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The Inspector General on the FBI in Fall 2016: How a Fateful Delay Set the Stage for the Ultimate October Surprise

By Peter Margulies Saturday, June 16, 2018, 11:15 AM

The Inspector General (OIG) report (see *Lawfare's* summary here) on the Clinton email investigation has reinvigorated a parade of what-ifs surrounding the 2016 presidential election. What if former FBI director James Comey hadn't criticized Hillary Clinton publicly in July 2016, even as Comey declined to recommend Clinton's prosecution? What if Comey had not felt compelled to notify Congress in late October 2016 that he was considering reopening the Clinton probe? Much ink has already been spilled on both of these questions. My focus here is on another what-if question flagged by the OIG report: What if the FBI had sought a warrant in *late September 2016* instead of late October for the copious Clinton emails found on the laptop of Clinton aide Huma Abedin's estranged husband, former U.S. Representative Anthony Weiner? In addressing why no earlier warrant request was forthcoming, the OIG report yields disturbing inferences about the situational awareness of former director Comey and the judgment of several senior FBI officials involved in the Clinton investigation, including former Deputy Director Andrew McCabe.

As I mentioned in a piece written before the 2016 election, the FBI's delay in obtaining access to the Clinton emails on Weiner's laptop was a classic failure to do what the FBI has sought to do since Sept. 11: "connect the dots." Prompt access to the emails would have confirmed for Comey in early October that all were duplicates of emails already possessed by the FBI. That understanding would have almost certainly convinced Comey that he did not need to notify Congress—a notification that dominated the news in the lead-up to Election Day and arguably stalled Clinton's momentum (the precise role played by Comey's announcement in the election results is tough to quantify and in any case is beyond the scope of this post). That's why the OIG report's analysis of the delay's causes is essential (and disturbing) reading.

The first take-away from the OIG report and Comey's fascinating book, "A Higher Loyalty," concerns the former FBI director's lack of basic situational awareness on the relationship between Weiner and Abedin and how that relationship exponentially increased the likelihood that Clinton emails were on Weiner's laptop. According to the OIG report, Comey told the authors of the report that he didn't know that Weiner was married to Abedin. Here or elsewhere, the OIG report does not question Comey's honesty or integrity, which I've always taken as an article of faith. But that only accentuates Comey's lack of situational awareness. A Lexis search reveals that through Sept. 15, 2016, the *New York Times* alone had run over 100 stories on Abedin's closeness to Clinton and her ill-fated marriage to Weiner. Abedin's relationship to each had been a prominent part of the Clinton narrative for years. A diligent investigator of Hillary Clinton's emails should have known this.

Moreover, Comey was hardly new to the Clinton investigation. Indeed, his involvement in the investigation and his July 2016 declination announcement were and will remain signature moments in his career, for better or worse. The OIG report criticizes Comey for being unduly aggressive in taking the lead in the prosecution decision—a decision informed in part by Attorney General Loretta Lynch's partial recusal due to her June 2016 tarmac encounter with Bill Clinton. Given Lynch's compromised posture and the FBI director's independence and stellar reputation, I'm not persuaded that Comey's accession to the pivotal role in the investigation was flawed (although I leave to others the procedural issue of Comey's declining to consult Lynch or Deputy Attorney General Sally Yates—an issue on which the OIG report criticizes the former FBI director). In any case, Comey's aggressiveness in July contrasts markedly with his lack of awareness or alacrity in late September when McCabe first informed him about Weiner's laptop and its possible link to the Clinton investigation. Again, to be clear, Comey's notification to Congress in late October proves that his failure to snap into proactive mode in late September was politically neutral. In addition, Comey had a large and vitally important agency to run and clearly assumed that his staff would notify *him* of anything actionable regarding Clinton. However, that still leaves another haunting what-if here—what if Comey in late September had simply known as much about Abedin and Weiner as millions of diligent *New York Times* readers had known for years?

If the what-ifs about Comey are haunting, the what-ifs about his staff and some of the procedures for screening them are matters of profound concern. Staff could have filled in whatever gaps existed in Comey's knowledge of Clinton staffers' personal relationships. Unfortunately, staff support at this key juncture was intermittent, at best. Consider ex-deputy director Andrew McCabe; former Clinton investigation and Russia investigation lead, Peter Strzok; and former McCabe special counsel Lisa Page, Strzok's prolific texting partner with whom he was having an affair. McCabe merits initial assessment because, as deputy director, he had responsibility for day to day running of the FBI, consistent with the priorities that Comey set. His problems included undue passivity about seeking legal authority to review the full contents of Weiner's laptop and the failure to follow the dictates of prudence and fully disclose a possible conflict of interest involving his wife's campaign for the Virginia State Senate.

As the OIG report indicates, neither Comey nor McCabe ensured that procedures were in place to plumb the full extent of McCabe's possible conflict. The nub of that conflict was the receipt by Jill McCabe, McCabe's wife, of \$675,000 for her losing state senate run from a PAC largely controlled by then Virginia governor and prominent Bill Clinton friend, Terry McAuliffe. McCabe followed procedures in place in disclosing his wife's Democratic campaign, which she lost on November 3, 2015, well before the fraught events of 2016. The OIG report rightly indicates that McCabe's disclosure and the timing of his wife's were sufficient to rebut any *legal* requirement that McCabe recuse himself from matters involving the Clinton investigation. However, that's not the end of the story. Admittedly, the procedures then in place didn't require that McCabe disclose the McAuliffe PAC funding. But McCabe's failing is that he did not show prudence in this charged situation and go *beyond* what the procedures required. Instead, the *Wall Street Journal* broke the McAuliffe PAC funding story at the worst conceivable time—Oct. 23, 2016, just two weeks before the presidential election.

The OIG report notes that both Comey and McCabe should have ensured that the screening procedures were more rigorous. Moreover, McCabe would in any case have been wise to share the facts about McAuliffe's funding help with Comey well before the Wall Street Journal published its scoop. The failure to take either path left Comey blindsided in the two weeks before the election, just as the questions surrounding the Clinton emails on Weiner's laptop presented themselves to Comey with accelerating urgency.

The OIG report further shows that McCabe did not serve either Comey or the FBI well by being unduly tentative in engaging Comey on the matter of Weiner's laptop in the four weeks between late September and late October. In McCabe's defense, he *did* mention the matter to Comey on September 28. However, McCabe himself described the mention as a "flyby"—one item on a list. As McCabe acknowledged, it was reasonable for Comey, the head of a massive federal agency, to assume that operational details regarding access to any relevant information would be handled through usual channels. Supporting this assumption, McCabe recalled that he told Comey that FBI staffers were "taking steps to figure out what we had" and would return to Comey with "some sort of an assessment" about what further steps to take (p. 281). Unfortunately, McCabe didn't see to it that those steps included a warrant to search portions of the laptop that FBI staffers had identified by *Sept. 29* (p. 324) as likely to include thousands of emails from Clinton, including messages from Clinton domain names and from the quaint Blackberry device that Clinton persisted in using for email communications.

Here, McCabe showed not merely a puzzling lack of full engagement but another prime flaw of an agent in a principal-agent relationship: inadequate knowledge of his principal. A prudent agent for principal James Comey would have understood that Comey felt bound by his earlier course of conduct with Congress to go public if he believed he might need to revisit closing the Clinton investigation. That strict code, which may not have served Comey well during this period, was a salient strand in Comey's public persona, going back to what may be Comey's finest hour: his fight as Deputy Attorney General in the George W. Bush administration, along with Jack Goldsmith and others, to demand changes in that administration's secret terrorist surveillance program. Rushing to Attorney General John Ashcroft's bedside to fortify Ashcroft's resolve, Comey displayed a determination to take difficult actions to safeguard what he on that occasion rightly perceived as the integrity of the legal system. McCabe presumably was well-versed in this fabled episode, yet curiously failed to see the parallel that Comey drew with the Clinton email investigation. In this respect, the *best* view of McCabe's reticence from late September through late October 2016 is that he badly misjudged his own principal.

I say that's the best view because the alternative is that McCabe knew that Comey would seek to notify Congress if he knew about the Clinton emails on Weiner's computer and—informed by that realization—sought to delay getting Comey fully engaged for as long as possible, in the hope of "running out the clock" until after the presidential election. If McCabe took this view, he could have done so for one of two reasons.

The first reason, favored by GOP conspiracy theorists, is a political narrative: in this scenario, McCabe was a closeted Clinton partisan who feared that timely pre-election scrutiny of the emails would result in Clinton's defeat. However, McCabe's alerting Comey to the issue on Sept. 28 makes this account implausible: why chance spurring Comey to act if McCabe wanted only to keep the emails under wraps? A more plausible scenario is that McCabe believed that the emails on Weiner's computer at the end of the day would be either duplicates (which in fact they were) or material similar to the messages that Comey had determined in July did not merit prosecution. For McCabe, handling this material after the election would not have been problematic. McCabe may also have thought that the delay from September 28 to after the election was simply "not that long" in the FBI context (as an unnamed FBI lawyer told the OIG on p. 296 of the report).

However, the "investigative routine" narrative also doesn't entirely fit events. McCabe acknowledged to OIG that, even on Sept. 28, he viewed the Weiner laptop as a "big deal" (p. 281). Waiting a month or more to learn more about such a momentous matter seems incongruous. Moreover, the OIG report notes that other officials at the Justice Department became puzzled in October that no one had sought a warrant to see the contents of that portion of Weiner's laptop, even though the information available as of late September indicated that a large batch of Clinton emails were on the device. Those puzzled officials included then-U.S. Attorney for the Southern District Preet Bharara, who ordered contact with the Office of the Deputy Attorney General on Oct. 21 about the delay in seeking a warrant. That initiative by Bharara contributed to the process that put the matter more concretely before Comey a few days later, when Comey notified Congress and ordered a warrant request. It seems odd that McCabe could have believed these internal pressures from seasoned law enforcement hands like Bharara could have been contained until after the election.

There's a third McCabe narrative, however—the "delegation" story. McCabe may have believed in the period from late September through late October that a decision on whether to seek a warrant would be made by others closer to the investigation, including Peter Strzok, who led both the Clinton and Russia investigations. In practice, for that fateful month, discretion rested with Strzok on whether to request that the FBI's New York office take steps to obtain a warrant to search the Clinton material known to be on Weiner's laptop. If McCabe believed that Strzok would take this step in regular order, that may have been among McCabe's worst mistakes.

For both Strzok and Strzok's texting partner Lisa Page, evidence plausibly points to some level of political interest in the subject matter of the Clinton investigation. In a now well-known text exchange from Aug. 8, 2016, Page anxiously queried Strzok, "[Trump's] not ever going to become president, right?" Strzok replied, "No .. [w]e'll stop it." While the OIG report concludes that there is insufficient evidence to demonstrate that Strzok's decisions were politically motivated, the report also tellingly notes a lack of "confidence" that Strzok's decisions were "free from bias." Perhaps Strzok's bias was inchoate, rather than concrete. Bias, if it were present, may have combined with an entirely reasonable wariness about the prospect of reopening the Clinton investigation within weeks of the election. Of course, if this were the case, Strzok's calculations did not turn out as he hoped—but that is also a story for another day.

While the Inspector General's caveat regarding Strzok's impartiality has been widely reported, the reports understate its significance. An Inspector General does not lightly decline to find that senior FBI officials were unbiased. Impartiality is the hallmark of sound law enforcement in a constitutional republic. James Comey's book is a meditation on that attribute's foundational importance. Against that backdrop, the OIG report's proviso about Strzok indicates that a fatal flaw afflicted at least two senior FBI officials—Strzok and Page. If McCabe's delegation rested on the belief that Strzok was reliable, that delegation was singularly ill-advised.

My discussion here does not suggest that the Clinton investigation's ultimate conclusion was unsound. I agree both with Comey's July 2016 declination decision and with his ultimate decision not to reopen the investigation, once the FBI determined just before Election Day that the emails on Weiner's computer were largely duplicates. My only focus here has been on the judgments and procedures that yielded the month-long delay in seeking a warrant for the contents of Weiner's computer relevant to the Clinton investigation. All those who expect the FBI to make competent operational judgments based on rigorous procedures should hope for an improvement over the performance during that period documented in the OIG report.

Topics: Federal Law Enforcement

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