

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

ORRIN G. HATCH, UTAH
JEFF SESSIONS, ALABAMA
LINDSEY O. GRAHAM, SOUTH CAROLINA
JOHN CORNYN, TEXAS
MICHAEL S. LEE, UTAH
TED CRUZ, TEXAS
JEFF FLAKE, ARIZONA
DAVID VITTER, LOUISIANA
DAVID A. PERDUE, GEORGIA
THOM TILLIS, NORTH CAROLINA

PATRICK J. LEAHY, VERMONT
DIANNE FEINSTEIN, CALIFORNIA
CHARLES E. SCHUMER, NEW YORK
RICHARD J. DURBIN, ILLINOIS
SHELDON WHITEHOUSE, RHODE ISLAND
AMY KLOBUCHAR, MINNESOTA
AL FRANKEN, MINNESOTA
CHRISTOPHER A. COONS, DELAWARE
RICHARD BLUMENTHAL, CONNECTICUT

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

May 17, 2016

VIA ELECTRONIC TRANSMISSION

The Honorable James B. Comey, Jr.
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, DC 20535

Dear Director Comey:

I am writing in regard to the FBI's ongoing investigation relating to Secretary Clinton's use of a non-government server and email address for her official State Department business. In particular, I am writing to raise concerns about the appearance of a conflict of interest by Justice Department officials and to seek your input about possible remedies. To state the obvious, it is a rare occurrence to have an administration's former cabinet official being investigated under the authority of that very same administration. The circumstances are further complicated by the fact that the investigation is underway during a presidential election year in which Secretary Clinton is her party's frontrunner. Moreover, the President and his press secretary have made statements that seemed to prejudge the scope and outcome of the FBI's ongoing investigation. Taken together, these circumstances reasonably raise the serious appearance of a conflict of interest. This is not just an academic concern, as it appears the Justice Department may be trying to keep the scope of the FBI's investigation unreasonably narrow, according to press reports.

While career FBI and Justice Department attorneys may be involved in the investigation, political appointees at the Justice Department, including the Attorney General herself,¹ will make the ultimate determination whether or not to prosecute Secretary Clinton and her associates. Even if these

¹ At a recent hearing before the House Appropriations Committee, Congressman John Carter asked the Attorney General if she would authorize prosecution if the FBI makes the case that Secretary Clinton broke the law. In response, Attorney General Lynch testified that the FBI and Justice Department personnel involved in the investigation "will make a recommendation to me when the time is appropriate" and refused to answer whether she would authorize prosecution if that is the FBI's recommendation. *The F.Y. 2017 Budget for the Dep't of Justice: Hearing Before the House Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies*, 114th Cong. (2016).

appointees are acting with the utmost integrity and professionalism, at the very minimum, the appearance of a conflict clearly exists. Indeed, there appear to be at least three areas of conflict here.

First, because the Justice Department officials who will make the decision are political appointees, their prospects for continuing employment at the Department are likely tied to whether Secretary Clinton or another Democrat is elected President in the fall. It is understandable that the public might believe there is a conflict of interest when it appears that the political appointees making the decision would harm their own employment prospects if they moved forward with a prosecution, should the investigation find one warranted.

Second, the President and his press secretary have made public statements that seem to suggest the President's preferred outcome in this investigation by downplaying the seriousness of the underlying facts. The President has since claimed he is not exerting political influence on the decision whether or not to initiate a prosecution because he does not talk to the Attorney General about pending investigations.² But this misses the point. It is not necessary for the President to exert political influence through private, one-on-one conversations; the public statements by the President and his press secretary undoubtedly also reached his Justice Department appointees and broadcast his preferences to them. Accordingly, in doing so he may have put additional pressure on his political appointees to refuse to approve indictments or at least to narrow the scope of the investigation. If the political appointees' boss, the President, has already publicly asserted that Secretary Clinton merely acted with "carelessness" and that her actions did not threaten national security, how can his political appointees contradict him if the investigation finds otherwise?

Third, Attorney General Lynch has additional professional associations with the Clintons that underscore the appearance of a conflict. Former President Bill Clinton appointed her to be the U.S. Attorney for the Eastern District of New York. In between serving as the U.S. Attorney under President Clinton and returning to the position under President Obama, she was a partner at a law firm that represented both President and Secretary Clinton. Once again, even if the Attorney General is acting in good faith, there is at least an appearance of a conflict of interest.

In short, there are legitimate reasons why the public would question whether a potential conflict of interest could affect the Justice Department's decision whether to pursue one or more prosecutions in this matter. Moreover, the current process for making these decisions lacks any meaningful transparency, scrutiny, or accountability. Especially in this unique circumstance, it is vitally important that the public have confidence in the outcome of the investigation, whatever it may be.³

² *Wallace Presses Obama: How Can You Say Hillary Didn't Jeopardize Nat'l Security?*, FOX NEWS INSIDER, Apr. 10, 2016.

³ Even journalists who are sympathetic to Secretary Clinton have noted this. See Ruth Marcus, *Why a No-Indictment for Hillary Clinton Would Still Be a Problem for America*, THE WASHINGTON POST, Mar. 29, 2016. (stating: "It bears some thinking at the top levels of the Justice Department and the FBI about whether there is some way to mitigate the suspicion [that political meddling will squelch an indictment] by making more information public than is the norm." as well as noting: "There's no indication that Justice has contemplated [appointing a special counsel].")

The Justice Department has a mechanism in place to deal with such conflicts, namely, appointing a Special Counsel from outside of the Department, but the Attorney General has not exercised it. The Special Counsel regulations are supposed to help ensure fair and impartial investigations in the face of conflicts, although the use of a Special Counsel can present its own issues. According to the regulations:

The Attorney General, or in cases in which the Attorney General is recused, the Acting Attorney General, will appoint a Special Counsel when he or she determines that criminal investigation of a person or matter is warranted and-

- (a) That investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances; and
- (b) That under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.⁴

According to the regulations, there are three conditions for appointing a Special Counsel: 1) the Attorney General decides an investigation is warranted; 2) the Justice Department has a conflict of interest or there are other extraordinary circumstances; and 3) the public interest is served. Based upon the available facts and circumstances, all of those conditions appear to have been met here.

This is not just an academic issue about conflicts of interest; it is possible that the Justice Department might be failing to provide the FBI with all the resources it needs for this investigation and might be improperly limiting the investigation's scope. You recently testified before Congress that you are "very close personally to that investigation to ensure that [the FBI has] all the resources [it] need[s], including people and technology."⁵ But, to the best of my knowledge, the Justice Department has made no similar commitment. The Department refused for months to confirm to the Committee that an investigation was underway at all, and it still refuses officially to confirm the scope of the investigation or whether it has provided the necessary Department resources for the FBI to properly address all the relevant legal issues.

Information in the public domain raises serious questions about whether the Department has done so. For example, it is unclear whether the Justice Department has empaneled a federal grand jury in order to issue subpoenas, so that the FBI can gather all of the relevant information. As a recent article in the Washington Post noted, "there is no indication that prosecutors have convened a grand

⁴ 28 C.F.R. § 600.1.

⁵ *Encryption Security and Privacy: Hearing Before the House Committee on the Judiciary*, 114th Cong. (2016).

jury in the email investigation to subpoena testimony or documents[.]”⁶ Given the public reports of the resources and time being devoted to the investigation by the FBI, this appears highly unusual.

Moreover, Attorney General Lynch’s public statements seem to imply that the investigation is being limited to an extremely narrow scope, as she only acknowledges that the investigation is evaluating the issues relating to Secretary Clinton’s and her subordinates’ potential mishandling of classified information.⁷ In a recent interview, Attorney General Lynch described the investigation as follows: “We’re looking at whether or not classified information was handled in a particular way, in an appropriate way.”⁸ At her recent appearance before the Committee, Senator Thom Tillis asked if the Justice Department had analyzed issues surrounding the joint income President and Secretary Clinton received from foreign governments for speeches President Clinton made, an issue raised by some of the released emails. One of the Clintons’ joint tax returns implicated in this and related public corruption issues was prepared by the law firm of Hogan & Hartson while the Attorney General was a partner at the firm.⁹ In response, the Attorney General seemed unaware of the Constitutional issue raised by Senator Tillis and testified that “the matter that has been under discussion both in this and other proceedings has been the Department’s review of how the State Department handled classified information.”¹⁰ A recent news report also included the assertion by anonymous “U.S. officials” that the investigation is solely focused on the handling of classified information and has not included any other legal issues stemming from the server arrangement or information revealed from the retrieved emails.^{11 12}

⁶ Adam Goldman, *Justice Dept. Grants Immunity to Staffer Who Set Up Clinton Email Server*, THE WASHINGTON POST, Mar. 2, 2016.

⁷ This is in contrast to a report alleging that the FBI expanded the investigation to address public corruption issues. See Catherine Herridge, Pamela K. Browne, *FBI’s Clinton Probe Expands to Public Corruption Track*, FOX NEWS, Jan. 11, 2016.

⁸ Bret Baier, *AG Lynch Discusses Apple Feud, Clinton Probe, Cybersecurity*, FOX NEWS, Feb. 29, 2016. Available at <http://video.foxnews.com/v/4780269874001/ag-lynch-discusses-apple-feud-clinton-probe-cybersecurity/?intcmp=hpvid1#sp=show-clips>

⁹ See *Meet the Attorney General*, THE DEP’T OF JUSTICE, available at <https://www.justice.gov/ag/meet-attorney-general> (noting that the Attorney General was a partner at Hogan & Hartson/Hogan Lovells from 2002-2010); see also *Hillary Clinton Releases Health, Financial Records*, HILLARYCLINTON.COM, available at <https://www.hillaryclinton.com/tax-returns/> (showing the Clintons’ 2007-14 joint tax returns were prepared by Hogan & Hartson/Hogan Lovells).

¹⁰ *Oversight of the U.S. Department of Justice: Hearing Before the Senate Judiciary Committee*, 114th Cong. (2016).

¹¹ Evan Perez, Pamela Brown, Simon Prokupecz, *FBI Interviews Clinton Aides Including Huma Abedin As Part of Email Probe*, CNN, May 6, 2016.

¹² If accurate, this statement by a U.S. official about the full scope of the investigation is additionally troubling in light of the fact that an FBI official recently filed a sworn declaration in a FOIA case regarding records relating to the investigation stating that “[b]eyond Director Comey’s acknowledgment of the security referral from the Inspectors General of the Intelligence Community and the Department of State, the FBI has not and cannot publicly acknowledge the specific scope, focus, or potential targets of any such investigation without adversely affecting the investigation.” See Decl. of David M. Hardy, *Leopold v. Dep’t of Justice*, 15-cv-2117 (DDC), ECF No. 9-1 at 7. In that lawsuit, the FBI official declared under penalty of perjury that the FBI was withholding materials it had recovered from the server, and other records relating to the investigation, because they are exempt under FOIA Exemption 7(A). He stated that those records and other FBI records relating to the investigation were “compiled for law enforcement purposes” and that their disclosure could reasonably be expected to interfere with “a pending or prospective law enforcement proceeding” – Exemption 7(A)’s prerequisites. *Id.* at 7-10. He similarly stated that the records “are potential evidence in the FBI’s investigation,” that disclosing “evidence [or] potential evidence [] while the investigation is active [] could undermine the pending investigation by prematurely

Perhaps the most troubling report is the Washington Post's recent article about the FBI's interview of Cheryl Mills.¹³ That article stated that Justice Department officials had made an agreement with Ms. Mills' attorney that it "would be off limits" for the FBI to ask her questions during the interview about her role in deciding which of the emails on Secretary Clinton's server would be deleted and which would be turned over to the State Department.¹⁴ The article further stated that the FBI agents nonetheless asked about this important issue, that Ms. Mills walked out of the interview briefly in response, and that the Justice Department prosecutors were "taken aback that their FBI colleagues" had asked the question.¹⁵ Ms. Mills reportedly never answered the FBI's questions on this issue.¹⁶

Secretary Clinton's potential mishandling of classified information is undoubtedly important and must be fully investigated. However, it would be disturbing if the Justice Department has narrowed the investigation to prevent the FBI from also investigating the other important issues raised by this extraordinary situation. For example, press reports have indicated that the FBI has been able to recover emails deleted from Secretary Clinton's private server.¹⁷ If federal records on the private server were hidden or destroyed, then there may have been a violation of 18 U.S.C. § 2071, which prohibits concealing or destroying such federal records. If any of the deleted emails were responsive to Congressional inquiries or to agency inquiries, such as ones from the State Department Inspector General, then there may have been violations of 18 U.S.C. §§ 1505 and 1519, respectively. Similarly, the content of many of the released emails implicates Constitutional issues and public corruption laws by raising issues relating to joint income from paid speeches given by President Clinton for foreign government entities, as well as the blurring of the lines between the actions taken on behalf of the State Department, the Clinton Foundation, and Teneo, a private firm founded by a former counselor to President Clinton.

Despite this range of relevant legal issues, which extend far beyond the national security issues raised by the potential mishandling of classified information, public reports only indicate that the Justice Department has assigned personnel from its National Security Division to supervise the FBI's investigation,¹⁸ with another report claiming the U.S. Attorney's Office from the Eastern District of Virginia is also involved.¹⁹ There is no indication that the Justice Department has assigned prosecutors from its Public Integrity Section or prosecutors with expertise in the unlawful concealment or deletion

revealing its scope and focus, [and that] if individuals become aware of the scope and focus of [the] investigation, they can take defensive actions to conceal their activities, elude detection, and/or suppress evidence." *Id.* at 9-10 (emphasis added).

¹³ Matt Zapotosky, *Clinton Aide Cheryl Mills Leaves FBI Interview Briefly After Being Asked About Emails*, THE WASHINGTON POST, May 10, 2016; *see also* Andrew McCarthy, *Obama's Justice Department Shields Cheryl Mills from FBI's Questions*, NATIONAL REVIEW, May 14, 2016.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Paul Reid, Hannah Fraser-Chanpong, *Report: FBI Pulls Deleted Emails From Hillary Clinton's Server*, CBS NEWS, Sep. 23, 2015.

¹⁸ *Supra* n. 6 ("The email investigation is being conducted by FBI counterintelligence agents and supervised by the Justice Department's National Security Division.").

¹⁹ Matt Zapotosky, *Officials: Scant Evidence that Clinton Had Malicious Intent in Handling of Emails*, THE WASHINGTON POST, May 5, 2016.

of federal records. Indeed, when Attorney General Lynch was specifically asked if any prosecutors from the Department's Public Integrity Section are working on the case, she refused to answer.²⁰

In previous investigations, the Department of Justice has been willing to state which of its divisions and sections had attorneys working on a particular case.²¹ Because there is no indication that Justice Department has provided any resources relating to the other legal issues surrounding Secretary Clinton's private email server, and in light of the Attorney General's statements about the scope of the investigation, as well as the report claiming the Justice Department made an agreement with Ms. Mills' attorney to preclude the FBI from asking her about the sorting and deletion of email, it appears that the Justice Department might be improperly limiting the scope of the FBI's investigation. Viewed within the context of the Department's appearance of a conflict of interest in this case, this raises the question of whether a Special Counsel is in fact needed.

One news report has even gone so far as to claim, without naming its sources, that FBI "agents have been spreading the word, largely through associates in the private sector, that their boss is getting stonewalled [by Obama political appointees], despite uncovering compelling evidence that Clinton broke the law."²² The article further claimed that "FBI sources say [Director Comey] has no backing from President Obama and Attorney General Loretta Lynch to recommend charges against the former secretary[.]"²³ While this report may or may not be accurate, it is understandable that the public's confidence in the integrity and independence of any prosecutorial decision is in question, given the appearance of a conflict of interest by the political appointees in charge of that process. This is precisely the type of situation a Special Counsel appointment is designed to address.

You have experience in these issues not only from the perspective of the FBI, but also from the perspective of the Justice Department, and specifically in the context of investigations of senior administration officials. While you were serving as the Deputy Attorney General during the George W. Bush administration, Attorney General Ashcroft recused himself from the investigation regarding the Valerie Plame leak, due to the appearance of a conflict of interest he had as a result of past professional associations with one of the suspects, which then made you the Acting Attorney General for that case. In that case, there was substantial public concern about whether an investigation of administration officials that was being conducted under the oversight of the administration's political appointees would be fair and impartial. Upon being designated Acting Attorney General, you removed the case from the usual Justice Department chain of command and appointed a special prosecutor,

²⁰ *Supra* n. 8. This is additionally troubling because prior Department of Justice guidance on "Election Year Sensitivities" states if prosecutors "are faced with a question regarding the timing of charges or overt investigative steps near the time of a primary or general election, please contact the Public Integrity Section of the Criminal Division for further guidance." *Election Year Sensitivities*, THE DEPARTMENT OF JUSTICE, Mar. 9, 2012. Available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-election-year-sensitivities.pdf>

²¹ For example, in the investigation into the IRS's targeting of conservative groups, the Justice Department acknowledged while the investigation was ongoing that it had assigned attorneys from both its Criminal Division and Civil Rights Division.

²² Charles Gasparino, *Will Hillary Get Charged, Or What?* THE NEW YORK POST, Mar. 20, 2016.

²³ *Id.*

Patrick Fitzgerald, to handle the matter.²⁴ Mr. Fitzgerald subsequently brought an indictment against the Vice President's Chief of Staff, Scooter Libby, who was later convicted. Accordingly, it appears that based on your relevant experience you are uniquely suited to weigh in on whether a Special Counsel is needed in the current case.

In order for the Committee to evaluate the issues surrounding the investigation stemming from Secretary Clinton's use of a non-government server and email address for her official business, and related issues, please answer the following:

1. In general, under what circumstances do you believe that the FBI would need to work with a Special Counsel from outside of the Justice Department in order to properly conduct an investigation? Please describe in detail.
2. In general, if you believed that the Department of Justice, pursuant to the regulations, had a conflict of interest in a particular investigation, would you express this view, and if so, how?
 - a. Would you make a request to the Justice Department for a Special Counsel? If not, why not?
 - b. If you were to make a request, but the request were denied by the Justice Department, would you notify this Committee, which has oversight authority over these matters? If not, why not?
3. Do you believe that a Special Counsel is warranted in the investigation stemming from Secretary Clinton's use of a non-government server and email address for her official State Department business? If not, why not, and what is different about the current extraordinary circumstances that causes you to reach a different conclusion than you did in the Valerie Plame matter?
4. Has the FBI requested or otherwise indicated to the Justice Department or other administration officials that it believes a Special Counsel should be appointed in this case? If so, what was the response?
5. Has the Justice Department limited the scope of the FBI's investigation in any way or denied it any resources?
6. Is the FBI aware of any agreements Justice Department officials have made with Secretary Clinton or her associates to deem certain areas of inquiry "off limits" in interviews with the FBI? If so, was the FBI consulted about such narrowing of topics?

²⁴ While you did not rely on 28 C.F.R. § 600.1 to appoint Mr. Fitzgerald, you did explain the interaction between that regulation and his appointment during the press conference in which you announced your decision. See <http://www.c-span.org/video/?179743-1/special-prosecutor-appointment>

Did the Justice Department officials make these agreements over the objection of the FBI?

7. Has the FBI requested that a grand jury be empaneled in connection with this investigation? If so, did the Department of Justice deny that request?
8. Has the Justice Department assigned prosecutors to the investigation from its Public Integrity Section, who have relevant experience in public corruption laws, or assigned prosecutors with experience in the laws pertaining to the destruction of federal records? If not, has the Justice Department explained to the FBI why it has not?

Please provide your answers by May 31, 2016. Thank you for your attention to this important matter. If you have any questions, please contact Patrick Davis of my Committee Staff at (202) 224-5225.

Sincerely,



Charles E. Grassley
Chairman
Committee on the Judiciary

cc: The Honorable Patrick J. Leahy
Ranking Member
Senate Committee on the Judiciary

The Honorable Thom Tillis
United States Senator for North Carolina

The Honorable John Carter
Congressman for the 31st District of Texas