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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

November 2, 2016

VIA ELECTRONIC TRANSMISSION

The Honorable Michael E. Horowitz
Inspector General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Dear Inspector General Horowitz:

The public's lack of confidence in the Justice Department's ability to handle investigations related to former Secretary of State Hillary Clinton impartially ought to be of grave concern for its leadership. The entire matter is in desperate need of independent, objective, non-partisan oversight. As the Inspector General, that is your statutory duty.

The Department has utterly failed to manage the significant appearances of conflicts of interest. The leadership of the Department has stuck their heads in the sand, assuming that their reputations and silence would be enough to insulate them. The American people are all too aware of the troubling meeting between Attorney General Lynch and former President Bill Clinton on the tarmac of a Phoenix airport and the Justice Department's acceptance of the FBI's recommendation not to prosecute a little over a week later.

However, the potential conflicts are much deeper and broader than that one meeting.¹

Attached please find two previous letters that I sent to the FBI relating to Attorney General Lynch's potential conflicts and the FBI's second in command, Andrew McCabe and his potential conflicts related to Clinton fundraiser, Gov. Terry McAuliffe. Additionally recent

¹ Letter from Charles Grassley, S. Comm. on the Judiciary, to James Comey (May 17, 2016). Available at [https://www.judiciary.senate.gov/imo/media/doc/2016-05-17%20CEG%20to%20FBI%20\(Clinton%20Investigation%20Special%20Counsel\).pdf](https://www.judiciary.senate.gov/imo/media/doc/2016-05-17%20CEG%20to%20FBI%20(Clinton%20Investigation%20Special%20Counsel).pdf). Letter from Charles Grassley, S. Comm. on the Judiciary, to James Comey (October 28, 2016). Available at [https://www.judiciary.senate.gov/imo/media/doc/2016-10-28%20CEG%20to%20FBI%20\(Clinton%20Investigation%20Conflicts\).pdf](https://www.judiciary.senate.gov/imo/media/doc/2016-10-28%20CEG%20to%20FBI%20(Clinton%20Investigation%20Conflicts).pdf)

reports have also illustrated long running, close ties between Peter Kadzik and the Clinton's inner circle.²

It is vital that the American people have confidence in the ability of the Department to be impartial with regard to criminal inquiries related to senior officials and candidates for high office. Yet, the Justice Department has failed to appoint a special counsel to ensure that these inquiries are insulated from the appearance that decisions are being made based on political considerations rather than on the merits.

Attorney General Lynch has professional associations with the Clintons that created the appearance of a conflict long before her meeting on an airplane with the former President. President Clinton appointed her to be the U.S. Attorney for the Eastern District of New York. She was a partner at a law firm that represented both President and Secretary Clinton. In addition, reports around the time of Attorney General Lynch's meeting with President Clinton indicate that Secretary Clinton was considering keeping her on as Attorney General.³ Executive Order 12674 demands that "[e]mployees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standard promulgating pursuant to this order."⁴

As the senior official in the Office of Legislative Affairs, Mr. Kadzik is being allowed to participate in decisions about what information on these matters will be disclosed to Congressional oversight committees. Reports have noted that Mr. Kadzik continues a very close relationship with John Podesta, the Chairman of Secretary Clinton's presidential campaign. For instance, news reports have noted:⁵

- Mr. Kadzik represented Mr. Podesta during the Monica Lewinsky investigation.
- Mr. Kadzik lobbied Mr. Podesta for then-President Bill Clinton to pardon Marc Rich. On this point, the House Committee on Government Reform found that Mr. Kadzik was hired by Marc Rich because of his connections with Mr. Podesta.
- Mr. Podesta emailed Obama campaign officials to recommend Mr. Kadzik for a role in the Obama campaign and called Mr. Kadzik a "fantastic lawyer" that "kept me out of jail."

² Chuck Ross, "Clinton Campaign Chairman Had Multiple Dinners With Top DOJ Official During Clinton Email Investigation," Daily Caller (October 25, 2016). Available at <http://dailycaller.com/2016/10/25/clinton-campaign-chairman-had-multiple-dinners-with-top-doj-official-during-clinton-email-investigation/>

³ Patrick Healy, "President Hillary Clinton? She Wants Progress on Immigration and to Drink with G.O.P." New York Times (July 3, 2016). Available at http://www.nytimes.com/2016/07/04/us/politics/hillary-clinton-president.html?_r=1

⁴ FBI Ethics and Integrity Program Policy Guide, p. 29 and 30, citing Executive Order 12674. Emphasis added.

⁵ Chuck Ross, "Clinton Campaign Chairman Had Multiple Dinners With Top DOJ Official During Clinton Email Investigation," Daily Caller (October 25, 2016). Available at <http://dailycaller.com/2016/10/25/clinton-campaign-chairman-had-multiple-dinners-with-top-doj-official-during-clinton-email-investigation/>

- Mr. Kadzik met with Mr. Podesta for dinner one day after Secretary Clinton's Benghazi testimony. Mr. Kadzik also met at Mr. Podesta's home for dinner on January 13, 2016. During both times the FBI was still investigating Secretary Clinton.
- On May 5, 2015, Mr. Kadzik's son asked Mr. Podesta for a job on the Clinton campaign.
- On May 19, 2015, Mr. Kadzik emailed Mr. Podesta and warned, "[t]here is a HJC oversight hearing today where the head of our Civil Division will testify. Likely to get questions on State Department emails. Another filing in the FOIA case went in last night or will go in this am that indicates it will be awhile (2016) before the State Department posts the emails."⁶

Given these facts, Mr. Kadzik's relationship with the Clintons and their associates is incompatible with the ability of Congress to have any confidence in his ability to be fair and impartial in advising on decisions about how to respond to Congressional oversight inquiries related to these matters.

At the FBI, Mr. McCabe's wife accepted more than half a million dollars from entities associated with Gov. Terry McAuliffe for her political campaign. Given Gov. McAuliffe's ties to the Clintons and the control Mr. McCabe later exerted over the Clinton investigation, some have suggested that there is at least the appearance of a conflict. All government employees must avoid situations that create the appearance of impropriety. Specifically, 5 C.F.R. § 2635.502, advises that a government employee should seek clearance before participating in any matter that could cause his or her impartiality to be questioned.

Against the backdrop of these apparent conflicts, the public has also learned that the Justice Department entered into unusual immunity agreements with all of Secretary Clinton's close associates. These immunity agreements inexplicably limited the scope in which the FBI could review relevant emails. For example, the immunity agreements between Cheryl Mills and Heather Samuelson only permitted the FBI to review email archives from Platte River Networks created after June 1, 2014, and before February 1, 2015, that included emails sent or received from Secretary Clinton's four email addresses during her tenure as Secretary of State. That limitation in scope would have excluded any emails from Cheryl Mills to Paul Combetta in late 2014 or early 2015 touching on the destruction or concealment of federal records being sought by Congress. Further, the scope would preclude the FBI from reviewing any of Secretary Clinton's emails if they were not from the four listed in the agreement. Finally, the agreements included an inexplicable agreement to destroy laptops that contained records subject to congressional subpoenas and preservation letters.

These unusual limitations, coupled with the sheer number of immunity agreements, without any charges being filed, seems to indicate that the Justice Department likely refused to

⁶ Emily Zanotti, "WIKILEAKS: Assistant AG Gave Podesta a 'Heads Up' on Hearings," (November 2, 2016). Available at <http://heatst.com/politics/wikileaks-assistant-ag-gave-podesta-a-heads-up-on-hearings/>

authorize any compulsory process, such as search warrants or grand jury subpoenas.⁷ Not until October 30, 2016, did the first reports surface that the Justice Department obtained a warrant to search the laptop associated with Huma Abedin and Anthony Weiner in the context of the FBI's investigation into Secretary Clinton.⁸ That appears to be the first compulsory process authorized in the matter, and it appears to have been authorized only after the FBI Director informed Congress of the need to obtain the information.

In addition, the public now knows that the investigation's scope was arbitrarily limited to classifications issues, with little or no effort to make a case against anyone for intentionally alienating federal records to subvert the Freedom of Information Act process and potentially obstruct Congress.

In light of all of this, an independent, objective, non-partisan review is vital. The American people deserve to know whether political considerations have improperly affected the handling of this inquiry and understand why key officials failed to recuse themselves to protect the public's confidence in a fair and impartial inquiry based on merits and the evidence rather than on politics.

Accordingly, please conduct a review sufficient to answer the following questions:

1. In light of Attorney General Lynch's previous history with the Clintons, does her involvement in the Clinton investigation create, at the minimum, the appearance of a conflict of interest? If not, why not?
2. In light of Mr. Kadzik's previous history with the Clintons, does his involvement in the Clinton investigation create, at the minimum, the appearance of a conflict of interest? If not, why not?
3. In light of Mr. McCabe's wife's relationship with a close ally of the Clintons, does his later involvement in the Clinton investigation create, at the minimum, the appearance of a conflict of interest? If not, why not?
4. When individuals such as Attorney General Lynch, Mr. Kadzik, and Mr. McCabe fail to recuse themselves for prudential reasons to avoid the appearance of a conflict, what policies and procedures exist to protect the Department from the consequences of those individual decisions and how can they be improved?

⁷ Malia Zimmerman and Adam Housley, "FBI, DOJ roiled by Comey, Lynch decision to let Clinton slide by on emails, says insider," FoxNews (October 13, 2016). Available at <http://www.foxnews.com/politics/2016/10/13/fbi-doj-roiled-by-comey-lynch-decision-to-let-clinton-slide-by-on-emails-says-insider.html>

⁸ Matt Apuzzo, Michael S. Schmidt, and Adam Goldman, "Justice Department Obtains Warrant to Review Clinton Aide's Emails," New York Times (October 30, 2016). Available at http://www.nytimes.com/2016/10/31/us/politics/justice-department-warrant-clinton-abedin-fbi.html?_r=0

5. Prior to Director Comey's October 28, 2016 letter to Congress did the FBI ever seek from the Justice Department any compulsory process in the Clinton email investigation? If so, please describe each request and note which requests were denied by the Department. For those that were denied, what were the reasons given for the denial?
6. In what ways, for what reasons, and by whose decision was the scope of the FBI's investigation and prosecutorial recommendation narrowed to only national security matters, with relatively little time or attention devoted to determining whether there were criminal violations for intentional alienation of federal records, perjury, or obstruction of Congress?
7. Why were the searches of the laptops of Clinton aides Cheryl Mills and Heather Samuelson limited to the timeframe that Secretary Clinton was in office, excluding potential evidence about the intent behind decisions to delete emails after Secretary Clinton was out of office even though they were subject to Congressional subpoenas?

I anticipate that your written reply and any responsive documents will be unclassified. Please send all unclassified material directly to the Committee. In keeping with the requirements of Executive Order 13526, if any of the responsive documents do contain classified information, please segregate all unclassified material within the classified documents, provide all unclassified information directly to the Committee, and provide a classified addendum to the Office of Senate Security. Although the Committee complies with all laws and regulations governing the handling of classified information, it is not bound, absent its prior agreement, by any handling restrictions or instructions on unclassified information unilaterally asserted by the Executive Branch.

Thank you in advance for your cooperation with this request. Please respond no later than November 7, 2016. If you have questions, contact Josh Flynn-Brown of my Committee staff at (202) 224-5225.

Sincerely,



Charles E. Grassley
Chairman
Committee on the Judiciary

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WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

May 17, 2016

VIA ELECTRONIC TRANSMISSION

The Honorable James B. Comey, Jr.
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, DC 20535

Dear Director Comey:

I am writing in regard to the FBI's ongoing investigation relating to Secretary Clinton's use of a non-government server and email address for her official State Department business. In particular, I am writing to raise concerns about the appearance of a conflict of interest by Justice Department officials and to seek your input about possible remedies. To state the obvious, it is a rare occurrence to have an administration's former cabinet official being investigated under the authority of that very same administration. The circumstances are further complicated by the fact that the investigation is underway during a presidential election year in which Secretary Clinton is her party's frontrunner. Moreover, the President and his press secretary have made statements that seemed to prejudge the scope and outcome of the FBI's ongoing investigation. Taken together, these circumstances reasonably raise the serious appearance of a conflict of interest. This is not just an academic concern, as it appears the Justice Department may be trying to keep the scope of the FBI's investigation unreasonably narrow, according to press reports.

While career FBI and Justice Department attorneys may be involved in the investigation, political appointees at the Justice Department, including the Attorney General herself,¹ will make the ultimate determination whether or not to prosecute Secretary Clinton and her associates. Even if these

¹ At a recent hearing before the House Appropriations Committee, Congressman John Carter asked the Attorney General if she would authorize prosecution if the FBI makes the case that Secretary Clinton broke the law. In response, Attorney General Lynch testified that the FBI and Justice Department personnel involved in the investigation "will make a recommendation to me when the time is appropriate" and refused to answer whether she would authorize prosecution if that is the FBI's recommendation. *The F.Y. 2017 Budget for the Dep't of Justice: Hearing Before the House Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies*, 114th Cong. (2016).

appointees are acting with the utmost integrity and professionalism, at the very minimum, the appearance of a conflict clearly exists. Indeed, there appear to be at least three areas of conflict here.

First, because the Justice Department officials who will make the decision are political appointees, their prospects for continuing employment at the Department are likely tied to whether Secretary Clinton or another Democrat is elected President in the fall. It is understandable that the public might believe there is a conflict of interest when it appears that the political appointees making the decision would harm their own employment prospects if they moved forward with a prosecution, should the investigation find one warranted.

Second, the President and his press secretary have made public statements that seem to suggest the President's preferred outcome in this investigation by downplaying the seriousness of the underlying facts. The President has since claimed he is not exerting political influence on the decision whether or not to initiate a prosecution because he does not talk to the Attorney General about pending investigations.² But this misses the point. It is not necessary for the President to exert political influence through private, one-on-one conversations; the public statements by the President and his press secretary undoubtedly also reached his Justice Department appointees and broadcast his preferences to them. Accordingly, in doing so he may have put additional pressure on his political appointees to refuse to approve indictments or at least to narrow the scope of the investigation. If the political appointees' boss, the President, has already publicly asserted that Secretary Clinton merely acted with "carelessness" and that her actions did not threaten national security, how can his political appointees contradict him if the investigation finds otherwise?

Third, Attorney General Lynch has additional professional associations with the Clintons that underscore the appearance of a conflict. Former President Bill Clinton appointed her to be the U.S. Attorney for the Eastern District of New York. In between serving as the U.S. Attorney under President Clinton and returning to the position under President Obama, she was a partner at a law firm that represented both President and Secretary Clinton. Once again, even if the Attorney General is acting in good faith, there is at least an appearance of a conflict of interest.

In short, there are legitimate reasons why the public would question whether a potential conflict of interest could affect the Justice Department's decision whether to pursue one or more prosecutions in this matter. Moreover, the current process for making these decisions lacks any meaningful transparency, scrutiny, or accountability. Especially in this unique circumstance, it is vitally important that the public have confidence in the outcome of the investigation, whatever it may be.³

² *Wallace Presses Obama: How Can You Say Hillary Didn't Jeopardize Nat'l Security?*, FOX NEWS INSIDER, Apr. 10, 2016.

³ Even journalists who are sympathetic to Secretary Clinton have noted this. See Ruth Marcus, *Why a No-Indictment for Hillary Clinton Would Still Be a Problem for America*, THE WASHINGTON POST, Mar. 29, 2016. (stating: "It bears some thinking at the top levels of the Justice Department and the FBI about whether there is some way to mitigate the suspicion [that political meddling will squelch an indictment] by making more information public than is the norm." as well as noting: "There's no indication that Justice has contemplated [appointing a special counsel].")

The Justice Department has a mechanism in place to deal with such conflicts, namely, appointing a Special Counsel from outside of the Department, but the Attorney General has not exercised it. The Special Counsel regulations are supposed to help ensure fair and impartial investigations in the face of conflicts, although the use of a Special Counsel can present its own issues. According to the regulations:

The Attorney General, or in cases in which the Attorney General is recused, the Acting Attorney General, will appoint a Special Counsel when he or she determines that criminal investigation of a person or matter is warranted and-

- (a) That investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances; and
- (b) That under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.⁴

According to the regulations, there are three conditions for appointing a Special Counsel: 1) the Attorney General decides an investigation is warranted; 2) the Justice Department has a conflict of interest or there are other extraordinary circumstances; and 3) the public interest is served. Based upon the available facts and circumstances, all of those conditions appear to have been met here.

This is not just an academic issue about conflicts of interest; it is possible that the Justice Department might be failing to provide the FBI with all the resources it needs for this investigation and might be improperly limiting the investigation's scope. You recently testified before Congress that you are "very close personally to that investigation to ensure that [the FBI has] all the resources [it] need[s], including people and technology."⁵ But, to the best of my knowledge, the Justice Department has made no similar commitment. The Department refused for months to confirm to the Committee that an investigation was underway at all, and it still refuses officially to confirm the scope of the investigation or whether it has provided the necessary Department resources for the FBI to properly address all the relevant legal issues.

Information in the public domain raises serious questions about whether the Department has done so. For example, it is unclear whether the Justice Department has empaneled a federal grand jury in order to issue subpoenas, so that the FBI can gather all of the relevant information. As a recent article in the Washington Post noted, "there is no indication that prosecutors have convened a grand

⁴ 28 C.F.R. § 600.1.

⁵ *Encryption Security and Privacy: Hearing Before the House Committee on the Judiciary*, 114th Cong. (2016).

jury in the email investigation to subpoena testimony or documents[.]”⁶ Given the public reports of the resources and time being devoted to the investigation by the FBI, this appears highly unusual.

Moreover, Attorney General Lynch’s public statements seem to imply that the investigation is being limited to an extremely narrow scope, as she only acknowledges that the investigation is evaluating the issues relating to Secretary Clinton’s and her subordinates’ potential mishandling of classified information.⁷ In a recent interview, Attorney General Lynch described the investigation as follows: “We’re looking at whether or not classified information was handled in a particular way, in an appropriate way.”⁸ At her recent appearance before the Committee, Senator Thom Tillis asked if the Justice Department had analyzed issues surrounding the joint income President and Secretary Clinton received from foreign governments for speeches President Clinton made, an issue raised by some of the released emails. One of the Clintons’ joint tax returns implicated in this and related public corruption issues was prepared by the law firm of Hogan & Hartson while the Attorney General was a partner at the firm.⁹ In response, the Attorney General seemed unaware of the Constitutional issue raised by Senator Tillis and testified that “the matter that has been under discussion both in this and other proceedings has been the Department’s review of how the State Department handled classified information.”¹⁰ A recent news report also included the assertion by anonymous “U.S. officials” that the investigation is solely focused on the handling of classified information and has not included any other legal issues stemming from the server arrangement or information revealed from the retrieved emails.^{11 12}

⁶ Adam Goldman, *Justice Dept. Grants Immunity to Staffer Who Set Up Clinton Email Server*, THE WASHINGTON POST, Mar. 2, 2016.

⁷ This is in contrast to a report alleging that the FBI expanded the investigation to address public corruption issues. See Catherine Herridge, Pamela K. Browne, *FBI’s Clinton Probe Expands to Public Corruption Track*, FOX NEWS, Jan. 11, 2016.

⁸ Bret Baier, *AG Lynch Discusses Apple Feud, Clinton Probe, Cybersecurity*, FOX NEWS, Feb. 29, 2016. Available at <http://video.foxnews.com/v/4780269874001/ag-lynch-discusses-apple-feud-clinton-probe-cybersecurity/?intcmp=hpvid1#sp=show-clips>

⁹ See *Meet the Attorney General*, THE DEP’T OF JUSTICE, available at <https://www.justice.gov/ag/meet-attorney-general> (noting that the Attorney General was a partner at Hogan & Hartson/Hogan Lovells from 2002-2010); see also *Hillary Clinton Releases Health, Financial Records*, HILLARYCLINTON.COM, available at <https://www.hillaryclinton.com/tax-returns/> (showing the Clintons’ 2007-14 joint tax returns were prepared by Hogan & Hartson/Hogan Lovells).

¹⁰ *Oversight of the U.S. Department of Justice: Hearing Before the Senate Judiciary Committee*, 114th Cong. (2016).

¹¹ Evan Perez, Pamela Brown, Simon Prokupecz, *FBI Interviews Clinton Aides Including Huma Abedin As Part of Email Probe*, CNN, May 6, 2016.

¹² If accurate, this statement by a U.S. official about the full scope of the investigation is additionally troubling in light of the fact that an FBI official recently filed a sworn declaration in a FOIA case regarding records relating to the investigation stating that “[b]eyond Director Comey’s acknowledgment of the security referral from the Inspectors General of the Intelligence Community and the Department of State, the FBI has not and cannot publicly acknowledge the specific scope, focus, or potential targets of any such investigation without adversely affecting the investigation.” See Decl. of David M. Hardy, *Leopold v. Dep’t of Justice*, 15-cv-2117 (DDC), ECF No. 9-1 at 7. In that lawsuit, the FBI official declared under penalty of perjury that the FBI was withholding materials it had recovered from the server, and other records relating to the investigation, because they are exempt under FOIA Exemption 7(A). He stated that those records and other FBI records relating to the investigation were “compiled for law enforcement purposes” and that their disclosure could reasonably be expected to interfere with “a pending or prospective law enforcement proceeding” – Exemption 7(A)’s prerequisites. *Id.* at 7-10. He similarly stated that the records “are potential evidence in the FBI’s investigation,” that disclosing “evidence [or] potential evidence [] while the investigation is active [] could undermine the pending investigation by prematurely

Perhaps the most troubling report is the Washington Post's recent article about the FBI's interview of Cheryl Mills.¹³ That article stated that Justice Department officials had made an agreement with Ms. Mills' attorney that it "would be off limits" for the FBI to ask her questions during the interview about her role in deciding which of the emails on Secretary Clinton's server would be deleted and which would be turned over to the State Department.¹⁴ The article further stated that the FBI agents nonetheless asked about this important issue, that Ms. Mills walked out of the interview briefly in response, and that the Justice Department prosecutors were "taken aback that their FBI colleagues" had asked the question.¹⁵ Ms. Mills reportedly never answered the FBI's questions on this issue.¹⁶

Secretary Clinton's potential mishandling of classified information is undoubtedly important and must be fully investigated. However, it would be disturbing if the Justice Department has narrowed the investigation to prevent the FBI from also investigating the other important issues raised by this extraordinary situation. For example, press reports have indicated that the FBI has been able to recover emails deleted from Secretary Clinton's private server.¹⁷ If federal records on the private server were hidden or destroyed, then there may have been a violation of 18 U.S.C. § 2071, which prohibits concealing or destroying such federal records. If any of the deleted emails were responsive to Congressional inquiries or to agency inquiries, such as ones from the State Department Inspector General, then there may have been violations of 18 U.S.C. §§ 1505 and 1519, respectively. Similarly, the content of many of the released emails implicates Constitutional issues and public corruption laws by raising issues relating to joint income from paid speeches given by President Clinton for foreign government entities, as well as the blurring of the lines between the actions taken on behalf of the State Department, the Clinton Foundation, and Teneo, a private firm founded by a former counselor to President Clinton.

Despite this range of relevant legal issues, which extend far beyond the national security issues raised by the potential mishandling of classified information, public reports only indicate that the Justice Department has assigned personnel from its National Security Division to supervise the FBI's investigation,¹⁸ with another report claiming the U.S. Attorney's Office from the Eastern District of Virginia is also involved.¹⁹ There is no indication that the Justice Department has assigned prosecutors from its Public Integrity Section or prosecutors with expertise in the unlawful concealment or deletion

revealing its scope and focus, [and that] if individuals become aware of the scope and focus of [the] investigation, they can take defensive actions to conceal their activities, elude detection, and/or suppress evidence." *Id.* at 9-10 (emphasis added).

¹³ Matt Zapotosky, *Clinton Aide Cheryl Mills Leaves FBI Interview Briefly After Being Asked About Emails*, THE WASHINGTON POST, May 10, 2016; *see also* Andrew McCarthy, *Obama's Justice Department Shields Cheryl Mills from FBI's Questions*, NATIONAL REVIEW, May 14, 2016.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Paul Reid, Hannah Fraser-Chanpong, *Report: FBI Pulls Deleted Emails From Hillary Clinton's Server*, CBS NEWS, Sep. 23, 2015.

¹⁸ *Supra* n. 6 ("The email investigation is being conducted by FBI counterintelligence agents and supervised by the Justice Department's National Security Division.").

¹⁹ Matt Zapotosky, *Officials: Scant Evidence that Clinton Had Malicious Intent in Handling of Emails*, THE WASHINGTON POST, May 5, 2016.

of federal records. Indeed, when Attorney General Lynch was specifically asked if any prosecutors from the Department's Public Integrity Section are working on the case, she refused to answer.²⁰

In previous investigations, the Department of Justice has been willing to state which of its divisions and sections had attorneys working on a particular case.²¹ Because there is no indication that Justice Department has provided any resources relating to the other legal issues surrounding Secretary Clinton's private email server, and in light of the Attorney General's statements about the scope of the investigation, as well as the report claiming the Justice Department made an agreement with Ms. Mills' attorney to preclude the FBI from asking her about the sorting and deletion of email, it appears that the Justice Department might be improperly limiting the scope of the FBI's investigation. Viewed within the context of the Department's appearance of a conflict of interest in this case, this raises the question of whether a Special Counsel is in fact needed.

One news report has even gone so far as to claim, without naming its sources, that FBI "agents have been spreading the word, largely through associates in the private sector, that their boss is getting stonewalled [by Obama political appointees], despite uncovering compelling evidence that Clinton broke the law."²² The article further claimed that "FBI sources say [Director Comey] has no backing from President Obama and Attorney General Loretta Lynch to recommend charges against the former secretary[.]"²³ While this report may or may not be accurate, it is understandable that the public's confidence in the integrity and independence of any prosecutorial decision is in question, given the appearance of a conflict of interest by the political appointees in charge of that process. This is precisely the type of situation a Special Counsel appointment is designed to address.

You have experience in these issues not only from the perspective of the FBI, but also from the perspective of the Justice Department, and specifically in the context of investigations of senior administration officials. While you were serving as the Deputy Attorney General during the George W. Bush administration, Attorney General Ashcroft recused himself from the investigation regarding the Valerie Plame leak, due to the appearance of a conflict of interest he had as a result of past professional associations with one of the suspects, which then made you the Acting Attorney General for that case. In that case, there was substantial public concern about whether an investigation of administration officials that was being conducted under the oversight of the administration's political appointees would be fair and impartial. Upon being designated Acting Attorney General, you removed the case from the usual Justice Department chain of command and appointed a special prosecutor,

²⁰ *Supra* n. 8. This is additionally troubling because prior Department of Justice guidance on "Election Year Sensitivities" states if prosecutors "are faced with a question regarding the timing of charges or overt investigative steps near the time of a primary or general election, please contact the Public Integrity Section of the Criminal Division for further guidance." *Election Year Sensitivities*, THE DEPARTMENT OF JUSTICE, Mar. 9, 2012. Available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-election-year-sensitivities.pdf>

²¹ For example, in the investigation into the IRS's targeting of conservative groups, the Justice Department acknowledged while the investigation was ongoing that it had assigned attorneys from both its Criminal Division and Civil Rights Division.

²² Charles Gasparino, *Will Hillary Get Charged, Or What?* THE NEW YORK POST, Mar. 20, 2016.

²³ *Id.*

Patrick Fitzgerald, to handle the matter.²⁴ Mr. Fitzgerald subsequently brought an indictment against the Vice President's Chief of Staff, Scooter Libby, who was later convicted. Accordingly, it appears that based on your relevant experience you are uniquely suited to weigh in on whether a Special Counsel is needed in the current case.

In order for the Committee to evaluate the issues surrounding the investigation stemming from Secretary Clinton's use of a non-government server and email address for her official business, and related issues, please answer the following:

1. In general, under what circumstances do you believe that the FBI would need to work with a Special Counsel from outside of the Justice Department in order to properly conduct an investigation? Please describe in detail.
2. In general, if you believed that the Department of Justice, pursuant to the regulations, had a conflict of interest in a particular investigation, would you express this view, and if so, how?
 - a. Would you make a request to the Justice Department for a Special Counsel? If not, why not?
 - b. If you were to make a request, but the request were denied by the Justice Department, would you notify this Committee, which has oversight authority over these matters? If not, why not?
3. Do you believe that a Special Counsel is warranted in the investigation stemming from Secretary Clinton's use of a non-government server and email address for her official State Department business? If not, why not, and what is different about the current extraordinary circumstances that causes you to reach a different conclusion than you did in the Valerie Plame matter?
4. Has the FBI requested or otherwise indicated to the Justice Department or other administration officials that it believes a Special Counsel should be appointed in this case? If so, what was the response?
5. Has the Justice Department limited the scope of the FBI's investigation in any way or denied it any resources?
6. Is the FBI aware of any agreements Justice Department officials have made with Secretary Clinton or her associates to deem certain areas of inquiry "off limits" in interviews with the FBI? If so, was the FBI consulted about such narrowing of topics?

²⁴ While you did not rely on 28 C.F.R. § 600.1 to appoint Mr. Fitzgerald, you did explain the interaction between that regulation and his appointment during the press conference in which you announced your decision. See <http://www.c-span.org/video/?179743-1/special-prosecutor-appointment>

Did the Justice Department officials make these agreements over the objection of the FBI?

7. Has the FBI requested that a grand jury be empaneled in connection with this investigation? If so, did the Department of Justice deny that request?
8. Has the Justice Department assigned prosecutors to the investigation from its Public Integrity Section, who have relevant experience in public corruption laws, or assigned prosecutors with experience in the laws pertaining to the destruction of federal records? If not, has the Justice Department explained to the FBI why it has not?

Please provide your answers by May 31, 2016. Thank you for your attention to this important matter. If you have any questions, please contact Patrick Davis of my Committee Staff at (202) 224-5225.

Sincerely,



Charles E. Grassley
Chairman
Committee on the Judiciary

cc: The Honorable Patrick J. Leahy
Ranking Member
Senate Committee on the Judiciary

The Honorable Thom Tillis
United States Senator for North Carolina

The Honorable John Carter
Congressman for the 31st District of Texas

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

October 28, 2016

VIA ELECTRONIC TRANSMISSION

The Honorable James B. Comey, Jr.
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Dear Director Comey,

On October 23, 2016, the Wall Street Journal reported a set of troubling facts about potential conflicts of interest in the criminal investigation into Secretary of State Hillary Clinton. That news article noted that Virginia Governor Terry McAuliffe's political action committee donated \$467,500 to Dr. Jill McCabe's state Senate campaign in 2015.¹ In addition, the Wall Street Journal reported that the Virginia Democrat Party, "over which Mr. McAuliffe exerts considerable control," also donated \$207,788 to her campaign.² Dr. McCabe is married to Andrew McCabe who is currently deputy director of the FBI, and became part of the leadership that oversaw the Clinton email investigation in 2016. Gov. McAuliffe is long-time confidant of Bill and Hillary Clinton and served as President Clinton's chief fundraiser in the 1990s. It is well reported and known that Gov. McAuliffe and the Clintons have been close associates for decades and it begs the question why Mr. McCabe was allowed to be in a position to exert oversight upon the Clinton investigation knowing that his wife was provided over half a million dollars by entities tied so closely to Gov. McAuliffe and the Clintons.

The Wall Street Journal has reported that the FBI did not see Mr. McCabe's position as a conflict of interest concerning the Clinton email investigation because his wife's campaign had ended by the time he stepped into a supervisory position in the investigation, which seems to concede any involvement during her campaign could have been a conflict.³ Notably, even before his supervisory position as deputy director, Mr. McCabe was in charge of the FBI's Washington, D.C. field office which, according to the Wall Street Journal, "provided personnel and resources

¹ Devlin Barret, "Clinton Ally Aided Campaign of FBI Official's Wife," Wall Street Journal (October 23, 2016). Available at <http://www.wsj.com/articles/clinton-ally-aids-campaign-of-fbi-officials-wife-1477266114>

² *Id.*

³ *Id.*

to the Clinton email probe.”⁴ In July 2015, around the time the FBI’s Clinton investigation began, Mr. McCabe was promoted to associate deputy director at FBI headquarters – the number three in the chain of command.⁵ The FBI asserts that Mr. McCabe did not have an “oversight role” in the Clinton investigation until he became the number two in command in 2016.⁶ However, the FBI’s statement does not foreclose the possibility that Mr. McCabe had a non-oversight role while associate deputy director. Thus, even during the time period in which his wife’s political campaign received approximately half a million dollars from Gov. McAuliffe’s political action committee, and over \$200,000 from the Virginia Democrat Party, he may have had a role in the investigation and did not recuse himself.

In October 2015, several months after his promotion, Gov. McAuliffe’s political action committee made three donations of more than \$100,000 to his wife’s campaign.⁷ Prior to October, and prior to his promotion, the largest donation was \$7,500.⁸ The Wall Street Journal has reported that 98% of the Gov. McAuliffe related donations to his wife came after the FBI launched the investigation into Secretary Clinton.⁹ Given these facts, the FBI must provide a more detailed explanation as to why it determined that it was appropriate for Mr. McCabe to participate in that investigation in any way.

Also, separate and distinct from the Clinton investigation, it has been reported that the FBI’s Washington field office, the same one which Mr. McCabe led, started an investigation into Gov. McAuliffe for allegedly receiving over \$100,000 in campaign contributions from foreign entities.¹⁰ The FBI has stated that Mr. McCabe was recused from the McAuliffe investigation when his wife chose to run for office.¹¹ It is unclear as to whether Mr. McCabe returned to the investigation when the campaign ended.¹²

As a general matter, all government employees must avoid situations that create even the appearance of impropriety. Specifically, 5 C.F.R. § 2635.502, advises that a government employee should seek clearance before participating in any matter that could cause his or her

⁴ Devlin Barret, “Clinton Ally Aided Campaign of FBI Official’s Wife,” Wall Street Journal (October 23, 2016). Available at <http://www.wsj.com/articles/clinton-ally-aids-campaign-of-fbi-officials-wife-1477266114>.

⁵ *Id.*

⁶ *Id.* The FBI released a statement saying, “[m]onths after the completion of her campaign, then-Associate Deputy Director McCabe was promoted to Deputy, where, in that position, he assumed for the first time, an oversight role in the investigation into Secretary Clinton’s emails.” See Devlin Barret, “Clinton Ally Aided Campaign of FBI Official’s Wife,” Wall Street Journal (October 23, 2016). Available at <http://www.wsj.com/articles/clinton-ally-aids-campaign-of-fbi-officials-wife-1477266114>

⁷ October 1, 2015 - \$150,000; October 27, 2015 - \$125,000; October 29, 2015 - \$175,000. See VPAP.org, http://www.vpap.org/donors/248345/recipient/257117/?start_year=2015&end_year=2015&recip_type=all

⁸ *Id.*

⁹ Wall Street Journal Editorial, “The FBI’s Clinton Probe Gets Curiouser,” (October 24, 2016). Available at <http://www.wsj.com/articles/the-fbi-clinton-probe-gets-curioser-1477352522>

¹⁰ Devlin Barret, “FBI Investigating Donations to Virginia Gov. Terry McAuliffe,” Wall Street Journal (May 23, 2016). Available at <http://www.wsj.com/articles/fbi-investigating-donations-to-virginia-gov-terry-mcauliffe-1464046899>

¹¹ Gregory S. Schneider, “Why the latest Hillary Clinton conspiracy might not be what it seems,” The Washington Post (October 24, 2016.) Available at <https://www.washingtonpost.com/news/post-politics/wp/2016/10/24/why-the-latest-clinton-conspiracy-might-not-be-what-it-seems/>

¹² *Id.* The article notes the FBI said, “[w]hen she chose to run . . . McCabe and FBI lawyers implemented a system of recusal from all FBI investigative matters involving Virginia politics, a process followed for the remainder of her campaign.” The implication is that he returned to the investigation when the campaign ended.

impartiality to be questioned. In addition, when impartiality is at issue, the employee should obtain a formal determination from the component superior that participation outweighs the concern that the FBI's integrity would be questioned.¹³ The Wall Street Journal reports that Mr. McCabe did seek ethics advice in March 2015 after he and his wife met with Gov. McAuliffe. However, it is not clear from which officials he sought advice, what guidance he received from the FBI, and whether he sought additional guidance after he was twice promoted to a position that had an apparent increased role in the Clinton investigation.¹⁴ In addition, with respect to the McAuliffe investigation, it is unclear whether he returned to the investigation after recusal and, if so, what ethics guidance he received.

Executive Order 12674, "Principles of Ethical Conduct for Government Officers and Employees," makes clear that "[e]mployees shall not hold financial interests that conflict with the conscientious performance of duty," "[e]mployees shall act impartially and not give preferential treatment to any private organization or individual," and "[e]mployees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order."¹⁵ Importantly, the FBI Ethics and Integrity Program Guide cites 28 C.F.R. § 45.2 which states that,

no employee shall participate in a criminal investigation if he has a personal or political relationship with [...] [a]ny person or organization substantially involved in the conduct that is the subject of the investigation or prosecution; or [a]ny person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.¹⁶

In complying with this rule, the employee must report the matter to his supervisor. If the supervisor determines that a personal or political relationship exists the employee shall be relieved unless the supervisor determines, in writing, the relationship will not "render the employee's service less than fully impartial and professional" and the employee's participation "would not create an appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution."¹⁷ As applied to Mr. McCabe's role in the Clinton email investigation and McAuliffe investigation, these rules demand that he and the FBI take steps to ensure that not even the appearance of a loss of impartiality is present. Further, given Mr. McCabe's potential role in both investigations, which has not been fully explained by the FBI, his wife's substantial campaign donations from Gov. McAuliffe's political action

¹³ 5 C.F.R. § 2635.502(d).

¹⁴ For example, it is not clear whether or not Mr. McCabe sought guidance from you or the Designated Agency Ethics Official regarding his potential conflict of interest or whether he sought a waiver to continue in his role in the Clinton investigation. The FBI Ethics and Integrity Policy Guide Section 4.6.1.2 notes that an employee who is concerned that circumstances would cause questions as to his impartiality should speak with ethics officials.

¹⁵ FBI Ethics and Integrity Program Policy Guide, p. 29 and 30, citing Executive Order 12674. Emphasis added.

¹⁶ *Id.* at 30. Emphasis added.

¹⁷ *Id.* Emphasis added.

committee and the Democrat party potentially create the appearance of a conflict of interest that has affected the public perception of the integrity of both investigations. This is problematic and the rules are designed to prevent these types of issues from occurring.

The FBI has repeatedly stated that the Clinton investigation was apolitical and you have said that FBI personnel “don’t give a rip about politics.”¹⁸ Further, you have stated, “I want the American people to know we really did this the right way. You can disagree with us, but you cannot fairly say we did it in any kind of political way.”¹⁹ The FBI’s Ethics and Integrity Policy Guide specifically notes that “[w]hether particular circumstances created an appearance that the law or [FBI ethical standards] have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.”²⁰

Since the Clinton investigation ended, the public’s knowledge of the relevant facts has rightfully increased substantially. The public now knows that the investigation’s scope was arbitrarily limited to classifications issues, with little or no effort to make a case against anyone for intentionally alienating federal records and subverting the Freedom of Information Act process. Moreover, the Justice Department apparently failed to authorize any compulsory process through search warrants or grand jury subpoenas.²¹ This resulted in generous grants of immunity to Secretary Clinton’s associates because of their refusal to cooperate voluntarily except under the terms and limitations most favorable to them—including an inexplicable agreement for the FBI to destroy laptops that contained records subject to congressional subpoenas and preservation letters. On top of these circumstances, now the public learns that the wife of the FBI’s second in command accepted more than half a million dollars from a close associate of Secretary Clinton, with 98% of the donations received after the FBI began its investigation. And, separate from the Clinton investigation, it is not clear whether Mr. McCabe has rejoined the investigation into Mr. McAuliffe after his wife’s campaign received substantial donations. Accordingly, it is reasonable for the public to question the impartiality of the process.

In order to better understand the context of the facts reported in the press about Mr. McCabe, please answer and provide the following:

1. Please describe Mr. McCabe’s role in the Clinton investigation as assistant director in charge of the FBI’s Washington, D.C. field office, associate deputy director, and as deputy director of the FBI.

¹⁸ Evan Perez, “FBI chief on Clinton investigation: My people ‘don’t give a rip about politics,’” CNN (October 1, 2015). Available at <http://www.cnn.com/2015/10/01/politics/james-comey-fbi-hillary-clinton/>

¹⁹ Everett Rosenfeld, “FBI Director Comey says ‘nobody would’ bring a case against Clinton,” CNBC (July 7, 2016). Available at <http://www.cnbc.com/2016/07/07/fbi-director-comey-our-recommendation-was-apolitical.html>

²⁰ FBI Ethics and Integrity Program Policy Guide, p. 35.

²¹ Malia Zimmerman and Adam Housley, “FBI, DOJ roiled by Comey, Lynch decision to let Clinton slide by on emails, says insider,” FoxNews (October 13, 2016). Available at <http://www.foxnews.com/politics/2016/10/13/fbi-doj-roiled-by-comey-lynch-decision-to-let-clinton-slide-by-on-emails-says-insider.html>

2. Please provide all records relating to communications between and among FBI officials relating to the conflict of interest issues pertaining to the candidacy of Mr. McCabe's wife for public office or his involvement in the Clinton email investigation.
3. The Wall Street Journal reported that Mr. McCabe met with Gov. McAuliffe and then sought ethics advice from the FBI. When did he meet with Gov. McAuliffe, where, and under what circumstances? What ethics components did he contact? What was the FBI's advice to Mr. McCabe? Did he follow that advice? Please explain.
4. After Mr. McCabe was promoted twice, did he seek further ethics advice after each promotion? If so, please detail each instance in which he sought advice from the FBI and which FBI component and employees provided the ethics guidance.
5. Were you aware of Mr. McCabe's potential conflicts? If so, when and how did you become aware? If not, why not?
6. Did the FBI perform a conflicts analysis under 28 C.F.R. § 45.2? If so, when and what was the conclusion? If not, why not?
7. Was a waiver analysis under 5 C.F.R. § 2635.502(d) performed? If so, when? In addition, please provide all records relating to the analysis and issuance of the waiver(s), including copies of the written waivers. If no analysis was performed, why not?
8. Did Mr. McCabe have a political or personal relationship with Gov. McAuliffe or his political action committee as defined in 28 C.F.R. § 45.2? If not, why not?
9. Did Mr. McCabe's involvement in the Clinton investigation as the assistant director in charge of the Washington, D.C. field office, as associate deputy director, and as the deputy director of the FBI create the appearance of a loss of impartiality? Please explain.
10. Did Mr. McCabe's involvement in the Clinton investigation as the assistant director in charge of the Washington, D.C. field office, as associate deputy director, and as the deputy director of the FBI affect the public perception of the investigation? Please explain.
11. What steps are you taking to mitigate the appearance of a conflict of interest in the Clinton email investigation and to reassure Congress and the American people that the investigation was not subject to political bias?
12. It is not clear when the investigation into Gov. McAuliffe's foreign campaign donations started, and which FBI officials have been involved. However, given Mr. McCabe's position at the FBI in the last two years, it is imperative that the FBI inform Congress about his potential role in this investigation. Please answer the following:

- a. Please describe Mr. McCabe's role in the Gov. McAuliffe investigation.
- b. When was Mr. McCabe recused from the McAuliffe investigation? Please provide exact dates and provide all records relating to the recusal.
- c. When Mr. McCabe and his wife met with Mr. McAuliffe in March 2015, did Mr. McCabe have a role in the McAuliffe investigation at that time? If so, what was his role and at what point thereafter did Mr. McCabe recuse himself?
- d. Did Mr. McCabe return to the McAuliffe investigation after his wife's campaign ended? If so, please explain why his participation does not cause the appearance of a loss of impartiality or a conflict of interest. In addition, please note exactly when Mr. McCabe returned to the investigation.
- e. Did Mr. McCabe report any ethical issues to FBI officials relating to the McAuliffe investigation? If so, provide all records relating to his reports and the FBI's final determination, to include all waivers.
- f. Was a waiver analysis under 5 C.F.R. § 2635.502(d) performed? If so, when? In addition, please provide all records relating to the analysis and issuance of the waiver(s), including copies of the written waivers. If no analysis was performed, why not?
- g. Did the FBI perform a conflicts analysis under 28 C.F.R. § 45.2? If so, when and what was the conclusion? If not, why not?

Please answer the questions according to their corresponding questions. I anticipate that your written reply and any responsive documents will be unclassified. Please send all unclassified material directly to the Committee. In keeping with the requirements of Executive Order 13526, if any of the responsive documents do contain classified information, please segregate all unclassified material within the classified documents, provide all unclassified information directly to the Committee, and provide a classified addendum to the Office of Senate Security. Although the Committee complies with all laws and regulations governing the handling of classified information, it is not bound, absent its prior agreement, by any handling restrictions or instructions on unclassified information unilaterally asserted by the Executive Branch.

Thank you in advance for your cooperation with this request. Please respond no later than November 14, 2016. If you have questions, contact Josh Flynn-Brown of my Committee staff at (202) 224-5225.

Sincerely,



Charles E. Grassley
Chairman
Committee on the Judiciary