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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*  
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July 6, 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:

On May 17, 2016, I wrote you a letter asking if you believed a special counsel was warranted in the Clinton investigation in light of the conflicts of interest that exist between Department of Justice officials, such as the Attorney General, and Secretary Clinton. I also asked, if you did not believe one was warranted, that you explain why your opinion in this case is different from your decision to appoint a special counsel in the Valerie Plame investigation after Attorney General Ashcroft recused himself. You failed to provide any response at all to that letter. Even before Attorney General Lynch's private meeting with former President Clinton, there were several apparent conflicts of interest, some of which I described in that letter. Prosecutorial decisions made under the shadow of apparent conflicts of interest are understandably suspect. The skepticism from much of the public over your announcement yesterday that the FBI is not recommending any prosecutions stemming from your investigation of Secretary Clinton's use of a non-government email account and server to conduct her official State Department business is reasonable. Your announcement itself contained a number of inconsistencies that also raise serious questions as to how the FBI reached its conclusions. All of these questions can only be answered with greater transparency.

First, Secretary Clinton has long claimed that none of the emails she sent or received on her non-government system were marked as classified. In your statement, you revealed that some "of the e-mails containing classified information **bore markings indicating the presence of classified information.**" However, you also claimed there was no intent to mishandle classified information. Yet you entirely failed to explain how information that was marked as classified—rather than so-called "derivatively classified" information contained in email conversations—could end up on an unclassified system without the intent of the person who transferred them. As you know, classified systems are kept separate from unclassified systems within the government; a user cannot plausibly unintentionally transfer documents marked as classified from the classified systems onto any

unclassified system and then email them. It takes affirmative, intentional action to do so, such as saving the classified document to a disk from the classified system and moving the disk to an unclassified system, printing the classified document from the classified system and scanning it into an unclassified system, or retyping a classified document into an unclassified system. And government personnel have been prosecuted and convicted for doing exactly this: Navy Reservist Bryan Nishimura was convicted in 2015 for transferring classified information from classified government systems to his unclassified personal electronic equipment, even though he had no intent of further distribution.<sup>1</sup> Despite this, you asserted that you did not see any intentional mishandling of classified information in the Clinton investigation and based your recommendation against prosecution on that assertion. Given the intent required to transfer documents *marked* as classified onto an unclassified system, there is no publicly-available explanation for the basis of your conclusion.

Second, you stated: “The FBI also discovered *several thousand* work-related e-mails that were not in the group of 30,000 that were returned by Secretary Clinton to State in 2014.” Secretary Clinton has claimed, including in a sworn declaration in a Freedom of Information Act case, that she had ensured that *all* of her work emails were turned over to the State Department after it noticed she had not, as required by law, turned them over when she left. Yet your statement included no analysis of the applicability of federal records laws, such as alienation of federal records under 18 U.S.C. § 2071, or perjury, and there was no indication that the FBI investigators even pursued this area of potential illegal activity. Similarly, although several of the emails from Secretary Clinton and her associates contained information that raised public corruption issues relating to the Clinton Foundation and paid speeches given by former President Clinton, your statement gave no indications that the FBI ever investigated these issues.

Third, you said “there is evidence of potential violations of the statutes regarding the handling of classified information” and that Secretary Clinton and her colleagues “were extremely careless in their handling of very sensitive, highly classified information.” Under the law, 18 U.S.C. § 793(f), gross negligence is enough for a violation, but you stated that because you were unaware of prior prosecutions absent evidence of intent, the FBI’s view is that no charges are appropriate in this case. This ignores the requirements of the law itself, the evidence of intent regarding the marked classified information, and the evidence of intent in establishing the private server in the first place. Moreover, novel situations should not be immune from applicable law simply because they are novel.

And finally, in your statement you claimed that “vast quantities of materials exposed in such a way as to support an inference of intentional misconduct” are needed to prosecute. However, you described no analysis of the laws against alienation of federal records and whether the “thousands” of work related emails deleted and withheld from the State Department constituted an inference of intentional misconduct under that statute.

In light of all these inconsistencies, it is even more troubling that the FBI tried to gag its agents with a non-disclosure agreement on this matter, in violation of whistleblower protection statutes. In your July 1st reply to my February 4th letter, you indicated that agents working on this case were required to sign a non-disclosure agreement that failed to exempt protected whistleblowing. Only after

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<sup>1</sup> *Folsom Naval Reservist is Sentenced After Pleading Guilty to Unauthorized Removal and Retention of Classified Materials*, FBI, July 29, 2015. Available at: <https://www.fbi.gov/sacramento/press-releases/2015/folsom-naval-reservist-is-sentenced-after-pleading-guilty-to-unauthorized-removal-and-retention-of-classified-materials>.

I wrote to you did you advise your FBI agents that they are still free to speak with Congress regarding waste, fraud, and abuse. Interestingly, I wrote to you on February 4, 2016, and finally received a partial response on July 1, 2016, and a full response on July 5, 2016 – five months after my original transmittal.

While your statement contained a summary of the purported facts with several definitive assertions about what they mean, it failed to provide enough details for the public to independently assess your conclusions. Given the inconsistencies in your statement, Congress and the people have a right to know the full set of evidence on which you based your decision.

As such, the FBI should release in detail the actual evidence it gathered in the course of the investigation, including the recovered emails. A final report to the American public would not be without precedent. For example, in light of the intense public interest and the resources devoted to the inquiry, the FBI released a final report at the end of the Anthrax investigation, even though there was no prosecution in that case. Similarly, the FBI should provide a detailed written accounting of the scope of its investigation, the investigative steps it took, and the evidence it gathered in the course of its investigation. Until the FBI does so, much of the public will rightly be skeptical of the integrity of this investigation.

Accordingly, please address the following questions:

1. When will you reply to my letter asking about the apparent conflicts in this case?  
Since I sent my letter, Former President Clinton had a private meeting with Attorney General Lynch and the New York Times reported that Former Secretary Clinton was considering retaining her as Attorney General if she is elected President. In light of the other apparent conflicts outlined in my letter and this new information, do you believe there is no appearance of a conflict warranting the appointment of a special counsel, and if not, why not?
2. How many emails contained classification markings, what were those markings, and why is that not considered evidence of intentional mishandling of classified information? Did the FBI investigation determine how each of those documents marked as classified was transferred from classified systems onto an unclassified system and then emailed?
3. Publicly-released email indicates Secretary Clinton instructed a subordinate to “remove headers” from a classified document and “send nonsecure.” The document was a set of talking points related to a principals meeting of the National Security Council. Please explain how that is not evidence of intent to mishandle classified information. Was Secretary Clinton asked about that email in her interview with the FBI? Was her subordinate asked about it? What were their responses?
4. Given your statement that Secretary Clinton and her aides were “extremely careless” in handling classified information, why do you believe it would be unreasonable for any prosecutor to bring a charge based on “grossly negligent” handling of classified information? Is there a distinction between those two standards? Or do you believe that there should be an Executive Branch policy of refusing to prosecute anyone for

gross negligence without evidence of intentional conduct, even though the statute does not require it? If so, would you recommend repealing the statute criminalizing gross negligence? If not, why not?

5. As part of the investigation, did the FBI review the classified cybersecurity briefing Diplomatic Security arranged for Secretary Clinton and her staff in 2011, the Boswell Memorandum regarding cybersecurity threats relating to the use of Blackberries, and the other relevant security warnings given to Secretary Clinton and her staff on these issues? If not, why not? Did you evaluate whether such repeated warnings to Secretary Clinton about specific cyber threats and the use of non-government email, along with her subsequent and continuing refusal to comply with those multiple warnings and instructions, constituted gross negligence? If not, why not?
6. Were any of Secretary Clinton's non-government servers, or their backups, located outside of the United States? Did the FBI recover all of the servers involved?
7. In your statement you said: "To be clear, this is not to suggest that in similar circumstances, a person who engaged in this activity would face no consequences. To the contrary, those individuals are often subject to security or administrative sanctions. But that is not what we are deciding now." Has the FBI recommended that Secretary Clinton or any of her senior aides have their security clearances suspended or revoked as a result of its findings? If not, why not?
8. One of the people who ran Secretary Clinton's private server, Bryan Pagliano, invoked the Fifth Amendment when called to testify before the Benghazi Committee, when approached by my Committee, and in related Freedom of Information Act litigation. He reportedly received a limited immunity agreement from the Department of Justice. Did any other people the FBI contacted as part of the investigation invoke the Fifth Amendment? Did Secretary Clinton invoke the Fifth Amendment when interviewed by the FBI?
9. The head of SES/IRM during Secretary Clinton's tenure, John Bentel, testified under oath to the Benghazi Committee that he only learned of Secretary Clinton non-government email and server when the story broke in the press in 2015. He made the same assertion to my Committee through his lawyer. Yet, as part of the State OIG's investigation, two of his subordinates independently told State OIG that they had raised concerns to Mr. Bentel in 2010 about Secretary Clinton's non-government email and server not complying with federal records requirements, that he falsely told them the State Department's legal team had approved her email system, and then told them "not to discuss the matter any further" and "never to speak of the Secretary's personal email system again." Did the FBI interview Mr. Bentel as part of the investigation? If not, why not? Did Mr. Bentel repeat his claim that he only learned of the non-government email and server from the media in 2015? Did the FBI attempt to resolve the conflict between Mr. Bentel's claims and the claims of his two subordinates? If not, why not?

10. Did the FBI or Department of Justice raise any concerns about several of Secretary Clinton's associates using the same attorneys to represent them in the investigation? Did the FBI determine whether Secretary Clinton paid for the attorneys for her associates, especially Mr. Pagliano and Mr. Bentel, and whether such third-party fee arrangements raised conflicts of interest given that those associates were being asked questions whose answers could incriminate Secretary Clinton? In the FBI's view, would a third-party fee arrangement in which Secretary Clinton paid for Mr. Pagliano's attorney constitute a conflict of interest when he was given immunity to speak about his involvement in her server? If not, why not?
11. According to press reports, the Department of Justice made an agreement with Cheryl Mills that certain topics would be off-limits during her interview with the FBI, including questions about her role in sorting and deleting Secretary Clinton's email. This was purportedly because Ms. Mills claimed to be acting as Secretary Clinton's private attorney in doing so, and thus sought to shield those actions behind attorney-client privilege. Did the FBI and/or Department of Justice make any agreements, formally or informally, with Secretary Clinton, her associates, or their attorneys, to preclude the FBI or Department of Justice from certain areas of inquiry? If so, please describe these arrangements and provide copies of all relevant records of them.
12. Did Secretary Clinton invoke attorney-client privilege, or any other privilege, to refuse to answer any questions posed by the FBI or the Department of Justice during her interview?
13. Rule 1.11 of the ABA Model Rules of Professional Conduct, which covers "Special Conflicts of Interest for Former and Current Government Officers and Employees," specifically states that "a lawyer who has formerly served as a public officer or employee of the government . . . shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation." While working for Secretary Clinton at the State Department, Ms. Mills was personally and substantially involved in Secretary Clinton's use of a personal email and server for official business. Under the rule, it appears that she should have been precluded from serving as Secretary Clinton's private attorney in the same matter after leaving the State Department. Did the FBI determine whether the State Department had given written consent for Ms. Mills' private representation of Secretary Clinton in this matter? Did the FBI otherwise raise concerns about the conflicts the representation posed?
14. When did the FBI first contact Secretary Clinton as part of the investigation? When did it request an interview? When was the date of the interview determined?
15. Did the FBI investigate Secretary Clinton's and her associates possible violations of laws concerning the treatment of federal records, such as 18 U.S.C. § 2071, which prohibits concealing or destroying such federal records? Did the FBI investigate whether any of the thousands of federal records Secretary Clinton and her attorneys deleted were responsive to Congressional inquiries or agency inquiries, such as ones

from the State Department OIG, which would have violated 18 U.S.C. §§ 1505 and 1519, respectively? Did the FBI evaluate the numerous emails released suggesting that Secretary Clinton and her associates may have attempted to evade the Freedom of Information Act?

16. Did the FBI investigate, or is the FBI currently investigating, allegations of public corruption relating to the Clinton Foundation and former President Clinton's speaking fees from foreign governments? If not, why not?
  
17. Under the law, it is a "well-settled principle that false exculpatory statements are evidence – often strong evidence – of guilt." *See, e.g., Al-Adahi v. Obama*, 613 F.3d 1102, 1107 (D.C. Cir. 2010); *United States v. Penn*, 974 F.2d 1026, 1029 (8th Cir. 1992); *United States v. Meyer*, 733 F.2d 362, 363 (5th Cir. 1984). As your statement and the State OIG report both demonstrated, Secretary Clinton and her representatives made numerous exculpatory statements later shown to be false: that she never sent or received any classified information; that she never sent or received any information that was classified at the time; that she never sent or received any information marked as classified; that she established the server setup in order to only have to use one device; that the State Department approved her server arrangement; that her attorneys reviewed each of her emails in sorting them for deletion or production; that she turned over all her federal records; that she would cooperate with any inquiries into the issue; that she would encourage her associates to cooperate as well. Did the FBI weigh the probative value of this cavalcade of false statements in determining her guilt and intent, as it should have under the law?

Please provide your response by July 20, 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