

Advance Sheet

THE TRAGEDY OF JAMES COMEY: A LAWYER'S TALE

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It is customary in modern times to refer to almost any great sadness as a “tragedy.” Any experience with a significant quantum of undifferentiated misery, whether from death, loss, or physical or mental suffering, is deemed sufficient to meet the requirements of the term. The media, always on the lookout for drama, grabs our attention almost daily with this kind of “tragedy,” no less heartrending for being commonplace. And those suffering the effects seem almost too eager to play the expected role. Today’s pain and misery becomes tomorrow’s eyewitness account or true-life testimony fit for a *Today* show vignette.

For the ancients, by contrast, a tragedy was a far less common and considerably more complex phenomenon. It featured unusual people in unusual predicaments whose thoughts and actions somehow provided singular insight into, even instruction about, the nature of human life. Not least of these was the imperfectness of human judgment and the uncertainty of a

world populated by gods or dominated by fortune. So Sophocles’ tragic tale, *Oedipus Tyrannus*, portrayed a man of great brilliance and power defeated by his “hubris,” which misled him into believing he could, through his own very great intelligence alone, think at the level of the gods and escape an oracular utterance that he would kill his father and marry his mother. His very attempt to avoid his supposed fate actually made it come true. The lesson lay not just in the insufficiency of human (as opposed to divine) intelligence, but perhaps also in the grave danger of believing in prophecies in the first place.

At first blush, the report of the Justice Department’s inspector general (IG) about the handling of the Hillary Clinton email controversy by the Federal Bureau of Investigation (FBI) would hardly seem to measure up to such lofty standards. Indeed, the report immediately fell afoul of the kind of banal partisan bickering that has become a staple of contemporary American politics. Amidst the already

tawdry public sniping between President Trump and former FBI Director James Comey, the president labeled it a vindication of sorts, suggesting it somehow exonerated him in the Russia probe, which it did not even purport to address. His opponents, meanwhile, saw it as proof that the FBI was not guilty of political bias because of the report’s conclusion that many of Comey’s decisions were “not unreasonable,” even though it also blasted many of his subordinates for being far from so professionally scrupulous.

Hardly more satisfying were the fatuous pronouncements of Comey himself. Despite the report’s withering criticism of his conduct, he proclaimed himself somehow satisfied with it. Indeed, he professed to find there proof of the strength, even if not the good thinking, of the Justice Department, praising the report even while dismissing out of hand its sharp criticism of his decision making. And in that respect, it presented a curious spectacle.

In these rancorous times, we are not so surprised at finding political cherry-picking and immoderate party claims in connection with even the most carefully considered and temperate analysis, and we are seldom disappointed. But the insouciance of the austere and righteously inclined Comey is harder to understand. The report upbraids Comey as having been “insubordinate” and dishonest toward his superiors. It documents how he actively concealed from all higher-ups his intention to hold his July 5 press conference severely criticizing Hillary Clinton’s handling of her emails while still saying there was no basis for prosecution. This, the report concluded, was simply not his judgment to make, a bold seizure of power rightfully lodged instead in the hands of his superiors.

According to the IG, moreover, Comey engaged in particularly bad thinking in concluding in October 2016 that he needed to send a letter to Congress regarding the discovery of the Anthony Weiner emails. Comey’s idea that his choice then was one

between openness and concealment was nothing but a “false dichotomy.” The real choice, the IG sharply commented, was between following department protocol and not doing so, and Comey wrongly chose the latter. In choosing that rule-breaking course, he once again betrayed an unwarrantable self-importance and arrogated to himself power in a manner wholly unjustifiable. Elsewhere, the IG concluded that, on Comey’s watch, the FBI was rife with leaking, the acceptance of questionable favors from reporters, and a failure to enforce the rules of recusal.

Comey learned the hard way, as did Oedipus, how the complexity of the world will frustrate even the best intentions.

How could James Comey be all smiles and complacency in the face of one of the most remarkable and severe dressings-down imaginable by an unimpeachably objective and independent governmental watchdog? Perhaps Comey was satisfied with the pass he got on political bias. The double wrongs in holding the rogue July 5 press conference and then sending the explosive October 28 letter could be said to have canceled each other out and justified the IG’s conclusion that Comey was not clearly motivated by partisan politics. If the latter severely damaged Clinton, the former certainly helped her. But calculated insubordination, which existed in both cases, is hardly peanuts. Arrogating power is no proper subject for nonchalance. To treat such criticism, as Comey seemed to,

as no worse than a pleasant walk in the park suggests either an acting job worthy of Bogart or obtuseness of a high and disturbing sort. How do we explain Comey’s conduct, not just earlier but in the face of the IG’s report?

What, If Not Political?

Indeed, ask yourself this question: If Comey’s motives for what is really shocking misconduct were not political, what were they? Here was an intelligent man, educated at the finest schools, with a lifetime of public service and an intense sense of his own integrity, suddenly acting in a way that an independent observer concluded was outside all the professional guardrails and dishonest to boot. The consummate professional apparently conducted himself wholly unprofessionally. Why? If not politics, what on earth could cause this career public servant both to act so badly and then to be so unperturbed in the face of the most scathing criticism?

An international newsweekly, before the IG’s report, found Comey’s original misbehavior rooted not in bad motives but in good ones, a desire to peek ahead to see the consequences of his actions and try to neutralize any negative effects, rather than merely following department rules. He certainly did look forward. His July 5 press conference anticipated the Democratic Convention when Clinton was to be nominated, wanting to clear the air before that event. The October 28 letter looked forward not to the election but to its aftermath. Seemingly heedless of the possibly unintended consequences of his own actions, Comey believed Clinton was certain to win and was worried he, and she, might be criticized later for having not disclosed before the election what he was doing. If this were true, it might add to the charges of arrogance and disobedience against Comey an alarming naïveté, not least in his belief that he could foresee sufficiently what the consequences might be.

Indeed, if Secretary Clinton is correct, those consequences were of the weightiest and most damaging sort. She and many of her partisans argue, a bit simplistically, that Comey’s October 28 decision cost her the very election Comey assumed would follow. If his motives were so good, he learned the hard way, as did Oedipus, that humans are poor prognosticators of how the complexity of the world will frustrate even their best intentions. The gods or fate, or just dumb bad luck, may have very different plans from your own.

On the other hand, it is hard to blame Comey for considering outcomes. To be sure, thinking about outcomes can skew one’s judgment, making one “outcome determinative.” But, in the best circumstance, the possible consequences represent a healthy check. Unlike in Comey’s case, the range of possible results, intended or otherwise, can provide a reason for caution, causing the decision maker to pause before acting, rather than immediately acting on one’s own view. Indeed, departmental rules may be said to exist, at least in part, to deflect those tempted to substitute their own judgment for the broad experience and orderliness of decision making supplied by an established agency.

Again, the striking thing about Comey’s thinking is not that he looked forward to the consequences, but how poorly he saw them or at least saw all of the possibilities. We may want high officials to consider the consequences of what they do in making important judgments. But it is quite another thing to have them decide to freely ignore those protocols that would require them to check their judgment with that of others. Comey’s problem lay in how little he understood the possible poverty of his vision, how he failed to allow anything to question his own conclusions.

Unconscious Bias

So, again, what really was the source of this trouble? What caused his judgment to be so poor? One possible explanation,

not really considered by the IG report, was that Comey was acting on biases he did not recognize. In both cases of looking forward, it could be said he was actually favoring Clinton without recognizing it. He wanted her name to be cleared before her nomination and to preserve her legitimacy once elected. In finding no political bias, the IG seemed to mean that Comey was not *intentionally* biased, not consciously choosing to aid Secretary Clinton. Comey attributed loftier reasons to his choices without being conscious of the risk of *unexamined* bias or unconscious motives, which are always present, regardless the decision maker. Quite simply, he failed to heed the possibility that his own judgment, his own sense of right and wrong, his own reason might be skewed by such subconscious matter or could be misguided or mistaken, as it apparently was.

Comey's disdain for his superiors' judgment and opinions gave these motives even greater play than usual. Having circumvented all of what existed to moderate his behavior, he went forward in the assurance he was right, giving his own prejudices absolute license to have their own way. Clearly, he and his team personally preferred Hillary Clinton and wanted her elected. The result, Oedipus-style, was that by relying on his own judgment, without being mindful of the institutional constraints or really allowing anyone or anything to question his conclusions, Comey seemingly brought about the very result he was trying to avoid, while undermining too the legitimacy of her victorious opponent to boot.

In short, Comey fell prey to that greatest of all human flaws, the ever-present danger of fooling oneself, not least with respect to the scope and strength of one's own perspicacity and vision. Not for nothing did the philosopher Socrates claim that no one was wiser than he, for he was the one man who knew he knew nothing. Knowing you know nothing is not the same as knowing nothing. The latter is mere ignorance; the former is knowledge

of an important sort, a cure for those who go off believing they know what the truth and all the consequences are, regardless of their inability to see all that matters, including the influence of their own suppositions, clearly.

Socratic wisdom comprises more than humility. It is an acknowledgment that human life itself, not to mention the future of human affairs, is a matter of the most daunting complexity. Knowing oneself, in ancient terms, means first and foremost realizing you are not like a god, with comprehensive knowledge, but a human being whose perspective is necessarily incomplete and defective. In making our judgments, as we must, we still have to recognize we are not acting expertly. We can at best make educated guesses, what we call "judgment," which have a way of missing the mark in whole or in part. Human life constantly calls upon us to make those calls. But it is one thing to make decisions, quite another to be so certain of them. We need to make our decisions mindful of their tendency, indeed near certainty, never to fulfill exactly our expectations.

For no group of people in our contemporary world is this lesson more critical than for Comey's own tribe: we lawyers. In general, we should know better. We are told in law school that the law is a seamless web. It is not often recognized how this means we are unlikely to view and understand it all. The old joke that lawyers are like nuns, always traveling in pairs, is less a testament to the necessary accumulation of billable hours than an acknowledgment that no one lawyer, even the most brilliant, can see all the many facets of a legal issue all by herself.

This ought to be an obvious point in light of a lawyer's place in the legal system. The recognition of our first allegiance to the system of justice, so much greater than we are, and then to our clients' interests above our own, should be a constant reminder that there are vast matters of importance beyond ourselves and that a lawyer, least of all, should ever elevate his

own perspective and interest over that of others. In the legal world, arrogance tends to be a self-correcting mistake, given how the law, not to mention the courts, has a perturbing tendency to bring us up short, to show us our misjudgments, even if they were only that the right cause would always prevail. It ought to be a simple matter to extend such lessons into the wider world.

But, as the tragedy of that lawyer extraordinaire, James Comey, is perhaps warning us, the old modesty and moderation are at risk of crumbling. Schooled in the professional arrogance of our day, convinced that victory is proof of personal brilliance rather than team success, mindful of and in pursuit of vain awards meted out by magazines and surveys of questionable provenance, forced to market ourselves to clients as *the* difference makers, we have begun to lose track of our own very humble station. No lawyer should fashion himself a "superstar." None can make all, or even most of, the calls correctly. Measured judgment is key, luck and bad fortune are always present, results are seldom perfect, and success can never be assured. One must try to free oneself of prejudice and consider all the consequences of action, but never rest comfortable that all bias has been purged or all outcomes foreseen.

In this respect, the risk is that James Comey, a man of such fine training and seemingly good intentions, is not outlier but avatar, not the unusual lawyer but now the normal one. Unluckily for us, he found himself presiding over events where his self-assurance in place of good judgment, where his determination to follow his own lights and circumvent the moderating effects supplied by others, caused incalculable damage. To avoid more such outcomes, large and small, we must read the story of James Comey much in the mode of an ancient tragedy, as a lesson, a warning to us all. ■