

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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July 7, 2016

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

At the beginning of our hearing today with James Comey, the Director of the Federal Bureau of Investigation (FBI), you suggested that you were considering sending a criminal referral to the FBI to investigate whether former Secretary of State Hillary Clinton lied under oath when she testified before Congress that she did not send or receive emails marked classified. You had this exchange with Director Comey:

CHAFFETZ: Did she—did Hillary Clinton lie under oath?
COMEY: Not to the FBI. Not in a case we're working.
CHAFFETZ: Did you review the documents where Congressman Jim Jordan asked her specifically and she said, quote, there was nothing marked classified on my emails, either sent or received, end quote?
COMEY: I don't remember reviewing that particular testimony. I'm aware of that being said though.
CHAFFETZ: Did the FBI investigate her statements under oath on this topic?
COMEY: Not to my knowledge. I don't think there's been a referral from Congress.
CHAFFETZ: Do you need a referral from Congress to investigate her—her statements under oath?
COMEY: Sure do.
CHAFFETZ: You'll have one. You'll have one in the next few hours.¹

Criminal referrals to the Department of Justice are very serious matters, although they are not always treated as such by some Members of Congress. When you made these statements regarding the classification markings at the beginning of the hearing, we had not yet heard key details about this issue from Director Comey. As the hearing pressed on, however, we learned some significant new facts.

¹ House Committee on Oversight and Government Reform, *Hearing on Oversight of the State Department* (July 7, 2016).

As you know, on Tuesday, when Director Comey announced his recommendation against prosecution, he stated: “Only a very small number of the emails containing classified information bore markings indicating the presence of classified information.”² During our hearing today, we learned the following new information:

- First, Director Comey testified that he was referring to only three emails out of more than 30,000, or less than 1/100 of 1%.
- Second, Director Comey testified that the classification markings on these three documents were not proper and did not comply with federal guidelines or manuals. The emails did not have classified headers, and they did not identify the original classifier, agency, office of origin, reason for classification, or date for declassification. Instead, they had only a “c” for “confidential” next to a paragraph further down in the email.
- Third, Director Comey testified that, based on these facts, it would be a “reasonable inference” for Secretary Clinton to have “immediately” concluded these documents were not classified.
- Fourth, Director Comey testified that he had not been informed that yesterday, the State Department reported that these emails, also known as “call sheets,” were not in fact classified and that they included these stray classification markings because of “human error.”³

The State Department spokesperson explained in detail how these inaccurate stray markings appeared in these documents:

Generally speaking, there’s a standard process for developing call sheets for the Secretary of State. Call sheets are often marked—it’s not untypical at all for them to be marked at the confidential level—prior to a decision by the Secretary that he or she will make that call. Oftentimes, once it is clear that the Secretary intends to make a call, the department will then consider the call sheet SBU, sensitive but unclassified, or unclassified altogether, and then mark it appropriately and prepare it for the Secretary’s use in actually making the call. The classification of a call sheet therefore is not necessarily fixed in time, and staffers in the Secretary’s office who are involved in preparing and finalizing these call sheets, they understand that. Given this context, it appears the markings in the documents raised in the media report were no longer necessary or appropriate at the time that they were sent as an actual email. So it appears that those ... markings were a human error. They didn’t need to be there. Because once the Secretary had decided to make the call, the process is then to move the call sheet, to change its

² Federal Bureau of Investigation, *Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton’s Use of a Personal E-Mail System* (July 5, 2016) (online at www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-b.-comey-on-the-investigation-of-secretary-hillary-clintons-use-of-a-personal-e-mail-system).

³ House Committee on Oversight and Government Reform, *Hearing on Oversight of the State Department* (July 7, 2016) (online at www.youtube.com/watch?v=04DpCU3mq3c).

markings to unclassified and deliver it to the Secretary in a form that he or she can use. And best we can tell on these occasions, the markings—the confidential markings—was simply human error. Because the decision had already been made, they didn't need to be made on the email.⁴

I understand that there was some confusion about this issue going into the hearing, but the facts that were established helped clarify this issue, and for that reason today's hearing served a valuable purpose. Director Comey testified that was not aware that these emails were marked improperly and were not in fact classified.

Based on this testimony, it appears that proceeding with a criminal referral in light of these new facts would be unwarranted. I hope this information helps, and I thank you for your consideration.

Sincerely,



Elijah E. Cummings
Ranking Member

⁴ Department of State, *Daily Press Briefing* (July 6, 2016) (online at www.state.gov/r/pa/prs/dpb/2016/07/259402.htm).