

should undertake the investigation. Director Freeh assured Shapiro that he should conduct the investigation.⁴⁴⁰

Generally, the Office of Professional Responsibility would investigate allegations of wrongdoing within the FBI. The FBI Office of Professional Responsibility investigates allegations of criminal or ethical misconduct by employees of the FBI. The FBI also has an Inspection Division. The Inspection Division is charged with ensuring that the FBI conducts its business according to the law and regulation.⁴⁴¹

In addition, the Department of Justice Inspector General would be available to investigate the circumstances surrounding the improper release of Billy Dale's file. The Inspector General enforces criminal and civil laws, regulations and ethical standards within the Department of Justice by investigating individuals and organizations who allegedly are involved in financial, contractual or criminal misconduct in Department of Justice programs and operations. Director Freeh did not believe that the Office of Professional Responsibility or the Department of Justice Inspector General were capable of conducting an investigation "properly" or "swiftly." He chose his friend, Howard Shapiro, to conduct the investigation.⁴⁴²

2. Howard Shapiro takes over the investigation

On the afternoon that Shapiro was instructed to undertake an investigation of the events surrounding the specious request by the White House of an already dismissed employee's FBI background file. Shapiro watched a video tape of Chairman Clinger's June 5 press conference on the discovery of the White House request for Billy Dale's FBI background file as a way to acquaint himself with the issues.⁴⁴³

According to Shapiro, Paul Cignoli, chief of the FBI's Civil Discovery Review Unit, took the initiative to determine whether or not the background files of other fired Travel Office employees had been disseminated to the White House.⁴⁴⁴ Shapiro learned that the background file of Brasseux had also been obtained by the White House. Shapiro advised Director Freeh of this fact and the Director advised Chairman Clinger.⁴⁴⁵

B. FBI REPORT

On June 14, 1996, the FBI released the *Report of the FBI General Counsel on the Dissemination of FBI File Information to the White House*. The report found that the White House had sought and received hundreds of FBI background investigations, "without justification." Director of the FBI Louis Freeh stated that the White House's actions constituted, "egregious violations of privacy."⁴⁴⁶

⁴⁴⁰ *Id.*, p. 29.

⁴⁴¹ Deposition of Thomas A. Kelley, pp. 43-44.

⁴⁴² Shapiro deposition, p. 28.

⁴⁴³ Shapiro deposition, p. 25.

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*, p. 24.

⁴⁴⁶ Howard M. Shapiro, *Report of the FBI General Counsel on the Dissemination of FBI File Information to the White House*, June 14, 1996. Statement of Louis J. Freeh, Director, Federal Bureau of Investigation.

The report also summarized the previous practices that led to these violations. There was an unusually large number of requests for FBI background investigations from the White House. The FBI report recounts the dramatic increase in requests from the White House during the years 1993 through 1996.⁴⁴⁷ The rise in number of requests is attributed to several factors.⁴⁴⁸ At the end of each administration, all files are removed from the White House for placement in the Presidential library of the retiring President. Therefore, in order to reconstruct the files necessary to accommodate access for career civil servants in the White House, new administrations must obtain previous reports filed on those civil servants.

According to the FBI report, when an administration has a change in party, the number of files it must order is greater than when the preceding and succeeding parties are of the same political party. The FBI could provide no evidence that the change in political party of the administration produced a greater demand for background files than a change in administration within the same political party. Particularly since the request for files at issue were mostly of people in the political offices where there were very few holdovers, there should have been few requests for files of White House Office staff.

Director Freeh criticized the Clinton administration's abuse of the FBI in the accumulation of FBI background files. On the occasion of the release of the report, Freeh, promising to prevent future abuse, said:

The prior system of providing files to the White House relied on good faith and honor. Unfortunately, the FBI and I were victimized. I should have known before last week about a decades old system that failed. The FBI and I fell victim to my lack of vigilance, and this failure to exercise proper management controls also affected the privacy rights of many persons. I deeply regret those problems and pledge that they will not occur again on my watch. Like the report on which I based my comments, I have not reached any conclusions regarding the motivation of any White House employee.⁴⁴⁹

In response to Freeh's statement that the FBI was "victimized," White House Press Secretary Mike McCurry said, "I do not understand those statements. There has been no abuse of the information in the files."⁴⁵⁰ This statement came soon after the White House Chief of Staff, Leon Panetta, apologized on national television to the "hundreds of people . . . whose classified FBI personnel files were obtained by the Clinton administration and reviewed by an Army security officer."⁴⁵¹

⁴⁴⁷ Howard M. Shapiro, *Report of the FBI General Counsel on the Dissemination of FBI File Information to the White House*, June 14, 1996. For statistical details of increase in file request from the Clinton administration, see *supra* at note 13.

⁴⁴⁸ It is important to not that the Clinton administration underwent a much hailed 25 percent cut in White House staff. Therefore, the number of requests for current reports should have lessened the demand placed on the FBI's White House desk.

⁴⁴⁹ Statement of Louis Freeh, Director, Federal Bureau of Investigation, June 14, 1996.

⁴⁵⁰ Tim Weiner, *Request for Files "Victimized" FBI, Its Director Says*; *New York Times*, June 15, 1996.

⁴⁵¹ McGrory, *Boston Globe*, June 10, 1996.

According to the FBI report, several offices in the White House can request a name check or a background investigation: the Executive Office of the President, the National Security Council, the Counsel to the President, or the Office of Personnel Security. The requests from the Office of Personnel Security, the office headed by D. Craig Livingstone, were sent under the name of the White House Counsel. No signature was affixed to the forms sent by the Office of Personnel Security.⁴⁵²

The report explains that the forms are picked up by an FBI courier and delivered to the Special Inquiry and General Background Investigations Unit of the FBI's Personnel Division. The forms that are the subject of this controversy sought "copies of previous reports." A request for a copy of a previous report is submitted to the Executive Agencies Sub-Unit of the Executive Agencies, Personnel and Administrative Support Unit of the Information Resources Division. That office has a staff of 36: 18 research analysts; 11 file assistants; and 7 clerks or typists.⁴⁵³ Two members of this staff are assigned to the "White House Desk."

When the White House Desk receives requests for previous reports, it obtains the FBI file number of the subject of the request. Once the file number is found, all background investigation files are obtained by the White House Desk. According to Shapiro's report, these files contain all raw data used to compile summaries and reports. To comply with a request for previous reports, the analyst first confirms that the files received are for the person for whom the White House has requested information. Then, the analyst determines what information to send to the White House. Memoranda, interviews, and other documents previously prepared in conjunction with the file are copied, as are any letters prepared for the previous transmittal of this information. The original documents that are copied are listed on a "pull card," and stamped on the back with the initials of the analyst on the back of the file. Then, the copies of the documents are sent to the White House with the original request.⁴⁵⁴

Those in the office managing the White House requests for background files saw a significant rise in the number of requests. Congresswoman Morella questioned Peggy Jean Larson, Supervisor of the Executive Agencies Dissemination Unit, Sub-unit, at the FBI.

Mrs. MORELLA. Did there come a time in late '93 and early '94 when you began to receive a large amount of requests for copies of previous reports?

Ms. LARSON. Yes, Ma'am.

Mrs. MORELLA. In your 32 years of experience with your unit, can you recall another instance when you received more than 400 requests for copies of reports within a 2- to 3-month period?

Ms. LARSON. Probably not within a 2- to 3-months period. It is not unusual that we would have received that many requests over a longer period of time, but I can't recall in that short period of time.

⁴⁵²Howard M. Shapiro, *Report of the FBI General Counsel on the Dissemination of FBI File Information to the White House*, June 14, 1996.

⁴⁵³*Id.*, p. 16.

⁴⁵⁴*Id.*, p. 18.

Mrs. MORELLA. Did you report the unusual number of requests to your supervisor?

Ms. LARSON. I made Mr. Thornton aware of the fact that we did have an increase in the number of request for prior backgrounds only. I only brought it to his attention because I was going to have to get some overtime. I believe it is in the record that one of my employees, her husband was ill and the other analyst was rather backed up.

Mrs. MORELLA. Did he indicate that he would follow up on this? I wondered what his response was.

Ms. LARSON. His response was, did I have enough help, and how much overtime did I need, and were there any problems. I said no, that just because of one of them being out, that the other analyst was in need of overtime. He said that was fine. But as far as the nature of the request, there was no problem with that.⁴⁵⁵

In his deposition, Bourke stated that those opening the requests would not recognize the names of people for whom background investigations had been requested.

Ms. OLSON. But anything that comes in with the first two boxes, previous report or name check, would go on to the Name Check Unit?

Mr. BOURKE. Correct.

Ms. OLSON. Regardless of who the individual is?

Mr. BOURKE. Correct. I mean, the people who open those packages wouldn't know James Baker from you, or me. Well, they would know him from me. They know me from him.⁴⁵⁶

People in that office, however, did recognize the name of James Baker.

Ms. REMINGTON. In late 1993, early 1994, would you know who James A. Baker was?

Ms. GEORGE. I remember when we got the name check in, Sherry Canter did it.

Ms. REMINGTON. Did she know who James Baker was?

Ms. GEORGE. Yes.⁴⁵⁷

It is clear that there were FBI officials who recognized the high number and unusual nature of the requests for background investigations coming in to the FBI, but they apparently relied upon the "good faith and honor" of the White House.

C. ATTORNEY GENERAL JANET RENO REFERS THE MATTER TO
INDEPENDENT COUNSEL KENNETH W. STARR

Independent Counsel Kenneth Starr wrote to the Attorney General Janet Reno on June 18, 1996, stating his reservations about the Independent Counsel conducting the investigation of the dissemination of FBI files to the White House, because he felt his mandate lacked the scope.⁴⁵⁸ Mr. Starr had begun a preliminary

⁴⁵⁵ *Security of FBI Files* hearing, August 1, 1996, pp. 71-72.

⁴⁵⁶ Bourke deposition, pp. 24-25.

⁴⁵⁷ George deposition, p. 34.

⁴⁵⁸ Associated Press, *Reno Orders FBI File Probe*, June 19, 1996.

inquiry on the first day the Dale file became public. Mr. Starr had heretofore conducted the investigation into the White House firing of seven employees of the White House Travel Office. Mr. Starr sought evidence regarding the White House retrieval of Dale's file, because it was evidence that the White House sought damaging information with which to tarnish Dale's image.

On the same day that Starr wrote of his concerns to Reno, Shapiro was notified that he would be tasked with conducting a complete investigation of both FBI and White House involvement in this affair.⁴⁵⁹ At 9 a.m. on June 20, 1996, Attorney General Reno made a request to the U.S. District Court for the District of Columbia that the issue of the White House retrieval of FBI background investigations on former Bush and Reagan administration officials be added to the jurisdiction of the Independent Counsel.⁴⁶⁰

In her public statement, Reno said, "I have concluded that it would constitute a conflict of interest for the Department of Justice itself to investigate a matter involving an interaction between the White House and the FBI, a component of the Department of Justice. Therefore, I have decided today to seek an expansion of Mr. Starr's jurisdiction from the court, so that he may conduct that further investigation."⁴⁶¹

Once a matter is put within the jurisdiction of an Independent Counsel, it is then specifically outside the jurisdiction of the FBI. Title 28 of the U.S. Code, in § 597, states that "[w]henver a matter is in the prosecutorial jurisdiction of an independent counsel or has been accepted by an independent counsel under § 594(e), the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter . . ." The FBI, as a bureau within the Department of Justice, is governed by this provision of the U.S. Code. The FBI should have suspended its investigation or any involvement in the FBI files investigation. Mr. Shapiro was clearly without any authority to investigate this matter.

D. FBI CONTACTS THE WHITE HOUSE AFTER RENO'S REFERRAL

As of June 20, 1996, the investigation of the release of FBI files to the White House was referred by Attorney General Reno to Independent Counsel Kenneth Starr. At that time, the only entities rightfully investigating the matter were the Independent Counsel and the Committee on Government Reform and Oversight.

1. Freeh requests that Chairman Clinger review background investigations rather than question agents

As part of its investigation, the committee sought to learn why personnel with largely political backgrounds were placed in sensitive positions in the White House Office of Personnel Security. Additional concerns were voiced regarding allegations of improper-

⁴⁵⁹ Shapiro deposition, p. 120. Mr. Shapiro also testified that he met with the Office of Independent Counsel and received a briefing on the Independent Counsel's investigation.

⁴⁶⁰ Notification to the court pursuant to 28 U.S.C. § 592 (a)(1) of the initiation of a preliminary investigation and application to the court pursuant to 28 U.S.C § (c)(1) for the expansion of the jurisdiction of an Independent Counsel; June 21, 1996.

⁴⁶¹ Statement of Attorney General Janet Reno, June 20, 1996.

ety on the part of Livingstone and Marceca. The committee heard testimony regarding Livingstone's and Marceca's suitability for the positions they held.⁴⁶² The committee initially sought to interview those agents who conducted the background investigations of Livingstone and Marceca.

In a July 10, 1996 letter, Director Freeh wrote that he had "grave concerns about having line Agents subjected to congressional inquiry about specific investigations and I respectfully ask that your committee use other means to obtain the information needed for your inquiry."⁴⁶³ Freeh was concerned that such interviews conducted by a congressional committee could have a "chilling effect on the vigor with which our Agents conduct investigations."⁴⁶⁴ In the same letter, Freeh wrote, "I respectfully ask that you allow the FBI to provide [the background files] to you through knowledgeable managers or that the Committee pursue the underlying documentation."⁴⁶⁵

Chairman Clinger acceded to Director Freeh's request regarding the review of Livingstone's and Marceca's background files. Barbara Olson, chief investigative counsel, arranged to view the files at FBI headquarters. On July 15, 1996, FBI Congressional Affairs Director Margaret Owens spoke with Steve Colloton of the Independent Counsel's Office to ensure that the Independent Counsel had no objections to making the files available to the chairman and approved staff of the Committee on Government Reform and Oversight. Mr. Colloton said the office of the Independent Counsel had no objections to the release of the files to the committee.⁴⁶⁶

2. Shapiro notifies White House Counsel's Office, whom he referred to as "affected parties," of potential incrimination Nussbaum's statement

In preparation for that visit, Owens had the files retrieved. Paralegals in the Civil Discovery Review Unit analyzed the files, ostensibly to redact names of those in the files who had provided information on the condition of confidentiality. On July 15, 1996, Paul Cignoli, Chief of the Civil Discovery Review Unit, brought a document in Livingstone's file to the attention of Tom Kelley.⁴⁶⁷ Mr. Kelley realized its importance.

The document was a portion of a memorandum of an interview with Bernard Nussbaum. Nussbaum, the former Counsel to the President, was interviewed by Special Agent Sculimbrene in conjunction with the background investigation of Livingstone. In the memorandum of that interview, Sculimbrene wrote in March 1993:

Bernard Nussbaum, Counsel to the President, advised that he has known [Livingstone] for the period of time that he has been employed in the new administration. [Livingstone] had come highly recommended to him by HILLARY CLINTON, who has known his mother for a longer period of time. [Nussbaum] was confident that the appointee lives

⁴⁶² Reneghan deposition, pp. 62-65.

⁴⁶³ July 10, 1996 letter from Director Freeh to Chairman Clinger.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ July 29, 1996 interview of Howard M. Shapiro by the Senate Committee on the Judiciary.

⁴⁶⁷ Kelley deposition, pp. 85-86.