

ORANGE COUNTY REGISTER

Clinton broke no law

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2016-07-13 18:45:47

FBI Director James Comey's conclusion that "no reasonable prosecutor" would bring criminal charges against Hillary Clinton for her handling of her emails should be accepted as a definitive conclusion that nothing illegal was done. The criminal law, in virtually every area, requires more than carelessness. A thorough investigation that took over a year and involved hundreds of FBI agents came to the conclusion that there was carelessness, but that no crime was committed.

The conclusion should have special credibility because of the source. FBI Director Comey is a lifelong Republican. He served as a high-level official in the United States Department of Justice under President George W. Bush. He repeatedly has been involved in aggressively investigating the Clintons. In the mid-1990s, he was a Deputy Special Counsel to the Senate Whitewater Committee. In 2002, Comey, then a federal prosecutor, took over an investigation into President Bill Clinton's 2001 pardon of financier Marc Rich. Comey earlier had prosecuted Rich. To put it mildly, Comey is no friend of the Clintons.

It is unusual for the FBI director to announce whether criminal charges are recommended. The decision whether to initiate a prosecution is always made by prosecutors, not the police. But Attorney General Loretta Lynch wanted to leave no doubt that the choice whether to indict Hillary Clinton would be based on the law and not on politics. She said that she would abide by whatever the FBI recommended, and thus it was left to Comey to announce his conclusions.

To be sure, Comey was critical of Hillary Clinton. On Thursday, July 7, Comey testified at a House Committee hearing and said, "I think she was extremely careless. I think she was negligent – that I could establish. What we can't establish is that she acted with the necessary criminal intent." Importantly, Comey stressed that Clinton did not lie to the FBI during their yearlong probe.

Key to the FBI's decision to recommend against criminal charges is that there was no evidence that Clinton had the criminal intent required for a prosecution and conviction. Virtually every crime requires proof of "mens rea," or intent or knowledge in order for it to be crime. First-degree murder, for example, requires proof of premeditated intent to kill. A person is guilty of the crime of receiving stolen property only if it is proven that he or she knew that property was stolen.

For Clinton to have violated the law, it must be proven that she knew that what she was doing was illegal. As Comey explained, prior prosecutions have been for “clearly intentional and willful mishandling of classified information,” and there is no evidence of this for Clinton.

As Comey said, “Should have known, must have known, had to know, does not get you there.” Comey emphasized that there has not been a single instance in which any person ever has been prosecuted for behavior like Clinton’s.

Many have likened Clinton’s conduct to that of David Petraeus, former director of the CIA, who was convicted for the unauthorized removal and retention of classified information. But former Attorney General Michael Mukasey, also a Republican who had been appointed to a federal judgeship by President Ronald Reagan, explained that there was no comparison. Petraeus knowingly gave classified material to his biographer and girlfriend and then lied to federal investigators. In sharp contrast, Clinton did not knowingly give classified materials to anyone, and Comey explicitly said that she did not lie to investigators. As Stephen Vladeck, an expert on national security law at the University of Texas, explained: “It’s just not a crime under current law to do nothing more than share sensitive information over unsecured networks.”

Clinton’s poor judgment in handling emails certainly is a relevant campaign issue. But those who claim that she broke the law and should have been prosecuted are wrong both in light of the evidence and in light of the FBI’s conclusion. Donald Trump declared that this shows that the system is “rigged” and expressed his view that Clinton is guilty. Rep. Jason Chaffetz, R-Utah, the chairman of the House Committee on Oversight and Government Reform, said that the “Average Joe” would have been led off in handcuffs had he done what Clinton did. Setting aside whether the “average Joe” ever would get access to classified information, it is crucial to remember that no one has ever been prosecuted for anything remotely like Clinton’s actions.

Conclusions about the criminal law, and whether it has been broken, should be based on the evidence and the law. And it is clear after the FBI’s investigation that Hillary Clinton broke no law.

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