

FBI DIRECTOR COMEY'S DETERMINATION TO DISCLOSE INFORMATION ABOUT A PENDING CRIMINAL INVESTIGATION OF A PRESIDENTIAL CANDIDATE SHORTLY BEFORE THE 2016 ELECTION VIEWED FROM THE PERSPECTIVE OF THE ETHICAL RESPONSIBILITIES HE HAD AS A GOVERNMENT LAWYER

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I. INTRODUCTION

James Comey is a lawyer who was the Director of the Federal Bureau of Investigation (FBI) at the time the Bureau carried out a criminal investigation of former Secretary of State Hillary Clinton.¹ The investigation took place during the 2016 election campaign in which Secretary Clinton was a candidate for President of the United States.² It has been described as one of the highest profile and most politically charged investigations in the FBI's history.³ Comey decided to disclose information about the pending investigation twice during height of that election campaign: on July 5, 2016 and October 28, 2016.⁴ Fierce differences of opinion have been expressed as

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¹ George W. Bush Whitehouse Archives, *Biography of James B. Comey, Former Deputy Attorney General*, <https://georgewbush-whitehouse.archives.gov/government/comey-bio.html> [<https://perma.cc/QPJ8-VSXXN>]; Vivian S. Chu & Henry P. Hogue, CONG. RSCH. SER., R41850, *FBI Director: Appointment and Tenure* 3, 6 (2014), <https://fas.org/sgp/crs/misc/R41850.pdf> [<https://perma.cc/S6VV-QH4K>].

² OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT. OF JUSTICE OVERSIGHT AND REVIEW DIVISION, REVIEW OF VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION, 18-04, at i, 40–41, 47–49 (June 2018) [hereinafter DOJ-IG Review], www.justice.gov/file/1071991/download [<https://perma.cc/ZZZ8-ZMHL>]; JAMES COMEY, A HIGHER LOYALTY: TRUTH, LIES, AND LEADERSHIP 165 (2018). The investigation focused on whether Ms. Clinton's use of a private email server while she was Secretary of State violated federal law regarding the handling of classified information.

³ DOJ-IG Review, *supra* note 2, at 497–98.

⁴ Comey made a public announcement on July 5, 2016 that the FBI had concluded the investigation and was recommending that Hillary Clinton not be prosecuted. Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System, FBI National Press Office (July 5, 2016) [hereinafter Comey Statement], <https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2019s-use-of-a-personal-e-mail-system> [<https://perma.cc/7YWZ-ARTG>]. Comey testified to the same effect before the House Committee on Oversight and Government Reform two days after that public announcement. See *Proceedings and Testimony Oversight of the State Department: Hearing Before the Committee on Oversight and Government Reform*, 114th Cong. 5–91

to whether he should have made these disclosures.⁵ This article views Comey's determination to make these disclosures from the perspective of his ethical responsibilities as a government lawyer.⁶

II. THE ETHICAL FRAMEWORK

Heineman, Lee, and Wilkins have articulated four fundamental ethical responsibilities that lawyers should take into consideration in fulfilling the various roles they perform in our society.⁷ This article focuses on two of these ethical responsibilities: the ethical responsibility Comey had to the institutions for which he worked, and the ethical responsibility he had to society at large. These two ethical responsibilities offer the most relevant guidance as to the course of action Comey should have taken in response to events that occurred in early July and late October of 2016.

Heineman, Lee, and Wilkins have noted that there can be instances a lawyer faces where the course of action one ethical responsibility guides the lawyer to take can conflict with the course of action another ethical responsibility may guide the lawyer to take, requiring the lawyer to choose

(statement of James Comey, Director, Federal Bureau of Investigation). Three months later, on October 28, 2016, Comey sent a letter to Congress advising that additional Clinton emails had been discovered, and that he was re-opening the investigation to consider these emails. DOJ-IG Review, *supra* note 2, Attachment E (October 28, 2016, letter from Director Comey to Chairs of various Congressional committees).

⁵ E.g., *Republicans Attack FBI Over Decision on Hillary Clinton Emails*, FORTUNE (July 6, 2016, 4:50 AM), <http://fortune.com/2016/07/06/republicans-attack-fbi-clinton-emails/> [<https://perma.cc/GKR5-J8DR>]; Jack Goldsmith, *Jack Goldsmith: Comey's Announcement Signals Max FBI Independence*, TIME (July 6, 2016, 5:14 PM), <https://time.com/4395178/jack-goldsmith-james-comey-hillary-clinton/> [<https://perma.cc/6QNA-S22Y>]; Jack Goldsmith & Benjamin Wittes, *James Comey, Hillary Clinton, and the Email Investigation: A Guide for the Perplexed*, LAWFARE BLOG (Oct. 29, 2016, 2:49 PM), <https://www.lawfareblog.com/james-comey-hillary-clinton-and-email-investigation-guide-perplexed> [<https://perma.cc/W7VN-L2QT>]; *What's Behind Comey's Unprecedented Reveal to Congress about Clinton Probe?*, PBS NEWS HOUR 2 (Oct. 31, 2016, 7:34 PM), <https://www.pbs.org/newshour/bb/whats-behind-comeys-unprecedented-reveal-congress-clinton-probe/> [<https://perma.cc/P4BK-LC9X>]; Sue Reisinger, *Comey Got High Marks as a GC, But Ex-Colleagues Are Aghast at Clinton Letter*, CORPORATE COUNSEL (Nov. 1, 2016, 12:00 AM) <https://www.law.com/corpocounsel/almID/1202771322249/comey-got-high-marks-as-a-gc-but-excolleagues-are-aghast-at-clinton-letter/?slreturn=20210821192108> [<https://perma.cc/FCP6-US9Q>]; Zoe Tillman, *Big Law Partners Slam Comey for 'Unprecedented' Statement on Email Probe*, NATIONAL LAW JOURNAL (Nov. 7, 2016, 12:00 AM) <https://www.law.com/nationallawjournal/almID/1202771206002/big-law-partners-slam-comey-for-unprecedented-statement-on-email-probe/> [<https://perma.cc/KZ8K-AD8G>]; DOJ-IG Review, *supra* note 2, at v–vi, x, 239–40, 333–34, 497–99.

⁶ See *infra* Sections II, III, and IV.

⁷ Ben W. Heineman Jr. et al., *Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century*, HARVARD LAW SCHOOL CTR. ON THE LEGAL PRO. 5, 11–12, 17 (2014), https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf [<https://perma.cc/CWX5-RQ9M>] (articulating the four fundamental ethical responsibilities: responsibility to clients and stakeholders; responsibility to the legal system; responsibility to the institutions for which they work; responsibility to society at large).

which will take precedence.⁸ Events that occurred in July and October of 2016, related to the investigation, served to create instances where the course of action guided by Comey's ethical responsibility to the institutions for which he worked conflicted with the course of action guided by the ethical responsibility he had to society at large.

A. Comey's Ethical Responsibility to the Institutions for Which He Worked

Heineman, Lee, and Wilkins define the ethical responsibility a lawyer has to the institution for which the lawyer works as the duty to follow shared principles and practices that have been developed to uphold the performance and integrity of the institution.⁹

Comey worked as the Director of the FBI, which operates under the Department of Justice.¹⁰ These institutions had principles and practices in place requiring that prior approval from the highest levels of the Department of Justice be obtained in order to release information to the public or to Congress about a pending criminal investigation.¹¹

The Inspector General of the Department of Justice has noted that these principles and practices serve to bolster the institution's performance and integrity.¹² Therefore, in the absence of any countervailing guidance offered by other ethical responsibilities Comey had as to the course of action he should take, the ethical responsibility he had to the FBI and the Department of Justice guided him to decline to release any information to the public or Congress about the Hillary Clinton criminal investigation without the prior approval of his superiors in the Department of Justice.

B. Comey's Ethical Responsibility to Society at Large

Heineman, Lee, and Wilkins define the ethical responsibility a lawyer has to society at large as the duty "to the wider public . . . to generally provide services in the public interest . . . [so as to promote] a safe, fair and just

⁸ *Id.* at 12, 17.

⁹ *Id.* at 12, 23.

¹⁰ 28 U.S.C. §§ 503, 531 (providing that the Attorney General heads the Department of Justice and that the FBI is a part of the Department of Justice).

¹¹ DOJ-IG Review, *supra* note 2, at 19–22 (regarding release of information to the media and the public about pending criminal investigations), 22–27 (regarding provision of information to Congress about criminal investigations), 19–25 (cataloguing those policies and practices).

¹² *Id.* at 497–99.

society.”¹³ Mary Jo White has paraphrased this responsibility as imposing a duty on lawyers “to consider the public’s welfare in addition to the interests of . . . [the] client.”¹⁴

In the context of government lawyers, the *Restatement (Third) of the Law Governing Lawyers* notes that “[c]ourts have stressed that a lawyer representing a government client must seek to advance the public interest in the representation and not merely the partisan or personal interests of the government entity or officer involved.”¹⁵ Similarly, the Professional Ethics Committee of the Federal Bar Association has noted that a federally employed lawyer has an ethical duty “to observe in the performance of his professional responsibility the public interest sought to be served by the government organization of which he is a part.”¹⁶

The public interests sought to be served by the Department of Justice, of which the FBI is a part,¹⁷ are articulated in the Department’s mission statement.¹⁸ The statement makes clear that foremost among these interests is ensuring “fair and impartial justice for all Americans.”¹⁹

However, justice not only has to be fair and impartial, but it also must be perceived as such,²⁰ because public acceptance of the legitimacy of an institution of government is enhanced when the process by which the institution makes its decisions is perceived as being fair and neutral.²¹ In the

¹³ Heineman Jr. et al., *supra* note 7, at 12–13, 17 (framing this ethical responsibility in the private lawyering context).

¹⁴ Mary Jo White, Chair of the SEC, Showcase Speech at the 2015 Annual Meeting of the Association of American Law Schools (Jan. 28, 2015), *available at* <https://www.sec.gov/news/speech/chair-white-speech-association-of-american-law-schools.html> [<https://perma.cc/KM2A-PT8S>].

¹⁵ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: REPRESENTING A GOVERNMENTAL CLIENT § 97 cmt. f (AM. LAW. INST. 2000).

¹⁶ *In re Lindsey*, 158 F.3d 1263, 1273 (D.C. Cir. 1998) (citing Federal Bar Association Ethics Committee, *The Government Client and Confidentiality: Opinion 73-1*, 32 FED. B.J. 71, 72 (1973)).

¹⁷ 28 U.S.C. § 531.

¹⁸ U.S. DEP’T OF JUSTICE, *About DOJ*, <https://www.justice.gov/about> (last visited July 11, 2021) [<https://perma.cc/3VQJ-346X>] (“To enforce the law and defend the interests of the United States according to the law; to ensure the public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.”) (emphasis added).

¹⁹ *Id.* (The statement notes that Thomas Jefferson wrote, “The most sacred of the duties of government [is] to do equal and impartial justice to all its citizens” and concludes with the declaration that “This sacred duty remains the guiding principle for the women and men of the U.S. Department of Justice.”)

²⁰ See generally *Offutt v. United States*, 348 U.S. 11, 14 (1954) (“[J]ustice must satisfy the appearance of justice.”)

²¹ See Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 L. & SOC’Y REV. 809, 810, 827–29 (1994). See also John T. Scott et al., *Courting the Public: Judicial Behavior and Public Views of Court Decisions*, UNIV. OF CAL., DAVIS, at 2 (2006), https://law.utexas.edu/wp-content/uploads/sites/25/spriggs_courting_the_public_judicial_behavior.pdf [<https://perma.cc/DWT6-3CEM>] (paper prepared in preparation for the 2006 Annual Meetings of the Midwest Political

case of a criminal justice institution, such as the Department of Justice, this occurs when the institution's decisions are viewed as being made on the basis of consistently applied legal principles and the facts of the matter, so that all persons are treated in an impartial manner.²² In this regard, the *Restatement (Third) of the Law Governing Lawyers* notes that “[a] government lawyer may occasionally bear special disabilities or obligations because of responsibility to maintain public trust in government.”²³

Thus, Comey had an ethical responsibility to society at large, not only to conduct the investigation of Hillary Clinton in a fair and impartial manner. He also had a duty, in instances where the fairness or impartiality of that investigation is publicly called into question as a result of actions taken with regard to that investigation by his superiors in the Executive Branch, to act affirmatively to foster faith in the fairness and impartiality of the investigation. As discussed below, this ethical responsibility to society at large guided Comey to disclose information about the pending criminal investigation on two occasions, in July and October of 2016.

There is an additional element of this ethical responsibility that guided Comey to make his October disclosure. That element is implied from the holding in *In re Lindsey*.²⁴ The court there held that lawyers in the Executive Branch of the federal government have a constitutional responsibility “to take Care that the Laws be faithfully executed,”²⁵ and that the “[i]nvestigation and prosecution of federal crimes is one of the most important and essential functions within this constitutional responsibility.”²⁶ The court further noted that the ethical duty a government lawyer has to observe the public interest in the performance of his or her professional responsibilities includes allegiance to this constitutional responsibility, which in the context of the investigation and prosecution of federal crimes, imposes an obligation on the lawyer to disclose evidence of potential criminal wrongdoing by a federal official that can supersede other ethical responsibilities the lawyer may have to the official or agency for whom the lawyer works.²⁷ The rationale behind the court's imposition of this duty was that the public has an “interest in

Science Association) (“[T]he public's confidence in the Court's neutrality is key to securing acceptance of Court outcomes.”).

²² Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 2014 PSYCHOL., PUB. POL'Y, & L. 78, 81 (2014) (noting that research has shown that people tend to regard police and the criminal justice system as legitimate if they believe that these institutions exercise their authority and make their decisions in a fair and impartial manner).

²³ AM. LAW INST., *supra* note 15 (emphasis added).

²⁴ *In re Lindsey*, 158 F.3d 1263, 1272–74 (D.C. Cir. 1998).

²⁵ U.S. CONST. art. II, § 3.

²⁶ *In re Lindsey*, 158 F.3d at 1272.

²⁷ *Id.* at 1272–74.

uncovering illegality among its elected and appointed officials” which is protected by “having transparent and accountable government.”²⁸ The court’s view was informed by James Madison’s observations that knowledge and information are crucial to ensuring that the people remain in control of their government.²⁹ For this reason, the court held that Lindsey, a Deputy White House Counsel, had a duty to disclose information about potential criminal wrongdoing by the President, and could not refrain from answering questions from a grand jury about conversations he had had with the President that could reveal wrongdoing on the President’s part on the basis of a claimed government-attorney-client privilege against revelation of such communications.³⁰ The court quoted with approval a statement by Judge Weinstein that “[i]f there is wrongdoing in government it must be exposed . . . [The government lawyer’s] duty to the people, the law, and his own conscience requires disclosure”³¹

Comey testified to a congressional oversight committee on July 7, 2016, about the FBI’s criminal investigation of Hillary Clinton.³² Developments that occurred in late October made the information he had given to Congress in July materially incorrect.

Congressional oversight serves “to watch and control the government,”³³ with the objective and purpose, among other things, of “inform[ing] the general public.”³⁴ The court in *In re Lindsey* recognized that “transparent and accountable government” serves to protect the public’s “interest in uncovering illegality among its elected and appointed officials.”³⁵ When an Executive Branch lawyer testifies to a congressional oversight committee reviewing an FBI criminal investigation of a federal official, the rationale expressed in *In re Lindsey* supports the conclusion that the lawyer has a duty to furnish truthful and accurate information to the committee. This includes a duty to update the committee when the information which the lawyer has furnished to the committee has become materially inaccurate due to subsequent developments and the lawyer’s actions taken in response to

²⁸ *Id.* at 1273.

²⁹ *Id.* at 1274.

³⁰ *Id.*

³¹ *Id.* at 1273 (alteration in original) (citation omitted).

³² *Oversight of the State Dep’t Before the H. Comm. On Oversight & Gov’t Reform*, 114th Cong. 5–91 (2016) (statement of Hon. James Comey), <https://www.govinfo.gov/content/pkg/CHRG-114hhrg21323/pdf/CHRG-114hhrg21323.pdf> [<https://perma.cc/7857-XFKC>].

³³ L. ELAINE HALCHIN & FREDERICK M. KAISER, CONG. RESEARCH SERV., 97-936, CONGRESSIONAL OVERSIGHT, at 1, <https://fas.org/sgp/crs/misc/97-936.pdf> (updated Oct. 17, 2012) [<https://perma.cc/2GKP-4VQ7>] (quoting John Stuart Mill).

³⁴ *Id.*

³⁵ *In re Lindsey*, 158 F.3d at 1273.

those developments, and where the matter has remained “alive” in the public eye.

Authority from other settings supports a duty to update a prior disclosure that has become materially inaccurate due to the occurrence of subsequent events.³⁶ For example, Rule 26(e) of the Federal Rules of Civil Procedure requires a party to supplement the party’s prior disclosures or responses “in a timely manner” when the party learns that they are incomplete or inaccurate in some material respect.³⁷ Similarly, Rule 12.280(g) and (h) of the Florida Family Law Rules of Procedure provides that a party is under a duty to supplement a prior discovery response or disclosure that, although correct when made, is no longer materially true or complete “as soon as possible after discovery of the incorrect information or change.”³⁸ Additionally, Mendelsohn and Brush have noted that courts have imposed a duty on public issuers to update a prior public disclosure that has subsequently become inaccurate, even though not specifically required by securities statutes, regulations, or case law, in instances where the courts have found that the prior disclosure has remained “alive” in the minds of reasonable investors and when there has been a fundamental change to the public issuer company.³⁹

The course of action guided by the ethical responsibility Comey had to society at large in light of the circumstances he faced in July and October of 2016 was to take extraordinary, affirmative steps to foster public trust in the FBI and the Department of Justice, and to update Congress as regards previously disclosed information about potential criminal wrongdoing by Hillary Clinton that had become materially incorrect due to subsequent developments and his action taken in response to such developments.⁴⁰

³⁶ See, e.g., *Backman v. Polaroid Corp.*, 910 F.2d 10, 17 (1st Cir. 1990).

³⁷ FED. R. CIV. P. 26(e).

³⁸ FLA. FAM. L. R. P. 12.280(g)–(h).

³⁹ Bruce Mendelsohn & Jesse Brush, *The Duties to Correct and Update: A Web of Conflicting Case Law and Principles*, 43 SEC. REG. L.J. 67, 68, 74–81 (2015).

⁴⁰ See discussion *infra* Section III.

III. COMMENTS BY THE PRESIDENT AND ACTIONS OF THE ATTORNEY GENERAL DURING THE PENDENCY OF THE INVESTIGATION CREATED AN INSTANCE IN JULY 2016 WHERE THE COURSE OF ACTION GUIDED BY THE ETHICAL RESPONSIBILITY COMEY HAD TO SOCIETY AT LARGE CONFLICTED WITH THE COURSE OF ACTION GUIDED BY THE ETHICAL RESPONSIBILITY HE HAD TO THE INSTITUTIONS FOR WHICH HE WORKED, REQUIRING HIM TO CHOOSE WHICH SHOULD TAKE PRECEDENCE

A. *President Obama's Comments*

The primary focus of the investigation “was seeking former Secretary Clinton’s intent in setting up and using her private email server.”⁴¹ During the course of the investigation, President Obama twice commented publicly about this issue.⁴²

His initial comments were made on CBS News’s *60 Minutes* program in October 2015, where he stated his belief that Secretary Clinton’s use of a personal email server for storage and transmission of classified information was “not a situation in which America’s national security was endangered” and “has not jeopardized America’s national security.”⁴³

The President’s comments angered FBI agents conducting the investigation who saw the comments as efforts by the President to influence the outcome of the pending investigation.⁴⁴ FBI officials and Department of Justice prosecutors were concerned about the impact of the President’s comments on the investigation, raising the specter that he was prejudging what the outcome of the investigation should be before it was completed, and creating a suspicion that there was political bias from the Executive Branch.⁴⁵

Forty-four members of the House of Representatives viewed the President’s comments similarly, resulting in their sending a letter to Attorney General Lynch requesting appointment of a special counsel to conduct the investigation.⁴⁶

⁴¹ DOJ-IG Review, *supra* note 2, at 41; *see also* COMEY, *supra* note 2, at 165.

⁴² DOJ-IG Review, *supra* note 2, at 66, 69.

⁴³ Michael D. Shear, *Obama Tells ‘60 Minutes’ Hillary Clinton Made Email ‘Mistake,’* N.Y. TIMES (Oct. 11, 2015), <http://nyti.ms/1Ovg06x> [<https://perma.cc/T2HZ-YXSB>]; *Exclusive: President Barack Obama on ‘Fox News Sunday,’* FOX NEWS (last updated Jan. 23, 2017), <https://www.foxnews.com/transcript/exclusive-president-barack-obama-on-fox-news-sunday> [<https://perma.cc/M3UL-2HQ4>].

⁴⁴ Matt Apuzzo & Michael S. Schmidt, *Obama’s Comments About Clinton’s Emails Rankle Some in the FBI,* N.Y. TIMES (October 16, 2015), <http://nyti.ms/1OHYVve> [<https://perma.cc/P3UX-NXQY>].

⁴⁵ DOJ-IG Review, *supra* note 2, at 66.

⁴⁶ *Id.* at 175 n.131.

Six months later, in April 2016, President Obama appeared on *Fox News Sunday*, where he was asked by Chris Wallace if he could still say that Mrs. Clinton's use of a private email server did not jeopardize America's secrets.⁴⁷ The President responded by saying that he had to be careful about what he said because of the pending investigation, but that what he did know was that Hillary Clinton was an outstanding Secretary of State, and that "[s]he would never intentionally put America in any kind of jeopardy."⁴⁸

B. Attorney General Lynch's Actions

On June 27, 2016, Attorney General Lynch had an off-the-record meeting with former President Bill Clinton on the tarmac of the Phoenix airport.⁴⁹ The Inspector General of the Department of Justice has noted that the Attorney General failed "to recognize the appearance problem" that such a meeting would create in light of the fact that the investigation was still pending; that former President Bill Clinton was Hillary Clinton's husband; and that Hillary Clinton was the focus of the investigation.⁵⁰

The morning after the meeting, Lynch began discussing whether she needed to recuse herself and asked her staff to contact the Departmental Ethics Office to find out if such was the case.⁵¹ That office responded to Lynch's staff that the Department's ethics regulations did not require her to recuse herself from further participation in the matter.⁵² She decided not to recuse herself.⁵³ When it became public knowledge on June 30 that the

⁴⁷ *Exclusive: President Barack Obama on 'Fox News Sunday,'* FOX NEWS (Apr. 10, 2016), <https://www.foxnews.com/transcript/exclusive-president-barack-obama-on-fox-news-sunday> [<https://perma.cc/QXE6-AFGX>] (transcript from President Obama's appearance on Fox News Sunday).

⁴⁸ *Id.* (In response, Chris Wallace noted that "some people I think are worried whether or not—the decision whether or not, how to handle the case, will be made on political grounds, not legal grounds," and then asked the President directly, "[c]an you guarantee to the American people, can you direct the Justice Department to say, 'Hillary Clinton will be treated—as the evidence goes, she will not be in any way protected,'" to which the President ultimately responded that he could give the guarantee Chris Wallace was requesting because "[n]obody gets treated differently when it comes to the Justice Department, because nobody is above the law."); Michael D. Shear, *Obama Says Hillary Clinton Wouldn't Intentionally Endanger U.S. With Emails*, N.Y. TIMES (Apr. 10, 2016), <https://www.nytimes.com/2016/04/11/us/politics/obama-hillary-clinton-email-fox-news.html> [<https://perma.cc/E8J5-LBJ5>].

⁴⁹ *See* DOJ-IG Review, *supra* note 2, at v, 202–03.

⁵⁰ *Id.* at v, 1, 40–41; COMEY, *supra* note 2, at 165.

⁵¹ DOJ-IG Review, *supra* note 2, at 212.

⁵² *Id.* at v, 175.

⁵³ *See id.*

Attorney General had an off-the-record meeting with former President Bill Clinton, a public furor arose.⁵⁴

The Attorney General spoke to the press the next day, July 1, about the meeting and how the matter would be handled going forward. She indicated at that time that, while she fully expected to accept the guidance of federal prosecutors and investigators, she was retaining the final say on whether to pursue an indictment of Secretary Clinton.⁵⁵ She also commented that she could understand how people could view her meeting with the former President as “cast[ing] a shadow over how this case” and how “the work that Department of Justice does . . . may be perceived,”⁵⁶ and that in light of that understanding, she “certainly wouldn’t do it again.”⁵⁷

The realization of the extent to which the public’s trust in the integrity of this investigation had been eroded by her off-the-record meeting with former President Bill Clinton caused her to convey “her regrets to the Midyear prosecutors [i.e., those Department of Justice prosecutors working on the Clinton investigation] for putting them in the position of having people outside the Department look at their work and think that it would be influenced by anything improper.”⁵⁸

C. In Light of the Foregoing, the Course of Action Guided by the Ethical Responsibility Comey Had to Society at Large to Carry Out His Responsibilities in the Public Interest in Accordance with the Public Trust Reposed in Him as a Government Lawyer Properly Took Precedence

President Obama’s comments and the Attorney General’s off-the-record meeting and refusal to recuse created the substantial appearance to the public, those in the FBI and the Department of Justice who were conducting the

⁵⁴ Matt Zapposky, *Attorney General Meets with Former President Clinton Amid Politically Charged Investigation into his Wife’s Email*, WASH. POST (June 30, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/06/29/attorney-general-meets-with-former-president-clinton-amid-politically-charged-investigation-into-his-wifes-email/> [https://perma.cc/5T6V-FQJX]; Mark Landler, *Meeting Between Bill Clinton and Loretta Lynch Provokes Political Furor*, N.Y. TIMES (June 30, 2016), <http://nyti.ms/29dECOM> [https://perma.cc/8ADY-T2Z4]; DOJ-IG Review, *supra* note 2, at 1 (where the Inspector General noted that while Lynch publicly denied having discussed the investigation with the former President, she did concede that “the meeting created significant controversy.”).

⁵⁵ DOJ-IG Review, *supra* note 2, at v, 218, 250; Uri Friedman, *Loretta Lynch: ‘I Certainly Wouldn’t Do It Again,’* ATLANTIC (July 1, 2016), <https://www.aspeninstitute.org/videos/loretta-lynch-certainly-wouldnt/> [https://perma.cc/L6Y8-2PZ7].

⁵⁶ Friedman, *supra* note 55.

⁵⁷ *Id.*

⁵⁸ DOJ-IG Review *supra* note 2, at 216.

investigation, and some members of Congress, that political influence and favoritism were being applied by an incumbent Democratic administration and the nation's chief law enforcement officer⁵⁹ to reach a result favorable to Secretary Clinton. Comey's ethical responsibility to society at large was to foster public trust in the investigation and in the FBI's recommendation based on that investigation not to prosecute. In order to meet this responsibility in light of the foregoing, it was necessary to demonstrate publicly: that the FBI conducted a fair and impartial investigation; that its recommendation that Secretary Clinton not be prosecuted was based on the facts revealed in the investigation and the applicable law; and that the President's comments and the Attorney General's continued participation after the off-the-record meeting did not have any impact on how the matter was handled. This could only be accomplished by Comey making the initial public announcement of that recommendation without the coordination or review of the Department of Justice or any other part of the government, and without the Department of Justice or any other part of the government knowing what he would say.

In his review of Comey's actions, the Inspector General of the Department of Justice noted that the Department's requirement to obtain prior approval from the highest levels within the Department before releasing information to the public about a pending criminal investigation serves to instill the institution's performance and integrity by "[p]rotect[ing] the institutions [the FBI and the Department of Justice] from allegations of . . . political interference, and biased enforcement of the law . . . [so that] the public will have greater confidence in the outcome of the Department's and the FBI's decisions."⁶⁰

The President and the Attorney General, the persons having ultimate authority over this investigation,⁶¹ created a substantial appearance of

⁵⁹ *About the Office of Attorney General*, U.S. DEP'T OF JUSTICE (Mar. 12, 2021), <https://www.justice.gov/ag/about-office> [<https://perma.cc/Q9WP-YKHE>] (noting that the Attorney General is the chief law enforcement officer of the federal government).

⁶⁰ DOJ-IG Review, *supra* note 2, at 498–99.

⁶¹ Barack Obama, a Democrat, was the sitting President during the course of the investigation. As President, he headed and controlled the Executive Branch of the federal government. U.S. CONST. art. II, § 1, cls. 1, 3. The FBI is a part of the Department of Justice and the Department is within the Executive Branch of the federal government. 28 U.S.C. §§ 501, 531. President Obama appointed Loretta Lynch as Attorney General and James Comey as FBI Director, who both served in these capacities during the investigation. *See Remarks by the President at Nomination of Loretta Lynch for Attorney General*, OBAMA WHITE HOUSE ARCHIVES (Nov. 9, 2014, 11:27 AM), <https://www.whitehouse.gov/the-press-office/2014/11/09/remarks-president-nomination-loretta-lynch-attorney-general> [<https://perma.cc/L69P-422J>]; Chu & Hogue, *supra* note 1, at 3, 6. He had the power to remove Lynch and Comey from these positions. *Cf.* Ex parte Hennen, 38 U.S. 230, 259 (1839) (holding generally that, where there is no constitutional or legislative proscription to the contrary, the power of removal is an incident of the presidential power of appointment); Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, title VI, § 1101, 82 Stat. 236, as amended by Pub. L. No. 94-503, title II, § 203, 90 Stat. 2427; Chu & Hogue, *supra*

political interference and favoritism on Secretary Clinton's behalf. Requiring their prior approval to release information would have undermined the ability to foster public trust in this matter and to dispel the appearance of political interference and favoritism created by their actions.

On July 5, 2016 (eight days after the Attorney General's off-the-record meeting with former President Bill Clinton, and four days after the Attorney General publicly stated that, notwithstanding such meeting, she was retaining the final say over whether Secretary Clinton would be prosecuted), Comey made a public statement about the investigation.⁶² He began by advising that the FBI was completing its investigation and referring the case to the Department of Justice for a prosecutive decision.⁶³ He noted that his statement would be unusual in a number of ways, two of which were that he had not coordinated or reviewed the statement he was about to give in any way with the Department of Justice or any other part of the government, and that they did not know what he was going to say.⁶⁴ He then stated the investigation's findings and that the FBI was recommending to the Department of Justice that bringing criminal charges against Secretary Clinton was not appropriate.⁶⁵

Director Comey's actions gave practical effect to the ethical responsibility to society at large by dispelling the appearance that political pressure or favoritism from his superiors had affected the prosecutorial recommendation being made, and by affording the public a basis to trust in the fairness and impartiality of the process that was conducted, and on which the Department of Justice and the FBI depend for the legitimacy of their authority.

note 1, at 1, 13–15.

⁶² Comey Statement *supra* note 4, at 1–7.

⁶³ *Id.* at 1.

⁶⁴ *Id.*

⁶⁵ *Id.* at 7.

IV. WHEN INVESTIGATORS TOLD COMEY ON OCTOBER 27 ABOUT THE EMAILS FOUND ON WEINER'S LAPTOP AND THEIR BELIEF AS TO THE POTENTIAL SIGNIFICANCE OF THESE EMAILS TO THE HILLARY CLINTON INVESTIGATION, HE TOOK ACTION WHICH RENDERED HIS JULY TESTIMONY TO A CONGRESSIONAL OVERSIGHT COMMITTEE MATERIALLY INACCURATE. AS A RESULT, AN INSTANCE WAS CREATED WHERE THE COURSE OF ACTION GUIDED BY THE ETHICAL RESPONSIBILITY HE HAD TO SOCIETY AT LARGE CONFLICTED WITH THE COURSE OF ACTION GUIDED BY THE ETHICAL RESPONSIBILITY HE HAD TO THE INSTITUTIONS FOR WHICH HE WORKED, REQUIRING HIM TO CHOOSE WHICH SHOULD TAKE PREFERENCE

A. What Comey Told Congress in July and How It Became Materially Incorrect in Light of the October Developments and the Action He Took in Response to Those Developments

Comey appeared before the House Committee on Oversight and Government Reform on July 7 to answer questions committee members had about the results of the completed investigation.⁶⁶ The hearing started with his statement to the effect that no prosecution was recommended because the investigation did not find sufficient facts to prove criminal intent.⁶⁷ The balance of the hearing consisted of questions from members as to why various facts established by the investigation were insufficient to demonstrate the requisite intent necessary for prosecution.⁶⁸

As a result of Comey's testimony, the committee and the public were given to understand that, as of July 7 (four months before the November 8 presidential election), the Hillary Clinton investigation had been completed

⁶⁶ HOUSE OF REPRESENTATIVES: COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, *supra* note 4, at 6–91; HALCHIN & KAISER, *supra* note 33 (setting forth Congress's oversight role over the Executive Branch of government).

⁶⁷ HOUSE OF REPRESENTATIVES: COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, *supra* note 4, at 6–91 (His statement to the Committee in this regard was as follows: “[t]here are two things that matter in a criminal investigation of a subject: What did the person do? And when they did that thing, what were they thinking? When you look at the . . . investigation and prosecution of mishandling of classified information, those two questions are obviously present: What did the person do? Did they mishandle classified information? And when they did it, did they know they were doing something that was unlawful? . . . when I look at the facts gathered here, as I said, I see evidence of great carelessness, but I do not see evidence that is sufficient to establish that Secretary Clinton or those with whom she was corresponding both talked about classified information on email and knew, when they did it, they were doing something that was against the law. So, given that assessment of the facts and my understanding of the law, my conclusion was and remains no reasonable prosecutor would bring this case.”).

⁶⁸ *Id.* at 7–91 (the word “intent,” or some variation such as “intentionally” and “intention,” appear more than 90 times in the transcript of the hearing).

and a final decision had been made not to prosecute because the investigation did not find facts sufficient to prove criminal intent on her part.

The FBI investigation that had been completed in July reviewed approximately thirty thousand emails Secretary Clinton had turned over to the State Department.⁶⁹ Another thirty thousand emails were not reviewed because they had been deleted by her lawyers as personal.⁷⁰ On October 27, Comey was told by his investigators that a trove of some hundred thousand emails had been discovered which they believed could offer insight into her intent in originally setting up her private email server and what she may have understood as to the legality of those actions, and that there was no chance that they could complete a review and assess these emails before the November 8 election.⁷¹ Investigators asked Comey for authority to seek search warrants in order to obtain access to these emails for review as part of the investigation.⁷² He gave his approval to obtain such process.⁷³ As a practical matter, this action served to re-open the investigation.⁷⁴

*B. Communications Between Comey's Staff and That of the Attorney
General as to Whether Comey Should Update Congress*

On the same day, Comey also instructed his team to tell senior staff at the Department of Justice what he had just learned; what he had done in response; and that he believed he had an ethical duty in light of these developments to update Congress and intended to send Congress a letter to this effect.⁷⁵

The Attorney General, Deputy Attorney General, and their staffs, had “almost nonstop” discussions on how to respond.⁷⁶ They ultimately decided not to talk directly with Comey, and directed the Deputy Attorney General’s senior advisor to communicate to Comey’s staff “the strong view that neither the DAG nor the [AG] felt this letter should go out.”⁷⁷ Although the Attorney

⁶⁹ COMEY, *supra* note 2, at 192–93.

⁷⁰ *Id.*

⁷¹ *Id.* (When he asked investigators on October 27 “[h]ow fast can you review and assess this?” . . . they replied “that this review would take many weeks . . . [and that t]here was . . . simply too much material to do it more quickly.” Specifically, the team told Comey “there was no chance the survey of emails could be completed before the November 8 election.”).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ DOJ-IG Review, *supra* note 2, at x, 333–35, 337 (In describing the effect of this action on the investigation, the IG and FBI staff used the terms “reactivation,” “restart” and “significant step forward in the investigation”).

⁷⁵ *Id.* at x, 334–36, 360–63; *see also* COMEY, *supra* note 2, at 194, 196–97.

⁷⁶ DOJ-IG Review, *supra* note 2, at 360.

⁷⁷ *Id.*

General and the Deputy Attorney General had the authority to order Comey not to send a letter to Congress, they did not do so.⁷⁸

C. The Course of Action Guided by the Ethical Responsibility Comey Had to Society at Large Was to Update Congress Immediately, and This Course of Action Properly Took Precedence

As noted above, the rationale articulated in *In re Lindsey* for concluding that Executive Branch lawyers have a duty to disclose information about potential criminal wrongdoing by federal officials logically extends to a situation where the lawyer testifies to a congressional oversight committee reviewing a completed criminal investigation of a former federal official conducted by the institution for which the lawyer works, to impose a duty on the lawyer to furnish truthful and accurate information to the committee about the investigation, as well as a duty to update that information in a timely manner when it has become materially inaccurate due to actions the lawyer has taken in response to subsequent events and when the matter has remained “alive” in the public mind.⁷⁹

Comey's July testimony had left Congress and the public with the clear understanding that the completed investigation of Secretary Clinton recommended no prosecution because of the inability to garner facts sufficient to prove criminal intent on her part. Twelve days before the November 8 election, investigators told Comey that Clinton emails had been found on her aide's husband's laptop which they believed could be crucial to resolving the issue of her intent, and, in response, Comey authorized the issuance of search warrants in order to obtain access to them for review and assessment as to their relevance to the closed investigation. At this same time, investigators also told Comey that there was no way they could complete a review of these emails by the November 8 election. While this belief subsequently proved incorrect,⁸⁰ it was the best available information on which Comey had to make a decision on October 27 and 28.

From the time in early July when Comey testified to the oversight committee, through late October when investigators told him about the Clinton emails they had found and he authorized seeking a subpoena to be

⁷⁸ *Id.* at 360–63.

⁷⁹ *See supra* Section II.B.

⁸⁰ DOJ-IG Review, *supra* note 2, Attachment F (November 6, 2016, letter from Director Comey to various chairs of congressional committees advising that the FBI investigative team had reviewed all of the emails on Weiner's computer and that, based on that review, the FBI had not changed the conclusions expressed in July with respect to Secretary Clinton).

able to review them, Secretary Clinton continued to campaign as the Democratic candidate for President, and the controversy regarding her emails persisted as a central issue in the campaign. By way of example, one media analysis, conducted in July and August before and after the Republican and Democratic national conventions, found that Clinton

had a news category entirely of her own - the emails that she sent and received as secretary of state . . . [and that] [n]o topic . . . tilted Clinton's coverage more toward the negative than did allegations surrounding her use of emails as secretary of state . . . news references to Clinton's emails . . . were a defining feature of her news coverage.⁸¹

Another noted that “[w]hen Gallup conducted a survey over a two-month period in July to September 2016, they found that the topics the respondents most frequently associated with Clinton were the Clinton Foundation and email controversies.”⁸²

Comey viewed the matter as one where he had told Congress in July that “we [the FBI] were finished” and “[t]here was no case here.”⁸³ And “[y]et on October 27, the FBI and Department of Justice had just decided to seek a search warrant to review a huge trove of Hillary Clinton's emails, including information that could conceivably change our view of the investigation.”⁸⁴ He believed he had a duty to “tell Congress that the FBI's prior statements about the investigation being over were no longer true.”⁸⁵ Comey's view is consistent with the logical extension discussed earlier of the duty articulated in *In re Lindsey*, that an Executive Branch lawyer has to disclose information of potential wrongdoing of a federal official when testifying to a congressional oversight committee reviewing a completed FBI criminal investigation of a federal official, which includes the duty to update the committee when that information is no longer true and the matter has remained “alive” in the public view.

While the Attorney General had the authority to order Comey to stand down and not send the letter updating Congress, she declined to do so. When

⁸¹ THOMAS E. PATTERSON, NEWS COVERAGE OF THE 2016 NATIONAL CONVENTIONS: NEGATIVE NEWS, LACKING CONTENT 6, 13, 16, 18 (Harvard Kennedy School, Shorenstein Center on Media, Politics and Public Policy, 2016) (analyzed news reports in five television networks and six daily newspapers during the four-week period in July and August 2016, before and after the Republican and Democratic national conventions).

⁸² ROBERT FARIS ET AL., PARTISANSHIP, PROPAGANDA, AND DISINFORMATION: ONLINE MEDIA AND THE 2016 U. S. PRESIDENTIAL ELECTION 89 (Berkman Klein Center for Internet and Society at Harvard Univ., Pub. No. 2017-6 2017), <http://nrs.harvard.edu/urn-3:HUL.InstRepos:33759251> [<https://perma.cc/7457-LHSM>].

⁸³ COMEY, *supra* note 2, at 194.

⁸⁴ *Id.*

⁸⁵ *Id.* at 195.

the Inspector General asked the Attorney General why she didn't order Comey not to send the letter, she stated "I did have a concern . . . about the perception of Department leadership trying to somehow prevent information damaging to a candidate from coming out and that also being a political problem . . . [b]ut the concern of appearing to put a thumb on the scale for a particular candidate was something we were wrestling with."⁸⁶

Comey sent his letter to Congress the next day on October 28, 2016.⁸⁷ The letter stated that he was writing to supplement his previous congressional testimony three months earlier where he had advised that the FBI had completed its investigation of former Secretary Clinton's personal email server, and to advise that the FBI had learned of the existence of emails "that appear to be pertinent to the investigation [of former Secretary Clinton]," in connection with an unrelated case. The letter further advised that the FBI was taking steps designed to allow investigators to review these emails to determine whether they contained classified information and to assess their importance to the investigation of former Secretary Clinton.⁸⁸ The letter ended with the admonition that the FBI could not "yet assess whether or not this material may be significant."⁸⁹

Comey acted "in a timely manner" as he notified the congressional committee the day after he was advised that additional emails had been discovered and he had reopened the investigation. The issue of Secretary Clinton's emails had remained "alive" as a campaign issue in the interim between July 7 and October 27, and reopening the investigation constituted a fundamental change from his July testimony that the investigation had been concluded.

V. CONCLUSION

This essay examines the ethical responsibility a lawyer has to society at large in the context of a lawyer working for a government institution. It addresses the interplay between this ethical responsibility and the ethical responsibility such a lawyer has to the institution for which the lawyer works in an instance where these two responsibilities offered conflicting guidance

⁸⁶ DOJ-IG Review, *supra* note 2, at 360–63.

⁸⁷ *Id.* at x, 333, Attachment E (October 28, 2016 letter from Director Comey to Chairs of various Congressional Committees); COMEY, *supra* note 2, at 192–94.

⁸⁸ DOJ-IG Review, *supra* note 2, Attachment E (October 28, 2016 letter from Director Comey to Chairs of various Congressional Committees).

⁸⁹ *Id.*

as to the proper course of action the lawyer should have taken, requiring the lawyer to choose which should take precedence.

This is not the first time, nor will it be the last, where a government lawyer in a decision-making position will face such a situation. It is hoped that this essay offers some considerations for a government lawyer to take into account in determining how to address the matter presented in a manner that contributes to fostering the public's trust in government institutions which is fundamental to our democratic system of government.