Misc. Non-Government	8/6/93
WHCU	Credit Union	8/6/93
F	FBI	8/9/93
O	Other Government Agency	8/10/93
G	GSA	8/11 - 8/17; 9/14 - 9/17; 10/29 - 11/26/93
N	NSC	9/14/93 ¹³⁷
R	Residence Staff	9/14/93 - 9/22/93
S	WHOP	12/6/93 - 2/3/94 (through Go); 4/26/94

Although the majority of the offices were ordered before Marceca arrived at OPS on August 18, only a relatively small number of requests were made for those offices. Approximately 255 requests were made between January 20, 1993 and August 17, 1993. From August 18, 1993 until February 3, 1994, OPS ordered approximately 1038 previous reports.

D. Training the OPS Staff and Marceca

Gemmell overlapped with Livingstone and Anderson for approximately six months, and with Wetzl for approximately two months. Gemmell observed that none of the new permanent OPS employees had federal government experience, let alone White House experience, and none had even general office experience upon which they could draw. Gemmell SJC Int., 6/26/96, at 92; Gemmell OIC-302, 7/29/96, at 4. While she was at OPS, Gemmell instructed the staff about various functions of the office, including the Update Project. Anderson OIC-302, 8/24/96, at 5. Gemmell also told some of the interns about the Update Project. Auode OIC-302, 9/5/96, at 3.

Gemmell told the OPS staff that the White House staff should be processed last in the Update Project, because that group would have substantial turnover relative to the other offices, some of which, such as AT&T, had little or no turnover. Gemmell SJC Int., 6/26/96, at 58-59. Gemmell recognized that the White House staff list would no longer be reliable after several

¹³⁷ On September 14, 1993, OPS requested approximately 240 files from the NSC list.

months had passed. *Id.* at 79. However, Gemmell does not recall giving specific instructions to any OPS employee about the need to request an updated list. Gemmell OIC-302, 7/29/96, at 3.

Gemmell departed the White House on August 13, 1996, before Marceca began his detail. *Id.* at 1. Shortly before Gemmell left, Marceca came to OPS and Gemmell spent a few hours with him describing the functions of the office. Gemmell SJC Int., 6/26/96, at 82-83. Gemmell has little recollection of the details of the meeting. *Id.* at 85. She did not regard Marceca as a clerical employee, and as a result, she did not go into great detail about what steps he should take to complete the Update Project. *Id.* at 87. Gemmell had provided similar information to Anderson and Wetzl, with whom she worked daily. Gemmell OIC-302, 7/29/96, at 3. At the time she met Marceca, Gemmell did not know that he would be responsible for the Update Project. HCGRO Hearing, 6/19/96, at 90, 96. Marceca took notes at the meeting, which he provided to OIC. (706-DC-583) The notes include the word "update" but do not mention any details about the Update Project. (706-DC-578)

E. The Secret Service Lists

In the back of one of the Update Project boxes that Lisa Wetzl archived were a number of files containing Secret Service computer printouts and typewritten lists of names. (Box CF-215) The first file has a yellow post-it note that reads, "UPDATE PROJECT AS OF 1/94 - MARCECA." (AL-DC-12887) This same language appears as the final entry on Wetzl's typed archive lists, following the last name on the list.

The files, of various colors, carry the following labels: AT&T; C&P Telephone Company; CIA; General Services Administration; Miscellaneous; White House Staff Personnel; Diversified Reporting; Federal Bureau of Investigation; Other Government Employees

(Caution);¹³⁸ National Security Council; National Park Service; and Office of Executive Residence.

The most significant contents of the files are Secret Service printouts. All of the printouts are dated June 10, 1993.¹³⁹ These reports are on 8-1/2" by 14" tractor-feed paper with green and white bars. Each page that contains data also contains a unique time of day, in the format of HH:MM:SS (hour:minutes:seconds) in the header line. Each of the reports is in the same format with the same heading, except that the name of the White House organization differs. Each report is separately paginated,¹⁴⁰ and each contains an alphabetical list of names and associated data, printed horizontally across the page. The first page of the most significant report is captioned as follows:

WAV073BS WAVES PAGE 39
6/10/93 10:49:31 AM EXCLUSIVE EMPLOYER DIRECTORY FOR WHITE HOUSE OPERATIONS PERSONNEL

LAST NAME FIRST MID DOB POB SSN PASS-TYPE FILE #

(AL-DC-12900) There is a separate report for each of the following groups or organizations:

American Telephone & Telegraph
C&P Telephone Company
Central Intelligence Agency
Misc. Non-Government Employees
Employees of Reporting Agency

¹³⁸ OPS requested reports for only 8 of the 48 names on the list of Other Government Employees.

¹³⁹ The printouts are in separate colored folders with typed labels identifying the White House office or contractor to which the report applies. Certain other documents were located in the files, including some of Marceca's typed lists. (E.g., AL-DC-12976 - 13019) The key list -- pages 39 through 53 of the White House Operations Personnel report -- was located in the file labeled "General Services Administration."

¹⁴⁰ Gemmell recalled the Update Project list as a single list that was torn into separate sections. Gemmell SJC Int., 6/26/96, at 57-58.

Federal Bureau of Investigation
White House Operations Personnel
General Services Administration
Other Government Agency
National Security Council
National Park Service
Employees of the Residence

The lists are not sorted by pass type. For example, the White House Operations Personnel list includes such pass types as White House Staff (WHS), Executive Office Building (EOB), New Executive Office Building (NEOB), and Volunteer (VOL). Also, it includes temporary passholders, designated with a leading "T," as in TWHS, TEOB, TNEOB, and TVOL. The "Exclusive Employer Directory" lists were not routine printouts.¹⁴¹ Stanley OIC-302, 7/30/96, at 4; Undercoffer HCGRO Int., 7/10/96, at 57.

The code that appears at the top of each page, "WAV073BS," identifies a standard, pre-programmed report produced by the WAVES computer system. (721-DC-1 - 17) *When the original version of WAV073BS is run on the WAVES computer, however, it produces a report significantly different in format from the OPS reports.* This original version of WAV073BS was last modified on August 31, 1988.¹⁴² 721-DC-1; Craft OIC-302, 7/30/96, at 1. Secret Service employees occasionally created "ad hoc" reports by starting with a computer program for pre-programmed reports, such as WAV073BS, and modifying the program, thereby creating a

¹⁴¹ The Secret Service provided OPS with a number of different types of printouts to serve different purposes. Friedline OIC-302, 7/30/96, at 2, 3; Stanley OIC-302, 7/30/96, at 2.

¹⁴² The program actually exists on the computer system in two forms: as a "reporting program" WAV073BS and in a "compiled version" known as RPTOBJ73. The compiled version is slightly easier to run because the program prompts the operator to enter the name of the employer, whereas in WAV073BS the operator must modify a line of the program each time a different employer is run. (721-DC-1)

derivative of one of the original source programs. Craft OIC-302, 7/30/96, at 2,4; Rabinowitz OIC-302, 10/16/96, at 3. If the Secret Service employee did not modify the caption, the entry "WAV073BS" would continue to print on every page.

For our purposes, the most significant difference between the original WAV073BS and the 6/10/93 printouts is that the original version contains a column headed "Status." On most Secret Service printouts, in the status column the word "active" or "inactive" is spelled out, or the letter A or I appears to indicate the person's status. HCGRO Hearing, 7/10/96, at 217, 219, 222 (Libonati). That column was deleted from the 6/10/93 printouts. *All of the 6/10/93 lists include both active and inactive passholders without distinguishing between them.*¹⁴³

The most important list for our investigation is the recovered portion of the White House Operations Personnel list. It begins with the name Poepsel at the top of page 39 and concludes with the name Zysman at the bottom of page 53. (AL-DC-12Creation of the900 - 12914) The final entry on page 53 indicates that the entire list contained 2,856 names. (AL-DC-12914)

F. Creation of the 6/10/93 Lists

The 6/10/93 lists most likely were produced by Maurice Craft, who was then and is now a Sergeant with the Secret Service's Uniform Division. In June 1993, Craft was the WAVES Center supervisor for the day shift. Craft was one of a small number of persons who knew how to create *ad hoc* custom reports from WAVES. Craft took over the day shift from Sergeant William Castle, who retired in March 1993. Castle OIC-302, 10/11/96, at 1. Castle trained Craft

¹⁴³ For example, the "Misc. Non-Government Employees" report includes Paul Begala, but also includes Harvey LeRoy Atwater and two of former Vice President Dan Quayle's children. (AL-DC-12930)

before he turned everything over to him. *Id.* In April 1993, Sergeant Jocelyn C. Pearson became evening shift supervisor of the WAVES Center. Pearson OIC-302, 10/7/96, at 1. Pearson's understanding of the WAVES computer system is limited, and she would not have been able to create a custom WAVES report on her own. *Id.* at 3; Rabinowitz OIC-302, 10/16/96, at 2.

In 1993, it was not uncommon for OPS employees to contact Craft directly and ask him to produce a WAVES report.¹⁴⁴ Craft OIC-302, 7/30/96, at 4. Later, possibly as early as the fall of 1993, the Secret Service adopted a policy requiring all report requests be routed through ASAIC Arnold Cole.¹⁴⁵ *Id.*; Cole OIC-302, 6/26/96, at 4; Cole HCGRO Dep., 7/10/96, at 51. Cole supervised the Access Control Branch beginning in 1991, when it fell within the Technical Services Division. Cole became head of the newly-created White House Division in March 1994. Cole HCGRO Dep., 7/10/96, at 6-7. OPS frequently received a variety of types of Secret Service reports. Aslaksen OIC-302, 8/22/96, at 2; Friedline OIC-302, 7/30/96, at 2,3; Stanley OIC-302, 7/30/96, at 2.

Craft does not specifically recall producing the 6/10/93 reports, but he noted that the reports were produced during his shift and acknowledged that it was not uncommon for him to

¹⁴⁴ A Secret Service agent who joined the Access Control Branch in January 1994 acknowledged that Craft sometimes misunderstood instructions and had to generate reports multiple times to create a report in the format requested. Undercoffer OIC-302, 9/6/96, at 2. A Secret Service agent who joined the Access Control Branch in April 1994 also occasionally found mistakes in reports generated by Craft. Striebling OIC-302, 9/8/96, at 2.

¹⁴⁵ A special agent who joined the Access Control Branch ("ACB") in April 1994 stated that there was an unwritten rule requiring OPS to request reports from the ACB rather than directly from the WAVES Center, but that the rule may not always have been followed. Striebling OIC-302, 9/8/96, at 3. The agent recalls that the rule became formal policy when the White House Division was formed in April 1994, taking over all access-related functions. *Id.*

receive requests from OPS for reports from WAVES. Craft OIC-302, 7/30/96, at 4-5.

The person most familiar with the WAVES reporting system was Stuart Rabinowitz, a private contractor who wrote most of the batch reporting programs, including WAV073BS. Rabinowitz OIC-302, 10/16/96, at 1. Between 1988 and 1993, Rabinowitz worked for the Secret Service at the White House on a part-time basis and had an office in the basement of the OEOB, near the WAVES Center. *Id.* Rabinowitz was the only private contractor working on WAVES in 1993. *Id.* at 2. Rabinowitz reviewed his invoices and determined that he did work for the Secret Service on June 7, 8 and 14, 1993. *Id.* He checked his diary and confirmed that there was no entry for June 10, 1993. *Id.*

G. Fingerprint Examination of the Secret Service 6/10/93 Reports

We obtained a fingerprint examination of all of the 6/10/93 lists. FBI Laboratory Memorandum, 10/23/96. One of Craft's prints was found on the CIA listing.¹⁴⁶ *Id.* at 2. One of Gemmell's prints was found on the Miscellaneous Non-Government Employees listing. *Id.* Two of Anderson's prints were found on page one of the NSC list. *Id.* Wetzl's prints were found on the C&P Telephone list, the FBI list, and the White House Operations Personnel list. *Id.* The fingerprint examiners checked for but did not discover any fingerprints of OIC employees Marceca or Livingstone, nor of Secret Service employees Castle, Cole, Friedline, Pearson, or Stanley. *Id.*

¹⁴⁶ Wetzl has stated that she believes that she took one of the reports to the Secret Service in 1994 and asked them to replicate the format, but they were unable to do so. Wetzl OIC-302, 8/8/96, at 2, 3. It is possible that Craft handled one of the reports at that time.

H. Other Documents in the "Update Project" Files

The Update Project files also contain typed lists of names prepared by Marceca. Electronic versions of the lists were on a computer disk that Marceca retained and ultimately provided to the OIC. These lists show that Marceca kept track of BIs that he received from the White House and reveal some of the procedures he followed in pursuing the Update Project. In sum, they reflect a regularity of procedures that militates against any finding of wrongful intent, but suggest reveal that Marceca was possessed of sufficient information from which a reasonable person in his position should have recognized that the Secret Service lists were not useful.

The blue AT&T folder contains a Secret Service printout and page one of an original, undated memorandum addressed from Livingstone to Al Nagy, Director of Telephone Services for the White House. The memorandum is signed by Mari Anderson for Livingstone. Printed on a dot-matrix printer, the memorandum reads as follows:

Please review this list of AT&T/C&P, *current or former employees*, and advise this office of their present status with the White House. *If they are no longer employed at the White House, it would be very helpful if you would provide the date of separation.* Those subjects whose last background investigation was in 1988/89, this office will provide them with an SF-86 packet, for completion.

(AL-DC-12889) (emphasis added) The memorandum then contains lists in three columns: "Name"; "Last BI"; and "Access." The "Access" codes are either A or T. Most of the "Last BI" dates are in 1989, some in 1988 and one in 1987. Eleven of the entries are stricken out in pencil or pen, with the word "gone" handwritten beside all but one of them. In the right margin, with a

bracket surrounding all the remaining entries, Marceca handwrote "86's Due By 7 Feb. 94."¹⁴⁷

OPS requested previous BI reports for the telephone employees before Marceca arrived. The memorandum suggests that Marceca recognized when he prepared it that some of them might be "former employees." The response confirmed that many of them had left the White House. The date the response was received is unknown. On Marceca's computer disk, the date that the memorandum was last saved is January 26, 1994. (706-DC-10) This is approximately ten days before the due date set by Marceca, so it is reasonable to conclude that Marceca received the response in early February.

The C&P Telephone file contains only the C&P WAVES printout and a post-it note inside the front cover of the folder containing the letter "T". (AL-DC-12892 - 12895) The CIA file contains only the Secret Service printout. (AL-DC-12898)

The General Services Administration file contains the GSA printout, the important P-Z fragment of the White House Operations Personnel printout, and four date-stamped memoranda (copies of which are on Marceca's computer disk) from Livingstone to William M. Cobbs, Building Manager for GSA's White House Field Office. (AL-DC-12916 - 12921) The memoranda appear to be in the same format as the memorandum relating to the telephone company employees.

The GSA memoranda carry the dates November 18, 1993, December 5, 1993, December 22, 199, and January 21, 1994. The earlier three memoranda are originals, signed by Livingstone. The 1993 memoranda state that new SF-86s will be required only for persons

¹⁴⁷ In the event that any charges were considered, we would need to engage a handwriting examiner to confirm this writing, which appears to be Marceca's.

whose last BI was in 1988; the 1994 memorandum states that new SF-86s will be required for persons with BIs from 1988 and 1989.¹⁴⁸ On the originals of the three memoranda, many of the names are stricken. Beside some of the names someone wrote either "Gone" or "Left."

The "Miscellaneous" file contains the "Misc. Non-Government Employees" printout. (AL-DC-12930)

The White House Staff Personnel file contains 33 separate lists of one or two pages, captioned "Previous Reports Received" with a typewritten date. (AL-DC-12933 - 12969) The lists, which are computer-generated and printed on a dot-matrix printer, match documents on the computer disks Marceca provided to the OIC. (706-DC-4, 5) In addition to the typed date, there is a date stamp on each page, generally of a date within a few days after the typed date. The lists include three columns, reflecting the last name, the background investigation date, and the letter "S". Beside each S is a check mark, written in pencil.

The typed dates generally coincide with FBI's records of the dates the previous reports were given to the White House. *Hence, it appears that Marceca made a typed record of reports received from the FBI each day.*¹⁴⁹

The Diversified Reporting file contains the "Reporting Agency" printout. (AL-DC-12971) The Federal Bureau of Investigation file contains the Federal Bureau of Investigation report. (AL-DC-12973) The Other Government Employees file contains the "Other Government

¹⁴⁸ Using the five-year guideline, persons with BIs from 1989 would not be required to obtain updated BIs until 1994.

¹⁴⁹ Marceca's computer disk contains similar typed lists dating from September 20, 1993, and including other codes, such as N, O, G, R, F, and OA. (705-DC-75 - 131)

Agency" printout. (AL-DC-12975)

The National Security Council file contains the National Security Council printout; a number of lists of names, BI dates and group codes; and a number of memoranda from OPS to the NSC. (AL-DC-12976 - 13019) One of the memoranda, dated September 9, 1993, asks the NSC to provide the social security number, dates of birth and place of birth of persons for whom that field is blank on the Secret Service report.¹⁵⁰ (AL-DC-12977) *This is an important memorandum, because it reveals that Marceca sought advice from the NSC before ordering previous BIs only for the persons about whom the Secret Service lists did not provide the information required to submit a request to the FBI.* On one copy of the memorandum, date-stamped September 10, 1993, Marceca wrote, "Forwarded to Pat Nelson." (AL-DC-12980) The file contains an original of the memorandum, signed by Livingstone, and a response, presumably from the NSC. (AL-DC-12977, 12979) Beside all but two of the sixteen names someone handwrote either "Not NSC" or "Departed NSC".

The NSC file also contains two original memoranda from Livingstone to the NSC requesting information about the employment status of "NSC related subjects" with outdated BIs. (AL-DC-12978, 12981 - 12987) On one memorandum, someone handwrote "Departed" beside 10 of the 12 names. The other memorandum is an alphabetical list of names seven pages long, and almost every name is stricken with a red pen.

The evidence thus suggests that Marceca requested BIs from the NSC list without first confirming that they were still employed -- *the same process he later used for the White House*

¹⁵⁰ Only five days later, on September 14, OPS requested previous background investigation reports for many of the NSC employees on the 6/10/93 list.

Operations Personnel list -- and only checked with the agency if he was missing information necessary to make the request or if he received an outdated BI. The evidence also demonstrates that Marceca must have realized that many of the persons on the 6/10/93 lists had departed the White House. It appears, however, that this realization did not cause him to hesitate when it came time to address the list of White House Operations Personnel.

The National Park Service file contains the National Park Service WAVES printout and a three-page memorandum, date stamped October 20, 1993, from Livingstone to the Superintendent of White House Grounds. (AL-DC-13021 - 13023, 13028) The memorandum includes some of the names from the National Park Service computer printout. Handwritten notes beside two of the names indicate that the persons had transferred or retired. Beside 9 of the names the word "Active" is handwritten. A separate typed list of reports received, date stamped November 4, 1993, contains the names of those nine persons, all of whom had previous BIs from 1988.

The Office of Executive Residence file contains a memorandum from Livingstone to Gary Walters, the chief usher, requesting the status of the same persons in the October 20 National Park Service memorandum, except for the eleven persons next to whose names notations appear in the earlier memo. (AL-DC-13036 - 13038) The memorandum to Walters is dated November 4, 1994, the same date as the typed list in the National Park Service file. The original of this memorandum has check marks beside many of the names. Nine of the names are highlighted in pink. Beside these names, someone stamped "LEFT." (AL-DC-13036 - 13038)

The box that Wetzl sent to archives with the Update Project files also contains two 8-1/2" x 11" pressboard binders, one labelled "UPDATE LEDGER 1988 and 1989" and the other

labelled "UPDATE LEDGER 1990 and 1991." (AL-DC-13043 - 13093, 13094 - 13144) These binders contain lined paper with typing and handwriting. At the top of each page is a year, and a letter of the alphabet. The pages are divided by a vertical line, on one side of which is a column headed "NAME" and on the other side of which is a column headed "BI DATE." Handwritten throughout the pages are names and dates of last BI for many of the persons for whom previous reports were ordered. Some of the writing appears to be Marceca's. This log would have enabled OPS to determine which BIs were expiring in the given years.

The Update Project logs do not include the names of the White House staff personnel whose files were ordered by Marceca, but they do include the names of persons whose previous reports had been improperly obtained along with groups ordered before Marceca arrived.

OPS also maintained a yellow folder labeled "Update Project," which was given to the FBI by the White House on June 11, 1996. This file contains a one-page Secret Service printout of National Park Service employees dated 6/8/93, with the same caption as the 6/10/93 WAVES reports. (AL-DC-11069) The report contains the same names as the 6/10/93 National Park Service report, but not all of the fields are the same. Most significantly, the 6/8/93 list does not contain dates of birth.¹⁵¹

The yellow file also contains a typewritten page, dated 6/4/93, that appears to contain instructions for the Update Project. (AL-DC-11070) In one column, captioned "DO," it lists the information required for the previous report requests: "NAME/DOB/POB/SS#." The page is a

¹⁵¹ The NPS report includes last name, first name, full middle name, place of birth, city and state of residence, social security number, and Secret Service file number.

photocopy, on which the words "(City + State)" are handwritten beside POB.¹⁵² In another column, captioned "DON'T," it lists offices within the White House that are *not* handled by OPS.

Another of the documents in the yellow "Update Project" file is a memorandum from J. Robert Manzanares, Director of Administration of the NSC, dated June 11, 1993. The memorandum states, "Per your request, following is a list of permanent WH/OEOB Pass holders from the previous administration." The memorandum contains 9 pages of listings of persons by name, social security number, and date and place of birth.¹⁵³ The file also contains a printout from the Secret Service E-Pass system entitled, "EPASS Possible ADMIN Holdover PASSHOLDERS BY NAME 11:33:08 31 MAR 1993."¹⁵⁴ The 56 page list includes the Secret Service file number, pass type, last and first name, middle initial, social security number and birth date. The file also includes a five pages listing employees on various offices' payrolls, date-stamped June 4, 1993, with a post-it note addressed to Craig from Erin Kelly, stating "Here is the list you requested from Todd Campbell." Also there is a five-page, computer-generated list from GSA, including employees' names, social security numbers, birth dates, and city and state of birth. On the first page of the GSA list is a pink post-it note, dated "6/10," that reads, "Nancy

¹⁵² Gemmell recognized the writing as her own. Gemmell OIC-302, 7/29/96, at 12.

¹⁵³ Among those listed in the 6/11/93 NSC memorandum as a permanent passholder is Brent Scowcroft. (AL-C-10999) OPS ordered Scowcroft's file from the FBI on September 14, 1993. The White House advised us that Scowcroft no longer required a permanent pass after September 25, 1993. This file therefore is classified as an "improper" request.

¹⁵⁴ As mentioned earlier, E-Pass is the computer system that controls whether or not a pass works at the White House gates. E-Pass is therefore regarded as the "critical" system for security purposes, and generally is more accurate than WAVES because entries are made directly to E-Pass and transferred automatically to WAVES.

per your request Lucille."¹⁵⁵

I. Improper Previous Report Requests

Between January 20, 1993 and February 3, 1994, OPS sent to the FBI approximately 1,293 requests for previous reports. We have determined that at the time the requests were made, at least 726 of the requests related to persons who were not employed in, and did not require access to, the White House.¹⁵⁶ See Fort & Poplos OIC Memorandum, 11/21/96.

In order to determine how many of the requests were improper, we first recorded every request made by OPS to the FBI after January 20, 1993.

Next, we obtained information from the White House about whether each person whose previous report had been requested still worked at the White House, or, if not, the date the employee left employment.

J. Reconstruction of the White House Operations Personnel List

One of our goals was to replicate the data that would have appeared on the Aa-Go portion of the 6/10/93 White House Operations Personnel report -- the missing pages 1 through 38 -- so that we could confirm that Marceca used this report and identify any patterns in the requests that

¹⁵⁵ The file also contains a number of memoranda written in 1996 from Livingstone to various White House offices advising them that certain employees are due for five-year updated FBI investigations. Finally, the file contains a page of hand-printed notes indicating that five persons with last-BI dates in 1990 must fill out paperwork, evidently for updated BIs, including Daniel Poneman. The page is not dated, but it makes reference to both Gary Aldrich and Dennis Sculimbrene.

¹⁵⁶ We did not take the steps that would be necessary independently to determine the precise number of requests that were improper, because it would not be a crime for OPS mistakenly to request unneeded reports. Our goal was to determine whether the requests fit any pattern that would support or rebut an inference of criminal intent.

he made. For example, we wanted to determine whether he proceeded alphabetically through the list, whether he skipped persons he knew were no longer working at the White House, and the extent to which he ordered previous reports for temporary as well as permanent passholders.

We were not able to replicate the 6/10/93 White House Operations Personnel list merely by asking the Secret Service to run WAV073BS with the criteria used for the 6/10/93 lists. The WAVES computer system is a dynamic system that changes constantly. SJC Hearing, 6/20/96, at 259 (Miller). Among the reasons that the data no longer in the system are no longer the same as they were on 6/10/93 are the following:

Many persons have been added to the system since 6/10/93 with the employer designation "White House Operations Personnel."

Some persons who would have appeared on the 6/10/93 list have changed employer designations to another entity.

Some persons who would have appeared on the 6/10/93 list have changed employer designations from "White House Operations Personnel" to "WHOP," or vice versa.

Some persons who would have appeared on the 6/10/93 list have changed their names because of marriage.

Many persons who would have appeared on the 6/10/93 list have changed their pass type, either from temporary to permanent, or vice versa, or from one type to another.

The only way to replicate the 6/10/93 lists with complete certainty would be to obtain a copy of the WAVES database reflecting the data in the system as of the moment that the original

computer print-outs were made.¹⁵⁷ Such a database is, however, unavailable.¹⁵⁸ Craft OIC-302, 7/30/96, at 4.

We developed a method to replicate the 6/10/93 lists by drawing on a number of resources that allowed us to approximate the information that would have been in the WAVES system on that date. The name of almost every then-current or former White House staff passholders requested by Marceca appears on our reconstructed list.¹⁵⁹

[1] Our procedure for replicating the lists began with a different type of WAVES report containing all active White House Operations Personnel passholders that was printed by the WAVES computer on 5/2/93. 708-DC-302. Each person on that list would have been on the 6/10/93 list, unless their employer designation changed in the intervening month.¹⁶⁰

[2] Next, we used a backup tape of data from the WAVES system from December 1994. Although the Secret Service does not retain regular backups of the WAVES system, this tape happened to have been retained. (720-DC-2 - 3) The Secret Service ran a report for us from the data on the December 1994 backup tape, showing all persons listed as White House Operations Personnel and the "last date" also known as the status date. (749-DC-288)

¹⁵⁷ Even a report run with data from the end of the day on 6/10/93 would be inaccurate, since changes were made to some records on that date.

¹⁵⁸ There is a field in WAVES that records the date of last action, but that date changes whenever any change is made to the computer record.

¹⁵⁹ For greater detail concerning the replication of the list, see J. Donald Fort, Memorandum to File, Feb. 14, 1997 [hereinafter "Fort Reconstruction"].

¹⁶⁰ The WAVES computer system is not perfect (or more precisely, no better than the data transferred into it). For example, the same person appears on a May 2, 1993 list three times, each time with his name spelled slightly differently but with the same unique file number. (708-DC-313 - 314)

The "status date" generally indicates the last time that the data relating to a particular record were changed, but it is not completely reliable as a measure of the last date the data were changed, because it can be changed by other factors.¹⁶¹ Undercoffer SJC Int., 6/27/96, at 4-5; Undercoffer Analysis of EPASS and WAVES, 7/15/96, at 2 (720-DC-59). We are relatively confident, however, that any person whose status date was prior to 6/10/93 would have been on the 6/10/93 list. Such persons already were inactive prior to 6/10/93, and their WAVES entries were not altered after that date.

[3] Next, we obtained a printout from the E-PASS computer system, using current data, for persons with employer "WHOP."¹⁶² We added to our list any persons who first had passes issued between 5/2/93 and 6/10/93. Such persons would have appeared on the 6/10/93 list, most likely as temporary passholders.

[4] We also added persons who, according to the E-PASS history file, had passes first issued on 6/10/93. Such persons would have been on the 6/10/93 WAVES list only if they had been added to E-PASS and transmitted to WAVES before the list was printed.

¹⁶¹ The status date in WAVES changes each time there is *any* change to data relating to a particular record. The date also may have changed when computer experts updated the E-PASS and WAVES systems in August 1994. Many of the status dates of persons whose passes were inactive prior to 1989 reflect a status date of January 1989, the month when E-PASS first came on line, because passholder information was electronically transferred to E-PASS at that time. The dates also may be incorrect if problems arose in the transfer of individual records from E-PASS to WAVES. See "Analysis of EPASS and WAVES re: List of 476 Names," 7/15/96, at 2 (Undercoffer Report) (reprinted in HCGRO Hearing transcript, 7/17/96, at 68). Even if a person's pass is inactive and no changes are made to the WAVES record, the WAVES status date may change when the E-PASS record is altered for administrative purposes, such as to delete the person's photograph from the computer. Undercoffer HCGRO Dep., 7/10/96, at 60-65.

¹⁶² Although persons may appear with the designation "WHOP" or "White House Operations Personnel" in WAVES, in E-PASS there is only the designation WHOP.

[5] Finally, we identified persons who were inactive in E-Pass as of 5/2/93 but nonetheless had a status date after 6/10/93, presumably because some change was made to their computer record after their pass was rendered inactive. Such persons would not have been on the 5/2/93 WAVES list of active passholders, but may have been on the 6/10/93 lists.

To test the accuracy of this procedure, we applied it to the portion of the White House Operations Personnel list that we have -- from Poepsel to Zysman. There are a total of 804 names in the existing section of the actual 6/10/93 list. Our reconstructed list contained thirteen additional persons who were not on the actual list (seven of whom had an entry date of 6/10/93) and omitted one person. Our analysis of the Po-Z section of the list teaches us that the reconstructed list may be over-inclusive and under-inclusive in certain minor respects. *See* Fort Reconstruction. Our Po-Z section, however, was 98% accurate, with half of the fourteen errors attributable to the 6/10/93 entries.

K. Determination that Marceca Used the Secret Service List

Upon comparing our reconstructed lists of names between Aarhus and Goldberg to the requests made by Marceca during the time that he was ordering reports of White House staff, we found that only four names requested by Marceca during the time that are *not* on our reconstructed list.¹⁶³ We therefore are relatively confident that Marceca used the missing portion of the 6/10/93 Secret Service report of White House Operations Personnel to order previous FBI background reports of former Reagan and Bush White House staffers.

That Marceca used the 6/10/93 reports is also established by the fact that the request

¹⁶³ One was a prospective Cabinet nominee whose report probably was requested in connection with his possible nomination, rather than because it appeared on any list.

forms that OPS sent to the FBI included personal information about previous White House passholders that was not generally available:

Full Name
Social Security Number
Date of Birth
Place of Birth (City and State)
Present Address

This information was contained in the 6/10/93 Secret Service reports. Moreover, OPS made an error in its request for reports relating to Joseph W. Hagin, using instead the name "Agin" -- the same error in the Secret Service database. *See Libonati OIC-302, 9/9/96, at 3.*

L. Analysis of Requests for Reports of White House Operations Personnel

Having reconstructed the Aa-Go portion of the list to a high degree of confidence, we proceeded to compare the list to the FBI's records of OPS requests to determine whether any patterns could be discerned in the requests. The requests were generally -- but not exclusively -- in alphabetical order, and they were not restricted to permanent passholders. We analyzed the pass types because OPS, were it acting rationally, would have requested FBI previous reports only for *permanent* passholders. If the OPS personnel believed that the Secret Service lists were accurate, then the temporary passholders would be Clinton Administration appointees who had not yet submitted their SF-86s or completed their background investigations.¹⁶⁴ Also, there rarely would be previous BI reports for temporary passholders, who generally had just joined the government and had never been subjects of FBI background investigations.

We found that in some instances, OPS requested previous reports for temporary

¹⁶⁴ Because of delays in the White House in processing permanent pass requests, few Clinton employees had permanent passes as of June 10, 1993. *Cole OIC-302, 6/26/96, at 6.*

passholders. *See Fort Reconstruction.* There was no overall pattern to the requests. In some alphabetical series only permanent passholders were requested; in other series both temporary and permanent passholders were requested; and in some sequences only temporary passholders were requested. *See id.*

Only fourteen of the permanent passholders between Aa and Go on our reconstructed list were *not* requested. These included George Bush (the former President's grandson); former OPS Director Jane Dannenhauer and her husband Michael Dannenhauer; and former OPS employee Nancy Gemmell. *See Fort Reconstruction.*

The names were 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 lists may have been separated, and not always handled in order.

There are series of names in which only permanent passholders were requested -- which would be expected if Marceca were pursuing the project in a rational fashion, albeit under the misconception that the list contained only active passholders. However, there also are series in which only temporary passholders were requested, *skipping* permanent passholders who had not yet been requested. And there are series in which temporary passholders were requested in alphabetical order, where the permanent passholders interspersed with them on the list already had been requested. Finally, there are series in which permanent and temporary passholders were requested together. *See Fort Reconstruction.*

M. Requests Made After Marceca's Departure

Initial public reports suggested that Marceca's improper requests ended with Goldberg, whose report was requested on February 3, 1994, before Marceca's departure from OPS. However, we discovered that on April 26, 1994, OPS requested seven names that immediately follow Goldberg, from Good to Graham, and one name that preceded Goldberg, using the employment code "S" as did Marceca.¹⁶⁵ Five of these eight were improper. Fort/Poplos OIC-302, 11/21/96. There were no additional requests using the code "S" until January 27, 1995, when three reports were requested using that code.¹⁶⁶

Although Lisa Wetzl testified that she picked up the Update Project in the fall of 1994, an analysis of all requests made in 1994 suggests that the reports for remaining White House staff employees actually were requested in June 1994. On June 7, the file of Everett Houser was requested -- thus picking up after "Go" in the alphabet -- and a total of approximately 38 files were requested throughout that month, generally in alphabetical order from Houser to Watson. The majority were White House Operations Personnel. (749-DC-371 - 517)

Only twelve additional requests were made throughout the remaining six months of 1994, then twelve in January 1995, eight in March 1995, four more in the remaining nine months of 1995, and three in the first four months of 1996.

¹⁶⁵ OPS date stamped the requests April 23, 1994. The FBI received them on April 26, 1994.

¹⁶⁶ In total, only 67 previous reports requests were made between February 3, 1994, when Goldberg was ordered, and the end of 1994.

N. General Services Administration

An analysis of the requests for previous reports of GSA employees -- which began while Gemmell was running the Update Project and was concluded, after a delay, by Marceca -- demonstrates that Marceca failed to check the employment status of the passholders before ordering their previous reports.

The OPS Update Project files included a report of GSA employees labeled, "Alpha Employee Security List" with a pink post-it note dated 6/10 and addressed to "Nancy." When we interviewed Gemmell, she recognized the USSS printouts but said she did not recall the GSA report. Gemmell OIC-302, 7/29/96, at 11. Gemmell stated that it was her practice to request a list of employees from each office only in the second phase of the Update Project, *after* the previous FBI report had been obtained from the FBI. Gemmell OIC-302, 5/8/97, at 4. Through an analysis of the lists and the previous BI report requests, however, we have determined that Gemmell probably used the GSA report to determine which reports to request.¹⁶⁷ Two of the GSA employees whose reports were requested while Gemmell was running the Update Project had left the White House. Fort/Poplos OIC-302, 11/21/96. However, both were on the GSA Alpha Employee listing provided by GSA to OPS on June 10, 1993,¹⁶⁸ and there are additional

¹⁶⁷ Gemmell was emphatic that she requested previous reports directly from the Secret Service lists, without first verifying that the employees were still at the White House, and that she verified employment only as a next step in the process. Gemmell OIC-302, 5/8/97, at 4. *Our analysis of the requests that she made and of the lists that she used, however, demonstrates that Gemmell's recollection is faulty.* She *did* inquire of the offices and eliminate the names of persons who no longer were employed at the White House before ordering previous BI reports.

¹⁶⁸ The two were Patricia Ballard (separated 11/22/89) and Michael Baril (departed 7/3/89). Departure dates were provided to us by the White House Counsel's Office.

persons on the USSS list whose files were not requested.

The FBI did not receive any requests for GSA reports from August 17 until September 14, 1993.¹⁶⁹ Before the gap, the names were received in alphabetical order, and all were on the GSA list of active passholders. (AL-DC-11062 - 11067) The last name received before the gap was Foreman. On October 29, the requests picked up at the precise place in the alphabet where they had left off on August 17, with the name Francis. *However, when Marceca picked up the project, he began using the Secret Service list, rather than the more-accurate GSA list.*

Permanent passholders from that point on in the GSA list were ordered, regardless of whether they were active or inactive. J. Donald Fort, Memorandum to File, 3/18/97.

O. National Security Council

The 6/10/93 printout for the National Security Council has a printed statement at the top left of the first page which reads: "Do Not Type Lable ()" [sic]. (AL-DC-13009) In the parentheses, someone drew a line with a highlighter marker, evidently indicating that no label should be typed for any person whose name was highlighted in the list. Throughout the report, the last names of temporary passholders are highlighted. At the top right of the page are the hand-printed words "Lables completed 7/2/93" [sic]. This date was more than a month before Marceca began his detail. *This suggests that files were created for permanent passholders with the employer designation National Security Council -- active and inactive -- before Marceca arrived on the scene.* Marceca testified about the NSC requests as follows:

When I walked in the first day in the White House, there were a number of

¹⁶⁹ Again, we note that these conclusions are based on data extracted from the FBI's computer database, not from independent investigation by the OIC.

file folders already prepared and these NSC folders were prepared and in the vault. We might be able to verify that here today with people at the table. What I did was I ordered the previous investigations, as I understood I was supposed to do *for all folks who had files*.

HCGRO Hearing, 6/26/96, at 97. OPS did not request reports of NSC employees until September 14, 1993,¹⁷⁰ when all of the NSC reports were requested on the same day.

¹⁷⁰ Between August 17 and September 14, only two reports of any type were requested.

VIII. DISSEMINATION OF INFORMATION FROM THE FILES

We found no evidence that any information from the improperly-obtained BI reports was disseminated beyond OPS.¹⁷¹ All OPS employees and interns have denied that any information from the files was disseminated or used for any improper reason.¹⁷² We considered two forensic methods to test those assertions.

¹⁷¹ The OIC received one letter from a representative of a person whose reports were improperly obtained, Jon D. Glassman. Letter from Edwin D. Williamson to Kenneth W. Starr, June 27, 1996. Mr. Glassman believed that there might be a connection between his recall as U.S. Ambassador to Paraguay in early 1994 and the ordering of his previous reports from the FBI. We reviewed Glassman's OPS file and found nothing that would support any inference of a connection. His previous reports were requested by OPS along with others in an alphabetical series as part of the final Marceca group on January 31, 1994, and returned on February 10, 1994, after Marceca left OPS. Apart from matter-of-fact reports of Glassman's two divorces, there is only one minor bit of derogatory information - [REDACTED]

[REDACTED] Because Glassman was an active government employee, State Department officials would have had ready access to his background information. There is no apparent reason to connect his recall with OPS.

FOIA(b)(6)
FOIA(b)(7) - (C)

¹⁷² We received some reports that Livingstone was not sufficiently discrete about information in BI files, but not in any case involving an improperly-obtained report.

One OPS intern reported that on one occasion Livingstone announced to the whole office a "soap opera" type tidbit of information that he had learned from a report about a prominent person who had joined the White House staff. Some interns recalled overhearing discussions about problems such as drug use and financial irresponsibility. Dowdell OIC-302, 8/23/96, at 3; Foudy OIC-302, 8/13/96, at 2.

[REDACTED] FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

[REDACTED] at 18; Foudy OIC-302, 8/13/96, at 2; Lee OIC-302, at 2; McDermott OIC-302, 9/11/96, at 3; Morrison OIC-302, 8/23/96, at 1-2; Pollock OIC-302, 9/5/96, at 4; Ziskind OIC-302, 8/14/96, at 2.

Most of the interns claimed that they never read any of the material in the OPS personnel files. There were instances, however, in which the interns read information in the files and even discussed what they saw. Riccardi OIC-302, 8/2/96, at 3.

First, we could fingerprint the files and their contents to determine who handled them. We used this method for the files of some of the high-profile Republicans, testing for the fingerprints of OPS employees and certain persons higher in the chain of command. Also, we used this method for certain files in which we discovered notes written by Marceca.

Second, we could inspect the reports to determine whether there is any evidence that they were photocopied, which might be suggested by missing staples or folded corners. We did this for all files for which it was possible.¹⁷³ Only a fraction of the files contained pages from which staples had been removed. We found no pattern of folds from which to conclude that the reports had been photocopied.

A. Fingerprinting of the OPS Files

In examining the files for fingerprints, we were interested primarily in whether Livingstone's prints were anywhere on or in the wrongly requested files, and whether Marceca's or Livingstone's prints were on BI reports in such files. We also tested for certain other White House employees.¹⁷⁴

The files of the most high-profile persons yielded no significant fingerprint evidence.¹⁷⁵ For example, we initially tested the files of former Republican staffers James A. Baker, Anthony

¹⁷³ Unfortunately, the FBI removed the staples from all of the files that it obtained from the White House in June 1996 so that the contents could be photocopied. Therefore, we were not able to inspect those files.

¹⁷⁴ The fingerprint examination was done by the FBI Laboratory. Some files were examined at the OIC's request, and others at the request of the Senate.

¹⁷⁵ We found some fingerprints of OPS employees on the folders and on administrative documents, such as the Nussbaum request forms. Because the employees may have handled such materials innocently, we do not consider those results significant.

David Blankley and Kenneth Duberstein. We compared fingerprints in those files with exemplars of Marceca, Livingstone, Kennedy and Nussbaum. The only match was of Marceca on Baker's file folder.¹⁷⁶ FBI Laboratory Report, Sept. 6, 1996.

Forty two of Livingstone's fingerprints were in Marceca's file, throughout the FBI's reports. Two of Kennedy's prints were found in one of the FBI's summary memoranda. FBI Lab Report, Sept. 6, 1996. Marceca's fingerprints were found on the file folder and on the first page of one of the FBI's summary memoranda.¹⁷⁷

B. Physical Examination of Documents within Files

1. Staples

The FBI used the original OPS request form as a cover sheet when the FBI responded to a request for previous reports. Individual BIs within the package often were stapled, and the entire package generally was stapled together. At some point after the previous BI reports were provided to OPS, the files and documents that Wetzl did not archive were two-hole punched, and the documents were clipped into the appropriate file folder using a two-prong fastener. In hole-punched files in which staples were removed from the BIs, it is possible that it was done to facilitate punching the holes in the pages, rather than to facilitate photocopying.¹⁷⁸

We were not able to examine the staples in the 406 files that the White House returned to

¹⁷⁶ Livingstone's prints were in the Dale and Brasseux files. That may have occurred when the files were retrieved in 1996. (AL-DC-11420, 11429) Dale's file was retrieved from the archives, and Brasseux's file was never sent to the archives.

¹⁷⁷ Marceca's prints also were found on government forms that he had submitted to OPS.

¹⁷⁸ It also is possible that an FBI employee unstapled and restapled individual packages before sending them to OPS, *e.g.*, if the original staple did not pierce all pages.

the FBI in June 1996. When the FBI received the original 406 files from the White House, FBI personnel, wearing gloves, removed all staples from the files 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. Accordingly, an FBI paralegal then examined all of the original documents and attempted to line up the existing staple holes to determine how many times the documents had been stapled. Stroud OIC-302, 10/17/96, at 1. His 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 paralegal found that documents in 16 of the files contained between four and six sets of staple holes, and documents in the remaining 390 files contained between one and three sets of staple holes. *Id.* The paralegal could not determine whether OPS had removed any staples to facilitate photocopying.¹⁷⁹ After photocopying the files, FBI personnel restapled documents in 135 of the files. R. Poplos, OIC Memorandum, 2/10/97, at 4.

We were able to examine the 303 OPS files that we obtained directly from the White House. In eleven of the files, we found staple holes without staples, indicating that staples were removed by someone at some time. R. Poplos, OIC Memorandum, 11/19/96, at 1-3. The files related to the following persons:

<u>NAME</u>	<u>ORGANIZATION</u>
Wendy Jean Chamberlin	NSC
Michael Bruce Donley	NSC
Arthur Blair Dorminey	NSC

¹⁷⁹ The paralegal noted that even if some of the documents had been stapled multiple times, it was possible that the FBI could have inserted multiple staples before sending the documents to OPS in 1993, either because of a broken staple or a staple that did not penetrate all of the pages. Stroud OIC-302, 6/17/96, at 1.

Nancy Bearg Dyke	NSC
James Kenneth Dyson	NPS
Martha Hodges Goodwin	WHS
Dolores Gorham	WHS
Donald Crandall Johnson	NSC
Daniel Bernard Levin ¹⁸⁰	NSC
Kevin Edward Moley	OGA
Roderick Anthony Moore	NSC

R. Poplos, OIC Memorandum, 11/19/96. The two White House staff files -- Goodwin and Gorham -- contained BIs that were requested in April 1994 and returned in May.¹⁸¹

Two of the files -- Dyke and Moley -- contained handwritten notes by Marceca. These are discussed *infra*.

2. Folded Corners

We examined all of the improper files for evidence of folded corners, such as might be expected had someone photocopied the documents without removing the staples -- or simply if someone had read the reports without removing the staples. Only a few of the files contained pages with folds, and we did not detect any pattern or find a sufficient volume from which to draw an inference that the reports were photocopied without removing the staples.

¹⁸⁰ Levin's file was checked for fingerprints. Marceca's fingerprint was located on the request form he sent to and received back from the FBI, but not on the previous reports.

¹⁸¹ In the Gorham file, a staple was removed from the top right side of the package, but there is an original staple in the top left side. Two of the files -- Dyke and Moley -- contained post-it notes with Marceca's writing. These are discussed *infra*.

IX. MARCECA'S REVIEW OF THE FILES

There is compelling physical evidence that Marceca read the improperly-obtained BI reports and identified derogatory information in them. We found post-it notes, apparently in Marceca's writing,¹⁸² that relate to the substance of the BI reports in eleven of the improperly-obtained files. Three of these notes advert to Republican administration connections (Moley, Dyke and Duberstein). We also found one note advert to Republican administration connections in a properly-obtained file that contained a recent BI and for which there was no new SF-86 (Poneman).¹⁸³ We found post-it notes relating to the substance of the BIs in five other improper files, indicating that Marceca read them (Baughman, Beers, Sittman, Ledsky, Zelikow and Wells). In one other file, someone highlighted a portion of a BI report relating to an investigation by Marceca's CID office (Burson). Other files contain notes written on the Nussbaum request form in Marceca's writing that do not relate to the substance of the BIs and may have related to Marceca's efforts to locate the persons. (Banks ("C&P Gone per Mr. Byson"); Carnes ("Gone"); Dance (last BI date); Daly (last BI date); Esmedia ("Gone per Knuchesky"); Rogers ("Deversified Reporting Deversified" [sic]); Dionne ("Depart of State Detail")).¹⁸⁴ We discuss below each file in which notes were found relating to the person's

¹⁸² Marceca's handwriting is distinctive. Of course, we would need a trained document examiner independently to determine whether Marceca wrote the notes before we pursued any prosecution based on them.

¹⁸³ We examined Poneman's file, although it was not an improper request, because Marceca's computer disk contained a memorandum analyzing the BI report.

¹⁸⁴ Several notes relating to information missing from the Secret Service printouts were found in writing that does not appear to be Marceca's. In six files, notes on the OPS file copy of the Nussbaum request form indicate that the "POB" -- place of birth -- was not available.

(continued...)

background.

A. Moley

Two post-it notes in the file of Kevin Howard Moley suggest that (1) Marceca was under the mistaken impression that the persons whose BI reports he was reviewing were still employed at the White House; (2) Marceca was looking for information about Republican connections; and (3) Marceca was looking for adverse information apart from political affiliation that might present a basis for questioning a person's suitability to serve at the White House.

Moley had worked in the Department of Health and Human Services from 1984 to 1988

¹⁸⁴(...continued)

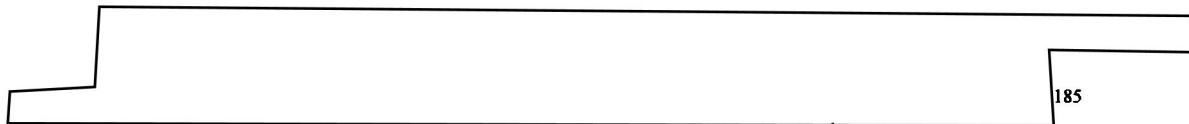
(Avrashov, Beers, Christoff, Chang, Carpendale, Carolina, Carney). One file contains a note stating that the social security number is missing (Skipwith), and another contains a note questioning whether the middle name is misspelled (Bailey). These notes suggest that someone other than Marceca may have typed the request forms.

One file contains a post-it that reads "update" on an original cover letter from the FBI, transmitting to Nussbaum on January 22, 1993, a reinvestigation report ordered by C. Boyden Gray in October 1992. (Toyer). In the attached BI, a piece of a blank post-it note is attached as a tab to a section reporting arrests of a relative of the employee. On March 29, 1993, GSA sent a form memorandum to OPS requesting that they certify that the employee's previous reinvestigation had been completed. On March 30, OPS submitted a Nussbaum form requesting previous reports for the employee, and the FBI responded on April 2 by sending additional copies of the documents that had been provided on January 22. On November 15, 1993, OPS again requested copies of previous reports, and the FBI responded by writing that there was no new information subsequent to the January BI that previously was provided.

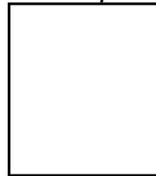
Two files of NPS employees, ordered and received before Marceca arrived at OPS, contain post-it notes that read "inactive." (Kenoyer, Roberts).

Other files contain typed notes, evidently from George Saunders, stating that the person had departed the White House (Becherer, Curry). In both cases, Saunders' notes pre-dated Marceca's requests for previous report. Curry was a Clinton appointee who served as a telephone operator. Her BI was completed and returned to the White House on July 30, 1993, but she left the White House in October 1993. *Her BI report already was in OPS when Marceca ordered it along with the other WHOP personnel.* Becherer left in May, 1993.

and from 1989 to the end of the Bush administration. From 1988 to 1989, he served as Director of Advance for Bush-Quayle '88 and as Director of Events for the 1989 Inaugural. Moley's name appeared on the 6/10/93 list of employees of "Other Government Agencies," although he was listed as inactive in the Secret Service computer. OPS ordered his previous reports from the FBI on August 6, 1996 -- *before Marceca arrived* -- and the FBI responded, sending Moley's previous BI report, on September 22, 1993.



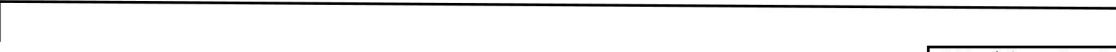
Marceca placed two post-it notes in Moley's file. The first, a 3"x3" note, was found on the top page in the file, a Nussbaum form returned by the FBI with the previous BI on September 22, 1993. The note reads as follows:



D. Fort & R. Poplos, Memorandum to File, 3/17/97. Moley was not an active passholder at the time.

The other post-it note appears on page 21 of Moley's FBI summary report. It is a small

¹⁸⁵ We do not believe that it is necessary to set forth in this report the details of the derogatory information in Moley's file. We note, however, that if the OIC were to consider a prosecution that would require the disclosure of information from improperly-obtained BI reports, we should evaluate the consequences to the innocent persons whose reports Marceca read.

¹⁸⁶  Nothing in the file suggests that Moley was the subject of any ongoing investigation by the OIG.

note (1-1/2" x 2") that reads:

Political

The note appears beside a paragraph in the FD-302 stating that Moley served as an advance man for the Republican National Committee and worked for the 1984 Reagan Bush Presidential Election Committee.¹⁸⁷

B. Dyke

Nancy Bearg Dyke, according to FBI records, worked in the White House as an advisor on national security matters during the Reagan and Bush administrations. Her file contained one post-it note, 3" x 3" in size. Marceca placed the note on the second page of her FBI summary report. It reads as follows:

FYI
Close
To George
Bush --

Nothing in the file reveals that Dyke had any personal or professional relationship with Bush, but her BI reports state that she was employed in the Office of the Vice President as Assistant to the Vice President for National Security Affairs from 1981 to 1982. Her 1989 report states that General Scowcroft had hired Dyke to work for the National Security Council.¹⁸⁸

C. Duberstein

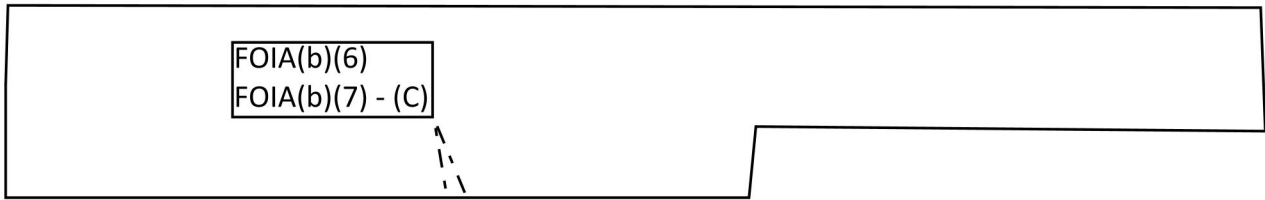
Kenneth Marc Duberstein's file contains one post-it note, size 1-1/2" x 3", which reads:

[Redacted] FOIA(b)(6)
FOIA(b)(7) - (C)

¹⁸⁷ Moley's file was one of the ones from which staples were removed.

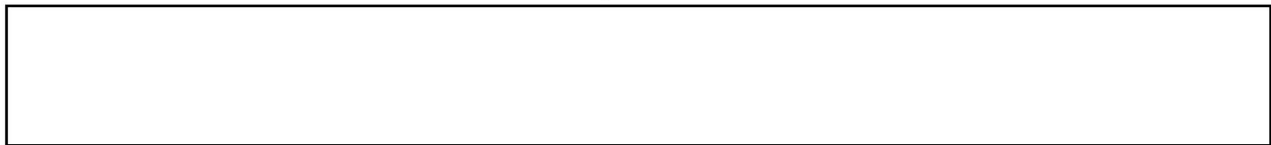
¹⁸⁸ Staples were removed from the FBI reports in Dyke's file.

Marceca placed the note on page 4 of the 1987 FBI summary BI report. That page indicates that



D. Baughman

Julia Harmon Baughman's file contains a note on the Nussbaum form that reads:



E. Sittman

William Frederick Sittman was a special assistant to President Reagan from 1982 to 1985, then vice president of Michael Deaver and Associates from 1985 to 1988, consultant to the RNC in 1988, and vice president of Henry Kissinger & Associates from 1988 to 1989. Sittman's file contains a white post-it note attached to the first page of a 1989 FBI background report. The note reads:

Why
Does he
Stay Here!

The note was attached to the report beside a paragraph that states that Sittman is divorced and resides at an address in Virginia with a female co-tenant.

F. Ledsky

Nelson Charles Ledsky was hired by the State Department in 1986 and detailed to the

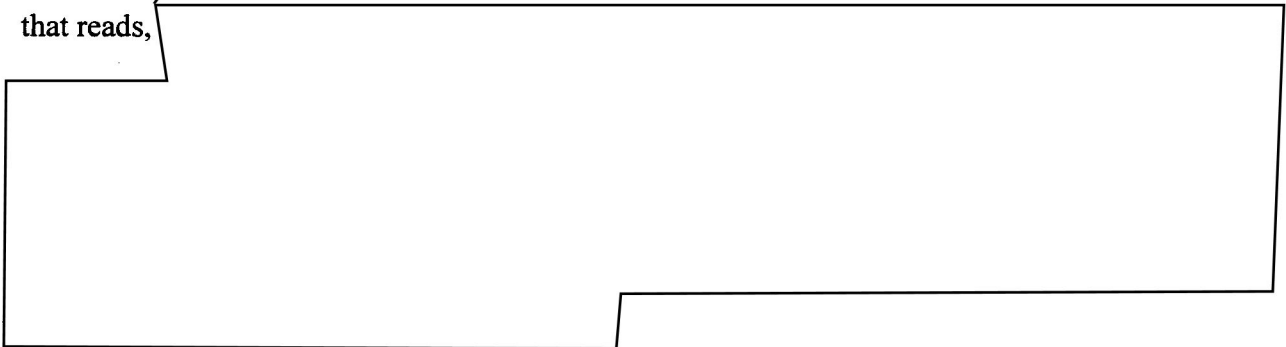
NSC. A post-it note on a one-page FBI supplemental memorandum from 1987 reads:



G. Burson

FOIA(b)(7) - (C)

According to her 1985 BI, Betty Jane Burson was a secretary with the Agency for International Development, detailed to the NSC. On page 3 of Burson's 1985 BI report, someone used a pink highlighter to highlight part of a sentence that reads, "Mrs. BURSON was divorced from WARREN KAY PECK on September 3, 1974." There is additional highlighting on a one-page 1979 FBI memorandum attached to Burson's BI. Someone highlighted part of a sentence that reads,

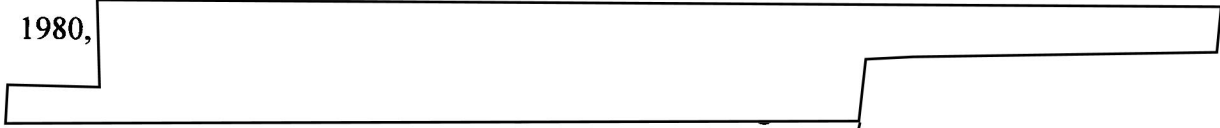


H. Zelikoe

Philip David Zelikoe joined the NSC as Director of European Affairs in 1989. Previously, he was a foreign service officer with the Department of State from 1985 until 1989.

¹⁸⁹ Marceca was an Army CID agent based at Fort Belvoir.

Zelikow's file contains two post-it notes.¹⁹⁰ The first was located on the page 3 of a March 15, 1989 BI report, beside a paragraph stating that after Zelikoe applied for an AUSA position in 1980,



This is
Sloppy
Work!!
This is a 1989 Report¹⁹¹

The note appears to be a criticism of the FBI's work. A second note, on a one-paragraph October 1989 summary memorandum reporting the results of a limited inquiry investigation, states:

There is
no Verification
he received his J.D.

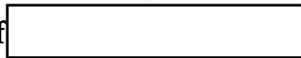
This note appears beside a paragraph that says that information from the Department of State verifies that Zelikow received his J.D. degree in 1981.

I. Wells

Michael Alan Wells was hired by GSA in 1991 as a custodial worker, on detail to the White House. A post-it on Wells' original request form reads:



At pages 5 to 6 of Wells' 1991 summary report, relating to checks of agency records, the report states that Wells had a history of



¹⁹⁰ Zelikoe's name is highlighted in pink highlighter in several places in the file, evidently because it is spelled in different ways.

¹⁹¹ Marceca highlighted the year "1989" in the date stamp on Zelikoe's BI.

J. Toyer

William Eugene Toyer, Jr. was a GSA pipefitter. Toyer's file contains one post-it note that probably was placed in the file before Marceca arrived, and a small blank note that Marceca *may* have placed in the file. The first post-it, which is not in Marceca's writing, says "update." It was found on an original January 22, 1993 cover letter from the FBI, transmitting to Nussbaum a reinvestigation report ordered by C. Boyden Gray in October 1992. In the attached BI report, a piece of a blank post-it note is attached as a tab to a section reporting arrests of a relative of the employee.¹⁹²

K. Poneman

Although Daniel B. Poneman remains a NSC employee and active passholder, we obtained his file because Marceca's computer disk contained a memorandum analyzing Poneman's background report and commenting on his travels to Nicaragua. The memorandum, which lists as the subject "Analysis of Personnel Background (NSC)," contains seven points relating to Poneman's BI and 302s.¹⁹³ Although Poneman was a holdover, his most recent BI was completed on November 12, 1990, within the preceding five-year period, so there was no new SF-86 for Marceca to review.

¹⁹² On March 29, 1993, GSA sent a form memorandum to OPS requesting that they certify that the employee's previous reinvestigation had been completed. On March 30, OPS submitted a Nussbaum form requesting previous reports for the employee, and the FBI responded on April 2 by sending additional copies of the documents that had been provided on January 22. On November 15, 1993, OPS again requested copies of previous reports, and the FBI responded by writing that there was no new information subsequent to the January BI that previously was provided.

¹⁹³ Marceca provided copies of the memorandum to the House Committee, after redacting Poneman's name, and was questioned about it. HCGRO Hearing, 6/26/96, at 304-05.

The file contains a small (1-1/2" x 2") post-it note on page 3 of an FD-302 summarizing interviews of Poneman. The note, which was posted beside a paragraph discussing business trips to Nicaragua, reads:

Oliver
North
operation
?

Someone used pink highlighter on various entries on that page of Poneman's 302, and elsewhere in his file.

X. TAX INFORMATION

There is no evidence that OPS improperly obtained information from the IRS about any of the persons for whom OPS wrongly requested previous FBI reports. Only two of the 709 "improper" files taken into OIC custody contained documents provided to the White House by the Internal Revenue Service. D. Fort OIC Memo, 11/19/96. Each file contained an authorization signed by the taxpayer permitting the release of information to the White House Counsel's Office, and both persons were *Clinton* appointees, not holdovers.¹⁹⁴ In one case, the taxpayer (Margaret V.W. Carpenter) signed the waiver form on February 10, 1993.¹⁹⁵ In the

¹⁹⁴ The authorization form states that the waiver is valid only if received by the IRS within 60 days of the date it is signed.

¹⁹⁵ Although the White House "returned" Carpenter's file to the FBI in 1996, Carpenter actually was a *Clinton* appointee. On December 9, 1992, representatives of the President-elect requested that the FBI conduct a Level III background investigation. The FBI responded with a letter to James Hamilton, Counsel to the Office of the President-elect, on December 23, 1992. The letter enclosed the new BI report and copies of previous BI reports. There are two small post-it notes on the documents provided to the office of the President-elect by the FBI, indicating that someone reviewed them. (One note, beside a reference to

[redacted] FOIA(b)(6)
FOIA(b)(7) - (C)

Carpenter completed a White House "Supplemental Information Sheet for Personnel Action" on February 3, 1993, and OPS stamped it on February 4. On February 4, OPS sent a previous report request to the FBI, requesting a Name Check and indicating that the person was being considered for a White House staff position. (The request form carried the name of *C. Boyden Gray*.) The FBI received the request on February 8 and responded by sending a cover memorandum and copies of the previous BI reports on February 23, 1994. On February 23, the OPS sent a form to the Secret Service Technical Security Division stating that Carpenter was working in Presidential Personnel and requesting a temporary White House pass valid for 90 days.

Carpenter appeared on the 6/10/93 list as a temporary passholder, and Marceca requested her previous reports on December 20, 1993. The FBI did not send any documents in response,
(continued...)

other case, the taxpayer (Dorothy Jane Curry) signed the waiver form on April 23, 1996.¹⁹⁶ In both cases, the IRS responded by sending a "Tax Check Report" to Associate Counsel William Kennedy. *Id.*

It was a routine part of the OPS security review procedures to obtain IRS "tax checks" for permanent White House passholders. The authorization forms specified six questions and authorized the IRS to release information relevant to any of the questions. The Tax Check Report indicated whether the taxpayer had filed timely returns during the past three years,

¹⁹⁵(...continued)

but wrote to OPS stating that an applicant investigation was done in August 1993 and sent to the office of Edgar Bueno. There is no August 1993 report in the OPS file.

Carpenter's file was not archived by Wetzl with the improper files. It was one of the 71 files that the White House gave to the FBI on June 13, 1996, after the White House determined that those persons had departed before OPS requested their reports. The White House stated in its cover letter to the FBI that ten of the files related to Clinton appointees, but the requests were made after the persons had departed the White House.

¹⁹⁶ Curry's file reveals that the White House Switchboard requested a pass for Curry on April 20, 1993. The White House submitted a Nussbaum form to the FBI requesting a Name Check on April 21, 1993. The FBI responded on April 28, indicating that no information was discovered. The file also contains an original, signed SF-86, dated April 23, 1993, and a signed form memorandum authorizing the White House Counsel to request an FBI background investigation. On May 10, OPS requested a temporary 90-day EOB pass from the Technical Security Division.

The White House asked the FBI to conduct a Level II Background investigation by a Nussbaum form dated June 11, 1993, indicating that Curry was being considered for a White House staff position. A note in the file, signed by Curry, indicates that she attended an "EOP Security Briefing" on June 24, 1993. The FBI submitted its completed BI summary report to Nussbaum on July 30, 1993.

A note in the file, dated October 18, 1993, states that Curry was no longer at the White House. Marceca requested Curry's previous reports on December 28, 1993, and the FBI received the request on January 4, 1994. On January 7, 1994, the FBI replied with a note stating that there was no new information in FBI files since the December 1993 investigation. (The file does not contain a December 1993 report.)

whether any negligence penalty had been assessed, and whether there were any criminal tax investigations or civil penalties for fraud under the Internal Revenue laws. (C-599 - 600)

XI. MARI ANDERSON'S RECOLLECTIONS

A. Updated Computer Lists

Mari Anderson recalls talking with Marceca about names that appeared on Secret Service lists on which they did not belong, and remembers obtaining new lists to use in the Update Project. As demonstrated by some of the responses set forth herein, however, Anderson tends to give breezy responses to questions, and when pressed, sometimes lacks a credible basis for her statements.¹⁹⁷ OPS received a number of different types of Secret Service lists, and it is possible

¹⁹⁷ Anderson has very detailed recollections about some unusual things. When asked about the list in an OIC interview, she said that the number "487" came to her mind in connection with the list, perhaps as in a total of 487 names on the list, or perhaps as the date "4/87," or April 1987. Anderson OIC-302, 8/24/96, at 5.

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

(continued...)

that Anderson is confusing other lists with the lists Marceca used for the Update Project.

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

OPS did review lists that contained the names of Bush administration personnel. In fact, it was Livingstone who brought to the attention of the Secret Service, in 1994, that James Baker was still listed in WAVES as a permanent passholder.¹⁹⁸ This led the Secret Service to discover a computer problem that had caused at least 8 records not to transfer from the EPASS system, into which they were entered, to the WAVES system, from which most reports given to OPS were printed. However, we cannot corroborate Anderson's recollection that she provided a corrected list to Marceca for use in the Update Project.

B. The Saturday Meeting

[Redacted]

¹⁹⁸ Livingstone retained a WAVES printout from February 1994 demonstrating that Baker still was active. The Secret Service then determined that as the result of a computer error, changes in status of several persons, including Baker, were not transferred from the E-PASS computer system to the WAVES computer system in August 1993.

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

C. Anderson's Knowledge

In a Senate interview, Anderson made statements suggesting that she knew that the OPS was obtaining reports for persons who had never worked in the Clinton administration.

Anderson SJC Int., 10/1/96, at 159-60.

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

XII. LEGAL ANALYSIS: FALSE STATEMENTS ON THE NUSSBAUM FORMS

Our jurisdictional mandate charges us with determining whether Marceca made false statements in violation of 18 U.S.C. § 1001 when he submitted forms to the FBI requesting previous background reports for persons who no longer required access to the White House,¹⁹⁹ and justifying those requests by stating that the persons were being considered for "access."

The False Statements statute prohibits two distinct offenses: (a) making materially false statements and (b) wrongfully concealing of material facts. As regards the former offense, the defendant must be shown to have made a (1) statement²⁰⁰ (2) which was material,²⁰¹ (3) false,²⁰²

¹⁹⁹ Section 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be [punished].

18 U.S.C. § 1001.

²⁰⁰ A "statement" includes any sort of representation that certain facts are true. *See United States v. Worthington*, 822 F.2d 315 (2d Cir. 1987); *see also United States v. Wales*, 977 F.2d 1323 (9th Cir. 1992) (affirming conviction under Section 1001 where the defendant checked the "no" box on a customs declaration form to deny that he was carrying more than \$10,000).

²⁰¹ The test of materiality is whether the statement was capable of influencing the exercise of a government function. *United States v. Arcadipane*, 41 F.3d 1, 7 (1st Cir. 1994); *United States v. Grizzle*, 933 F.2d 943, 948 (11th Cir. 1991). Materiality is an issue for the jury. *United States v. Gaudin*, 115 S. Ct. 2310, 2314 (1995).

²⁰² False statement violations, "like common law perjury, require proof of actual falsity." *United States v. Diogo*, 320 F.2d 898, 902 (2d Cir. 1963); *see also United States v. Milton*, 8 F.3d 39, 45 (D.C. Cir. 1993).

(4) known by the defendant to be false,²⁰³ and (5) "within the jurisdiction of any department or agency of the United States."²⁰⁴ The forms requesting previous background reports submitted to the FBI satisfy elements 1, 2, 3 and 5. In order to satisfy the fourth element, we would have to prove that, as to one or more particular forms, Marceca knew that the person whose reports he was requesting no longer required access, and therefore that a particular form was false.

The evidence establishes that Marceca must have known that *some* of the persons whose reports he was requesting no longer required access, because he received a substantial number of reports for persons whom he later learned had left the White House. With the exception of inferences that might be drawn from the few prominent names, however, there is no basis to establish that he knew that any *particular* person no longer required access. With regard to the few prominent persons, Marceca would contend either that he did not actually recognize the name (*e.g.*, Blankley), that the name was not uncommon (*e.g.*, Baker), or that he reasonably thought that the person still required access (*e.g.*, Fitzwater).

The evidence that the few requests for persons we recognize as prominent were consistent with the procedures that Marceca was following, along with the absence of evidence that Marceca did anything unusual with the information in the BI reports after he obtained them, likely would give rise to reasonable doubt about his state of knowledge when ordering those files. Marceca would credibly contend that he believed that the Secret Service computer system carried

²⁰³ The government must prove beyond a reasonable doubt "that the statement was made with knowledge of its falsity." *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.").

²⁰⁴ The applicable definitions of the terms "department" and "agency" are contained in 18 U.S.C. § 6.

each of the persons for whom he requested previous BI reports as an active passholder, and that he ordered each report with the intent of carrying out his assignment to obtain a previous BI for each active passholder.

The knowledge element may be satisfied, however, by evidence beyond a reasonable doubt that the defendant was willfully blind to the facts, *i.e.*, that he demonstrated "a reckless disregard of the truth, with a conscious purpose to avoid learning the truth." *United States v. London*, 66 F.3d 1227, 1242 (1st Cir. 1995).²⁰⁵ This requires more than a mere showing that the defendant "should have known" that the statement was false, or that he was negligent in failing to inquire, because inadvertence, mistake and carelessness do not constitute knowledge. *See United States v. Bussey*, 942 F.2d 1241, 1246 (8th Cir. 1991) (affirming jury instruction that "a defendant's knowledge of a fact may be inferred from willful blindness to the existence of a fact. . . . A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge."); *United States v. Schaffer*, 600 F.2d 1120, 1122 (5th Cir. 1979). ("[T]he knowledge

²⁰⁵ *See also United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993) (finding reckless indifference or deliberate avoidance sufficient to satisfy § 1001's scienter requirement); *United States v. Hester*, 880 F.2d 799, 802 (4th Cir. 1989) (rejecting argument that the "scienter element of the false statement statute, as expressed in the word 'knowingly,' requires proof of 'actual' knowledge" and finding it sufficient that defendant acted with "deliberate disregard for truth or falsity with a conscious purpose to avoid learning the truth"); *United States v. White*, 765 F.2d 1469, 1481-82 (11th Cir. 1985) ("avowed failure to [check figures] evidenced a reckless disregard of the truth, with a conscious purpose to avoid learning the truth. Such action is sufficient to show that a false statement was made knowingly and willfully."); *United States v. Gold*, 743 F.2d 800, 822 (11th Cir. 1984) ("the record was replete with testimony that suggested indifference by defendants at best and deliberate criminality at worst" where defendants ignored warnings); *United States v. Tamargo*, 637 F.2d 346, 351 (5th Cir. Unit B 1981) ("a conviction under § 1001 requires proof that the defendant had the specific intent to make a false or fraudulent statement deliberately or at least with reckless disregard of the truth and with the purpose to avoid learning the truth.").

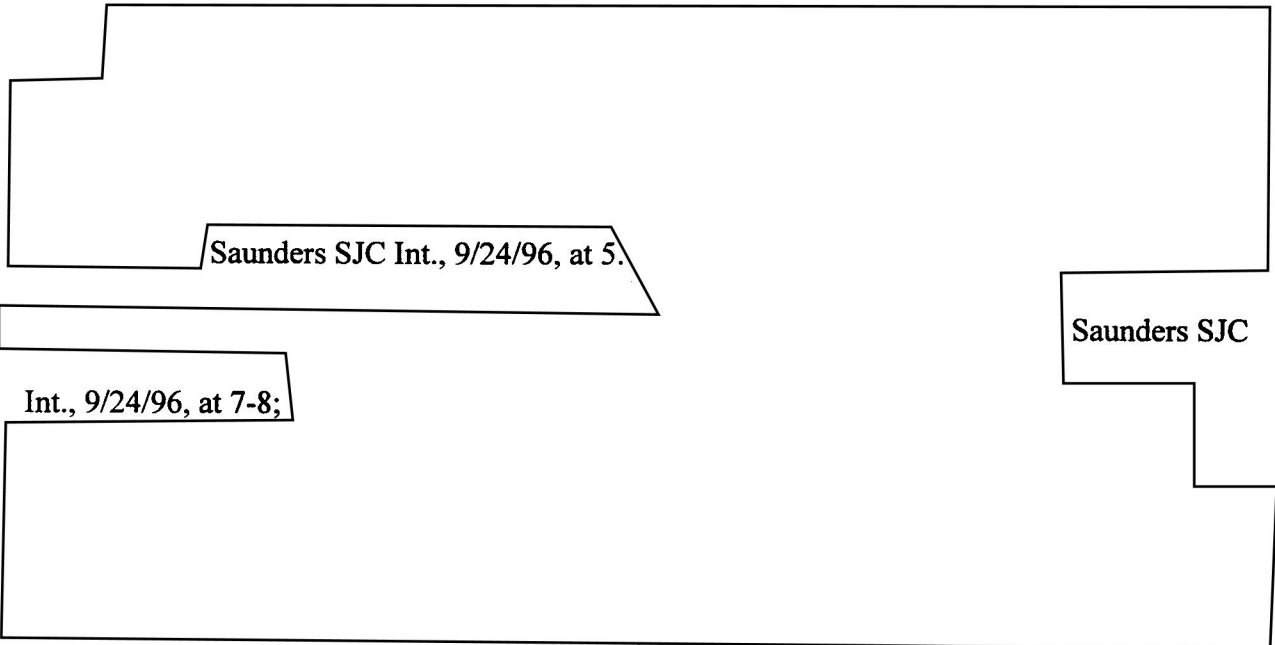
requirement is satisfied by proof of a conscious purpose to avoid learning the truth"); *United States v. Evans*, 559 F.2d 244, 246 (5th Cir. 1977) (affirming jury instruction that "a person who makes a statement with reckless disregard of the truthfulness of the statement and with a conscious purpose to avoid learning the truthfulness of the statement, is deemed to have knowledge of this statement and its truthfulness or lack thereof.")

A prosecution predicated on the theory that Marceca was willfully blind to the falsity of one or more of the forms would face several obstacles. Most significantly, the lists *were* misleading, and might cause a reasonable person wrongly to assume that the persons listed therein were active passholders. Gemmell, the experienced employee who transferred the lists to Marceca, was under the mistaken impression that the lists were accurate. Wetzl, who worked alongside Marceca throughout the Update Project, believes that he relied on outdated lists and innocently ordered the reports. Anderson, the best witness to establish Marceca's awareness that the lists contained erroneous information, recalls that it was agreed that Marceca should continue using the lists because there was no readily available method to determine which persons still required access.

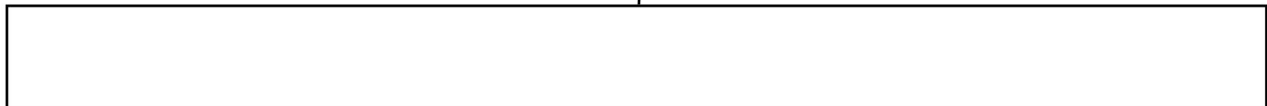
Most significantly, in the absence of any evidence that the wrongly-obtained BI reports were used in any improper way after OPS received them, there would be no evidence that Marceca had a motive intentionally to obtain the unneeded reports, and therefore no basis from which to infer that he would intentionally have avoided learning that they were unnecessary.

XIII. FILE CHECK-OUT LOG

Another issue that we examined was a gap in a log in which OPS kept track of BI reports that were taken out of the OPS office. The log was maintained in a three-ring binder in the OPS office.²⁰⁶ The log attracted our attention because there are no entries between March 29, 1994 and September 21, 1994. *The log gap is a source of suspicion because it permits the inference that someone removed the missing pages to conceal that BIs of former White House employees were removed from the OPS office for some nefarious purpose at some point before Wetzl archived them.*²⁰⁷



²⁰⁷ There is also the theoretical possibility that the log was stopped in 1994 for the purpose of concealing that certain BIs were to be removed from the office for an improper reason. This is unlikely, because an OPS employee could remove a BI at anytime without bothering to log it out, and had they stopped keeping the log for this reason, there would be no reason to start it again.



²⁰⁹ There was no similar checkout system at the beginning of the Clinton Administration. Saunders SJC Int., 9/24/96, at 5.

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Anderson asserts that she maintained the log faithfully at least until June 1994 -- three months before her departure from the White House. *The physical evidence and the recollections of other OPS employees, however, suggest that the log fell into disuse after March 1994 and was revived only after Wetzl took over as Executive Assistant in September.*

The log begins with an entry on July 19, 1993. The log was maintained on a photocopied form with columns for the person's name, the name of the person or agency to whom it was checked out, the date it was released and the date it was returned. (OPS-1184) Before the gap, the pages had thirty rows and the columns were titled "Name," "Agency," "Date Rec'd," and "Date Returned." Notwithstanding the titles, the "Agency" column generally has only the name of the person who removed the BI, and the date columns contain the date the document was removed and the date it was returned. The final entry before the gap is on the second to last line on the fourth page. After the gap, there is one page using the old format, then a new form with twenty-two rows and columns titled "Subject Name," "Released To," "Date Released," and "Date Returned." (OPS-1189)

The most compelling evidence that the log was not used between March and September 1994 is the absence of any entries in the last column of the fourth page indicating that BIs taken out in March were ever returned to OPS. (OPS-1187) Most of the BIs were checked out by George Saunders. On the first two pages of the log, virtually every line contains an entry indicating that the BI was returned, and Saunders initialed the last column in most instances. (OPS 1184 - 85) On the third page, although virtually every file was checked out to Saunders, only 9 rows contain entries indicating that the files were returned. (OPS 1186) On the fourth page, there are no entries in the last column. OPS 1187. For those BIs checked out by Saunders

both before and after the gap, however, the entries in the fourth column indicate that he generally returned them within a few weeks of removing them from the office. If Anderson were correct in her recollection that she maintained the log through June, it seems likely that some of the BIs checked out by Saunders in March would have been returned before then. Furthermore, the last row on the fourth page is blank, suggesting that the log fell into disuse before the page was completed.²¹¹

Saunders recalls that there was a period of time when he took out and returned files without making any entries in the log. Saunders SJC I/V, 9/24/96, at 14. During that period, he does not recall anyone in OPS mentioning that any entry should be made in the log. *Id.*

Saunders was not asked to initial or date any entries in the log, but he didn't question why:

All I can recall, I can't put a date to it, that there was a period of time when I would go in and receive a file, the log wasn't mentioned, I didn't mention it, I took the files, returned them. There was no log involved. There was a period of time, because as I look back on it, it's something I might have questions, but I didn't at the time, I guess because it wasn't my responsibility. My responsibility was to get the file, do the work, and get them back.

Saunders SJC Int., 9/24/96, at 14. Saunders does not know for certain that no log was kept, but he recalls that at some point, after he had not been paying attention to the log for some time, Livingstone told him to start initialing the log again.²¹² *Id.* at 16.

[REDACTED]

[REDACTED]

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²¹² Ed Hughes also recalled that there was a period of time during which the log was not kept. Hughes SJC Int., 9/19/96, at 9.

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XIV. POSSIBLE FALSE STATEMENTS IN 1996

Some of Marceca's testimony about his work in OPS -- to the grand jury and to the Congress -- was misleading at best. Marceca's attorneys contend that he is unintelligent and inarticulate, and that any erroneous statements he made about ordering the previous reports do not reflect any deceptive intent. Furthermore, they point out that the questions to which he gave misleading responses were sometimes lacking in precision. We must evaluate the suspect statements in the context of other testimony given by the witness before reaching a conclusion about whether the statements were false, whether they were willfully false and material, and whether they warrant prosecution.

In some instances, discrete areas of Marceca's testimony that appear to be false can be explained upon reading the entire section of testimony dealing with the issue. In other instances, statements taken in isolation appear to be false, but Marceca made more forthcoming statements elsewhere during the same testimony, suggesting that he had no intent to conceal the truth. Whether Marceca acknowledges the truth at another point in his testimony, or on a prior occasion, is relevant to determining his intent in the facially false statement.²¹³

²¹³ Here is a striking example of a materially misleading response by Marceca that presumably was not intentional:

Mr. Marceca. When I walked in the first day in the White House, there were a number of file folders already prepared and these NSC folders were prepared and in the vault. We might be able to verify that here today with people at the table. What I did was I ordered the previous investigations, as I understood I was supposed to do for all folks who had files.

Mr. Clinger. *Did you take those files home with you at any time?*

(continued...)

With these considerations in mind, there are three categories of testimony by Marceca that warrant scrutiny:

Issue 1

Whether Marceca knew that the lists were inaccurate and that he was obtaining files for persons who were not employed by the Clinton White House, and if so, what action he took in response.

Summary of Findings

Marceca repeatedly testified that he had no reason to suspect that the list was inaccurate. However, he acknowledged at other points that he learned, after ordering their previous reports, that some of the persons on the list had left the White House. Also, he testified that he had changed his approach to the Update Project at some point, when he realized that the method he was using was not efficient.

Marceca's facially contradictory statements about whether he realized the list was not accurate can be harmonized if he (a) believed that each person on the lists was reflected in the Secret Service computer as an active passholder, *i.e.*, that the lists accurately reflected Secret Service records about who had authorized access, but (b) found that many of the employees on the lists had departed, *i.e.*, that the lists contained names of persons who no longer needed access.

The evidence suggests that Marceca's testimony about having changed his approach to the Update Project was false.

Issue 2

Whether Marceca read the substance of the previous reports.

Summary of Findings

Marceca's testimony about whether he read the files for content was inconsistent. There were various points at which he said that he did not read any file for content

(...continued)

Mr. Marceca. Yes, sir. I had a CID computer. *I took them home every day.*

Mr. Clinger. There was earlier testimony that none of these ever left the White House?

Mr. Marceca. I never took files home. *I took the computer disk home.*

HCGRO Hearing, 6/26/96, at 96-97 (emphasis added).

unless he determined that the person was still at the White House and needed an updated background investigation. However, Marceca acknowledged at several points that he reviewed all reports. He also said that he would have to read the reports to determine the White House office in which the person might be employed.

At the House public hearing, both Wetzl and Livingstone testified that Marceca reviewed previous reports for content, although they were not closely questioned about which files he reviewed. Marceca, who was sitting at the table with them, was not asked directly whether he had reviewed *all* the previous reports for content; instead, questioning focused on which reports he had passed on to Livingstone.

Issue 3

Whether Marceca passed on improperly-obtained files to Livingstone.

Summary of Findings

Marceca testified that he passed on to Livingstone only three files that contained derogatory information. We fingerprinted the jackets and contents of the files of the most high-profile persons and found no prints of Livingstone in the files of Anthony Blankley, James Baker, Kenneth Duberstein, or Marlin Fitzwater.

A. Marceca's Testimony About Whether He Knew that the Secret Service Lists were Inaccurate

In a *Washington Post* article on June 8, 1996, Marceca is described as saying that he ordered reports based on the Secret Service's weekly list of passholders. John Harris, "White House Admits Having Background Files," *Wash. Post*, June 8, 1996, at A-1. Marceca is quoted as saying, "I worked off the Secret Service list I didn't know who these people were, I just processed names that were on the access list." *Id.* (In some of his testimony, Marceca similarly confuses the Update Project, which involved only permanent passholders, with the "access list," which held the names of persons who did *not* have passes. Monitoring the WAVES access lists - - on which the Clinton administration placed thousands of names -- was a significant function of OPS, but OPS requested only a limited "name check" inquiry before placing a person on the

access list.) The story further reports that Marceca believed that many Republicans from the previous administration continued to hold White House passes in the Clinton administration, so he would not have concluded that the list was erroneous if he had noticed the names of prominent Republicans.

We have determined that Marceca learned that the Secret Service lists included the names of persons who no longer needed access to the White House,²¹⁴ although we cannot establish that he ordered any report if he knew *in advance* that the person was gone.²¹⁵ One of the issues raised by Marceca's testimony is whether the evidence that Marceca knew that many of the people on the list were gone is inconsistent with his testimony that he never realized that the list was faulty.

There is substantial evidence that Marceca learned that the lists contained the names of persons who no longer *needed* access because they had departed the White House many years before.²¹⁶ But we have no direct evidence that Marceca ever realized that the lists were not what

²¹⁴ Marceca did not order reports for some persons on the WHOP list whose names he must have recognized, such as Jane Dannenhauer and George Bush. Marceca's memoranda to various agencies also reveal that he knew, after obtaining previous reports, that some of the persons would be gone. His memorandum to GSA stated that he was including names of "current and former employees," asked the recipient to provide the "current status" of each person, and asked for the date of separation for those persons who had "left the White House." (AL-DC-12916) Marceca's memorandum to NSC asks for the status of each person on the list, and for the date of separation for those who have left NSC. (AL-DC-12978)

²¹⁵ The first group Marceca ordered was NSC. Before ordering the reports, he wrote to the NSC requesting biographical information about certain persons for whom information was missing on the Secret Service list. (AL-DC-12977) The NSC responded by stating that most of the people were gone.

²¹⁶ One might conclude that Marceca should have realized that the lists contained inactive passholders when he learned that many of the persons on the list had departed the White House long before the list was printed. While there is evidence from which Marceca could have drawn such an inference, there is no evidence that he ever did.

Gemmell erroneously believed them to be -- lists of persons who were recorded as active passholders *on the Secret Service computer*.

It was generally understood, by both OPS and Secret Service employees, that the Secret Service did not automatically remove employees of previous administrations from active status. Stanley OIC-302, 7/30/96, at 2; Wetzl OIC-302, 8/8/96, at 7. Hence, there always were "incorrect" entries on the Secret Service lists, because the lists included names of persons who had left the White House, but who, for whatever reason, were still reported in the Secret Service computer as active passholders. As a result, proving that Marceca realized that some of the persons on the lists had departed does not prove that he knew that the lists were fundamentally flawed. This could be shown directly if he somehow learned of the error, or circumstantially if the volume of persons who had departed was so large that Marceca must have recognized the error.²¹⁷

If Marceca had realized that the lists included both active and inactive passholders -- *i.e.*, if he came to realize that the lists were not what Gemmell had believed them to be -- then his testimony that he never realized that the lists were inaccurate would be false. For the reasons set forth above, however, Marceca's testimony that he believed that the lists were accurate is not necessarily inconsistent with the evidence that he realized that they contained the names of many persons who no longer were employed at the White House.

1. Marceca's June 9, 1996 Declaration

In the declaration he provided to Livingstone's attorney on June 9, 1996, Marceca gave

²¹⁷ According to a memo Marceca received back from the NSC, most of the persons who needed five-year updates had left the White House.

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. . . .

Marceca Declaration, 6/9/96, at 2.

2. Marceca's June 11, 1996 Grand Jury Testimony

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3. Marceca's June 18, 1996 House Deposition

In his June 18, 1996 House deposition, Marceca initially testified that he never realized that the list he was using was faulty:

Q Did there come a time when you were made aware that some of the requested -- that there were problems with some of the information that was being requested of the FBI?

A I don't know what you mean, sir.

Q It's your understanding, *it was your understanding at the time that you were working on the update project that every person on the list was, every person on the list from which you were working was properly included on those lists; is that correct?*

A *That's correct.*

Q All right. *Did there come a time when you found out that there were people who were not properly on those lists?*

A *Not to my knowledge, from the time I left, no.*

Q From the time you left?

A To the time I left, no.

Marceca HCGRO Dep., 6/18/96, at 73 (emphasis added).

Although Marceca had stated that he never realized that "there were people who were not properly on those lists," he later testified at length -- during the same proceeding -- about how he avoided ordering reports of persons who had departed but whose names were on the list. *This*

suggests that Marceca's testimony that the lists were "proper" was not, in his mind, inconsistent with his testimony that he realized that they contained the names of persons who had departed.

Marceca also testified that he took steps to avoid ordering reports for persons who had departed:

Q Did you perform any activity in order to assure that the names on those lists were current?

A Yes, I did.

Q Okay. What did you do?

A I would type up a list of names of -- by like mid-December, I was not progressing very quickly down the alphabet and there was a number of names that were still there, and, as I recall, I was early into the alphabet, and so other than the SF-86, the occasional SF-86 that would check it off. When I say "occasional," that may be the wrong term but the SF-86s I went through.

But the overall project looked like it was not being accomplished very well. So I began to make lists of names, maybe a dozen names on a sheet of paper. *Generally, I typed those up on the typewriter and I started to systematically circulate those to various offices in the White House, okay? Such as GSA, the grounds, telephone company, and I asked those folks to tell me if those people are here, or if they have gone. Okay?*²¹⁸ And I would get those -- I would get -- I would then go back the next week and some of those lists would say, oh, one name is on here and the rest of them we don't know anything about. So that one name that was on there, I would then immediately take that file, that name, and I would order up -- I'd look in the file to find out if there was a file. If there was no file, I would immediately order up their SBI, Okay?

Now what that told me, I found a person who is definitely a holdover. In some cases those folks, the GSA would tell me this person is still here, but these people with GSA, two

²¹⁸ There is no evidence that Marceca ever contacted any of these organizations *before* ordering previous reports for their employees. To the contrary, the evidence proves that Marceca consulted them only *after* ordering the previous BIs.

or three people with GSA left in '87 and they are no longer here. *So I would go back to the file then and I would check off the list and I would not call for an SBI [secret background investigation] because I knew they were not there. Okay?*²¹⁹

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.

Marceca HCGRO Dep., 6/18/96, at 99-100 (emphasis added). *We have found no evidence to corroborate Marceca's testimony that he requested the BI only "if all else failed."* In fact, the evidence shows that ordering the BI generally was a first step, not a step of last resort as suggested by Marceca's testimony.

Subsequently, Marceca reiterated that he did not question whether the list was a list of active passholders:

Q Is it true that that didn't mean that at the time you believed Marlin Fitzwater one way or the other had access; is that true?

A *I believed that everybody on that list had legitimate access unless I could establish that they were no longer on the access list.*

Q Do you recall ever having those thoughts at the time, though, that you were looking at that list while you were working in the White House Travel Office in connection with any name on that list?

A *I had no reason to suspect anything other than they were legitimate pass holders or had access to the White House.*

Q And I will leave from the subject, but one final question about that. Was there any name on that list that gave you any pause or made you hesitate or stop and think about the name and whether they had

²¹⁹ *The evidence reveals that this did not happen.* Marceca ordered previous reports of GSA employees directly from the Secret Service computer report. Marceca describes the process that he *should* have used; not the process he actually used.

access?

A Not that I can recall.

Marceca HCGRO Dep., 6/18/96, at 113-14.

Shortly thereafter, Marceca again acknowledged that he knew that he had obtained files of persons who no longer were at the White House:

A I would look -- I would look at the SBI, and it would generally describe, hey, you know, this person worked at the Office of the Vice President, okay? Well, that triggers immediately to me the Office of Vice President, and that was done in 1989, that unless this person has been placed in another position, which a lot of them were, that it is likely that this person was not here. So I would -- I would make every attempt to find out if this was a person that was here.

Now, if I found that the person was still here, and their investigation was within the last five years, this thing went in the folder and nothing more was done about it.

Q Okay.

A *If I found that they were gone, okay, I now had an SBI on somebody that was gone, and in the dead file it went.*

Q Where was the dead file?

A In the file rack there was a folder, there was a file there for dead files.

Q And that was where you put all SBIs that you would review and find that they were not currently at the White House?

A That they were gone.

Q Did they -- did the SBI go into a folder?

A Oh, yes, because I ordered it with a -- I ordered it with this -- this was in the folder, the copy was in the folder. When the SBI came back, I reviewed it. I would place on the folder the date of the last SBI. So immediately, if you looked at the folder, I knew when the

next SBI was due, okay?

Now, once I identified clearly that the person was gone, then it would go in the dead file, okay? It was done.

Marceca HCGRO Dep., 6/18/96, at 118-20 (emphasis added).

4. Marceca's Testimony at the June 26, 1996 House Hearing

At the HCGRO hearing, Marceca initially maintained that he did not know that list was erroneous:

Mr. Peterson. So when you were going through this list, then, you didn't see any names that you thought looked out of the ordinary? It just seemed like usual?

Mr. Marceca. At that time, sir, no one stood out in my duty.

Mr. Peterson. And so these press accounts that talks about there were all these obvious names on there, at least to you this wasn't obvious? This was a list of people that you were told to check out and you were just going through and doing your job?

Mr. Marceca. Yes, Sir.

Long after the fact, when the files were collected and you put them all in a row, then it looks like something else. 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.

HCGRO Hearing, 6/26/96, at 162-63 (emphasis added).

Subsequently, however, Marceca gave testimony that suggests that he did not blindly order files from the lists:

Mr. Barrett. Mr. Marceca, one of the mysteries to me is this A-to-G mystery. Can you shed some light on the A-to-G mystery?

Mr. Marceca. Yes, sir. I went through the update list department by department, and near as I recall, near the end of that list was staff, I guess it is

because it was "S," and I was working on -- I was gleaning and scrubbing, so to speak, everything that was on that list that I believed needed to have access, needed access to the White House. So I was going down that list and trying to make sure that, one, they were still at the White House, and two, that I didn't prevent them from coming into the White House in case of an emergency.²²⁰

HCGRO Hearing, 6/26/96, at 193. It is not clear in the above excerpt whether Marceca was talking about "gleaning and scrubbing" the list *before* or *after* ordering the previous reports. It is possible that he considered requesting the BIs to be *part* of the "gleaning and scrubbing" process, because he thought he might be able to locate persons based on information in their previous BIs. His concern about doing something that might "prevent them from coming into the White House in case of an emergency," in that case, could represent a legitimate concern that if he failed to locate a person and order a re-investigation, and the person consequently was dropped from active status in the Secret Service computer system, then the person would be turned away at the White House gates if the person ever tried to gain access.

Later in the hearing, Marceca expressed in a single response both his belief in the accuracy of the list and his realization that persons on the list were gone:

- Mr. 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.
- Mr. 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*

²²⁰ We have not found any evidence that Marceca played a role in rendering any pass inactive, as this excerpt suggests.

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.

HCGRO Hearing, 6/26/96, at 284.

Finally, Marceca testified that at some point he *did* realize there were "problems" with the list he was using, and he changed his method:

Mr. Marceca. I had what I believed was a master access list.

Mr. 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.*

HCGRO Hearing, 6/26/96, at 285-86. We have found no evidence to support Marceca's assertion that he "changed" his approach to updating in response to identifying problems with the list. He did send memoranda to various White House offices inquiring whether persons were still employed, but it was only *after* he had ordered their background investigation reports.

B. Marceca's Testimony about Whether he Read the Substance of Previous Background Investigation Reports

Marceca gave varying explanations about whether he read every BI report that he received. On June 8, 1996, the Washington Post reported as follows:

Anthony Marceca, a civilian investigator for the Army, said he requested the FBI files after he was brought to the White House to help clear up a backlog of security work. He said the Secret Service's weekly list of pass-holders formed the basis for his requests to the FBI.

"I worked off the Secret Service list," Marceca said. "I didn't know who these people were, I just processed names that were on the access list."

Marceca said he believes many Republicans from previous administrations had valid White House passes in the early days of the Clinton administration. Therefore, he thought it was appropriate to secure their background checks from the FBI.

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.

John Harris, "White House Admits Having Background Files," *Wash. Post*, June 8, 1996, at A-1.

Subsequent stories repeated Marceca's assertion that he had reviewed the files in a search for "derogatory information."

1. Marceca's June 9, 1996 Declaration

In the declaration that Marceca provided to Livingstone's attorney on June 9, 1996, Marceca acknowledges that he reviewed the BIs for substance -- issues that went to suitability -- but implies that he was looking primarily for "inconsistencies" between the previous report and the SF-86, which would exist only for legitimate holdover employees. The first sentence in the following excerpt is consistent with our finding that Marceca reviewed each previous report when it arrived at OPS, before he determined whether the person was still in need of access to the White House. However, the second sentence jumps ahead to a much later stage in the process, implying that he only read previous reports after obtaining new SF-86 forms:

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

Marceca Declaration, 6/9/96, at 3 (emphasis added).²²¹ The first sentence of the above excerpt accurately discloses that Marceca reviewed the reports when they arrived at OPS. However, the juxtaposition with the sentence that follows creates the false impression that Marceca reviewed the reports only once -- after he obtained a new SF-86 from the person -- implying that he did not read the reports of persons who had left the White House, since they did not complete new SF-86s. Following the above excerpt, the declaration proceeds to state that Marceca gave files to Livingstone only if there were inconsistencies, reinforcing the impression that Marceca reviewed the reports only *after* the employee provided a new SF-86.

2. Marceca's June 10, 1996 OIC-302

The OIC-302 of Marceca's June 10, 1996 interview suggests that he acknowledged that he read all of the reports:

The FBI would send back their background reports to MARCECA. *Once MARCECA received the background reports from the FBI, he would review them for derogatory information.* Gemmell was the Security Office employee who told him to look for derogatory information. Within the background report, MARCECA would look for the date that the last background report had been conducted, so that he could order another one if it had been longer than five years.

²²¹ The declaration is signed under penalty of perjury, citing 28 U.S.C. § 1746(2), but there was no legal requirement to make the statement, a prerequisite to a perjury prosecution under 18 U.S.C. § 1621(2). *Cf. United States v. Reinecke*, 524 F.2d 435, 436 (D.C. Cir. 1975) (perjury does not lie for false statement before tribunal that was not competent).

Marceca OIC-302, 6/10/96, at 2.²²²

3. Marceca's June 11, 1996 Grand Jury Testimony

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²²² Nancy Gemmell said that during the previous administration, no OPS employee other than Dannenhauer read BI reports. Gemmell OIC-302, 5/8/97, at 5-6. Gemmell realized that Livingstone did not desire to remain as Director of OPS, and she thought that Marceca might take over the leadership job. *Id.* at 3. 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 OIC-302, 5/6/97, at 5.

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4. Marceca's June 18, 1996 House Deposition

Marceca's most direct testimony about whether he read the substance of the previous BI reports was in his June 18 deposition by House staffers. On several occasions, Marceca again described the Update Project process without mentioning that he read the substance of the reports. The overall impression he leaves when he gives a narrative of the Update Project is that he was interested only in the date of the last investigation and the office in which the person worked. He does not disclose that he made note of derogatory information even before he confirmed that the person was still at the White House. However, he does acknowledge that he read the reports in an effort to determine where the person worked, which would require more detailed reading than merely looking at the date on the top of the first page:

Q And once the files came back from the FBI, what did you do with those?

A Okay. When the FBI -- if there was a background investigation from the FBI, I looked at the background investigation to find out what the date, the last date of investigation was.

Q Right.

A Once I determined the last date of the investigation, I put that on the file folder--

Q Right.

A -- in pencil. The purpose of that is that was a tickler for the person's need for the next update. They were required every 5 years.

Q Right. Right.

A In that background SBI from the FBI was generally the office that the individual worked in at the White House. We had nothing to tell us what office they worked in.

Q Right.

A *I reviewed the background investigation to find out where the last office that they worked in. Some of the SBIs came back and I couldn't even tell, they were so generic, that I couldn't even tell where they worked. They just said "White House staff."*

Q Right. Were there occasions in which you had to refer files to Mr. Livingstone?

A There were what I recall was approximately three times that I did.²²⁷

Q And please describe the circumstances in which you did that.

A Okay. I had gotten the SBIs back from the FBI and I had in my hand a SF-86, which is a job application. This was -- everybody that needed a new SBI had to fill out a SF-86. If they started to work at the White House, they needed one. If -- if it was just their first day at the White House and no background, they needed one. Okay? If they were a holdover, they needed one if it was time for a reinvestigation.

Continuing with that, there were the three instances that I recall that before I sent out the SF-86 to the FBI to do a new reinvestigation or to do an investigation, I spotted some problems and I tried to correct those problems, as I was supposed to do, with the person. When those problems couldn't be corrected, I turned those files over to Mr. Livingstone.

Q What were those problems? Generically?

A Well, one of them -- they were -- let's term them personnel -- one had a personnel problem. One had I believe an arrest in their record that was in the SBI, and not on their SF-86. And I do not recall exactly what the other one was. But it

²²⁷ Marceca proceeds at this point to talk about files for which he had an SF-86. In essence, he is contending that *he gave files to Livingstone only if there was an SF-86*, not denying that he did reports before he received an SF-86.

was a matter that I gave to Mr. Livingstone.

Q And do you know how those issues were resolved by Mr. Livingstone?

A I don't know how he resolved that issue, but I know that Mr. George Saunders gave me the files back with the problem corrected.

Marceca HCGRO Dep., 6/18/96, at 70-72 (emphasis added).

Marceca later testified about what he did with reports that he received from the FBI. In the following passage, he does state, in passing, that he "would look at" the BIs, and that he "reviewed" each BI when it arrived in the office:

Q Okay. When the SBIs came back from the Nussbaum forms where you check "copy of previous report," did you read those previous report --

A The SBIs?

Q The SBIs.

A When previous reports came back on my name checks,²²⁸ I would get those SBIs and look for the office, and *I would look for the last date of investigation.*

Q What do you mean by "office"?

A I would look -- *I would look at the SBI, and it would generally describe, hey, you know, this person worked at the Office of the Vice President, okay? Well, that triggers immediately to me the Office of Vice President, and that was done in 1989, that unless this person has been placed in another position, which a lot of them were, that it is likely that this person was not here. So I would -- I would make every attempt to find out if this was a person that was here.*

²²⁸ Marceca evidently was referring to previous reports, not name checks. When OPS requested a name check from the FBI and a previous report existed, however, the FBI provided a copy of the previous report along with the name check response.

Susan Thomases

Now, if I found that the person was still here, and their investigation was within the last five years, this thing went in the folder and *nothing more was done about it.*

big question

[Handwritten scribbles]

[Handwritten scribbles]

Q Okay.

A If I found that they were gone, okay, I now had an SBI on somebody that was gone, and *in the dead file it went.*

Q Where was the dead file?

A In the file rack there was a folder, there was a file there for dead files.

Q And that was where you put all SBIs that you would review and find that they were not currently at the White House?

A That they were gone.

Q Did they -- did the SBI go into a folder?

A Oh, yes, because I ordered it with a -- I ordered it with this -- this was in the folder, the copy was in the folder. *When the SBI came back, I reviewed it.*²²⁹ I would place on the folder the date of the last SBI. So immediately, if you looked at the folder, I knew when the next SBI was due, okay?

Now, once I identified clearly that the person was gone, then it would go in the dead file, okay? It was done.

Marceca HCGRO Dep., 6/18/96, at 118-19 (emphasis added). In this passage, Marceca stated that he reviewed the BIs before he determined whether the person was still at the White House. At this point, however, the questioning had not yet focused on what he would look for when he reviewed the reports.

²²⁹ At this point, Marceca states that he "reviewed" every report. *This is an extremely significant portion of Marceca's testimony, because it provides him a possible defense against any charge that he falsely denied have read the reports for substance in his responses to questions later in the deposition.*

[Handwritten scribbles]

Shortly thereafter, the questioning turned to focus exclusively on the files of persons who had departed the White House. In the following testimony, the questioning begins to focus on precisely what Marceca did with the files before putting them in the "dead file":

Q When you left, you said you put files in a dead file. Had you created --how much of that drawer had you filled, if you know?

A Probably about half of it.

Q Okay. And had you looked at all of those background -- those BSIs [sic] before putting them in the dead --

A *I looked at them for previous investigations, the date of previous investigation, and I looked at them for the office that they would work in so that I could identify who should get a new SF-86.*

Q Okay. And while you were looking at them for that information, did any name such as the name on the list for Deposition Exhibit Number 11 stand out at that time, such as a Tony Blankley, a James Baker, a Marlin Fitzwater, a Kenneth Duberstein?

A At that time, no, and I didn't even see -- I was looking for that Blankley or Blakely or whatever his name is, and I can't even find it now.

Marceca HCGRO Dep., 6/18/96, at 126 (emphasis added). He gave an incomplete answer about what he looked for when he read the reports, but the response is not false.

As questioning focused more on whether Marceca had reviewed the BIs *for substance*, he resisted admitting that he had done so. In the following excerpt, Marceca clearly provides misleading information about what he did:

Q Okay. *Were you ever told that it was your job to read the contents of all of the previous reports that were ordered during the time when you were there?*

A As I recall, I was -- *I had to look up the dates of the last investigation, and I had to find the office, if I could. So as far as*

*that goes, I looked at the reports.*²³⁰

Q Okay. I think on questioning earlier you said that you looked at the reports, and I think you had said that you spotted some problems?

A Correct.

Q Can you tell me what you were reading when you were spotting problems?

A Okay. *If I would look at a report in depth, it would have an SF-86 attached to it, okay?* And I would be looking for any FBI report, instances of travel as one of the things, and I would be looking to see if they put that travel on the SF-86. I would be looking for work, jobs that they had, and I would see if they would correspond with the SBIs. So for that, to accomplish that, I had to read both of these documents and assimilate those two, and that is what I did.

Q **And did you do *that*²³¹ to all of the documents as you got them back from the FBI that you ordered previous reports on?**

A *If – the only – as I said before, the only way I would do that is if I had an SF-86. Now, if somebody came back and I could not find where they worked in the White House, okay, if they were previous employees, previous White House employees and not with this new administration, as I said, they would go in the dead file.*

Did I look at those things? I didn't waste my time looking at those, other than trying to find the last date of investigation.²³² *But did I review those? No, I didn't. I*

²³⁰ This answer is incomplete, because Marceca fails to reveal that he did read the substance of all previous reports. However, the answer is not responsive to the question.

²³¹ If the reference "do that" refers back to his prior response about when he would look at files "in depth," Marceca may contend that his response related only to files that had SF-86s attached. Hence, he may claim that he differentiated his *initial* review of the report from his *in depth* review; in the latter case, he would compare the previous report to the new SF-86.

²³² Marceca earlier stated that he reviewed the reports to determine the office in which the

(continued...)

would have fallen asleep.

Q Why do you say you would have fallen asleep?

A Well, because most of them are the same, the same words just repeated over and over again.

Q The SBIs are the same words?

A The SBIs are mostly what great things people say about one another.

Marceca HCGRO Dep., 6/18/96, at 127-29 (emphasis added). Marceca's comment that he "didn't waste my time looking at those, other than trying to find the last date of investigation" is demonstrably false in light of the evidence of his post-it notes in the file.²³³

Marceca's most direct denial that he read the substance of the BIs came in the following colloquy:

Q What about the category of individuals that you have sent off for a previous report, *you have gotten back for a previous report, and they are not due their 5-year update; they are fine?*

A In other words, they have a 5-year update? Very good question.

Q Thank you.

Mr. Muse: I knew we would get to one.

The Witness: That SBI, we would be looking at that, and hopefully it

(...continued)

person worked, Marceca HCGRO Dep., 6/18/96, at 1226, but he omitted it from this response.

²³³ Marceca may claim that his comment that he would have "fallen asleep" is not a denial that he performed an initial review of every report that arrived, but instead refers to the "in depth" review he would perform only if the person filed a new SF-86. However, the comment about falling asleep follows Marceca's statement that he would look at the reports only to find the date of the last background investigation, which he did when he received the reports from the FBI.

would be on the front page that the SBI was on such a such a date within the last 5 years, went in the file and went in the master file.

BY MS. OLSON:

Q *Did you ever review those to see if there were any problems with them?*²³⁴

A *I didn't have the time. No, I did not.*

Q Do you know if Mr. Livingstone reviewed those in the course of his duties just to see if there was any problems with these holdover people?

A I do not believe Mr. Livingstone -- I don't know that he did, but I can't imagine him going in a safe to get something out to walk out and to do it when he was busy all the time.

* * *

Q Do you recall him ever doing any advance work while were you [sic] there?

A Let's see. That is the third time you asked that.

Q Okay. I just keep asking it because you are someone who actually understands advance work.

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?

A *That's correct.*²³⁵

²³⁴ In context, this question refers only to the previous reports that *do not* require updates; *i.e.*, those with BIs dated within the past four years.

²³⁵ 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").

* * *

Q Was it anybody's job in that office, that you are aware of, to review these files to make a determination on the basis of the content of those files whether or not they should remain as holdover employees of the new administration?²³⁶

A No.

Marceca HCGRO Dep., 6/18/96, at 130-33.

Of the persons in whose files we found Marceca's post-it notes or highlighting that identified derogatory information, the last BI dates were as follows:

<u>LAST NAME</u>	<u>LAST BI DATE</u>
Moley	7/10/91
Dyke	9/9/89
Duberstein	4/13/87
Poneman	11/2/90
Baughman	2/10/91
Sittman	5/26/89
Ledsky	7/7/87
Burson	8/30/89
Zelikoe	10/23/89
Wells	6/5/89
Toyer	9/87

Duberstein, Ledsky and Toyer had BIs beyond the five year limit. Dyke, Sittman, Burson and Zelikoe all had BIs older than four years, but less than five years old -- the range within which Marceca understood it was his job to get an updated BI. *Moley and Baughman clearly did not need updated BIs.* Hence, Marceca's notes in their files can only be taken to prove that he read reports of persons who did not need updates, and identified derogatory information in those reports.

²³⁶ In context, this question addresses only the files of persons who did not need updates; *i.e.*, whose BIs had been completed within the past five years.

The Moley and Baughman files fall into the category of files that, as set forth in the above question, "didn't need an update, that didn't have an 86." *Marceca's response, affirming that he "didn't read them for content, [he] only read them to see if they needed an update" was false.* His response to the follow-up question -- denying that it was anyone's job "to review these files to make a determination on the basis of the content of those files whether or not they should remain as holdover employees of the new administration" -- may also have been false, although it is subject to some ambiguity about whether it was really Marceca's "job" to determine whether they should remain as holdover employees.

In evaluating the significance of this false statement, we should keep in mind that the notes that Marceca left in Moley's background file, while they are evidence of the falsity of his denial that he read the BIs for "content," also are evidence of the truthfulness of his claim that he did not know that the persons whose reports he requested had left the White House. We also should keep in mind Marceca's admissions in the House hearing, set forth in the following section of this report.

Also, it is notable that *Marceca did not request Moley's previous reports.* The request for Moley's previous reports was received by the FBI on August 10, 1993 -- before Marceca began working at OPS.

5. Marceca's Testimony at the June 26, 1996 House Hearing

At the June 26 House hearing, Marceca implied in his opening statement that he had read the reports for content when they arrived at OPS, although he immediately shifted to make clear that his main focus was to determine the date of the most recent BI:

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 been done in the last 5 years, I began the task of putting together a proper file to initiate the reinvestigation process.

HCGRO Hearing, 6/26/96, at 39 (emphasis added). The italicized statements in the above excerpt contradict some of Marceca's responses in his HCGRO deposition, because they represent an unequivocal assertion that he reviewed *every* report for suitability as soon as he received it, regardless of whether he obtained a new SF-86.

In the HCGRO's Interim Report concerning the FBI Files matter, the majority cited Marceca's opening statement for the following proposition: "*After receiving the previous report from the FBI, 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.*" HCGRO, Interim Report, at 47 & n. 305 (Sept. 28, 1996). The report does not mention any conflicting testimony at the deposition or the hearing.

The section of questioning in which Marceca most directly admitted he reviewed the reports of the former White House staffers in the Aa-Go range follows:

Mr. Clinger. As far as you were concerned you had gone A through G on this particular file. [sic] You had also during that period reviewed other files as you have now indicated and given us the information, that you reviewed a substantial number of files involving National Security Council personnel, both staff and appointees; is that correct?

Mr. Marceca. *I reviewed everybody's.*

Mr. Clinger. Which was not an A to G list. You had completed the review of the A to G list for the White House staff; is that correct?

Mr. Marceca. No, sir. If I understand your question, you said A to G. *I reviewed A to G.*

HCGRO Hearing, 6/26/96, at 132 (emphasis added).

In discussing one of the memoranda Marceca wrote from Livingstone to the NSC inquiring whether persons with outdated BIs were still on staff, the following questioning occurred:

Mr. Davis. So this was a request from you before you requested files from the FBI to see if you needed to update your list?

Mr. Marceca. No, sir. This is like a progress report after I had gotten the previous investigations, and from those previous investigations, which is the only way I could find out when the last investigation was was [sic] from the previous investigation, I had to have that. Therefore, when I got the previous investigations, I then determined when their last investigation was and that is what these dates mean, sir.

Mr. 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.

HCGRO Hearing, 6/26/96, at 211-12 (emphasis added). Notwithstanding Marceca's admission in his opening statement that he reviewed all reports, his affirmative response to Congressman Davis's question suggests that he did *not* have any use for a previous report until he confirmed that the person was still working at the White House.

At a later point, Marceca apologized for reviewing improperly-obtained reports:

Mr. Marceca. I agree wholeheartedly with Mr. Nussbaum's sentiments. If I might comment?

Mr. Cummings. Please.

Mr. Marceca. I would like to say that 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.* I would apologize in person if I could.

I truly regret the failure to identify the fact that some of the individuals that we were creating files for should have never been retrieved from this -- from the FBI. I understand how those folks feel. I don't want my privacy invaded, and I feel that and I am sorry for that.

And I apologize to this Congress and the American people that have suffered through this -- these hearings and everything else and all this press. And to each person, I say I am sorry. I did not seek these FBI files for any improper motive and I believe I was discharging my duties.

HCGRO Hearing, 6/26/96, at 259-60 (emphasis added).

One of the final questioners revisited the issue of who had read the files, questioning Wetzel and Livingstone about their deposition testimony relating to whether Marceca had read reports.²³⁷ Although Wetzel's answer referred to previous "career" employees -- a term that technically would not include the former Republican political appointees -- she did acknowledge that Marceca or Livingstone read previous reports when they "came in":

Mr. LaTourette. I do want to bring up something that I read that you testified to in your deposition, and that is, we haven't talked about what happened to these files once they got back into your office. As I understood your previous testimony is

²³⁷ Wetzel HCGRO Dep., 6/17/96, at 111-16; Livingstone HCGRO Dep., 6/14/96, at 48-51.

that these files were then reviewed for contents, whether it be a new-hire or an update request from the FBI of an old investigation. I believe you said that Mr. Marceca and Mr. Livingstone would read them for content; is that a correct observation?

Ms. Wetzl. Right. I am sorry. You will have to specify which investigations we are talking about.

Mr. LaTourette. Both. I believe in your deposition at page 112, the question was, what did they read for content, and it was everything. They read not only the reinvestigation requests but also the SF 86s or the FBI report when they came in for the new-hires.

Ms. Wetzl. You have to be more specific about who read it. The previous reports, the copies of FBI investigations that we received about *previous career people* that were not . . . those investigations were not initiated at our request, those came straight to our office, and to my knowledge, Tony received them.

Mr. LaTourette. *And read them for content?*

Ms. Wetzl. *I assume so.*

Mr. LaTourette. Okay. And was there a period of time, or maybe none of these came in before Mr. Marceca got there, that Mr. Livingstone also read them for content?

Ms. Wetzl. *It was my impression that when the previous reports came in it was either, depending on the time period, either Tony or Craig who read them.* However, I can't testify about who read what before Tony, because I wasn't working on the Update Project at that time.

HCGRO Hearing, 6/26/96, at 300-01 (emphasis added).

Livingstone also was not questioned specifically about improperly-obtained reports, but he acknowledged in his answers that Marceca had read all previous reports:

Mr. LaTourette. Mr. Livingstone, in your deposition you made some

observations that you or Mr. Marceca did in fact read these background files for content, and when specifically questioned about it, including the ones from former White House employees, the answer was, yes, because nobody told us not to. Do you recall that line of questioning? Is that an accurate characterization that regardless of what the background investigation was, new Clinton hires or old people, they were read for content; is that right or not?

Mr. Livingstone. I am sorry. I heard you ask me several different questions.

Mr. LaTourette. It was really one question. That is, as a result of Mr. Marceca's work, files were coming into the office from the FBI. Those files were read for content; were they not?

Mr. Livingstone. Yes, sir.

Mr. LaTourette. They were either read by Mr. Marceca, because he was charged by you to read them, or in some instances, you read them; would that be an accurate statement?

Mr. Livingstone. Yes, sir.

Mr. LaTourette. And as I understood, it would not be a fair question to ask you which file did you read, because you don't remember. You read thousands of files; right?

Mr. Livingstone. The FBI said we got some 30,000 files since I have been there.

Mr. LaTourette. But the constant is, *whatever the file was, whatever person it related to, somebody in your office, either you or Mr. Marceca, or someone else you trusted, read it for content; correct?*

Mr. Livingstone. Are you talking about specifically the copies of the previous report, sir?

Mr. LaTourette. Yes. I am most interested in those.

Mr. Livingstone. As I recall, those reports are just summaries of reports, 1-or 2-page documents.

- Mr. LaTourette. *Read for content, however?*
- Mr. Livingstone. *Yes, sir.*
- Mr. LaTourette. *The purpose of reading these files for content, as I understood your deposition, and we didn't get into it today, was specifically to look for derogatory material, and I know you defined that in your deposition as nothing heinous; it could be a parking ticket, a traffic ticket, could be an extramarital affair, could be the use of drugs, could be a lot of things, but the reason that you read those was to highlight or flag derogatory material; is that a fair observation, why files would be read for content?*
- Mr. Livingstone. *I think a more accurate characterization, sir, as I believe I have testified, would be to check for suitability, and as Mr. Marceca, and Ms. Wetzl, I believe testified to, see what the date was of their background investigation, to see if they needed to have a reinvestigation conducted.*
- Mr. LaTourette. *With all due respect, you can flip open to the first page and find out what date the investigation was performed and figure out on a calendar where 5 years was. So it was not reading a file for content. Reading a file for content, to my understanding, is reading the file to see what it says, not just checking the date; am I wrong?*
- Mr. Livingstone. *I am sorry, sir, I believe that you asked me why we read the files, and I gave you an answer. One, was to check for the date of the report; two, was to check for suitability concerns.*

HCGRO Hearing, 6/26/96, at 301-03 (emphasis added).

Congressman LaTourette did not ask Marceca whether he had read all of the previous reports. However, when he asked Marceca about the memorandum Marceca had prepared for Livingstone analyzing Poneman's BI, Marceca falsely stated that the analysis involved a comparison of the SF-86 and the person's BI. Although Marceca redacted the memorandum before providing a copy to the Congress, it was clear from Congress's copy that the BI Marceca

was analyzing was dated November 2, 1990 -- less than three years before Marceca went to work at OPS. Nonetheless, no one questioned him about the assertion that his analysis involved a review of an SF-86, nor did anyone note the inconsistency between this memo and his earlier testimony that he did not read reports of persons who did not need updated BIs:

Mr. LaTourette. Okay. Tempus fugit, time is fleeting, so I want to move on to you, Mr. Marceca.

Mr. Marceca, you delivered to the committee, or your lawyer delivered to the committee, these 200-some documents and you have a characterization of them as to what they mean. I am holding up 000134, which you were questioned about earlier, and it is an analysis of personal background. I don't want to ask you specific questions about this, just this type of thing. If I understand the way this worked, a report would come in, somebody would read it for content, and did you, Mr. Marceca, prepare an analysis of what you read in that file for content, delivering it to Mr. Livingstone, your superior? Is that what this is? You have read somebody's file and this is your analysis of that file and you now reported it in writing to your superior, Mr. Livingstone?

Mr. Marceca. To my recollection, *this specific letter was developed because there was 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.

Mr. LaTourette. I am not asking whether it has merit. Who put these black marks on it, did you do that?

Mr. Marceca. Yes, sir.

Mr. LaTourette. You or your lawyer did that? I assume that was done to protect someone's privacy, which I think at this late stage of the game is very noble. Regardless of what the content of it is was, it was your job to review files for content, then to

prepare a report about what you thought was important for your boss, Mr. Livingstone to know; is this pretty typical of what you did?

Mr. Marceca. I did it -- this is probably a very rare document. *I doubt that there is more than one of those because there were not that many problems that I found in people's backgrounds.*

Mr. LaTourette. I have two of them here --

Mr. Marceca. Do you think you have two of the same one, sir?

Mr. LaTourette. No, I have 132 and 134.²³⁸

Mr. Clinger. The gentleman's time has expired.

HCGRO Hearing, 6/26/96, at 304-05 (emphasis added).

C. Marceca's Testimony about Whether he Passed on Previous Reports to Craig Livingstone

Marceca's declaration contains the following information about whether he provided the previous BI reports to Livingstone:

8. As part of my consistent practice for the Update Project, I did not deliver the files or FBI Previous Reports to the head of the Office of Personnel Security, Craig Livingstone. *I only delivered files that I created in the course of the Update Project for Mr. Livingstone's review if I discovered what I believed to be inconsistencies in an individual's paperwork.*

9. As best as I recall, there were only three files that I reviewed in the course of the Update Project that I delivered for Mr. Livingstone's review. To the best of my recollection, none of these files were of former high-ranking Bush or Reagan Administration officials, such as Fitzwater. My recollection is that one of the individuals involved worked for the General Services Administration, one worked for the telephone company, and one was a grounds keeper.

²³⁸ The two documents to which Mr. LaTourette referred actually were different versions of a single document. (AY-DC-121, AY-DC-122)

Marceca Declaration, 6/9/96, at 3-4.

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

Then, in the House deposition, Marceca testified as follows:

Q Right. Were there occasions in which you had to refer files to Mr. Livingstone?

A There were what I recall was approximately three times that I did.

Q And please describe the circumstances in which you did that.

A Okay. I had gotten the SBIs back from the FBI and I had in my hand a SF-86, which is a job application. This was -- everybody that needed a new SBI had to fill out a SF-86. If they started to work at the White House, they needed one. If -- if it was just their first day at the White House and no background, they needed one. Okay? If they were a holdover, they needed one if it was time for a reinvestigation.

Continuing with that, there were the three instances that I recall that before I sent out the SF-86 to the FBI to do a new reinvestigation or to do an investigation, I spotted some problems and I tried to correct those problems, as I was supposed to do, with the person. When those problems couldn't be corrected, I turned those files over to Mr. Livingstone.

Q What were those problems? Generically?

A Well, one of them -- they were -- let's term them personnel [sic] -- one had a personnel problem. One had I believe an arrest in their record that was in the SBI, and not on their SF-86. And I do not recall exactly what the other one was. But it was a matter that I gave to Mr. Livingstone.

Q And do you know how those issues were resolved by Mr. Livingstone?

A I don't know how he resolved that issue, but I know that Mr. George Saunders gave me the files back with the problem corrected.

Marceca HCGRO Dep., 6/18/96, at 71-72.

When questioned at the House hearing specifically about the memorandum he had written

analyzing Poneman's background investigation, Marceca responded, "I doubt that there is more than one of those because there were not that many problems that I found in people's backgrounds." HCGRO Hearing, 6/26/96, at 305.

XV. MARCECA'S BACKGROUND INVESTIGATION

On June 27, 1996 -- the day after Marceca testified before the House Committee -- an article appeared in the *Wall Street Journal* disclosing that Marceca had filed a civil lawsuit in Texas for defamation, claiming that he had lost his job in the White House after the FBI received allegations that he was involved in criminal activity. "Army Staff in Files Controversy Says He was Fired from White House Job," *Wall St. J.*, June 26, 1996, at A-20. The next day, an article appeared reporting that Marceca had testified in a civil deposition that he had read his own background file. "Marceca Looked at His Own FBI File," *Wall St. J.*, June 28, 1996, at A-10. Marceca was scheduled to testify before the Senate Committee on June 28. Instead, Marceca invoked the fifth amendment and refused to testify.

A. Marceca's Own Background Investigation

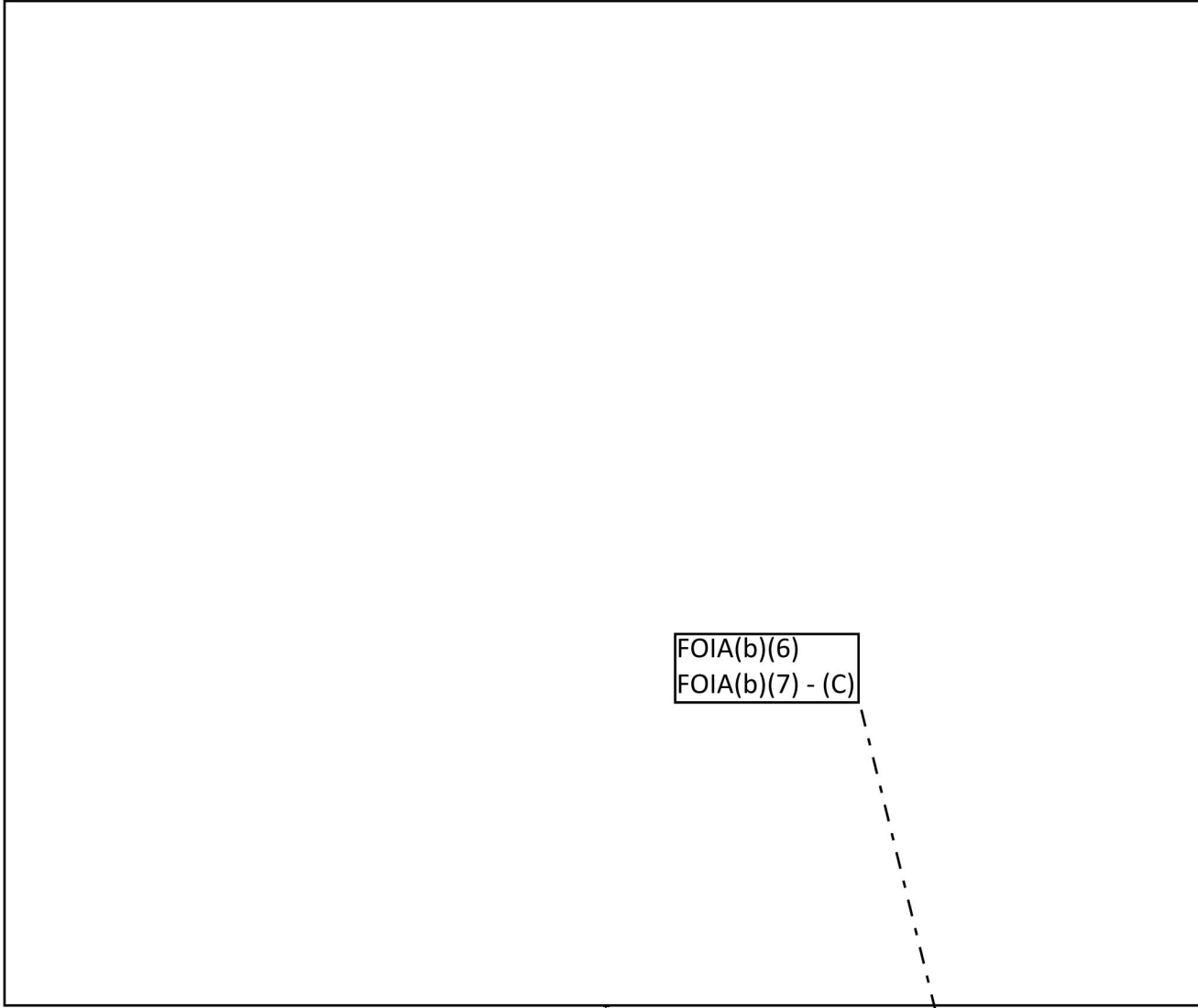
Marceca's FBI background investigation is significant for two reasons. First, Marceca testified that he read at least part of his own BI report²³⁹ -- which he and other OPS employees understood was contrary to White House policy -- and he may have lied about the circumstances under which he read the report when he was deposed in connection with a lawsuit he brought against two persons who provided negative information about him. Second, Marceca may have lied about two incidents in his background -- albeit ten years in the past -- when the FBI interviewed him in connection with his BI.

The FBI's background investigation of Marceca resulted in two reports, both of which are in his red OPS file. On December 16, 1993, the FBI submitted to Nussbaum a "partial" report of

²³⁹ Marceca testified in his civil deposition that he knew about information provided by two persons. One of those persons specifically requested that her identity be withheld from Marceca.

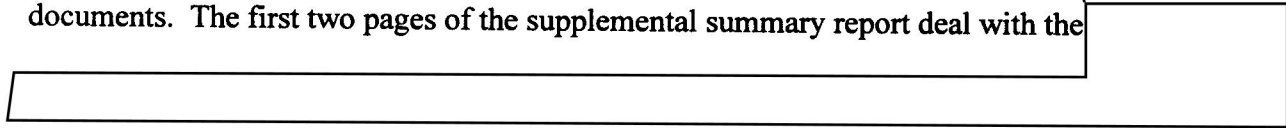
a Level II background investigation. This package includes a cover letter, two copies of an 18-page summary memorandum, two copies of an arrest record for a former co-worker, and FD-302s of Marceca (two separate interviews),

FOIA(b)(6)
FOIA(b)(7) - (C)



FOIA(b)(6)
FOIA(b)(7) - (C)

The FBI's second submission about Marceca is composed of a December 27, 1993 cover letter to Nussbaum, two copies of a four-page summary memorandum, and an FD-302 reflecting an interview of Marceca. A blue "CONFIDENTIAL" cover sheet is clipped to all of these documents. The first two pages of the supplemental summary report deal with the



²⁴² Livingstone opined that the FBI had gone into unduly intrusive detail in its investigation of Marceca and that the process was unfair to Marceca. Livingstone OIC-302, 9/13/96, at 27-28. Livingstone specifically recalled the references to Marceca's childhood. *Id.* at 26.

FOIA(b)(6)
FOIA(b)(7) - (C)

On November 1, 1994, DIS wrote to OPS requesting permission to read Marceca's FBI background investigation in connection with the Army's routine periodic reinvestigation to determine whether Marceca should retain his Top Secret security clearance. (AO-DC-3794) Livingstone signed the document authorizing release of the BI report to the DIS. *Id.*

FOIA(b)(6)
FOIA(b)(7) - (C)

(706-DC-709) The note is in Marceca's writing. Special Agent Woods conducted all three interviews of Marceca. The first interview was a standard applicant interview. The second and third interviews were prompted by leads that Woods was given in response to information gathered in the course of the background investigation that revealed inconsistencies and derogatory information. Woods says that she was not confrontational with Marceca and that she took the questions asked during the second and third interviews directly from the leads given to her by FBI Headquarters. Woods OIC-302, 3/26/97, at 2. She recalls that she had to be very insistent when she called Marceca to schedule the third interview, because she was operating

²⁴³ The note is clipped to the week of February 7, 1994, but there is no indication of when the conversation occurred.

²⁴⁴ Cecilia Woods was the FBI agent who interviewed Marceca on three occasions in connection with his 1993 background investigation. She shared office space with Aldrich and Sculimbrene.

under a tight deadline. *Id.* at 3. Woods had to go to Marceca's office to insist that he meet with her immediately for the third interview. Livingstone was upset that Woods needed Marceca because Marceca was working on an important assignment. *Id.* at 3.

FOIA(b)(6)
FOIA(b)(7) - (C)

FOIA(b)(6)
FOIA(b)(7) - (C)

FOIA(b)(6)
FOIA(b)(7) - (C)

FOIA(b)(6)
FOIA(b)(7) - (C)

B. Marceca's Quest for a Senior Law Enforcement Position

Livingstone assisted Marceca in Marceca's effort to obtain a political appointment with an Inspector General's office.²⁴⁷ Livingstone OIC-302, 9/16/96, at 15. Documents on Marceca's computer disks manifest his efforts to garner support for his application. On February 2, 1994, he wrote to an aide for Senator John Glenn requesting that the Senator support his application for a position as Assistant Inspector General for the Department of the Interior. (706-DC-26) The letter chronicles Marceca's political support of Senator Glenn, states that Marceca had contact with the Senate Government Affairs Committee concerning his work on procurement fraud cases, and mentions that he briefed Senator Glenn in the Senator's office concerning an official matter. He also wrote to a man in Alaska named George Edwardsen Jr., forwarding a draft letter recommending Marceca for the position on behalf of a group of Native Americans with whom Marceca had worked in 1989. (706-DC-25) On March 9, 1994, Marceca wrote to Edwardsen to thank him for arranging the letter of recommendation. Marceca mentioned that Marceca and _____

²⁴⁷ Later, Marceca called OPS and inquired whether Livingstone wanted a job as a CID agent working for Marceca. Livingstone OIC-302, 9/13/96, at 30; OPS-7751.

Edwardson's brother had met with a Department of Interior employee in an effort to assist the Native American group and advance his likelihood of obtaining the position.²⁴⁸ (706-DC-50)

Marceca's calendar reflects an interview with the "USIA IG" on February 8, 1994. (706-DC-707) There are references to Inspectors General of various agencies throughout the calendar. *E.g.*, 706-DC-659.

1. Marceca's Civil Lawsuit

On September 14, 1994, Marceca wrote to his Texas attorney, Kirby Roberts, as follows:²⁴⁹

This letter is a request that you act to obtain on my behalf, thru the Freedom of Information act, my background investigations on file by the Federal Bureau of Investigation (FBI) and Defense Investigative Service (DIS).

I have received information within the past couple of weeks, that certain individuals who were interviewed in the background process deliberately lied to the investigators, in attempt to bring discredit to my character. I have further discovered that the false information provided by these individuals has caused me not to be considered for a Presidential

²⁴⁸ The letter reads as follows:

Yesterday, your brother Charlie and I met with Dr. Bernita Joyce, at the U.S. Department of Interior, Washington, DC. We are scheduled to meet again tomorrow evening, at which time we should lay the BIA claims to rest once and for all. It was apparent to any outside observer, that the BIA office at Fairbanks, has been way out of line, with nothing except incompetence to support their anti North Slope position.

The meeting with Dr. Joyce may contribute the needed assistance for my obtaining the Deputy Inspector General position, and the Lord may very well make thing right for the Inupiat communities, after all these years.

(706-DC-50)

²⁴⁹ Marceca provided a copy of this letter to us.

Appointment.

(706-DC-61) (emphasis added)

Marceca sued Lilly A. Stephenson and Joyce L. Montag in a complaint dated November 10, 1994 and filed on November 14, 1994 in the Western District of Texas, Austin Division, as Civil Action No. A-94-CA-775-JN. The complaint is signed by his counsel, Kirby J. Roberts.

The complaint sets forth, *inter alia*, the following information:

- 3.1 Upon information and belief, during the month of November or December, 1993, the Defendants, Lilly A. Stephenson and Joyce L. Montag, provided information to an agent of the Federal Bureau of Investigation ("FBI") regarding the Plaintiff in this cause. The nature of the information provided is summarized as follows:
 - a) The Plaintiff was present during the previous ten (10) years in the general location known as Buchanan Dam, Texas at least every one or two months and that Defendant Stephenson was in regular contact with Plaintiff on these occasions.
 - b) That Plaintiff had engaged in numerous activities which activities constituted criminal offenses.
 - c) That Plaintiff was a member of an organized crime "family".
 - d) That because of the foregoing, Plaintiff was a person of ill repute and dishonest. All of the foregoing statements were and are false.
- 3.2 At the time of the filing of this suit Plaintiff is unable to set forth the following as to each of the particular Defendants:
 - a) Which comments were made by which particular Defendant; and
 - b) The precise words used in communicating the foregoing matters to the Federal Bureau of Investigation.

3.3 Plaintiff will, as soon as such documents are obtained, move for leave to amend this pleading to clarify the foregoing. Plaintiff has been informed (through counsel) that, unless the FBI receives a subpoena for the documents, it will take approximately two (2) years to provide the documents containing the notes of statements of the Defendants.

3.4 *The information and belief upon which Plaintiff has made the foregoing allegations is based upon an opportunity which Plaintiff had in September, 1994, to make a cursory examination of the report from the background investigation concerning Plaintiff. The background investigation had been done at the request of persons serving under the President of the United States. It was at the time of this "cursory examination" of the background report when Plaintiff first learned the nature and identity of the source of the comments made about him by the Defendants. The purpose of the background investigation being performed on Plaintiff was for determining whether or not Plaintiff would be considered qualified for nomination or appointment by the President of the United States to a position in the Executive Branch of Government.*

3.5 As a direct and proximate result of statements made by the Defendants to the FBI, Plaintiff was denied an opportunity for consideration for such Executive appointment which resulted in damages to Plaintiff of more than \$50,000.00. Plaintiff also believes that he was terminated early from his position as Assistant to the Director of Security for the White House in February, 1994 as a proximate result of the defamatory statements made by the Defendants.

(AX-DC-2 *et seq.*) (emphasis added)

2. Marceca's Civil Deposition

Marceca was questioned in a civil deposition on February 20, 1995. The questioning first addressed the harm that Marceca had alleged:

Q Would you for the record tell me again when you made -- first made application for your promotion?

A October of 1993.²⁵⁰

Q Okay. And when did you first learn that the position you were seeking was denied?

A The first week of December -- correction. It was not denied. I first learned that there was a problem in my background.

Q Okay. There was a -- you had a problem in your background?

A Correct.

Q Okay. What was that date?

A I believe it was the first or second week of December.

Q Of '93?

A Yes, sir.

Q All right. Who told you that?

A Craig Livingstone.

Q Said there was a problem. Okay. What did he say the problem was?

A Said it had to do with an investigation in Texas.

* * *

Q Did he tell you what the problem was?

FOIA(b)(6)
FOIA(b)(7) - (C)

A No, he didn't.

Q Okay. Did he tell you any of the details about the -- what the problem was?

A He only said that there was a problem in my background.

Marceca Civil Dep., 2/20/95, at 75-77. Marceca then testified that he never discussed the matter with Livingstone again, but Marceca assumed it had to do with [redacted] FOIA(b)(6) FOIA(b)(7) - (C) [redacted]

[redacted] *Id.* at 77-78. Marceca testified that Livingstone advised him in January 1994 that he would not be eligible for a Schedule C position, but that Livingstone told him only that he "had been engaged in activity that was not consistent with the type of individual that the president would appointment [sic] to a political position." *Id.* at 79-80, 83.

Subsequently, Marceca testified, he asked Livingstone to set up an appointment for him with the person responsible for Inspector General appointments. *Id.* at 82. On January 26, 1994, Marceca met with the person in the Presidential Personnel office, and that person offered to make an appointment for Marceca with the Department of Interior. Marceca testified that he then had one interview at Interior, and no follow-up. *Id.* at 82-84. Marceca contended that his detail was not extended as a result of the adverse information provided by Stephenson and Montag. *Id.* at 94-96. Also, he maintained that he should have gotten "a US attorney's job [sic] or inspector general's job." *Id.* at 99.

Marceca testified that Livingstone refused to let Marceca see the BI, because "it's presidential privileged papers." *Id.* at 84-85. Marceca gave the following explanation of how he came to see his BI report:

Q All right. Let's get the date in the record. When did you do the cursory examination. What was the date of it?

A Would you be more specific about what you're speaking of when you said cursory examination.

Q Well, in your pleadings you said that you had an opportunity to do a cursory examination of the final report which you use as a basis for your original complaint.

A Yes, sir.

Q What is the date that you did the cursory examination?

A September 11, 1994.

Q September 11, 1994. All right.

You were denied in June of '94 [sic]. Did you do any investigation into this case between the time you were terminated, June, '94, until September 11, 1994?

A Sir, the term "investigation" implies that that was an official act.

Q I'm talking about you personally, unofficial. Did you do anything to find out why you were denied?

A If you would use the word "inquiry," I would feel that you are more accurate than the word "investigation."

Q All right. Did you make any inquiries?

A Between that time, yes, sir, I did.

Q What did you do?

A I contacted Mr. Livingstone.

Q All right. How many times?

A Probably three times through the summer.

Q Okay. And what did he tell you each time?

A That the BI was not sufficient. It was deficient is what he said, and would not -- I would not be -- I would not be endorsed for a Schedule C appointment.

Q Okay. No reasons or anything. he just said it wasn't going to happen?

A Refused to discuss it.

Q Refused to discuss it. Okay. Did you ask him if you could see your report?

A Yes, sir.

Q What did he say?

A No, I could not.

Q All right. On September 11, 1994, who let you see that report?

A Nobody let me see it.

Q Nobody let you see it?

A No, sir.

Q How did you happen to see the report?

A I was visiting the White House and I was in Mr. Livingstone's office, and I pulled out a --

We were in a conversation.²⁵¹ He took a telephone call and turned his back, turned around to his desk. There was a newspaper there. He was on the phone four or five minutes. And I reached up and pulled the newspaper out and background investigation [sic] spilled on the floor.

²⁵¹ Marceca was in the White House on September 1, September 11, September 12 and September 15, 1994. (708-DC-343) However, Livingstone was on vacation in Puerto Rico from September 8, 1994 until September 16, 1994. Livingstone provided us with a copy of his airline ticket. (BG-DC-2) Secret Service records show no entry or exit by Livingstone on September 11, 1994. (718-DC-1)

*I picked up the background investigations, and the last background investigation to pick up, put back in the stack, which happened to have been all rolled up, was my background investigation.*²⁵²

I opened that up, and when I saw my name -- and I saw -- I briefly read what the FBI said. I turned a couple of pages back, and I saw Mrs. Stephens' (sic.), what she said.

Q It's Stephenson.

A Sorry. Stephenson. I looked at what Mrs. Stephenson said briefly. I read that, and I flipped it back and I saw what Ms. Montag said.²⁵³

* * *

Q And so what you did when you picked up that report, opened it up and read it, you committed a criminal act, did you not?

A No, sir, I did not.

Q You didn't commit a criminal act.

A No, sir. I was cleared to look at background investigations.

Q But not yours?

A *Sir, that was the fickle finger of fate that that would fall on the floor.*

* * *

²⁵² There is no evidence that the FBI or OPS ever "rolled up" background investigation reports.

²⁵³ In the December 18, 1993 partial summary report, the discussion of the Stephenson allegation at pages 5 to 6 precedes the discussion of the Montag allegation at pages 6 through 8.

In the OPS file, Montag's 302 precedes Stephenson's. Both 302s are near the end of the package, in the order in which we received it.

Q Now, what you should have done is you should have put it back on his desk and never looked at it. Isn't that true?

A I don't think so.

Q You don't think so?

A No, sir. I was offered the opportunity from -- by an accident of nature, and I took advantage of it and I looked at it.

Q Is that not a violation of your code of ethics?

A I don't believe so, sir. It was an accidental discovery.

Id. at 112-16 (emphasis added). Marceca then discussed what he saw when he read the reports:

Q How many pages did you read?

A I believe I scanned -- a page and a half was Mrs. Stephens' (sic.)

* * *

Q Okay. A page and a half.

A Right.

Q All right. And was that the FBI investigator's report?

A It was a report submitted to the White House. I don't know what your question is, sir?

Q Well, what I'm saying is was that page and a half, was that signed off by the Federal Bureau of Investigation as an official document?

A It was part of the background investigation that went to the White House prepared by the FBI.

* * *

Q Okay. But what you saw was a page and a half that was the

results of the FBI investigation, right?

A Sir, I scanned a page and a half.

Q All right.

A Concerning Mrs. Stephenson's statements.

Q Okay.

A In that statement, I saw falsehoods and lies.

* * *

Q Okay. How long did it take you to read hers?

A I probably spent less than a minute reading through hers.

Q Through hers. How long did you take in reading Joyce Montag's?

A Probably less than a half a minute in looking at hers.

Q All right. How long was hers?

A I only looked at the one page.

Q Okay. One page. Okay. What you saw on Lanny's and what you saw on Joyce's, was it exactly the same?

A No, but there were similar allegations.

Q Okay.

A Which led me to believe that they had collaborated.²⁵⁴

²⁵⁴ Nothing in the FBI's reports relating to Stephenson and Montag suggests any connection between them. However, the 1988 DIS background report on Marceca discloses that Stephenson was asked about the Montag incident. Stephenson said that Marceca had admitted to her that he resigned from the Attorney General's office because his supervisor would not believe his version of the event. (AO-DC-4063)

(continued...)

* * *

Q All right. Let's talk about the overall document that you picked up, the background report. How big -- how many pages was it?

A It looked to be somewhere over 50 pages probably.

Q Something over 50 pages. And you only read a page and -- actually two and a half total pages; is that correct?

A I flipped through the first few pages.

* * *

Q Those -- you're talking about Judge Stephenson's?

A Stephenson's and Montag's were the first two under the briefing sheet.

Q Okay. Why, if you don't think it was wrong to have looked at that, why didn't you go ahead and continue to look at the report until you saw all of it?

A When I saw what Stephenson said, I was startled and shocked that a judge would lie, but it did not shock me what Montag said. And I guess I was shocked and that's why I put it back.

Q Okay. But you weren't curious to see what anybody else said?

A I didn't need to know anything else after I saw what Stephenson said.

Q So you just picked out two of the reports out of 50 pages and assumed that that's the reason that you were denied your promotion; is that correct?

(...continued)

Marceca had a copy of the 1988 DIS report, and proffered it as an exhibit at his deposition. Marceca Civil Dep., 2/20/95, at 176-79. The DIS report is part of the FBI's master file on Marceca, but was not forwarded to the White House.

A No, that's not correct. I have background knowledge in reviewing background investigations, and I know that the first one or two are generally the most damaging allegations against an individual.

Q Okay. So they were on the top of the pile?

A Those were the first, most critical interviews.

* * *

Q That was enough by itself?

A That a person that was a member of the court would make those allegations would be enough, after reviewing. And I've reviewed hundreds of background investigations, and I know that will be enough to drop anybody off the list.

Q Okay. All right.

A I knew that Montag's was not. Montag's could be argued away. But it was probably no argument when a magistrate or a district justice comes forward and makes allegations like that to an FBI agent.

Id. at 121-25.

Stephenson's attorney then told Marceca that Stephenson had obtained her 302 by filing a FOIA request with the San Antonio FBI office, and the 302 did not contain the allegations in Marceca's complaint. *Id.* at 125-27; 168. Marceca's reaction demonstrates that he was shocked that Stephenson was able to get access to her report, which Marceca had sought unsuccessfully;²⁵⁵ Marceca even accused the attorney of having committed a crime in obtaining

²⁵⁵ Marceca's attorney issued a civil subpoena for the records to the White House Counsel on October 23, 1995. (705-DC-4283) Associate White House Counsel Chris Cerf obtained Marceca's OPS file and reviewed it. OPS staff member Ed Hughes recalls that Cerf expressed surprise that Marceca had ever worked at the White House. Hughes OIC-302, 8/15/96, at 5. Cerf does not recall making such a comment. Cerf OIC-302, 9/25/96, at 4.

it. *Id.* at 127.

When the attorney showed Marceca the 302, Marceca said that it was *not* the same report he had reviewed at OPS. *Id.* at 155-56. However, the 302 is the same document that is in Marceca's OPS file, and the summary report accurately reflects its substance.

The colloquy about the Stephenson 302 strongly suggests that if Marceca did read his own background report, he did not spend much time reading it, and he did not accurately remember what he had read.

C. Marceca's Access to His Own File

1 White House Policy Regarding Access to Own Reports

OPS and White House counsel employees understood that they were not authorized to review their own background investigation reports. Anderson OIC-302, 8/24/96, at 13; Cerf OIC-302, 9/25/96, at 5; Wetzl OIC-302, 8/8/96, at 8.

2. Marceca's Fingerprints

Marceca's fingerprints were found on only the first page of the FBI's preliminary (December 27, 1993) summary memorandum. FBI Fingerprint Report, 9/6/96.²⁵⁶ This is the report that *does not* discuss Stephenson.

3. Marceca's Volunteer Application

On August 12, 1994, Marceca signed a form requesting a volunteer pass, stating that he would be reporting to Livingstone and working in OPS. Livingstone signed the form to approve the request for a volunteer pass, and the request was approved by the volunteer office on

²⁵⁶ Livingstone's fingerprints were found throughout the file, and Kennedy's fingerprints were identified on two pages. *Id.*

September 2, 1994. This information is in a second OPS file that was created for Marceca. A post-it note in the file states, "2/14/95 Rest of file archived per CL."

4. Marceca's Entries to the White House

Secret Service logs show that Marceca used his pass to access the White House four times in September 1994: September 1, 11, 12 and 15.²⁵⁷ (708-DC-343) There are both entry and exit logs for each day except September 11, for which there is only an entry log at 3:39 pm. *Id.* Marceca wrote in his personal calendar that he was at the White House on Sunday, September 11 from 3:45 pm until 6:30 pm. (706-DC-790) Both his calendar and the Secret Service logs show that he spent the entire day at the White House on Monday, September 12. On September 11, 1994, the day that Marceca claimed he had a conversation with Livingstone, Livingstone was on vacation in Puerto Rico.²⁵⁸ (BG-DC-2)

²⁵⁷ Marceca also entered on September 1 as a guest of Wetzl, at 3:14 pm. (720-DC-589) His entry under his own pass was at 3:33 pm. (708-DC-343)

²⁵⁸ If we were to predicate any charge on the fact that Livingstone was on vacation, we would need to verify that he actually went on the trip, through airline records or by corroborating it with his traveling companion, Miss A. Lemar. (BG-DC-1)

There is no Secret Service entry or exit log for Livingstone for September 11, 1994. (718-DC-1)

EXECUTIVE
SUMMARY

EXECUTIVE SUMMARY

THIS MEMORANDUM CONTAINS GRAND JURY INFORMATION PROTECTED FROM DISCLOSURE BY FEDERAL RULE OF CRIMINAL PROCEDURE 6(e) AND INFORMATION PROTECTED FROM DISCLOSURE BY THE PRIVACY ACT

TO: Kenneth W. Starr
Independent Counsel

FROM: Rod J. Rosenstein
Associate Independent Counsel

DATE: October 13, 1997

SUBJECT: Executive Summary of Report on Investigation of the Acquisition of Federal Bureau of Investigation Background Investigation Reports by the White House Office of Personnel Security ("FBI Files" Matter)

The attached memorandum reports the findings of our investigation of the "FBI Files" matter. In an effort to include all information of potential relevance to our decisionmaking process and provide a roadmap for anyone who further reviews our work, we have erred in favor of over-inclusiveness. This Executive Summary gives a brief overview of the allegations and our investigative findings.

In June 1996, the Congress discovered that Anthony Marceca, while on detail to the White House Office of Personnel Security ("OPS") in late 1993 and early 1994, requested and obtained sensitive FBI background investigation reports ("BIs") not only for current White House passholders -- which was entirely proper because such information was necessary in order to evaluate the security risks of those persons -- but also for *former* White House passholders, including high-ranking officials in the Reagan and Bush Administrations the security status of whom was no longer relevant. The allegations were the subject of considerable attention in the

news media, and committees of the Senate and the House of Representatives investigated the matter in the summer of 1996.

The discovery of the collection of FBI background reports about former Republican political appointees raised political concerns because the Clinton Administration was suspected of arming itself to use information in the BIs for partisan advantage. Legally, it raised concerns because Marceca and others at the White House might have violated the law by making false statements to obtain the BIs or by misusing information gleaned from them.

The White House contended that Marceca had requested BIs of former staffers inadvertently when he relied on a list supplied by the Secret Service without realizing that the list included persons who no longer had access to the White House. The controversy was fueled when the Secret Service publicly contested the White House's explanation. The Secret Service noted that many of the persons whose files were requested had been listed as "inactive" in the Secret Service computer system since 1992 or earlier, signifying that they did not have access to the White House. The Secret Service maintained that any passholder list it had given to OPS in 1993 would have specified whether particular passholders were active or inactive.

A related issue concerning Marceca's supervisor, OPS Director David Craig Livingstone, arose during the House investigation. An interview report found in the FBI's master background investigation file concerning Livingstone states that Bernard Nussbaum, while serving as White House Counsel, told the FBI in early 1993 that Livingstone had been recommended by Hillary Rodham Clinton and that Mrs. Clinton was a friend of Livingstone's mother. The insert was controversial because no one had been able to explain how Livingstone had obtained his job, and Nussbaum previously had testified in the House that he did not know how Livingstone was hired

and that Nussbaum had never discussed the matter with Mrs. Clinton.

The Office of the Independent Counsel ("OIC") began to investigate the allegation against Marceca immediately after it arose. The matter initially appeared to relate to the Travel Office matter, over which the OIC had jurisdiction, because the first wrongly obtained BI identified was that of Billy Ray Dale, the former director of the Travel Office who was fired in 1993 and later prosecuted for embezzlement. The OIC quickly concluded that it lacked jurisdiction over the FBI Files matter. The Attorney General subsequently applied for an expansion of the OIC's jurisdiction, and the Special Division expanded the OIC's jurisdiction to include Marceca's conduct on June 21, 1996. The OIC's jurisdiction was expanded again on October 25, 1996, to include the issue of the inconsistency between Nussbaum's sworn testimony and his alleged statement to the FBI.

Our investigation is substantially complete.¹ As to Marceca, the White House was correct and the Secret Service was incorrect about the list of former White House staff members. The Secret Service list that Marceca used did indeed include both current and former White House staff members, without distinguishing between the two categories. The evidence suggests that Marceca did not understand that the Secret Service list contained inactive passholders, and there is no evidence that anyone misused information from the BIs of former passholders. Marceca used the same system -- and requested unneeded files -- for employees of the General Services Administration and the National Security Council.

¹ A separate memorandum details remaining investigative steps. It will be supplemented with any issues identified by participants in the review of our report.

Marceca was a temporary employee of [FOIA(b)(6) FOIA(b)(7) - (C)]. Although he was the only employee in OPS who had substantial previous experience working in an office environment, he was poorly trained for his duties and he lacked adequate supervision. He could have concluded that the lists were faulty when he realized that many of the persons named in the lists were no longer at the White House, but the evidence suggests that he did not draw that conclusion, and instead continued doggedly to rely on the lists. *There is therefore insufficient evidence to support the allegation that Marceca willfully made false statements or otherwise acted with criminal intent when he requested the BIs.* Moreover, there is no evidence that anyone in the White House tried to take advantage of Marceca's error by making improper use of the BIs.

Our report details Marceca's statements about the FBI Files matter after it became public last year, more than two and a half years after the relevant events. Some of his statements about the matter were misleading or incorrect. It appears that the Congress nonetheless uncovered, in substance, all central facts about the acquisition and disposition of the BI reports.³

As for the allegation against Nussbaum, we have found no evidence that Livingstone's mother has ever been friendly with Mrs. Clinton. Consequently, the entire premise of the allegation is faulty. In addition, it would be difficult to prove what Nussbaum said to the FBI in

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³ Members of Congress clearly have been interested to learn, as we did, that Marceca left notes in some of the files highlighting derogatory information. While the notes bolster the conclusion that Marceca read all of the BI reports and searched for derogatory information, they do not prove that he acted with criminal intent, and in some instances they bolster the conclusion that he acted under the assumption that the persons were still employed at the White House.

1993, because the FBI agent who wrote the memorandum reporting the statement has no independent recollection of talking to Nussbaum about Livingstone.

The attached memorandum provides a detailed analysis of the allegations and our investigative findings.