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Should the FBI have sought Clinton's prosecution?

Yes: Clinton committed a guilty act with criminal intent

FBI Director James Comey's rationale for not prosecuting Hillary Clinton over her private storage of top-secret emails represents a dismissal of the law rather than the enforcement of it.

Traditionally, to convict someone of a crime, a prosecutor must show two things: that the accused committed a guilty act and that they did so with a guilty mind (or with criminal intent).

Legislatures should always consider the appropriate intent standard for crimes it promulgates so that only the intended acts and actors are punished. Ohioans get this. That is why The Buckeye Institute led the way for — and state policymakers adopted — the first and best criminal intent reform in the nation.

In the case of federal law, Congress did indeed consider the appropriate criminal intent requirements concerning the mishandling of national defense information.

The FBI investigated Secretary Clinton for violating 18 U.S.C. §793(f), which makes it a crime punishable by up to 10 years' imprisonment for a person lawfully possessing information related to national defense to permit that information to be "removed from its proper place of custody or delivered to anyone in violation of his trust" through "gross negligence."

The FBI concluded that Clinton sent and received on a personal server top-secret emails from secure government servers. It is not up for debate whether she committed the guilty act. The question is whether she had the required intent. Director Comey's statements lead to the unavoidable conclusion that she did, in fact, meet the "guilty mind" requirement.



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Stating that Secretary Clinton's actions were "extremely careless," Comey said the recommendation not to prosecute the former Secretary of State was appropriate because there was no "willful mishandling of classified information."

However, "willful" is not the standard Congress put in the law. Congress used a "gross negligence" standard. "Gross negligence," as the Department of Justice has described in briefs to the Supreme Court, is a "gross deviation from the standard of care that a reasonable person would observe in the situation."

If you are thinking that "extremely careless" sounds an awful lot like a "gross deviation from the standard of care that a reasonable person would observe," you're right.

Could Congress have meant to use the standard that Comey applied? The law makes it clear that the answer is "no." When Congress wanted to use the standard, Comey suggests it, in fact, did. The section immediately preceding the provision Secretary Clinton allegedly violated — 18 U.S.C. §793(e) — requires the violator to "willfully" violate the statute.

Rules of interpretation require us to presume that the legislature says what it means and means what it says.

And if the plain words of the law weren't enough, the standard also has the virtue of making sense. Officials who are given a security clearance have a duty to safeguard that information, as the lives and safety of U.S.

agents — and all Americans — might depend upon it.

Because of that duty, Congress holds those who are authorized to have access to top-secret information to a higher standard. That is why Section (e)'s requirement of a "willful" violation applies to those who have unauthorized possession of top-secret information, whereas Section (f) requires only "gross negligence" for those who have lawful possession — like Secretary Clinton.

Director Comey argues that "no reasonable prosecutor" would bring this case. That naked statement ignores Congress's judgment that "gross negligence" is the standard that should be required to prosecute those who are afforded the special trust to handle top-secret information. Simply put, Director Comey seeks to add requirements that Congress rejected.

Prosecutorial discretion is a legitimate tool. With an unknown number of federal crimes and limited resources, government agencies have to choose which crimes to prosecute. But that is not the reason Comey gave, nor could he give, in choosing not to prosecute Clinton. Significant resources have already been spent on the investigation, which concluded that the law, as written, was violated.

While we can have a debate about what criminal intent standard should be required, if Director Comey, Secretary Clinton, or anyone else wants to change the standard, Congress needs to do what Ohio did to change its intent standards: Pass a law.

But I doubt they will, because Congress had it right the first time.

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No: Revealing facts, using restraint, is good policy

Before criticizing too harshly FBI Director James Comey's recommendation against prosecuting former Secretary of State Hillary Clinton, it might be useful to examine all the considerations that informed his decision, including those unstated. Under all the circumstances, love or hate Hillary, acting with restraint while exposing all the facts was probably the most responsible thing to do.

The statute most often cited in connection with these events makes it a crime, through gross negligence, to permit classified information to be removed from its proper place of custody, delivered to unauthorized personnel, lost, stolen, abstracted or destroyed. Comey's initial determination had to be whether Clinton's conduct constituted gross negligence.

Clinton's case appears to be nothing like that of retired CIA Director David Petraeus, who resigned in disgrace after sharing highly classified information with his lover and biographer and lying about it to the FBI. Comey has described the Petraeus case as "far worse" than Clinton's.

Most cases have involved military personnel. In one case, the defendant left classified information in an unlocked drawer in his garage, where it was found by a moving company employee. In another, the defendant discarded classified materials in a dumpster where they were discovered by neighborhood children, while certifying that he had destroyed the materials. In another, the defendant forgot classified materials in a friend's room, where they were discovered by the friend's roommate. The most comparable case is probably that of former CIA Director John Deutch,



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who was found to have classified information on a home computer. Deutch reportedly had agreed to plead guilty to a misdemeanor charge of mishandling classified information when President Bill Clinton (yes, the other Clinton) granted him a presidential pardon.

There are other possible criminal charges, including felonies and misdemeanors. The misdemeanor in Deutch's case prohibits storing classified information at an unauthorized location. Clinton's lawyers might disagree, but the statute certainly seems to apply, and its threatened use against Deutch suggests that has been the Justice Department's historical view. The explanation for her not being charged under any of these statutes probably lies in Justice Department policy and considerations other than a strict application of the law.

As a former Justice Department official, Comey undoubtedly considered the Justice Department's policies, which recognize that an individual may be charged criminally based on "probable cause," but that "(m)erely because this requirement can be met in a given case does not automatically warrant prosecution." They also mandate considering "all relevant considerations," and admonish that "no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact."

A jury would probably

be instructed that to convict, it would have to find beyond a reasonable doubt that Clinton's conduct was an extreme departure from what a reasonable person would do. The systemic problems that Comey found in the State Department's handling of classified information could make that difficult to prove. On the other hand, his conclusion that "no reasonable prosecutor would bring this case" is difficult to square with his description of her actions as "extremely careless," which sounds suspiciously like gross negligence.

Other unspoken considerations must have informed Comey's decision — especially the prospect that a Clinton indictment would almost certainly alter the course of the election. It would be disastrous to force Clinton out of the race, only to lose the case. It is only slightly more imaginable that Comey would alter the course of history based on misdemeanor charges.

"If this was the basis for Comey's recommendation, although political, it also was practical. It is naive to believe that prosecutors don't make such decisions all the time — or that they shouldn't. Comey's explanation may reflect a judgment not to decide the election in one fell swoop, but rather to expose the facts and allow voters to make an informed decision. If so, perhaps he should have said so, and not have pretended that the decision was purely legal. Nonetheless, love Hillary or hate her, acting with restraint was probably the best Comey could do in a no-win situation.

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