

Commentary: Justice Department to Comey: You sinned

Blame Comey. That's the main takeaway of the much-awaited Justice Department inspector general's report on the Hillary Clinton email investigation. The report faulted former FBI Director James Comey both for saying in July 2016 that there were no grounds for a reasonable prosecutor to go after Clinton and for saying in October of that year that the investigation of her emails had been reopened.

The report released Thursday is intended to rebuke Comey and send a message about keeping the rule of law separate from politics.

Comey has said that he had no choice but to act as he did under the circumstances, and that he would do it again.

The inspector general, speaking as the disembodied voice of an independent entity within a Justice Department that is also supposed to be independent, is directly refuting Comey's argument. Comey should not have broken the rules the first time, in discussing the Clinton email investigation publicly. Doing so led him to the second infraction — the one that harmed Clinton's chances at the presidency.

The report says that there's no evidence that Comey was motivated by partisan support for either side. But that doesn't matter for the main point of the report, which is that Comey should have followed the rules and kept his mouth shut. If he had, he would have avoided putting the Justice Department into the political mess from which it has not yet emerged.

The principle at stake here is that law enforcement and prosecution are supposed to be outside partisan politics. This is one of the most important unwritten constitutional norms we have.

Other democracies try to separate law enforcement from politics by creating formally independent police and prosecutors. We haven't chosen to do that, and even if we tried, it would be tricky, because the Constitution creates an executive branch but doesn't provide for independent law enforcement or prosecution.

Instead, we try to assure law enforcement independence from politics and safeguard the rule of law by powerful norms. One of these is that law enforcement shouldn't comment on ongoing investigations — especially when they are about politicians running for office.

Even before he became president, Donald Trump wanted to break the unwritten norm against politicization. He made that clear by leading chants of “lock her up” and by saying in the presidential debates that he would try to prosecute Clinton if he won.

Faced with a challenge to the nonpoliticization norm, Comey tried to fight back with his July 2016 statement. His implicit logic was that Trump was using the email investigation to taint Clinton. Comey's statement was an attempt to stop that by saying there wasn't going to be a prosecution.

That impulse seems to have come from purely professional motives and from the desire to protect law enforcement from being politicized. But the inspector general condemns it anyway — because in breaking the unwritten rules, it was a step toward politicization.

The report notes that in the July statement, Comey said no reasonable prosecutor would have gone after Clinton based on the evidence. The report makes it clear that Comey did not consult with the Department of Justice before making his statement. The report further says that Comey should have taken his statement to the attorney general before making it. After all, Comey wasn't then a prosecutor — he was FBI director, which meant he was only in charge of investigations, not prosecutions. The report says this action of Comey's was “insubordinate. ”

This infraction might sound minor, because Comey was also a career prosecutor. But it isn't. It's the voice of the Department of Justice saying that all the rules need to be followed, including the one that says the director of the FBI is answerable to the attorney general when it comes to prosecutions. That's how the rule of law gets justified and normalized.

Once Comey had gone on record once, he had to do it again when the Anthony Weiner investigation seemed to reveal more Clinton emails. This, too, was likely an act aimed at avoiding politicization. Comey thought Clinton would win, and didn't want it said that he had withheld the fact of the reopening the investigation after he had publicly said there was nothing worth prosecuting.

The IG report makes it clear that this was no excuse. Comey was again breaking the rules. And in a rule-of-law system, the rules are everything.

The upshot is that the inspector general's report is the voice of genuine independence — speaking about the danger of being so independent-minded that you break the norms, the way Comey did.

To a law enforcement professional like Comey, it's as close to the voice of God as a human institution can be.

And its message to Comey is, "Son of man, you have sinned."

Comey responded Thursday in an op-ed article in *The New York Times*, in which he defends himself, but deep down he must get the message. The person who enforces the rules should be extra careful not to break any.

I'll leave the politics to others to analyze the fallout. But from the standpoint of the norm against politicizing prosecutions and the rule of law, the report speaks loud and clear:

Don't break the rules — any of them — if you are the nation's chief law enforcement official. Sin leads to sin. Politics breeds politics.

It's a lesson we are now all learning the hard way.

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