

DOES JIM COMEY THINK THOMAS DRAKE EXHIBITED DISLOYALTY TO THE UNITED STATES?

As you've no doubt heard, earlier today Jim Comey had a press conference where he said Hillary and her aides were "extremely careless in their handling of very sensitive, highly classified information" but went on to say no reasonable prosecutor would prosecute any of them for storing over 100 emails with classified information on a server in Hillary's basement. Comey actually claimed to have reviewed "investigations into mishandling or removal of classified information" and found no "case that would support bringing criminal charges on these facts."

Our investigation looked at whether there is evidence classified information was improperly stored or transmitted on that personal system, in violation of a federal statute making it a felony to mishandle classified information either intentionally or in a grossly negligent way, or a second statute making it a misdemeanor to knowingly remove classified information from appropriate systems or storage facilities.

[snip]

Although there is evidence of potential violations of the statutes regarding the handling of classified information, our judgment is that no reasonable prosecutor would bring such a case. Prosecutors necessarily weigh a number of factors before bringing charges. There are obvious considerations, like the strength of the evidence, especially regarding intent. Responsible decisions also consider the context of a person's

actions, and how similar situations have been handled in the past.

In looking back at our investigations into mishandling or removal of classified information, we cannot find a case that would support bringing criminal charges on these facts. All the cases prosecuted involved some combination of: clearly intentional and willful mishandling of classified information; or vast quantities of materials exposed in such a way as to support an inference of intentional misconduct; or indications of disloyalty to the United States; or efforts to obstruct justice. We do not see those things here.

To be clear, this is not to suggest that in similar circumstances, a person who engaged in this activity would face no consequences. To the contrary, those individuals are often subject to security or administrative sanctions. But that is not what we are deciding now.

Before we get into his argument, consider a more basic point: **It is not Jim Comey's job to make prosecutorial decisions.** Someone else – whichever US Attorney oversaw the prosecutors on this case, Deputy Attorney General Sally Yates, or Loretta Lynch – makes that decision. By overstepping the proper role of the FBI here, Comey surely gave Lynch cover – now she can back his decision without looking like Bill Clinton convinced her to do so on the tarmac. But he has no business making this decision, and even less business making it public in the way he did (the latter of which points former DOJ public affairs director Matthew Miller was bitching about).

But let's look at his judgment.

Given that Jeffrey Sterling has been in prison for a year based off a slew of metadata (albeit

showing only 4:11 seconds of conversation between James Risen and Sterling) and three, thirty year old documents, classified Secret, describing how to dial a phone, documents which were presented to prove Sterling had the "intent" to retain a document FBI never showed him retaining, I'm particularly interested in Comey's judgment that no reasonable prosecutor would bring charges based on the facts found against Hillary. Similarly, given the history of the Thomas Drake prosecution, in which he was charged with Espionage because he kept a bunch of documents on NSA's fraud, at the direction of the Inspector General, which the FBI found in his basement.

I can only imagine Comey came to his improper public prosecutorial opinion via one of two mental tricks. Either he – again, not the prosecutor – decided the only crime at issue was mishandling classified information (elsewhere in his statement he describes having no evidence that thousands of work emails were withheld from DOJ with ill intent, which dismisses another possible crime), and from there he decided either that it'd be a lot harder to prosecute Hillary Clinton (or David Petraeus) than it would be someone DOJ spent years maligning like Sterling or Drake. Or maybe he decided that there are no indications that Hillary is disloyal to the US.

Understand, though: with Sterling and Drake, DOJ decided they were disloyal to the US, and then used their alleged mishandling of classified information as proof that they were disloyal to the US (Drake ultimately plead to Exceeding Authorized Use of a Computer).

Ultimately, it involves arbitrary decisions about who is disloyal to the US, and from that a determination that the crime of mishandling classified information occurred.

For what its worth, I think most of these cases should involve losing security clearances rather than criminal prosecution (though Petraeus also lied to FBI). But we know, even there, the

system is totally arbitrary; DOJ has already refused to answer whether any of Hillary's aides will be disciplined for their careless handling of classified information and Petraeus never did lose his clearance. Nor did the multiple witnesses who testified against Sterling who themselves mishandled classified information lose their security clearance.

Which is another way of saying our classification system is largely a way to arbitrarily label people you dislike disloyal.