

DOJ Faces Potential Discovery Pitfalls In Comey Prosecution

By **Kenneth Notter** (November 3, 2025, 3:51 PM EST)

The two-page, Sept. 25 indictment of former FBI Director James Comey has already generated hundreds of pages of analysis from commentators.

Most commentary has focused on the unusual events leading to the indictment and the difficulty the government may have in proving its allegations at trial.

But little attention has been paid to the pitfalls the government faces in fulfilling its discovery obligations. By indicting Comey, the government triggered a series of rules that requires it to turn over certain documents and other information to Comey's team.



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Doing so will require gathering, reviewing and producing vast amounts of material ahead of the trial, which is currently scheduled for early January. And the government must do all that with a team of prosecutors new to the case, and a first-time prosecutor running the case.

Those unusual circumstances may increase the odds of a discovery misstep. Though government discovery violations often go undetected, the intense public scrutiny and a likely evidentiary hearing on Comey's motion to dismiss the indictment offer Comey's team opportunities to pressure-test the government's discovery and expose any shortcomings.

And for practitioners, the Comey case offers important reminders on how to ensure the government fulfills discovery obligations.

Discovery in Federal Criminal Cases

Even many lawyers are surprised to learn that a defendant has greater discovery rights in a civil case than in a federal criminal case. A federal criminal defendant cannot, for example, depose witnesses or require third parties to produce documents before trial without a court order.[1]

Nor is there a uniform set of rules governing criminal discovery in the federal courts. Instead, a variety of sources impose a hodgepodge of discovery obligations on the government.

For example, in a series of cases beginning with *Brady v. Maryland* in 1963, the U.S. Supreme Court has held that prosecutors must disclose information that is "favorable to an accused." [2] Information is

favorable if it is potentially exculpatory or could be used to impeach government witnesses or evidence.[3]

A federal law known as the Jencks Act also requires the government to produce statements made or adopted by a government witness that relate to the witness's testimony.[4] But it must do so only if the defendant requests production and, even then, only after the witness has testified on direct examination.[5]

The Federal Rules of Criminal Procedure likewise impose a series of discovery obligations on the government. Under Rule 16(a), for example, "[u]pon a defendant's request," the government must produce materials the defendant needs to prepare their defense or that the government plans to use at trial.[6] The rules also allow defendants to seek other discovery with court approval.

In practice, federal criminal discovery varies widely. Some jurisdictions, like the U.S. District Court for the District of Massachusetts, have local rules imposing extra discovery obligations on the government.[7] Others, like the U.S. District Court for the District of Columbia, clarify the government's Brady obligations.[8] And some judges issue discovery orders setting specific discovery deadlines.

Risks for the DOJ in the Comey Case

Navigating discovery in U.S. v. Comey may prove difficult for the government.

To begin with, time is not on the government's side. Under the U.S. District Court for the Eastern District of Virginia's discovery order in the case, the government must immediately begin producing information favorable to Comey, and complete that process and produce all Jencks material by the end of December.[9]

Merely gathering the material to review may be complicated. The universe of material to review is typically limited to those possessed by the prosecution team — the "government officials participating in the investigation and prosecution" of the case, according to the Justice Manual.[10]

In the Comey case, however, it is unclear whether officials like President Donald Trump, Attorney General Pam Bondi or others qualify as members of the prosecution team. If they do, the government may need to produce their files and communications, which may be met with resistance by administration officials.

That raises a related complication. Justice Department policy requires preserving and reviewing the prosecution team's electronic communications for discoverable information.[11] That typically means official devices and accounts.

But Trump has reportedly used personal social media accounts to discuss the Comey case with Bondi.[12] And the lead prosecutor on the case, Lindsey Halligan, reportedly used an encrypted messaging app to discuss the ongoing prosecution of New York Attorney General Letitia James with a journalist. This suggests that she may use nontraditional means to discuss the Comey case, too.[13]

At a minimum, the government may need to preserve communications from these nontraditional sources. Failure to do so may invite doubt about the government's general preservation efforts.

Halligan's recent appointment further complicates matters for the government. Discovery in criminal

cases runs as much on institutional policy, jurisdiction-specific tradition and learned experience as anything else. Yet Halligan has never prosecuted a case prior to this. For all new prosecutors, there is bound to be an adjustment period. And even innocent missteps can have severe consequences. Good faith is no defense if a slip-up involves failing to produce favorable information, for example.[14]

If public reports are accurate, there are ample landmines to step on in the Comey case. For example, the memo to Halligan from prosecutors noting the lack of probable cause to charge Comey is favorable information that must be produced.[15] Other internal documents or communications that undermine the thoroughness or integrity of the government's investigation may also need to be produced.[16]

Of course, that information may prove embarrassing to the administration. But avoiding embarrassment is no basis to withhold favorable information.

Withholding discoverable information could have serious consequences. For example, the prosecution of the late Ted Stevens, former senator for Alaska, collapsed, and the U.S. District Court for the District of Columbia set the guilty verdict aside in 2009 because prosecutors withheld favorable information.[17] Though discovery violations typically do not result in such drastic consequences, nothing about the Comey case has been typical.

Lessons for Practitioners

Practitioners can draw valuable lessons and reminders from the Comey case.

Devote time to discovery early.

The most obvious reminder is not to write off discovery. Though less glamorous than cross-examination or closing argument, the discovery process is just as important. A devastating cross-examination or dramatic closing requires material to work from. That material largely comes from the discovery the government produces. Any time devoted early on to acquiring, reviewing and organizing discovery will repay you many times over.

Comey's team, for example, seems to have already put in substantial work collecting publicly available evidence in support of its motion to dismiss.[18] That effort will likely result in an evidentiary hearing on Comey's motion. And that hearing offers unparalleled opportunities to identify potential sources for discovery and spot holes in the government's productions.

Request discovery early, and do so again later.

One of the first things to do once a client is indicted is to request discovery. A blanket request for "all discovery" won't cut it though. Counsel should request all favorable information, early production of Jencks Act material, the specific categories of information listed in Rule 16(a) and any other material required under the local rules.

Counsel should also request that all productions be in a format for easy uploading to a document review system, and that each production include an index identifying the produced material, its source and a rough description of its contents. For document-intensive cases, also consider asking the government to identify any favorable information within the production.[19]

As the case nears trial, counsel should send another request. Discoverable information, like

communications among the prosecution team or with witnesses, necessarily gets created as the case progresses. And some information that may have once seemed inculpatory — and thus likely not discoverable — may take on new meaning as the government better understands the defense theory.

It is thus critical to request and receive confirmation that the government has both produced newly created material and rechecked its existing files for discoverable material.

Clarify whenever possible.

When asked about discovery, the government generally responds with a blanket declaration that it has produced all discoverable information and will fulfill all discovery obligations. Yet that declaration is meaningless unless counsel understands where the government has searched for discoverable information.

That makes it critical to clarify — by letter or other means — who the government considers part of the prosecution team, and which accounts, devices, and other locations the government has reviewed or will review.

Rule 5(f) the Federal Rules of Criminal Procedure offers another opportunity. The Due Process Protections Act, enacted in 2020, amended Rule 5 to require courts to enter an order confirming the government's Brady obligations at the first court appearance in each case.[20] Counsel can use that opportunity to advocate for an order that defines the government's Brady obligations.

For example, some prosecutors wrongly believe the government must disclose information only if it is favorable and material to guilt or innocence. Materiality is relevant only to the after-the-fact determination if the government deprived the defendant of due process by withholding information; it is irrelevant to whether the government must produce favorable information in the first place.[21]

Correcting that misunderstanding ensures that all favorable information — regardless of the government's assessment of its materiality — gets produced.

Be professional, and ask for what you need.

The defense always at least partly depends on the good faith of individual prosecutors for discovery. There are few ways to verify whether the government has in fact fulfilled its duties. And there are countless ways a prosecutor can make discovery more difficult for defense counsel.

Maintaining a healthy working relationship with the prosecutors is critical. That is easy to do in most cases, since most prosecutors are professional and uninterested in toying with the defense. But even when difficult, it is essential — a breakdown in the relationship will always hurt the defense more than the government, because the defense invariably needs more from the government than the government needs from the defense.

Maintaining that healthy relationship allows the defense to ask for what it needs. If documents were produced in an inconvenient format, ask for them to be reproduced in a different format. If there are gaps in a production, ask that they be filled. Most prosecutors will assist when possible, and experienced prosecutors know that it is in their interest to do so.

Back up what you say.

Beyond requests based on professional courtesy, any request must have legal support to back it up. Making bald demands will get you nowhere. Defense counsel must point the government to the basis for the request.

Doing so is more likely to be effective, but even if the request goes unfilled, it shows the government that it is dealing with a prepared and competent opponent, and may inspire prosecutors to be extra diligent in ensuring all obligations are met.

Conclusion

Books could and likely will be written about the Comey case. A key part of the ultimate story may turn on how the government navigates the many potential pitfalls awaiting it in discovery. But no matter the outcome, practitioners can draw important lessons and reminders from the case.

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[1] See Fed. R. Crim. P. 15(a)(1), 17(c).

[2] *Brady v. Maryland*, 373 U.S. 83, 87 (1963); see Fed. R. Crim. P. 5(f)(1) (court must order at the start of case to remind government of its obligations under Brady).

[3] See *United States v. Bagley*, 473 U.S. 667, 675-77 (1985).

[4] 18 U.S.C. §3500(b), (e).

[5] *Id.* §3500(a)

[6] Fed. R. Crim. P. 16(a)(1)(E).

[7] See D. Mass. L.R. 116.1, 116.2.

[8] See D.D.C. L.R. 5.1.

[9] See Discovery Order, *United States v. Comey*, No. 1:25-cr-00272, Dkt. 28 (setting deadlines).

[10] Justice Manual §9-5.001, U.S. Dep't of Justice.

[11] *Id.* §9-5.004.

[12] Josh Dawsey, Sadie Gurman & Aruna Viswanatha, Inside the Justice Department Where the President Calls the Shots, *The Wall Street Journal* (Oct. 8, 2025).

[13] Anna Bower, "Anna, Linsdey Halligan Here," *Lawfare* (Oct. 20, 2025).

[14] Brady, 373 U.S. at 87.

[15] Katherine Faulders, Alexander Mallin & Peter Charalambous, Prosecutors' Memo to New U.S. Attorney Found No Probable Cause to Charge James Comey, ABC News (Sept. 25, 2025); see United States v. Armstrong, 517 U.S. 456, 475 (1996) (Breyer, J., concurring) (noting "work-product immunity ... in Rule 16(a)(2)" does "not alter the prosecutor's duty to disclose material that is within Brady").

[16] See Dennis v. Sec'y Pa. Dep't of Corrs., 834 F.3d 263, 310-11 (3d Cir. 2016) (information to challenge government's "paltry investigation" were "material under Brady"); Gumm v. Mitchell, 775 F.3d 345, 370 (6th Cir. 2014) (similar).

[17] United States v. Stevens, No. 08-cr-231, 2009 WL 6525926 (D.D.C. Apr. 7, 2009).

[18] Exhibit to Mot. to Dismiss, United States v. Comey, No. 1:25-cr-00272, Dkt. 59-4.

[19] See United States v. Saffarinia, 424 F. Supp. 3d 46, 85-86 (D.D.C. 2020) (ordering government to identify "any known Brady material to the extent that the government knows of any such material").

[20] Due Process Protections Act, Pub. L. No. 116-182, 134 Stat. 894 (Oct. 21, 2020).

[21] See, e.g., United States v. Olsen, 704 F.3d 1172, 1183 n.3 (9th Cir. 2013) ("prosecutor's speculative prediction about the likely materiality of favorable evidence, however, should not limit the disclosure of such evidence").