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NO GOOD DEED GOES UNPUNISHED

To avoid anointing Trump, the FBI Director falls into a trap of his own making

By Julius (Jay) Wachtel. “It’s pretty strange to put something like that out with such little information right before an election. In fact, it’s not just strange; it’s unprecedented and it is deeply troubling.” One day after the [FBI Director’s startling reveal](#) about a new trove of emails, [Hillary took a swing at the very same official](#) who, in an equally “unprecedented” move, [had recently exonerated her from criminal liability](#). We’ll know in a few days whether Comey’s letter to Congress was indeed the equivalent of running over Hillary’s quest for the Presidency with an “18-wheeler” (as DNC chair Donna Brazile put it) or simply another annoying distraction in a most annoying Presidential campaign.

Still, there’s little doubt that James Comey’s maneuverings created the perfect storm of a dilemma. We’ll get to that in a moment. For now, let’s address the email scandal of which so much hash has been made.

When Hillary was anointed Secretary of State she turned up her nose at the thought (horrors!) of a State.gov email address. Instead, America’s chief diplomat continued to use her beloved Blackberry and a personal email account that routed messages through a private server installed at her home. Despite her repeated denials, she used this process for conveying and receiving classified information. Here’s an extract from Director Comey’s initial press release that describes the security status of *thirty-thousand* work-related emails that Hillary’s lawyers reluctantly turned over to the FBI:

From the group of 30,000 e-mails returned to the State Department, 110 e-mails in 52 e-mail chains have been determined by the owning agency to contain classified information at the time they were sent or received. Eight of those chains contained information that was Top Secret at the time they were sent; 36 chains contained Secret information at the time; and eight contained Confidential information, which is the lowest level of classification. Separate from those, about 2,000 additional e-mails were “up-classified” to make them Confidential; the information in those had not been classified at the time the e-mails were sent.

Alas, when the scandal erupted Hillary ordered the purge of all “personal” correspondence from the server, so the true extent of the imbroglio will never be known.

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It's not that our would-be Prez was ignorant of the rules. First ladies and Secretaries of State are extensively briefed about handling classified materials and the techniques used by America's antagonists to gain unauthorized access (Russians are reportedly terrific at such things.) As a lowly ATF agent and first-line supervisor your blogger was cleared for "top secret" (the scale actually goes well beyond that) but in practice never came across anything marked higher than "confidential," the lowest rung on the ladder. Even these materials required special handling, and one can only imagine what's required to safeguard the information that routinely crosses the desk of our nation's top diplomat.

Whatever her reasons – a forthcoming Presidential campaign, past experience battling the fires that nearly drove her husband from office, or more simply, a matter of temperament – Hillary clearly sought to keep her trove of official correspondence private. Yet no Government employee is entitled to create a secret stash of official correspondence. Despite her protestations, [there is no evidence](#) that she ever officially asked to use a personal email account, nor that doing so was approved. *Update 4/10/18: In fact, [an extensive May 2016 report](#) by the State Department's Office of Inspector General found that she had not:*

Secretary Clinton used mobile devices to conduct official business using the personal email account on her private server extensively, as illustrated by the 55,000 pages of material making up the approximately 30,000 emails she provided to the Department in December 2014. Throughout Secretary Clinton's tenure, the FAM [official Foreign Affairs Manual] stated that normal day-to-day operations should be conducted on an authorized AIS [automated information system], yet OIG found no evidence that the Secretary requested or obtained guidance or approval to conduct official business via a personal email account on her private server. According to the current CIO and Assistant Secretary for Diplomatic Security, Secretary Clinton had an obligation to discuss using her personal email account to conduct official business with their offices, who in turn would have attempted to provide her with approved and secured means that met her business needs. However, according to these officials, DS and IRM did not—and would not—approve her exclusive reliance on a personal email account to conduct Department business, because of the restrictions in the FAM and the security risks in doing so.

Of course, as a lawyer, Hillary knew better than to request permission that would surely be denied, lest the inevitable rebuke become, if ignored, evidence of criminal intent.

But didn't Comey clear her? We'll let the reader be the judge:

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Although there is evidence of potential violations of the statutes regarding the handling of classified information, our judgment is that no reasonable prosecutor would bring such a case. Prosecutors necessarily weigh a number of factors before bringing charges...In looking back at our investigations into mishandling or removal of classified information, we cannot find a case that would support bringing criminal charges on these facts. All the cases prosecuted involved some combination of: clearly intentional and willful mishandling of classified information; or vast quantities of materials exposed in such a way as to support an inference of intentional misconduct; or indications of disloyalty to the United States; or efforts to obstruct justice. We do not see those things here.

Hillary's conduct potentially fell within the purview of two Federal criminal statutes, 18 USC 1924, a misdemeanor, and 18 USC 793(f), a felony:

[Title 18 United States Code, sec. 1924](#): (a) Whoever, being an officer, employee, contractor, or consultant of the United States, and, by virtue of his office, employment, position, or contract, becomes possessed of documents or materials containing classified information of the United States, knowingly removes such documents or materials without authority and with the intent to retain such documents or materials at an unauthorized location shall be fined under this title or imprisoned for not more than one year, or both.

[Title 18, United States Code, sec. 793\(f\)](#): (f) Whoever, being entrusted with or having lawful possession or control of any document...relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed....Shall be fined under this title or imprisoned not more than ten years, or both.

Director Comey mitigated the seriousness of Clinton's seemingly slam-dunk "mishandling of classified information" by pointing out that her actions weren't "clearly intentional and willful." Exactly what does this legal-speak mean? According to the [U.S. Attorney's Manual](#), "an act is done 'willfully' if done voluntarily and intentionally and with the specific intent to do something the law forbids." As we pointed out, Hillary dodged that trap by simply not asking, then playing dumb. What's more, neither statute requires proof of willfulness. For example, 18 USC 1924 hews to the far less demanding "knowing" standard, which requires evidence that an accused acted with "knowledge or awareness of the facts or situation, and not because of mistake, accident or some other innocent reason." In other words, did Hillary really mean to store her Government emails on a private server, or not?

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Hillary's absolution doesn't rest on the cold, hard facts. It's based, instead, on Comey's belief that her acts, while perhaps technically illegal, didn't rise to the level where a "reasonable" prosecutor would feel compelled to press charges. But to our best recollection there has never been anything even remotely comparable to what she did. What other *Secretary of State*, for reasons of pure selfishness, purposefully circumvented accepted communications protocols, not on a case-by-case basis but for years, keeping critical deliberations out of Government archives while potentially exposing a wealth of highly sensitive material to our nation's adversaries?

Separating law enforcement and prosecution accomplishes two things. On the one hand, it insulates cops from political pressure; on the other, it assures that liberty interests are protected by officials who are answerable to the courts and [whose duty is to bring justice, not merely convict](#). Accordingly, charging decisions are typically made and announced by prosecutors. But Comey, a former United States Attorney and Deputy Attorney General, is no longer a prosecutor but the executive of our nation's premier law enforcement organization. In other words, he's a top cop. When he stepped out of that role to proclaim that Clinton would not be charged his comments were as stunning for their source as for their content.

This former Fed – he's probably not the only one – believes there was abundant evidence to convict Hillary of the misdemeanor. Of course, merely bringing charges would have in effect anointed Trump as our next Commander-in-Chief. That's presumably something that neither FBI Director Comey nor his boss, Attorney General Loretta Lynch, nor any other senior member of the administration, nor at least half the public could easily stomach. So something *had* to be done. But the A.G. couldn't step in. Had Loretta Lynch given Hillary a pass her decision would have been roundly condemned as politically driven, and particularly after the furor raised by her [June tête-à-tête with Hillary's husband](#). (Lynch insisted that her chat with Bill had nothing to do with the emails.)

To be sure, Comey is also an appointee. As FBI Director, though, he carries far less political baggage than the A.G. He also enjoys an unimpeachable reputation (check out, for example, [his sterling role](#) in keeping White House weasels from strong-arming a bedridden John Ashcroft.) Your blogger can't be positive that Lynch personally beseeched Comey to clear Hillary. Maybe it was a little bird. But whoever or whatever did it, it probably wasn't a hard sell.

Then the other shoe dropped. When more e-mails surfaced, Comey was instantly caught in a dilemma of his own making. Having inappropriately assumed the prosecutorial mantle in "[l'affaire qui plombe Hillary Clinton](#)" (thanks, *Le Monde*), the nation's top cop owned the imbroglio, hook, line and sinker. [Comey had already testified](#)

[about the matter](#) before the House Judiciary Committee. He knew full well that not everyone at Justice and the FBI was pleased with his decision to let Hillary off, and undoubtedly worried that word about the new batch would leak. Keeping Congress in the dark, even for an instant, was out of the question. It could make it seem as though he wasn't an impartial public servant but just another political hack. So of course the man blabbed.

As one might expect, [that badly upset the applecart](#). Critics quickly accused Comey of purposely meddling in an election, even (horrors!) of favoring Trump. What they missed were the struggles of a proud Government servant straining to protect his reputation after a fundamental misstep. Had Comey kept quiet and stuck to his official role from the very start, responsible for overseeing investigations but not for implementing their findings, he could have simply directed a review of the new stash and, in due course, submitted his agents' conclusions, leaving further decisions to Loretta Lynch, where they properly belong.

But Comey had already put on her hat. Imagine the reaction if he and the A.G. managed to suppress word of the emails until after Hillary's election. Imagine the consequences if the new batch proved significant. Comey was indeed caught between a rock and a hard place. And now, by extension, so is everyone else but Trump.