Comey Failed to Act in the Public Interest

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On July 5, FBI Director James Comey delivered a prepared statement summarizing the bureau's yearlong investigation of Hillary Clinton's use of a personal email system during her tenure as secretary of state. Evidence indicated that Clinton and her closest colleagues, according to Comey, "were extremely careless in their handling of very sensitive, highly classified information." Yet, he concluded, "although there is evidence of potential violations of the statutes regarding the handling of classified information, our judgment is that no reasonable prosecutor would bring such a case."

It may be correct that, taking into account all factors, a reasonable prosecutor *could* have concluded that criminal charges should not be brought against Clinton. But, contrary to Comey's assurances, the FBI's findings also provide grounds for a reasonable prosecutor, all things considered, to bring charges. By mischaracterizing the law in what is, in his words, "a case of intense public interest," Comey ill-served the public interest.

The crux of the matter, Comey argued, was that the FBI had not identified in Clinton's case, as it had in others the government had prosecuted dealing with the mishandling of classified information, "clearly intentional and willful mishandling of classified information; or vast quantities of materials exposed in such a way as to support an inference of intentional misconduct; or indications of disloyalty to the United States; or efforts to obstruct justice."

But could no reasonable prosecutor have determined that Clinton's mishandling of classified information was intentional? Must the mishandling of classified information be intentional to be prosecutable?

Several prominent former prosecutors have weighed in to provide what Comey denied existed: a plausible alternative interpretation of his findings and of the law that would justify a reasonable prosecutor recommending that Attorney General Loretta Lynch indict Hillary Clinton.

In a House hearing on July 7, Rep. Trey Gowdy, himself a former federal prosecutor, elicited from Comey the admission that Clinton made several false public statements: that she had never sent nor received classified information over her private email; that none of the emails she sent or received contained anything marked classified; that she used just one device for emailing; that her lawyers read all emails that went through her private server and were overly inclusive in determining which were work-related; and that she returned all work-related emails to the State Department.

That's a lot of false public statements. All are self-serving.

Prosecutors use false exculpatory statements as evidence of intent and consciousness of guilt. Combined with her explicit rejection of a government email address, a failure to turn over her emails until, two years out of office, she was compelled by Congress to do so, and the State Department's finding that it "did not—and would not—approve her exclusive reliance on a personal email account to conduct Department business" because of official restrictions and "security risks," a reasonable prosecutor, Gowdy maintained, could have found substantial evidence of intent.

But absent a showing of intent, a reasonable prosecutor still would have a respectable case against Clinton, because under the relevant law, intent is not a necessary element of criminal mishandling of classified information.

In the Wall Street Journal, Michael Mukasey, a former U.S. federal prosecutor (and former federal judge and U.S. attorney general), observed, "It is a felony for anyone entrusted with lawful possession of information relating to national defense to permit it, through 'gross negligence,' to be removed from its proper place of custody and disclosed." A reasonable prosecutor could readily determine that the "extremely careless" conduct the FBI ascribed to Hillary Clinton and her closest colleagues constituted gross negligence.

Moreover, Comey's statement that the FBI did not discover "clear evidence that Secretary Clinton or her colleagues intended to violate laws governing the handling of classified information" is, Mukasey wrote, irrelevant to whether she committed the misdemeanor of knowingly removing classified documents to an unauthorized location.

In agreement with Mukasey, Andrew McCarthy, a former federal prosecutor, argued in National Review Online that according to Comey's summary of the FBI investigation, "Hillary Clinton checked every box required for a felony violation of Section 793(f) of the federal penal code (Title 18)." According to McCarthy, "many, if not most, reasonable prosecutors would feel obliged to bring the case" if the grossly negligent conduct were likely to have harmed national security.

On July 5, Comey affirmed that "it is possible that hostile actors gained access to Secretary Clinton's personal e-mail account." Many security officials in the United States and abroad would say that it is a near certainty. A jury could well have concluded that a reasonable person serving as secretary of state would understand that use of a private, unauthorized, unsecured home-brew email server was, as Comey remarked, less secure than even private email services such as Gmail, and thus that Clinton's gross negligence harmed American security. Clinton not only exposed highly classified information to hacking by hostile actors but also set a demoralizing precedent whereby the secretary of state systematically flouts security precautions to which everybody else in diplomacy and defense is expected to strictly adhere.

These considerations do not show that Comey was wrong to decline to recommend criminal charges. They show that he was wrong to declare that no reasonable prosecutor could have weighed the relevant factors differently and reached an alternative conclusion.

Comey's misrepresentation has had the foreseeably baleful consequence of encouraging the left's conviction that the case against Clinton had no basis in law. In Slate, Fred Kaplan dismissed "the fuss over Hillary Clinton's email" as "one of the most overhyped news stories of this overhyped news season." The Washington Post's Eugene Robinson asserted that the House hearings were "a partisan attempt to wring another news cycle's worth of headlines out of a 'scandal' whose dying embers were being definitively snuffed out." Guardian columnist Jill Abramson maintained, "The Clintons are justified in feeling that they are victims of an endless, right-wing drive to knock them off politically from their very first days in the White House."

Cases that no reasonable prosecutor would pursue do exist. Closer to that standard, for example, would be Comey's deplorable decision in December 2003 as deputy attorney general to appoint a special prosecutor in the Valerie Plame leak case (Attorney General John Ashcroft recused himself). Comey went forward despite knowing that Deputy Secretary of State Richard Armitage leaked CIA employee Plame's CIA connection to journalist Robert Novak (no charges were brought against Armitage). Indeed, the CIA had cleared the information for Novak's article and the CIA's investigation found that the leak did not harm national security.

The case itself inflicted a crippling blow on the Bush presidency while the nation was waging war on two fronts, and resulted in the outrageous conviction of Scooter Libby for obstruction of justice, making a false statement, and perjury based on a byzantine reconstruction of circumstantial evidence.

Worse yet, according to star prosecution witness Judith Miller, Special Prosecutor Patrick J. Fitzgerald deliberately elicited erroneous testimony from her that was crucial to his case.

Comey's contrasting choices in regard to Clinton and Libby demonstrate the extraordinary power of federal law enforcement, which can damage the public interest both by highhandedly declaring "potential violations" as beyond the cognizance of courts and by criminalizing conduct that should be beyond courts' cognizance.

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