

Above the Law

FBI Director James Comey's announcement that he will not recommend prosecution of Hillary Clinton for violation of the Espionage Act (despite finding in excess of 110 emails sent or received by her via private email outside of legally required, authorized channels) constitutes an historic betrayal of a bedrock principle of American jurisprudence since the founding of the Republic: Equal Justice Under Law. If anyone had a doubt as to whether the principle that no one is above the law remains a central tenet of the FBI and the Department of Justice, James Comey removed that doubt infamously. He established the existence of two sets of law in America, one for the common man and one for the politically well connected.

The phrase, "Equal Justice Under Law," engraved atop the main portico of the Supreme Court of the United States, used to be a mainstay of all honorable public servants at the FBI and the Department of Justice, but FBI Director Comey, whose job it is to investigate law violations by U.S. citizens regardless of their station in life and refer violations found to Justice for prosecution, publicly rendered it a mere shibboleth when he refused to recommend Clinton for prosecution despite FBI referrals of lesser government servants and military personnel who committed far less extensive and significant violations of the Espionage Act.

In the American revolution, Thomas Paine echoed the fundamental principle of equal justice in his famous retort: "[I]n absolute governments the King is law" but "in America the law is King." In his seventh Novangulus letter, John Adams wrote, in lauding what he believed to be the true and just constitutional foundation of Great Britain, that justice depends on "a government of laws, and not of men," by which he meant law applied to all equally rather than to some selectively. Indeed, in the very decision that established federal judicial review, *Marbury v. Madison*, Chief Justice

John Marshall famously wrote: "The government of the United States has been emphatically termed a government of laws, not of men."

The malevolent will of government officials to exceed the limits of the law and escape justice was to be ruled out in our Republic. The very notion of justice depends on equal justice or else the Republic devolves into chaos and tyranny. The law is to be applied equally to the rich as well as the poor, the politically powerful as well as the apolitical, the President as well as the citizen; although an ideal never truly realized, it was an ideal no federal law enforcement officer or official would overtly reject or cast aside. Although Comey's prior history revealed a deep respect for the rule of law, in this single most important moment in his career when he was called upon to champion that principle, he demurred. He will not be remembered for his earlier acts because they are far overshadowed by this latest turn wherein he abandoned the rule of law and replaced equal justice under law with political favoritism.

Indeed, worse than demur on whether Clinton should be prosecuted (a decision for the Attorney General), Comey exceeded the limits of his office by concluding contrary to the evidence and law that no crime had been committed. It was for Comey to investigate whether the evidence revealed a violation of the Espionage Act. He did that, and he admitted the finding of facts that establish a violation of the Act.

Whether the law violations found justified prosecution was not his decision to make, and yet he made it anyway, letting Attorney General Loretta Lynch off the hook. It was Comey's duty to investigate and, if the facts revealed law violation, to refer the matter to the Attorney Justice for the ultimate decision on whether to prosecute. He did not do that. Of course, in light of the Attorney General's announcement only a day before that she would follow whatever recommendation she received from the FBI Director, it appears that the fix was

in, that once again, as in so many other instances in this Administration, political expedience in service to the President's agenda superseded justice and the rule of law.

The consequence of Comey's rejection of equal justice under law is profound. Coming from the FBI Director and endorsed by the Attorney General of the United States, the new precedent that the political class can violate the law and not be made to account rends American justice, replacing it with political preferred outcomes, rendering impartiality or blind justice a thing of the past. Justice Felix Frankfurter presciently observed in *United States v. United Mine Workers* (1947) what would become of America were we to abandon the principle of equal justice: "If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny." In this case one man, James Comey, created new law in place of the dictates of statutory law, the Espionage Act.

In this instance, Comey took it upon himself to determine what the law should be, rather than what it actually is. On its face, Clinton plainly violated the Espionage Act. Indeed, for 110 individual violations (the most committed by any American with the possible exception of Edward Snowden), the statute in question would require Clinton to be fined or imprisoned or both. The gravity of the offense is enormous: Hillary Clinton put at risk Americans under cover serving the nation in the most sensitive and vulnerable roles overseas, as well as secret methods used by the government to pursue the nation's interests against its enemies. For far less consequential acts of gross negligence under this same statutory section, servicemen have been charged, convicted, and incarcerated.

Their hapless lot is that they were not Secretary of State, according to Comey. He justified not recommending prosecution for Clinton on two weak reeds: (1) that referral would be unprecedented (meaning that no other Secretary of State had been so referred), but that is misleading because the

applicable precedent focuses on access to and the handling of classified information regardless of one's position within the government and (2) that Hillary did not "intentionally" violate the Act, but that is irrelevant under Section 793-f of the Espionage Act and, nevertheless, the evidence contradicts that legal conclusion because, indeed, Hillary was fully briefed and aware of State Department restrictions on and legal limits affecting use of classified information, she just chose to ignore those restrictions and limits (that is an "intentional" violation).

The law concerning the "extreme carelessness" Comey attributed to Clinton's handling of classified information (18 USC Section 793-f) states: "Whoever, being entrusted with . . . any document relating to the national defense . . . through gross negligence permits the same to be removed from its proper custody . . . shall be fined under this title or imprisoned not more than ten years, or both." The law is plain. Comey's findings reveal at least 110 instances wherein Clinton violated the law.

Based on those findings, he should have referred the matter to the Attorney General to decide whether the law violations warranted prosecution. If the principle of equal justice were honored, the Attorney General would have referred the matter for prosecution. Indeed, her complicity in Comey's action and her failure to reject the recommendation and recommend the matter for prosecution establishes that she, too, as the chief law enforcement officer of the United States, rejects equal justice under law and prefers political favoritism over the rule of law. The decision to close the case will remain the most consequential defining moment of her career as well. She too will live in infamy.

What, then, is an American citizen to do if his government's law enforcers apply the law selectively to favor the interests of the politically powerful? What is that citizen to do when the courts cannot provide a remedy for the pass given Hillary

Clinton? Are we to acquiesce in the political manipulation of the law by doing nothing, or are we to use whatever legal recourse we as individuals have to right the wrong?

In this instance, the ballot is the only remaining remedy. The former Secretary of State, who violated the Espionage Act, and, were she an officer in the military, would have been sent to jail, should not be allowed the privilege of becoming the nation's chief executive. She should be held accountable by the electorate because she has not been held accountable under the law. If we wish to reassert the rule of law, insist upon resurrection of the bedrock principle of equal justice under law, we must ensure that the office of President of the United States is not filled by a person who brazenly violated the very laws enacted to protect the nation's most sensitive secrets. No President of the United States should be above the law. If prosecutors will not charge Clinton, if a grand jury will not be allowed to indict her, if a court of law will not be allowed to hear the case against her, then voters must deny her the presidency.

Indeed, can any person who values justice vote in favor of a person to be President, to, under Article II, Section 3 of the Constitution, "take Care that the Laws be faithfully executed..." who, herself, violated the law and never accounted for the violations? Among the solemn duties of the President is to ensure that those who commit acts of espionage are brought to justice and, in the military context, are even executed in accordance with military justice; can a President who committed Espionage Act violations herself yet was excused from accountability be rightfully empowered to prosecute those who commit the same violations?

And under Article I, Section 3, it remains a basis for impeachment and removal from office if the President is convicted of "high crimes and misdemeanors" of which Espionage Act violations are quintessential examples. How is it, then, that if a future President commits the same violations of law,

placing in peril the national security of the United States, could we ever justify impeachment when a President Hillary Clinton will have engaged in the same offenses yet has not been made to account.

In short, all Americans must demand equal justice because without it our nation devolves into petty tyranny. Because the FBI Director and Attorney General have failed us, we must restore justice through the ballot box; it is our duty; there is no other way. Hillary Clinton must never become President of the United States if the principle of Equal Justice Under Law is to triumph over political favoritism and tyranny.

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