

# Hillary Clinton's Email "Scandal"

## How will it affect the election?

**Laurence Nardon & Delaine Tubbs**

Politico recently wrote about the "last days" of Democratic candidate Bernie Sanders's "revolution," revealing that Sanders is clinging to the chance that his opponent, Hillary Clinton, will be indicted for criminal offenses, clearing the way for Sanders who has otherwise been mathematically defeated [1]. While Sanders's consolation may be remote, his hopes are rooted in a scandal that has been a fixture in the 2016 presidential election: Hillary Clinton's emails. Clinton's communication choices while she was Secretary of State and resulting investigations all constitute a scandal, or non-scandal, that seemingly won't end.

Before taking office as Secretary of State, Hillary Clinton, and husband Bill Clinton, set up a server for private use in their New York home. Throughout her tenure as Secretary from January 2009 to February 2013, Clinton used the server to host a personal email account which she exclusively relied on to conduct government business; she never used or activated a "state.gov" email address. Investigation of the September 2012 attack on the American consulate in Benghazi, Libya precipitated the discovery of Clinton's personal server and email account. In June 2013, after she left office, investigating State Department staff recognized for the first time correspondence between Clinton's personal account and official accounts. Upon the request of the State Department, Clinton handed over more than 30,000 emails in December 2014 for use in the ongoing enquiry. Knowledge of Clinton's private account became public in March 2015 when the State Department revealed Clinton's reliance on her personal email to congressional investigators and the media began reporting the story.

Clinton explained that she "opted for convenience to use my personal email account, which was allowed by the State Department" and repeatedly emphasized that her choice was "not disallowed" by any law or regulation. She also explained that an *additional* 32,000 emails deemed private had been deleted from the server. The State Department

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began publicly releasing the emails in its possession in May 2015. Later, in fall 2015, Clinton testified about her email use before a special House committee created to examine the Benghazi attack which yielded no conclusive findings about Clinton's email practices. Nevertheless, many have since accused Clinton of disregarding rules, risking national security and thwarting transparency. These sentiments have persisted throughout Clinton's presidential campaign and are echoed by formal responses such as civil suits and government investigations. The primary challenges that Clinton faces are Freedom of Information suits, a State Department report and a Federal Bureau of Investigations (FBI) probe.

### **Partisan accusations by private groups**

First, the State Department and Clinton were hit with several civil suits invoking the Freedom of Information Act. The act was created in 1966 to "provide the public the right to request access to records from any federal agency," and is now the legal basis for accusations that Clinton wrongfully concealed information by controlling communication. Thus, plaintiffs such as the conservative watchdog group, Judicial Watch, are demanding the release of emails and further investigation. Judicial Watch's suit, though it is against the State Department and does not name Clinton as a defendant, has affected Clinton due to the traction it has gained in court. State Department officials and Clinton staffers, including Clinton's former chief of staff, Cheryl Mills, have already been compelled to testify under oath for the case. The legitimacy that the case has been granted lends credence to Judicial Watch's claim that Clinton intentionally set up her private server to avoid accountability. To date, Clinton's campaign has dismissed the suit by framing it as a partisan attack, her campaign saying, "Judicial Watch continues to clog the courts with its partisan lawsuits intended only to hurt Hillary Clinton's presidential campaign" based on "bogus" allegations.

### **Disregard for Department of State's policies**

However, government investigations conducted by agencies *considered* non-partisan are less easily dismissed as mere politics. The latest remarks come from a report by the Office of the Inspector General of the State Department (OIG), released in May [\[2\]](#). The report reviews email and technology policies spanning 20 years and

finds regulatory violations across the agency but notes specific breaches by Clinton. The report focuses on record keeping and cyber security and shows that Clinton violated rules pertaining to both. The former is governed by the Federal Records Act which sets guidelines for preserving all types of records and communication. The report states that Clinton violated the Act by not printing and filing her emails and by failing to surrender emails that dealt with Department business when she left office. Second, the report outlines cybersecurity policies which require officials to "use agency-authorized information systems". The OIG determined that Clinton "had an obligation to discuss using her personal email account to conduct official business," yet found no evidence that Clinton requested approval; had Clinton done so, she would have been denied permission. The report concludes that Clinton did not break the law but only violated administrative policy, yet isolating Clinton's violations and documenting warnings she received to alter her behavior clashes with Clinton's claims that she was "allowed" to use her personal account and server. In response, Clinton allies have alluded to conflicts of interest due to some individuals in the OIG who have been critical of Clinton in the past, but accusations of bias are disputed and have not masked the report's critical tone.

### **Possible FBI Indictment**

Finally, Clinton's largest threat may be the ongoing FBI probe which began after investigators found confidential information in 2,028 of Clinton's emails in July 2015. The emails were not marked classified when originally transmitted. The Bureau explicitly stated that the investigation pertains to "law enforcement" and is an evaluation of possible *criminal* conduct. The investigation will determine whether or not to indict Clinton or others involved with her server. The FBI could be examining possible violations of the Espionage Act, under which causing sensitive information "to be removed from its proper place of custody" due to gross negligence is a felony or less-severe misdemeanor charges for "mishandling classified information." Laws concerning classified information tend to be broadly written and subject to prosecutorial discretion; a study of past investigations for the mishandling of classified records shows that the FBI rarely indicts without some evidence of distribution that is absent in Clinton's case. In fact, the FBI did not prosecute in 80% of similar cases from 2011 to

2015 [3]. Some Democrats are concerned with the role of partisan politics in the FBI probe because of the bureau's director James Comey. Though Comey is a Republican, he was appointed by President Obama and is respected on both sides of the aisle, mitigating claims that Comey would skew investigations against Clinton. The FBI has not yet indicated when it will finish its investigation but has indicated that the election is not affecting the probe's timeline.

### **Impact on the campaign**

In spite of the persistent scandal, Clinton is almost sure to be confirmed as the nominee at the Democratic National Convention in July because she has clinched the necessary count of delegates. If the FBI recommends indictment and the Clinton-friendly Justice Department follows through, however, her status could be less sure. There is no *automatic* effect on the election; neither the Constitution nor the law forbid indicted or convicted persons from running for office. Still, indictment would be a huge obstacle for the Democratic Party which would have to decide between three sub-optimal choices: Hillary Clinton, Bernie Sanders, or a new candidate. Clinton has refused to say if she would drop out if indicted, and 71% of Democrats and 50% of all voters say she should not. However, the Democratic Party would incur the risks and unpredictability by making an indicted Clinton the poster child of the party and possibly being left with an impeachable president. The alternatives are also troubling. The party could rally behind Sanders, the democratic socialist who has a loyal following, but also has reasons to reject him. Sanders has expressed willingness to prioritize his agenda at the cost of the party's wellbeing; he has no history of party loyalty, having never sought office as a Democrat. Finally, the Democratic leadership could choose someone not even running, such as Vice President Joe Biden or Secretary of State John Kerry. These politicians have experience comparable to Clinton and higher approval ratings. However, this choice could radically divide the already-fraying party by rejecting the symbolic, democratic selection process. As evidenced by both Donald Trump's and Sanders's success, voters are disillusioned with American politics and perceive "establishment" politicians as self-interested and non-democratic. Rejecting Sanders for an unelected nominee may exacerbate angst and widen the rifts in the party.

Timing also affects Clinton and the party's fate in the incidence of an indictment. If she is indicted before the convention in late July, Clinton could withdraw and let the party chose an alternative candidate by normal procedures. Changing the nominee after the convention poses more challenges. *If* Clinton agreed to withdraw, the Democratic National Party would have to race against the clock to find a new nominee because at least 25 states have deadlines to finalize their ballots. After ballot certification deadlines, the Democratic Party could be forced to sue states to change ballots or hope that no candidate would win a majority in the electoral college, forcing the House of Representatives to choose a victor, which hasn't happened in the modern era.

### **Clinton's image already determined**

An indictment would pose a host of problems because of the weight that it carries for voters and party leaders alike. However, the entirety of Clinton's email scandal has already likely already done its damage by shaping Clinton's image. Polls show that the continuous drip of information about Clinton's emails has left her with a bad reputation. Because of Clinton's email practices, 40% of voters are less likely to vote for her and 57% say she is not honest or trustworthy. Yet, because Clinton's reputation as untrustworthy or "crooked" is so prolific, little can shift the political discourse. Clinton has already been tried and convicted in the minds of the public: 65% of voters believe Clinton likely broke the law [4]. New information or claims can be reframed to fit into existing, rigid and partisan narratives, so regardless of the outcomes of criminal investigations or civil suits, one party will feel vindicated and the other can cry foul.

Finally, criminal accusations could end a campaign in an ordinary election, but the 2016 cycle is extraordinary. With Trump as an opponent, more than a scandal is required to ruin Clinton. Trump himself has faced legal and ethical scandals ranging from fraud to adultery to bankruptcy. Though polls show that Clinton is widely unpopular, her opponent is even more so. Clinton performs better than Trump in categories such as favorability, values and temperament. Thus, voters may choose to swallow Clinton's email snafu in light of the alternative: a candidate who lacks policy

experience and is defined by prejudice.

For many Americans, this presidential election symbolizes an uncomfortable choice between two non-ideals, unlikeable options, and the disenchanting voters (e.g. committed Sanders fans and anti-Trump conservatives) may choose to stay home on November 8<sup>th</sup>. Even though Sanders's hopes for her indictment may be remote, Clinton's emails have likely contributed to a prevailing sense of weariness in this election cycle. Nevertheless, American voters' and politicians' willingness to disrupt the status quo reveals that democracy still matters and moves.

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[1] [www.politico.com](http://www.politico.com)

[2] <https://oig.state.gov>

[3] [www.politico.com](http://www.politico.com)

[4] [www.rasmussenreports.com](http://www.rasmussenreports.com)