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INVESTIGATION INTO THE WHITE HOUSE AND DEPARTMENT OF JUSTICE ON SECURITY OF FBI BACKGROUND INVESTIGATION FILES

SEPTEMBER 28, 1996.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CLINGER, from the Committee on Government Reform and Oversight, submitted the following

NINETEENTH REPORT

together with

ADDITIONAL AND MINORITY VIEWS

On September 24, 1996, the Committee on Government Reform and Oversight approved and adopted a report entitled "Investigation into the White House and Department of Justice on Security of FBI Background Files." The chairman was directed to transmit a copy to the Speaker of the House.

I. EXECUTIVE SUMMARY

A. INTRODUCTION

The committee's investigation into the unauthorized possession of hundreds of FBI background files by the White House remains in progress. There are many questions that are unanswered; cooperation from the White House and other witnesses has not been full and complete; more witnesses must be interviewed; and, many more documents from earlier committee requests are outstanding. Accordingly, this is an interim report to inform the public as to the status of the investigation in the closing days of the 104th Congress.

1. The conduct of White House officials

The FBI files matter, or "Filegate," is as serious an issue as the Clinton administration has encountered. The discovery of the unauthorized access to so many FBI background files on so many former White House employees is bad enough. These files contain the most private and personal information on an individual, his spouse and family. The fact that two individuals, Craig Livingstone and Anthony Marceca, with extensive political involvement and checkered pasts were in charge of handling the files is cause for alarm and investigation.

That present and former White House officials have not been forthcoming in revealing who hired the two central characters in this matter is of great concern to the committee. The committee intends to aggressively pursue the answers. Whoever was responsible for bringing them into the White House is ultimately responsible for these actions. Placing the public trust of such sensitive, private files in the hands of two political operatives was a disaster waiting to happen. And, it did.

In general, the FBI files issue shows a lack of respect by the Clinton administration for proper security procedures to protect both the President of the United States and the national security. This is all the more so since the White House ignored recommendations from a Democratic committee chairman of the U.S. Senate to take security precautions in response to reported security irregularities in the first years of the Clinton administration.

The Clinton White House displayed a lack of respect for the privacy and confidentiality of private citizens. The mere fact that individuals lacking in professional skills and discretion were put in charge demonstrates the cavalier approach of the Clinton administration toward sensitive security matters.

During the early revelations of the FBI files investigation, White House officials were quick to blame others rather than take responsibility. This happened even when all the facts were not known. First, it was touted as a routine mistake; then it was blamed on a low-level clerk; then the General Accounting Office; and then, the Secret Service. Each of these explanations was thoroughly discredited.

Some White House officials, through surrogates and unattributed background quotes in the press, continue to blame the Secret Service, even after that theory was soundly debunked. The fact that the White House seeks to avoid responsibility for this matter, and instead passes the buck, ensures that White House accountability for its own actions will be elusive.

Furthermore, the FBI files issue made it more difficult for the FBI and the Secret Service, the two agencies responsible for protecting the President and performing security for the White House, to trust actions of the White House. Prior to the files matter coming to light, these agencies cooperated with the White House under the presumption of a "good faith" relationship. Now, however, both have taken steps to implement more skeptical, arms-length processes for future interaction with White House officials. This unfortunate departure from tradition is yet another result of the growing mistrust of our political leaders in Washington. Undoubtedly, it is a black eye on this White House.

2. The conduct of the FBI

The committee also is troubled by another serious issue that reemerged during the FBI files investigation: the politicization of the FBI. Questions about a cozy relationship between the FBI and the White House surfaced during the committee's investigation into the White House Travel Office firings. At the time, in a statement by FBI Director Louis Freeh said, "I told the President that the FBI must maintain its independence and have no role in politics."[1] These questions raised great concern because the politicization of law enforcement in a democracy is a swift and sure way to trample over the civil liberties of private citizens. Consequently, the FBI Director took steps to reverse these perceptions of coziness. But it did not prevent the hundreds of files from being sent to the White House without question.

In the course of the committee's inquiry into the files matter, this perception resurfaced. The committee uncovered several questionable actions by FBI General Counsel Howard Shapiro that we find inexplicable and inexcusable. His "heads up" to the White House Counsel had the effect of an early warning to the subjects of the committee's and the Independent Counsel's investigations of potentially damaging information. Shapiro's delivery of a politically controversial manuscript, joint editing of a White House letter to Director Freeh, and possession of his own personal White House pass had a similar effect.

This committee witnessed blatant interference in its investigatory proceedings. Mr. Shapiro's justifications for his actions are implausible. The committee is seriously troubled by the interference of Mr. Shapiro in the investigations of this committee, as well as those of the Independent Counsel. Mr. Shapiro himself acknowledged that his "heads up" to the White House was inappropriate. However, his coziness with the White House continues. Even the perception of such a relationship threatens the independence of the FBI. The committee calls upon Mr. Shapiro to tender his resignation from the office of the FBI general counsel.

The act of resignation is necessary, if the Director wishes to restore the arms-length relationship between the FBI and the White House, as well as the public's confidence. Failure by the Director to do so will allow the continued erosion of confidence in law enforcement and in the Director's own independent leadership.

The committee has yet to determine whether colossal incompetence or a sinister motive precipitated these events. We have yet to learn exactly who is Craig Livingstone, who hired him and why. Answers to these questions are necessary to explain the true story of "Filegate."

The committee's investigation has sufficient information to realize the great danger in the White House's unauthorized acquisition of these sensitive FBI files. We know the files were in the hands of political operatives, non-professionals, volunteers, teen-agers in proximity to a photocopier, and individuals without security clearances. We know there was virtually no supervision over this sensitive process. We know that some data was taken from the White House compound to the home of a witness who has now claimed

[1] Report of Fiscal Year 1994; Federal Bureau of Investigations; Louis Freeh, Director.

fifth amendment protection against testifying before Congress. No one yet knows where these files have been or who looked at them. The potential for the abuse of the rights and privacy of hundreds of private citizens remains clear and present.

The committee continues to investigate this case and discover the true story. In the meantime, the committee cannot yet assure the public that a lax attitude toward and disrespect for the privacy and rights of ordinary Americans has not gripped this White House.

B. THE MATTER OF THE FBI FILES

1. The discovery of the files: Travelgate to Filegate

Since May 30, 1996, the Committee on Government Reform and Oversight has conducted an intensive investigation into the actions of the White House and the Department of Justice concerning the White House's improper acquisition of hundreds of FBI background investigation files of former Republican officials. The genesis of this revelation of massive invasion of privacy was with the committee's document requests for all previously withheld files on Billy Dale.

On May 30, 1996, the committee discovered that the White House had improperly ordered Billy Dale's FBI background file 7 months after he was fired, when the White House finally produced 1,000 pages of the 3,000 pages of documents that were being withheld under a May 9, 1996 invocation of executive privilege.

The committee issued a January 11, 1996 subpoena which included a request for all records relating to Billy Dale. The documents were due to the committee on January 22, 1996. Prior to the subpoena, the committee had submitted several document requests to the White House which included document requests relating to Mr. Dale.

Prior to May 30, 1996, the White House Counsel had represented in February 1996 that the only categories of documents withheld were: "personnel" records, attorney notes, and "deliberative material" concerning investigations of Congress and the Independent Counsel.

Throughout the spring of 1996, White House Counsel withheld this group of documents. At no time did the White House Counsel make any representations that he was in possession of an FBI background file of Mr. Dale. In fact when Mr. Dale's file was forwarded on May 30, 1996, on the morning a contempt vote was scheduled, it was not even distinctly identified in a production log and was just grouped among documents emanating from "The Counsel's Office." Since the document had been obtained from the Office of Records Management who received it from the Office of Personnel Security, the characterization of the source of the document was misleading.

Yet if the document did come from the "Counsel's Office" as identified by the White House, why does the White House Counsel Jack Quinn claim that he told the committee about the document in February 1996 while Special Counsel Jane Sherburne, who was at the same February 1996 meeting, claims she didn't know about the Billy Dale file until June 4, 1996? The Counsel's Office has provided mutually inconsistent accounts of who knew about the Billy Dale file and when.

It is important to note that the Billy Dale file only was produced after a vote of contempt was taken in the full committee on May 9, 1996. In a meeting with Chairman Clinger shortly before the contempt vote, Quinn informed the chairman that he had not even attempted to collect certain categories of subpoenaed documents and he had not yet undertaken a review of the documents for privilege issues. Quinn issued a blanket "protective" executive privilege claim over the documents on May 9, 1996 at the behest of the President. Personnel records are not normally subject to executive privilege.

"Personnel records" are distinctly different from FBI background reports and are kept in separate and distinct offices at the White House. Certainly the Counsel's Office, which handles the FBI background reports, is aware of this distinction. After all, the Counsel's Office reviews FBI background reports and it does not ordinarily review "personnel" records. The White House Counsel's Office was misleading in how it represented Billy Dale's file to the committee. While the White House Counsel now tries to revise the history of how they characterized this file, the actions by Counsel staff are representative of the type of gaming that was typical in negotiating document productions.

On May 30, 1996, when Billy Dale's file was produced to the committee, Chairman Clinger also was notified by letter[2] that President Clinton was formally asserting executive privilege over the then remaining 2,000 pages of outstanding documents. Quinn claimed that Attorney General Reno reviewed the documents and agreed with the propriety of assertion of executive privilege. Although Quinn represented that this assertion of executive privilege was being made by President Clinton, the committee never was provided any documentation of a personal assertion by President Clinton.

2. The discovery of the Billy Dale file

The privileged resolution was withdrawn from floor consideration at Chairman Clinger's request in order to review the new documents and determine the propriety of President Clinton's executive privilege claims over the remaining 2,000 pages of identified responsive documents.

The committee began an immediate review of the 1,000 pages already produced. That day, committee investigative staff discovered a White House memo, dated December 20, 1993, requesting a copy of Billy Dale's FBI background investigation previous report. The request for Dale's file was sent to the FBI a full 7 months after Mr. Dale and the White House Travel Office employees had been summarily fired and an FBI investigation announced by the White House.

The request form found among the White House's document production was in memorandum format addressed "TO: FBI, LIAISON" and "FROM: BERNARD W. NUSSBAUM."[3] The form stated that Mr. Dale's previous report was being requested because he was currently being considered for "ACCESS (S)" to the White

[2]Letter from Jack Quinn to Chairman William F. Clinger, Jr., Committee on Government Reform and Oversight, U.S. House of Representatives, May 30, 1996.
[3]White House document CGE 43641.

House.[4] An attached memo indicated that the FBI complied with the request and forwarded the Dale file to the White House on January 6, 1994.[5]

Although the committee had previously issued, on February 7, 1996, a subpoena to the Department of Justice for all records pertaining to Billy Dale, DOJ never produced its copy of the document.

The committee asked Attorney General Reno to provide information on the Justice Department's knowledge of its failure to produce its copy of the Dale file and the White House memo requesting it in December 1993, particularly in light of the fact it was responsive to other Justice Department requests and subpoenas. The Department of Justice responded, stating that the committee had not requested the Dale file. The memo request from Nussbaum's office was not located in its search.

When FBI Unit Chief James Bourke was asked in a committee deposition about DOJ's failure to produce this document, he testified that he had "no idea" why, and that it wasn't his responsibility.[6] Mr. Bourke later explained that it was the FBI general counsel's responsibility to request document searches in response to congressional subpoenas and he was not aware of any request.[7]

It is clear that White House officials attempted to hide its requisition and possession of the Dale file: first, by erroneously describing it as a personnel file instead of an FBI background file; second, by withholding it under a blanket executive privilege; and third, for failing to list this and other specific documents in its final privilege log.

The committee has yet to find the reason why the White House requested the Dale file from the FBI 7 months after he was fired.

3. White House's changing explanations for "Filegate"

In the first few days following the discovery, the White House offered several conflicting explanations about how it obtained hundreds of FBI background files. The White House initially released statements from Craig Livingstone's attorney claiming that the activities of Livingstone and Marceca were all an "innocent mistake." Why did the White House so quickly endorse the explanations of Livingstone and Marceca before getting all the facts?

4. A "file clerk" caused the problem—June 5, 1996

White House Special Counsel to the President Jane Sherburne issued a statement on June 5, 1996, claiming that "file clerks" performing a routine recordkeeping effort "may have mistakenly" sought Mr. Dale's FBI background file.[8] Ms. Sherburne refused to provide the committee with the name of the "file clerk" that sought Dale's file. Unknown to the committee, at the time, Ms. Sherburne met with Livingstone that evening at the White House. Mr. Livingstone claimed to know nothing about this growing "problem" at the

[4] According to Anthony Marceca's documents produced under subpoena to the committee, (unnumbered) the "(S)" notation referred to the type of access being sought for the individual. An "S" meant that the White House was seeking access for Mr. Dale as White House Staff rather than for an "I" for intern or volunteer position.

[5] White House document CGE 43642.

[6] Committee deposition of James Bourke, June 17, 1996, pp. 62–63.

[7] *Id.*, pp. 65–66.

[8] Statement by Jane Sherburne, June 5, 1996.