



Memorandum

**Legal Analysis of Former Secretary of State
Hillary Clinton's Use of a Private Server to
Store Email Records**

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MEMORANDUM

To: Interested Parties
From: Cause of Action
Subject: Legal Analysis of Former Secretary of State Hillary Clinton’s Use of a Private Server to Store Email Records
Date: August 24, 2015

I. Introduction

On August 24, 2015, former Attorney General Michael Mukasey stated on national television that there are criminal laws in place that would disqualify former Secretary of State Hillary Clinton from holding any office under the United States if a jury were to find her guilty of removing and subsequently destroying public records.¹ Prior to these statements, General Mukasey authored an opinion piece in the *Wall Street Journal* noting, “the law relating to public records generally makes it a felony for anyone having custody of a ‘record or other thing’ that is ‘deposited with . . . a public officer’ to ‘remove’ or ‘destroy’ it, with a maximum penalty of three years. Emails are records, and the secretary of state is a public officer and by statute their custodian.”²

To date, no analysis has reviewed the factual and legal arguments behind the former Attorney General’s claims. This memorandum analyzes the legal implications of Mrs. Clinton’s use of a private server and email account for official government business while serving as Secretary of State from January 21, 2009 to February 1, 2013. As described below, based upon facts publicly disclosed and consistent with General Mukasey’s conclusions, the manner in which former Secretary Clinton stored official email correspondence during her tenure as Secretary of State, and her conduct with those emails subsequent to her resignation, trigger applicable laws and regulations relating to federal records and also raise criminal concerns, with at least one applicable penalty being the disqualification from holding the office of President. In addition, her control of federal records through the use and maintenance of a private server and email account that were not linked to any official recordkeeping system undermined the proper

¹ See Transcript, MSNBC *Morning Joe* (Aug. 24, 2015), available at <http://goo.gl/na0GM4>. See also 18 U.S.C. § 2071.

² Michael B. Mukasey, *Clinton Defies the Law and Common Sense*, Wall St. J. (Aug. 14, 2015), <http://goo.gl/bhk7AC>.

functioning of the Freedom of Information Act and the Congressional investigation into the Benghazi terrorist attack.

II. Factual Background

A. Former Secretary Clinton Used a Private Server and Email Account to Conduct Her Official Government Business

On March 2, 2015, the *New York Times* reported that Hillary Clinton, while serving as Secretary of State, exclusively used a private email account to conduct government business and that neither she nor her aides took actions to have those emails preserved in the State Department's official recordkeeping system at the time.³ Mrs. Clinton responded to that report eight days later through a press conference and a written statement issued March 10, 2015, in which she denied any wrongdoing but did admit to using a private email account housed on a private server over which she maintained exclusive control.⁴ She also claimed to have turned over printed copies of all of her work-related emails to the State Department on December 5, 2014 (22 months after she resigned from office). According to her written statement, this production represented 30,490 emails "sent and received by Secretary Clinton from March 18, 2009 to February 1, 2013" for a total of 55,000 printed pages.⁵ Mrs. Clinton further claimed that approximately 90 percent of these emails were contemporaneously captured by the State Department's record-keeping system because "they were sent to or received by 'state.gov' accounts."⁶ Her server housed an additional 31,839 emails, which Mrs. Clinton says she determined to be personal and private.⁷ In her oral statements, Mrs. Clinton stated that these emails had been deleted from her server.⁸ In a subsequent letter written on March 27, 2015 to Trey Gowdy, Chairman of the House Select Committee on Benghazi, Mrs. Clinton's lawyer, David Kendall, explained that Mrs. Clinton had deleted all of her emails from her tenure as

³ Michael S. Schmidt, *Hillary Clinton Used Personal Email Account at State Dept., Possibly Breaking Rules*, N.Y. Times (Mar. 2, 2015), <http://goo.gl/wma5Jf>.

⁴ See Hunter Walker & Colin Campbell, *Hillary Clinton: 'It would have been better' if I used official email*, Business Insider (Mar. 10, 2015), <http://goo.gl/cfTwm5>; Laura Meckler & Josh Dawsey, *Hillary Clinton Says It Would Have Been 'Smarter' to Use Government Email*, Wall St. J. (Mar. 10, 2015), <http://goo.gl/alHbzI>; Catalina Camia & Martha T. Moore, *Hillary Clinton defends use of private e-mail*, USA Today (Mar. 10, 2015), <http://goo.gl/rFv32Z>; *Statement from the Office of Former Secretary Clinton* (Mar. 10, 2015), available at <http://goo.gl/wtSQ9e>; *Complete text of Hillary Clinton's remarks on e-mails, Iran*, Wash. Post (Mar. 10, 2015), <http://goo.gl/hH83r9>. On July 13, 2015, an additional written response to the email scandal was posted to Hillary Clinton's official campaign website. See *The Facts About Hillary Clinton's Emails*, <https://www.hillaryclinton.com/p/briefing/factsheets/2015/07/13/email-facts/>.

⁵ *Statement from the Office of Former Secretary Clinton*, *supra* note 4, at 2. Mrs. Clinton claims that before March 18, 2009 she continued to use the email account she had used while serving in the Senate but that she no longer had access to that account. *Id.* On May 21, 2015, it was reported that the National Archives and Record Administration had determined that 1,246 of these emails were deemed personal rather than federal records. Lauren French, *More than 1,000 Clinton emails deemed 'personal'*, Politico (May 21, 2015), <http://goo.gl/168jQf>.

⁶ *Statement from the Office of Former Secretary Clinton*, *supra* note 4, at 2.

⁷ *Id.* at 4.

⁸ See Alexandra Jaffe & Dan Merica, *Hillary Clinton: I used one email 'for convenience'*, CNN (Mar. 11, 2015), <http://goo.gl/QfWomn>.

Secretary of State such that “no e-mails from hdr22@clintonemail.com reside on the server or on any back-up systems associated with the server.”⁹

B. The National Archives and Record Administration Did Not Authorize Former Secretary Clinton To Store Record Emails on a Private Server

Concerned by the events described in the March 2, 2015 *New York Times* article, the National Archives and Records Administration (NARA), the federal agency in charge of overseeing federal records management, wrote to the State Department on March 3, 2015 expressing its concern that “Federal records may have been alienated from the Department of State’s official recordkeeping system” and asking, pursuant to its statutory authority, that the State Department submit a report within 30 days detailing “how these records were managed and the current status of these records.”¹⁰ Federal statutes and regulations define the term “alienation” in terms of “allowing a record to leave the custody of a Federal agency without the permission of the Archivist of the United States.”¹¹ This letter thus demonstrates, among other things, that NARA had not given Mrs. Clinton or the State Department permission to house or archive her official email records on a private server.

The State Department responded to NARA on April 2, 2015.¹² The two-page report and accompanying exhibits highlight the State Department’s policies regarding the creation and retention of email records and explain that the State Department was aware that former Secretary Clinton had used a “non-government” email account during her tenure, although the report does not indicate by what authority or authorization, if any, she did so.¹³ The report also noted that on October 28, 2014 the State Department had requested Mrs. Clinton (together with the most recent former Secretaries of State) to supply it with copies of any federal records in her

⁹ Letter from David E. Kendall, Lawyer for Hillary Clinton, to Trey Gowdy, Chairman of the H. Select Comm. on Benghazi, at 6 (Mar. 27, 2015), *available at* <http://goo.gl/jXpS5x>.

¹⁰ Letter from Paul M. Wester, Jr., Chief Records Officer, NARA, to Margaret P. Grafeld, Deputy Assistant Sec’y for Global Info. Servs, Bureau of Admin., U.S. Dep’t of State (Mar. 3, 2015), *available at* <http://goo.gl/8Bys0x>; *see also* Michael S. Schmidt, *State Department Is Asked to Explain Handling of Hillary Clinton’s Emails*, N.Y. Times (Mar. 18, 2015), <http://goo.gl/9j7x8O>.

¹¹ 36 C.F.R. 1230.3(b); *see also id.* § 1228.100(a) (“The Archivist of the United States and heads of Federal agencies are responsible for preventing the alienation or unauthorized destruction of records, including all forms of mutilation. Records may not be removed from the legal custody of Federal agencies or destroyed without regard to the provisions of agency records schedules (SF 115 approved by NARA or the General Records issued by NARA.”); 44 U.S.C. § 3105 (“The head of each Federal agency shall establish safeguards against the removal or loss of records he determines to be necessary and required by regulations of the Archivist. Safeguards shall include making it known to officials and employees of the agency—(1) that records in the custody of the agency are not to be alienated or destroyed except in accordance with sections 3301–3314 of this title[.]”); *id.* § 3106(a) (“The head of each Federal agency shall notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully removed from that agency, or from another Federal agency whose records have been transferred to the legal custody of that Federal agency.”).

¹² Letter from Margaret P. Grafeld, Deputy Assistant Sec’y for Global Info. Servs., Bureau of Admin., U.S. Dep’t of State, to Paul M. Wester, Jr., Chief Records Officer, NARA (Apr. 2, 2015) (“State Dep’t Report to NARA”), *available at* <http://goo.gl/4HbmLl>.

¹³ *Id.* at 2.

possession, including “emails sent or received on a personal email account.”¹⁴ The report admitted that when it made this request, “the degree to which [Mrs. Clinton’s email] records were captured in the Department’s systems was unknown.”¹⁵

C. The State Department Sought Former Secretary Clinton’s Emails when It Realized It Could Not Respond fully to Document Requests from the House Select Committee on Benghazi

News reports and documents released to the public paint a murky picture as to who knew of Mrs. Clinton’s use of a private email system and when they knew it. In an April 9, 2015 letter to Senator Charles E. Grassley, for example, the State Department’s Office of Inspector General (OIG), in response to the Senator’s question as to when and how OIG learned of Mrs. Clinton’s use of a private email account for her official work, claimed that its staff did not become aware of the fact until after the news media had reported the story.¹⁶ Similarly, a March 23, 2015 *New York Times* article suggests that some State Department recordkeeping officials were not aware of Mrs. Clinton’s use of a private email account until sometime after her resignation.¹⁷ As that news report explains, the reason the State Department approached Mrs. Clinton at the end of October 2014 to request her email records was because officials realized that Mrs. Clinton was using an outside email address for her official correspondence only after they attempted to respond to document requests from the House Select Committee on Benghazi:

Last summer, State Department lawyers responding to document requests from the House committee investigating Benghazi found correspondence showing Mrs. Clinton used a private email account. The lawyers determined that they needed all of Mrs. Clinton’s emails to respond to the committee requests.¹⁸

On March 4, 2015, two days after the *New York Times* initial report, the House Select Committee on Benghazi, realizing that it may not have received all available State Department records relating to Benghazi, issued a subpoena to Mrs. Clinton for all documents, including email communications, in her possession related to Libya and the terrorist attack.¹⁹

¹⁴ *Id.* at 1-2; Letter from Patrick F. Kennedy, Under Sec’y of State for Mgmt., to Cheryl Mills, Lawyer for Hillary Clinton (Nov. 12, 2014), *available at* <http://goo.gl/C4EV9q>. The State Department Report also noted that, “[d]ue to an error, the letters to the representatives for Secretaries Clinton, Powell and Albright had to be re-sent in November since the original letters to those representatives referenced Secretary Rice instead of their corresponding former Secretary[.]” State Dep’t Report to NARA, *supra* note 12, at 1, n.1.

¹⁵ State Dep’t Report to NARA, *supra* note 12, at 2.

¹⁶ *See* Letter from Steve A. Linick, Inspector General, U.S. Dep’t of State, to Senator Charles E. Grassley, at 1 (Apr. 9, 2015), *available at* <http://goo.gl/NkxqGX>.

¹⁷ *See* Michael S. Schmidt, *In Clinton Emails on Benghazi, a Rare Glimpse at Her Concerns*, N.Y. Times (Mar. 23, 2015), <http://goo.gl/V7Oexn>.

¹⁸ *Id.*

¹⁹ Press Release, H. Select Comm. on Benghazi, *Statement from the Communications Director on Subpoena Issuance* (Mar. 4, 2015), <http://goo.gl/MsSOJO>; Subpoena to the Honorable Hillary R. Clinton (Mar. 4, 2015), *available at* <https://goo.gl/O2jjNI>; *see also* Jack Gillum & Ted Bridis, *House committee subpoenas Clinton emails in Benghazi probe*, Associated Press (Mar. 5, 2015), <http://goo.gl/25yWBb>.

On March 19, 2015, Chairman Gowdy of the Select Committee on Benghazi wrote to Mrs. Clinton’s lawyer, David Kendall, to grant his request for an extension of time to respond to the March 4, 2015 subpoena.²⁰ At the same time, he requested that Mrs. Clinton “relinquish her server to a neutral, detached, and independent third-party, such as the Inspector General for the State Department, for review and an independent accounting of any records contained on the server, including a determination of which documents in the Secretary’s possession belong to the State Department and which are private.”²¹ The justification for such a request centered on the way Mrs. Clinton had concealed knowledge of the emails and her use of a private server and email account both during and after her tenure as Secretary of State. As Chairman Gowdy explained, in response to the Select Committee’s initial request to the State Department for all relevant documents relating to their investigation into the Benghazi terrorist attack, the State Department delivered approximately 15,000 pages of documents in August 2014.²² Included among these documents were a mere eight emails to or from former Secretary Clinton.²³ These few emails revealed that Mrs. Clinton was using a private email address for her official work, which was the first time the Select Committee became aware of the practice.

Given the paucity of emails to or from Mrs. Clinton, the Select Committee submitted two new requests for relevant documents and communications “authored by, sent to, or received by former Secretary of State Clinton,” one on November 18, 2014 to the State Department and the other on December 2, 2014 to Mrs. Clinton through her lawyer, Mr. Kendall.²⁴ Mr. Kendall made no document production on Mrs. Clinton’s behalf but simply referred the Select Committee’s letter to the State Department, stating that it was the State Department who was “in a position to produce any responsive documents.”²⁵ There was no mention at this time that Mrs. Clinton’s work-related emails were stored on her own private server and not in the State Department’s recordkeeping system.

In response to the November 18, 2014 and December 2, 2014 document requests, the State Department delivered 847 pages (representing about 300 of Mrs. Clinton’s emails) on February 13, 2015.²⁶ The only reason the State Department was able to produce these documents, however, was because of the email records that Mrs. Clinton had produced to the State Department on December 5, 2014,²⁷ proof that neither Mrs. Clinton nor the State Department had preserved her email records (whether in paper or electronic form) in the State

²⁰ Letter from Trey Gowdy, Chairman of the H. Select Comm. on Benghazi, to David Kendall, Lawyer for Hillary Clinton (Mar. 19, 2015), *available at* <http://goo.gl/aMozh0>.

²¹ *Id.* at 5. Mrs. Clinton subsequently rejected the request to turn over her server. *See* Letter from David Kendall, Lawyer for Hillary Clinton, to Trey Gowdy, Chairman of the H. Select Comm. on Benghazi, at 3-6 (Mar. 27, 2015), *available at* <http://goo.gl/jXpS5x>.

²² Letter from Trey Gowdy to David Kendall, *supra* note 20, at 1.

²³ *Id.*

²⁴ *Id.* at 2.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 2-3.

Department recordkeeping system either during or for the almost two years after her tenure as Secretary of State.

Equally troubling to Chairman Gowdy, it was not until after the February 13, 2015 production that the State Department revealed for the first time, in a meeting with the Select Committee held on February 27, 2015, that Mrs. Clinton exclusively used a private email account throughout the entirety of her tenure as Secretary of State.²⁸ The State Department, however, never revealed that Mrs. Clinton retained exclusive control over her work-related emails both during and after her tenure, that Mrs. Clinton only returned the paper copies of these emails after request from the State Department, or that the State Department's request to Mrs. Clinton was precipitated by the Select Committee's document requests.²⁹ Thus, it was only when the Select Committee learned the full story from the March 2, 2015 *New York Times* story that it then issued its March 4, 2015 subpoena.³⁰

The work of the Select Committee also revealed that several State Department officials other than Mrs. Clinton, as well as non-State Department individuals with whom Mrs. Clinton interacted in furtherance of her official duties, also used private email accounts to communicate with Mrs. Clinton about official business.³¹ According to Chairman Gowdy, “[s]ince the Secretary used exclusively personal email, and several State Department officials also used personal email, there can be no assurance any and all of her relevant emails conducted between two private accounts would have been captured in Secretary Clinton’s review of documents.”³²

Finally, Chairman Gowdy’s letter highlighted the problematic way in which Mrs. Clinton conducted her search for relevant documents. Mrs. Clinton’s official statement from her March 10, 2015 press conference explained that the process was simply one in which search terms were employed to return what she considered to be the responsive documents.³³ The problem with such an approach, however, is that:

²⁸ *Id.* at 2; *see also* Press Release, H. Select Comm. on Benghazi, *Gowdy Statement in Response to Clinton Comments on the Benghazi Committee* (July 7, 2015), <https://goo.gl/mrKNw1> (“For more than two years, [Mrs.] Clinton never availed herself of the opportunity, even in response to a direct congressional inquiry, to inform the public of her unusual email arrangement designed to evade public transparency. The State Department, which should have informed congressional investigators years ago, failed to do so either.”)

²⁹ Letter from Trey Gowdy to David Kendall, *supra* note 20, at 2-3.

³⁰ *Id.* at 3; *see also* Press Release, H. Select Comm. on Benghazi, *Gowdy Statement in Response to Clinton Comments on the Benghazi Committee* (July 7, 2015), <https://goo.gl/mrKNw1> (“[Mrs. Clinton] was personally subpoenaed the moment the Benghazi Committee became aware of her exclusive use of personal email and a server, and that the State department was not the custodian of her official record.”).

³¹ *Id.* at 4; *see also* J.K. Trotter, *Source: Top Clinton Aides Used Secret Email Accounts at State Dept.*, Gawker (Mar. 3, 2015), <http://goo.gl/ctOQfh>; Daniel Halper, *Hillary's Top Two Aides Used Personal Email at State Department*, *The Weekly Standard* (Mar. 11, 2015), <http://goo.gl/mjYBCZ>; Michael S. Schmidt, *In Clinton Emails on Benghazi, a Rare Glimpse at Her Concerns*, *N.Y. Times* (Mar. 23, 2015), <http://goo.gl/29r0qs>; Monica Crowley, *Was Hillary Clinton running her own rogue intel operation?* *Wash. Times* (Mar 18, 2015), <http://goo.gl/psUZRH>; Rachael Bade, *Hillary Clinton emails mentioning Benghazi kept from panel*, *Politico* (June 17, 2015), <http://goo.gl/3DojtP>.

³² Letter from Trey Gowdy, *supra* note 20, at 4.

³³ *Statement from the Office of Former Secretary Clinton*, *supra* note 4, at 4-5.

Some emails may have been a mixture of both official and personal records and it is unclear how those emails would have been reconciled with her responsibility to provide all records to the State Department. Further, the extent to which the Secretary or her counsel relied on search terms to identify documents versus personal inspection, or both, remains unclear. In short, there is no assurance the public record regarding the Secretary's emails is complete.³⁴

Chairman Gowdy's request for Mrs. Clinton to submit her server for an independent audit so as to ensure that all relevant records are produced appears justified, not only in light of the above facts, but also given the revelation that Mrs. Clinton failed to turn over a number of emails relating to Libya and the Benghazi terrorist attack that she sent to or received from Sidney Blumenthal on her private email account.³⁵ These new emails, supplied by Mr. Blumenthal in response to a subpoena issued in conjunction with his testimony before the Select Committee on June 16, 2015, had not previously been produced to the State Department or the Committee, although they were within the scope of the Committee's previous subpoenas.³⁶ As the Select Committee explained: "The State Department has informed the Select Committee that Secretary Clinton has failed to turn over all her Benghazi and Libya related records. This confirms doubts about the completeness of Clinton's self-selected public record and raises serious questions about her decision to erase her personal server—especially before it could be analyzed by an independent, neutral third party arbiter."³⁷

News reports also indicate that a comparison of the emails supplied by Mr. Blumenthal with those previously supplied by Mrs. Clinton demonstrate that Mrs. Clinton "removed specific

³⁴ Letter from Trey Gowdy to David Kendall, *supra* note 20, at 5.

³⁵ See Rachael Bade, *Some of Clinton's Libya emails said to be withheld from Benghazi Committee*, Politico (June 15, 2015), <http://goo.gl/261kHJ>; Rachael Bade, *Hillary Clinton emails mentioning Benghazi kept from panel*, Politico (June 17, 2015), <http://goo.gl/3DojtP>; Karen DeYoung, *State Department says 15 e-mails missing from pages Hillary Clinton provided*, Wash. Post (June 25, 2015), <http://goo.gl/YYrY09>.

³⁶ See Rachael Bade, *Hillary Clinton emails mentioning Benghazi kept from panel*, Politico (June 17, 2015), <http://goo.gl/3DojtP> ("The State Department or Hillary Clinton withheld emails from the House Benghazi committee that explicitly mentioned Democratic messaging following the 2012 terrorist attack, even though the panel had specifically asked for those kinds of correspondence to be turned over[.]"); Karen DeYoung, *State Department says 15 e-mails missing from pages Hillary Clinton provided*, Wash. Post (June 25, 2015), <http://goo.gl/YYrY09> ("The State Department said Thursday that it could not locate 'all or part' of 15 e-mails provided last week to the House Select Committee on Benghazi by Sidney Blumenthal from his exchanges with then-Secretary of State Hillary Rodham Clinton. . . . It was the first indication that some 55,000 pages of e-mails from a private server Clinton used while in office were not a complete record of her work-related correspondence[.]"); Sarah Westwood, *Records show Clinton withheld emails about oil, terrorism*, Wash. Exam. (June 27, 2015), <http://goo.gl/sX3b3E> (describing content of withheld emails); Michael S. Schmidt, *Benghazi Emails Put Focus on Hillary Clinton's Encouragement of Adviser*, N.Y. Times (June 29, 2015), <http://goo.gl/HIZWnz> ("Angered that the State Department had not already provided it with some of those emails, the committee asked the department whether it had received them from Mrs. Clinton. The department determined that it had not received all or part of 15 emails.").

³⁷ Press Release, H. Select Comm. on Benghazi, *State Confirms Clinton Failed to Turn Over ALL Benghazi and Libya Documents* (June 25, 2015), <http://goo.gl/JKxgR>.

portions of [certain] emails she sent to State,”³⁸ which, if true, means that she deliberately tampered with documents subject to a Congressional subpoena.

Other news stories and document productions have added to the confusion and concern over who knew and when they knew that Mrs. Clinton was using a private system for all of her work-related emails. On June 2, 2015, the *Daily Caller* reported that the general counsel and certain staffers for the House Committee on Oversight and Government Reform met with two whistleblowers from the State Department on May 1, 2015.³⁹ According to one of the whistleblowers, an investigator with the State Department’s Office of Inspector General learned of Mrs. Clinton private server during an investigation into long-time Clinton aide Huma Abedin, who was on the State Department payroll even as she maintained outside employment with a private firm.⁴⁰ That investigation revealed the existence of the private server, which Mrs. Abedin used to conceal certain activity. The whistleblower also alleged that the investigation revealed that Mrs. Clinton was “criminally culpable” to some degree and that “only half the hard truth” regarding the use of the private server had been publically revealed.⁴¹ Nothing further came of this investigation, however, because then acting Inspector General Harold Geisel, a former ambassador under President Bill Clinton,⁴² closed the investigation.⁴³

D. The Email Records Created and Received by Former Secretary Clinton Were Not Automatically Archived in the State Department Recordkeeping System

Confirming the above revelations from the Select Committee on Benghazi, the release of additional documents and news reports demonstrate that Mrs. Clinton never properly archived the email records she created and received as Secretary of State. In response to the claim that her work-related emails would have been automatically captured and preserved in the State Department recordkeeping system because they were either sent to or received from government email accounts, *Politico* reported on March 11, 2015 that a recent State Department Inspector General report “raises questions about former Secretary of State Hillary Clinton’s claim that a large proportion of her emails were formally archived because they involved State employees using official email.”⁴⁴ Although the referenced Inspector General report notes that in 2009 the

³⁸ Sarah Westwood, *Records show Clinton withheld emails about oil, terrorism*, Wash. Exam. (June 27, 2015), <http://goo.gl/sX3b3E> (stating that “in July 2012, Clinton removed paragraphs from a Blumenthal memo that warned ‘simply completing the election ... and fulfilling a list of proper democratic milestones may not create a true democracy.’ Blumenthal also wrote—in sections that Clinton deleted before providing the document to State—that the government would likely be ‘founded on Sharia,’ or Islamic laws.”).

³⁹ Chuck Ross, *Exclusive: House Committee Knows Of Hillary Email Server Whistleblower*, *Daily Caller* (June 2, 2015), <http://goo.gl/Bp5U1s>.

⁴⁰ *Id.* This report casts doubt on the representation made by Steve Linick, the current State Department Inspector General, to Senator Grassley that his staff did not become aware of Mrs. Clinton’s use of a private email system until after the media reported the story. See *supra* note 16 and accompanying text.

⁴¹ Ross, *supra* note 39.

⁴² See U.S. Dep’t of State Archive, *Biography, Harold W. Geisel*, <http://goo.gl/mj6mVx>.

⁴³ Ross, *supra* note 39.

⁴⁴ Jack Shafer, *Report raises questions about Hillary’s email defense*, *Politico* (Mar. 11, 2015), <http://goo.gl/vQpuYu>.

State Department adopted a new electronic archiving system for cables and email records known as the State Messaging and Archive Retrieval Toolset (SMART), it also found that “Department of State employees have not received adequate training or guidance on their responsibilities for using those systems to preserve ‘record emails.’”⁴⁵ The Inspector General report also explained that State Department personnel often “do not create record emails because they do not want to make the email available in searches or fear that this availability would inhibit debate about pending decisions.”⁴⁶ In addition, Mrs. Clinton’s representative subsequently admitted that Mrs. Clinton was not aware of the actual extent to which her official emails were in fact captured by the State Department’s recordkeeping system⁴⁷ and, as noted above, neither was anyone else at the State Department.⁴⁸

In a follow-up piece published March 13, 2015, *Politico* reported that “Hillary Clinton’s claim that most work-related emails sent from her personal account were preserved in the electronic files of other State Department officials fell apart Friday” when a State Department spokesman “acknowledged that regular archiving of the work email in-boxes of senior officials besides the secretary did not begin until” February 2015.⁴⁹ This State Department admission that its personnel were not automatically archiving record emails during Mrs. Clinton’s tenure is consistent with a representation it made before the United States Court of Appeals for the District of Columbia in a pending case that touches on Mrs. Clinton’s work-related emails. There the State Department argued that the FOIA “creates no obligation for an agency to search for and produce records that it does not possess and control.”⁵⁰ In the context of the case, where the State Department previously had found no documents responsive to the plaintiff’s FOIA request, this constitutes an admission that the State Department did not have access to Mrs. Clinton’s official emails within its own system until after she delivered the 55,000 pages of printouts on December 5, 2014.⁵¹

⁴⁵ U.S. Dep’t of State, Office Inspector General, *Office of Inspections: Review of State Messaging and Archive Retrieval Toolset and Record Email 1* (March 2015) (“State IG Report on the SMART System”), <http://goo.gl/Sq6OuL> (noting that State Department personnel only “created 61,156 record emails out of more than a billion emails sent” in 2011 and only “41,749 record emails in 2013”).

⁴⁶ *Id.*

⁴⁷ See Letter from Cheryl Mills, Lawyer for Hillary Clinton, to Patrick F. Kennedy, Under Sec’y of State for Mgmt. (Dec. 5, 2014), *available at* <http://goo.gl/hm6WOM> (explaining that the State Department already had Mrs. Clinton email records “to the extent the Department retains records of government electronic email accounts”) (emphasis added).

⁴⁸ See State Dep’t Report to NARA, *supra* note 12, at 2 (admitting that when it made its request to Mrs. Clinton, “the degree to which [Mrs. Clinton’s email] records were captured in the Department’s systems was unknown”).

⁴⁹ Josh Gerstein, *Hillary email flap exposes gaps in State Department records*, *Politico* (Mar. 13, 2015), <http://goo.gl/ub54Mj>.

⁵⁰ Opp’n to Pl.’s Mot. for Disc. and Order To Show Cause Why Def. U.S. Dep’t of State and Former Sec. of State Clinton Should Not Be Held in Contempt, at 6, *Freedom Watch, Inc. v. U.S. Dep’t of State*, No. 15-5048 (D.C. Cir. Mar. 19, 2015), *available at* <http://goo.gl/yP8tQ9>.

⁵¹ See *id.* at 4 (explaining that it plans to review the collection of Mrs. Clinton’s emails to determine which may be publically released and, once that is completed, “will search those records to determine whether any of the records are responsive to plaintiff’s FOIA request”); see also State Dep’t Report to NARA, *supra* note 12, at 2 (“These emails [*i.e.* the 55,000 pages delivered to the State Department on December 5, 2014] are being reviewed under the

In two more recent cases, both involving the public advocacy group Judicial Watch, the State Department again implicitly admitted that it did not have previous access to Mrs. Clinton's email records in its own system. On May 1, 2015, the State Department agreed to request the reopening of a FOIA case brought by Judicial Watch because, although it had previously searched its records and produced responsive documents, that search had not encompassed the cache of email records supplied by Mrs. Clinton on December 5, 2014.⁵² The court agreed to reopen the case on May 8, 2015.⁵³ Similarly, on June 19, 2015, a federal court agreed to reopen another case because "of revelations that then-Secretary of State Clinton and members of her staff used personal email accounts to conduct State Department business, and that emails from those accounts may not have been covered by State Department searches for documents responsive to the FOIA request at issue in this case."⁵⁴ The court noted further that "[t]he State Department agrees that the case should be reopened under these circumstances."⁵⁵

Previous work by the State Department Office of Inspector General (DOS-OIG) further reveals that the failure to archive record emails was a systemic problem across the agency. Thus:

- In 2014, DOS-OIG concluded that the Bureau of Conflict and Stabilization Operations "does not have a uniform process for the storage and organization of files. Files and records are stored in several locations, including the bureau's network shared drive, SharePoint document libraries, personal emails, and hard drives."⁵⁶ The Bureau also permitted "[c]ontracting officer's representatives [to] keep emails and other materials on their personal computers instead of using shared drives or paper files."⁵⁷
- In 2013, DOS-OIG concluded that in the Bureau of East Asian and Pacific Affairs, the "staff members store official records variously on personal drives, email folders, shared drives, and SharePoint. Bureau shared drive folders are not organized in accordance with Department guidance."⁵⁸

Freedom of Information Act and the releasable documents will be made publically available online by the Department.").

⁵² See Joint Mot. To Reopen Case under Fed. R. Civ. P. 60(B)(2), *Judicial Watch v. U.S. Dep't of State*, No. 1:12-cv-2034, at 1-2 (May 1, 2015), available at <http://goo.gl/5kRJQn> (noting that it had previously searched for and produced responsive documents but that, "[b]ased on the receipt of Former Secretary Clinton's emails, the Department agreed to jointly file this motion to reopen the case" and that it "will search the set [of Clinton emails] for any records responsive to Plaintiff's FOIA request").

⁵³ Order, *Judicial Watch, Inc. v. U.S. Dep't of State*, No. 1:12-cv-2034 (May 8, 2015), available at <http://goo.gl/L5QsID>.

⁵⁴ Minute Order, *Judicial Watch, Inc. v. U.S. Dep't of State*, No. 1:13-cv-01363 (June 19, 2015), available at <http://goo.gl/mLF5Xj>.

⁵⁵ *Id.*

⁵⁶ U.S. Dep't of State, Office Inspector Gen., *Inspection of the Bureau of Conflict and Stabilization Operations*, at 20 (Mar. 2014), available at <http://goo.gl/pgWsYi>.

⁵⁷ *Id.* at 25.

⁵⁸ U.S. Dep't of State, Office Inspector Gen., *Inspection of the Bureau of East Asian and Pacific Affairs*, at 26 (Sept. 2013), available at <http://goo.gl/JWrMNp>.

- In 2012, DOS-OIG concluded that in the Bureau of Administration, Global Information Services, Office of Information Programs and Services, “SMART captured [only] 61,156 of an estimated 15 million record emails in the system that should [have been] captured. The OIG team noted that confusion among Department employees and, in some cases, inadequate performance have resulted in an underuse of SMART's record email function.”⁵⁹

Records recently produced by NARA pursuant to a number of FOIA requests relating to Mrs. Clinton’s use of a private email system show that NARA also was aware of these same problems across the State Department.⁶⁰

It is therefore evident that almost none of Mrs. Clinton’s work-related emails were ever preserved in the State Department’s official recordkeeping system during her tenure as Secretary of State or for the 22 months thereafter.⁶¹

III. The Management and Preservation of Records During and After Hillary Clinton’s Tenure as Secretary of State

A. The Federal Records Act and Its Implementing Regulations Govern the Creation, Preservation and Disposal of Federal Records

The Federal Records Act establishes the framework for records management⁶² throughout the Federal government and requires all federal agencies, including the Department of State, to establish a system to capture and preserve records created in the conduct of official government business.⁶³

⁵⁹ U.S. Dep’t of State, Office Inspector Gen., *Inspection of the Bureau of Administration, Global Information Services, Office of Information Programs and Services*, at 13 (Sept. 20 12), available at <http://goo.gl/5BGRyT>.

⁶⁰ See, e.g., Email from David Langbart, NARA, to Michael Kurtz, NARA (Nov. 2, 2009), available at <http://goo.gl/UaBMVm> (discussing major problems with SMART’s technical handling of email attachments); Email from David Langbart, NARA, to Michael Kurtz, NARA (Jan. 22, 2010) available at <http://goo.gl/4Uwbsp> (discussing problems with State employees not properly using SMART’s “record email” retention function); Email from Paul M. Wester, Jr., Chief Records Officer, NARA, to David Ferriero, Archivist of the U.S., NARA, *et al.* (Mar. 12, 2015), available at <http://goo.gl/LHts6V> (discussing State OIG’s audit of the SMART system, which identified, among other matters, failure of State Department personnel to properly save email records).

⁶¹ See also Press Release, H. Select Comm. on Benghazi, *Select Committee on Benghazi Releases Clinton Subpoena* (July 8, 2015), <https://goo.gl/WFZt9x> (“The committee immediately subpoenaed Clinton personally after learning the full extent of her unusual email arrangement with herself, and would have done so earlier if the State Department or Clinton had been forthcoming that *State did not maintain custody of her records and only Secretary Clinton herself had her records when Congress first requested them.*”) (emphasis added).

⁶² Under 44 U.S.C. § 2901(2), “records management” is defined as “the planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records maintenance and use, and records disposition in order to achieve adequate and proper documentation of the policies and transactions of the Federal Government and effective and economical management of agency operations.”

⁶³ See 44 U.S.C. § 2902 (“It is the purpose of this chapter, and chapters 21, 31, and 33 of this title, to require the establishment of standards and procedures to assure efficient and effective records management. Such records management standards and procedures shall seek to implement the following goals: (1) Accurate and complete documentation of the policies and transactions of the Federal Government. . . .”).

The law defines a “record” as any material, “regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.”⁶⁴

The Federal Records Act further requires all heads of agencies (such as the Secretary of State) to “make and preserve” such records;⁶⁵ to “establish and maintain an active, continuing program for the economical and efficient management of the records of the agency”;⁶⁶ and to “establish safeguards against the removal or loss of records [that are] determine[d] to be necessary and required by regulations of the Archivist.”⁶⁷ The law also governs the manner and means by which federal records may be destroyed or otherwise disposed.⁶⁸ Significantly, federal records may not be alienated or destroyed except as authorized by the Federal Records Act⁶⁹ and the regulations specifically prohibit the removal of records from the legal custody of an agency.⁷⁰

NARA is the primary agency for records management oversight, and the Archivist of the United States is responsible for assisting federal agencies in maintaining satisfactory documentation of agency policies and transactions, including by promulgating “standards, procedures, and guidelines with respect to records management.”⁷¹ As part of its mandate,

⁶⁴ 44 U.S.C. § 3301; *see also* 36 C.F.R. § 1220.18 (adopting the definition of 44 U.S.C. § 3301 for the definition of “records” or “federal records” for all purposes).

⁶⁵ 44 U.S.C. § 3101. This provision also requires the preservation of records “designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency’s activities.”

⁶⁶ 44 U.S.C. § 3102. All such programs must include “effective controls over the creation and over the maintenance and use of records in the conduct of current business.” *Id.*

⁶⁷ 44 U.S.C. § 3105.

⁶⁸ *See, e.g.*, 44 U.S.C. § 3302 (“The Archivist shall promulgate regulations, not inconsistent with this chapter, establishing—(1) procedures for the compiling and submitting to him of lists and schedules of records proposed for disposal, (2) procedures for the disposal of records authorized for disposal, and (3) standards for the reproduction of records by photographic or microphotographic processes with a view to the disposal of the original records.”); *id.* § 3303 (requiring agencies to seek approval for disposal of records through the submission of lists and proposed disposal schedules); *id.* § 2909 (“The Archivist may empower a Federal agency to retain records for a longer period than that specified in disposal schedules, and may withdraw disposal authorizations covering records listed in disposal schedules.”).

⁶⁹ 44 U.S.C. § 3314 (“The procedures prescribed by this chapter are exclusive, and records of the United States Government may not be alienated or destroyed except under this chapter.”); *see also* 36 C.F.R. § 1230.3(b) (defining the meaning of “Alteration,” “Deface,” “Removal” and “Unlawful or accidental destruction (also called unauthorized destruction.)”); *id.* § 1230.10 (requiring the heads of agencies to “[p]revent the unlawful or accidental removal, defacing, alteration, or destruction of records.”).

⁷⁰ 36 C.F.R. §§ 1222.24(a)(6), 1230.10(a).

⁷¹ 44 U.S.C. § 2904(c)(1); *see also id.* § 2905(a) (“The Archivist shall establish standards for the selective retention of records of continuing value, and assist Federal agencies in applying the standards to records in their custody.”); *id.* § 2104(a) (“The Archivist shall prescribe such regulations as the Archivist deems necessary to effectuate the functions of the Archivist, and the head of each executive agency shall cause to be issued such orders and directives as such agency head deems necessary to carry out such regulations.”).

NARA requires all federal agencies to create and maintain a “comprehensive records management program” that ensures, among other things, that:

- (a) Records documenting agency business are created or captured;
- (b) Records are organized and maintained to facilitate their use and ensure integrity throughout their authorized retention periods;
- (c) Records are available when needed, where needed, and in a usable format to conduct agency business;
- (d) Legal and regulatory requirements, relevant standards, and agency policies are followed;
- (e) Records, regardless of format, are protected in a safe and secure environment and removal or destruction is carried out only as authorized in records schedules.⁷²

The Federal Records Act mandates that when records are unlawfully or accidentally removed, defaced, altered, or destroyed, the agency must promptly notify NARA and produce a comprehensive report.⁷³ The agency head also must collaborate with the National Archivist to “initiate action through the Attorney General for the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully removed from that agency.”⁷⁴ In addition, if the agency head does not initiate such action, “the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.”⁷⁵

It was under this authority that NARA acted in sending its March 3, 2015 request to the State Department.⁷⁶ There is no evidence, however, that NARA or the State Department have sought action through the U.S. Attorney General to recover the emails stored on and allegedly deleted from Mrs. Clinton’s server.

B. Although Not Categorically Prohibited, the Use of Private Emails for Official Government Business Is Regulated To Ensure Proper Management of Federal Records

A federal record is defined by its content, not the medium in which that content is communicated.⁷⁷ As such, emails and other electronic forms of communication are federal

⁷² 36 C.F.R. § 1220.32.

⁷³ 44 U.S.C. § 3106(a); 36 C.F.R. §§ 1230.10(d), 1230.14.

⁷⁴ 44 U.S.C. § 3106(a); *see also* 44 U.S.C. § 2905(a) (same); 36 C.F.R. § 1230.18 (“NARA will assist the head of the agency in the recovery of any unlawfully removed records, including contacting the Attorney General, if appropriate.”).

⁷⁵ 44 U.S.C. § 3106(b); *see also* 44 U.S.C. § 2905(a) (same).

⁷⁶ *See also* 36 C.F.R. § 1230.16(b) (“If records have allegedly been damaged, removed, or destroyed, NARA will notify the agency in writing promptly with a request for a response within 30 days.”).

⁷⁷ *See* 36 C.F.R. § 1220.18 (“*Documentary materials* is a collective term that refers to recorded information, regardless of the medium or the method or circumstances of recording.”); *id.* § 1222.10(b)(2) (“*Regardless of physical form or characteristics* means that the medium may be paper, film, disk, or other physical type or form; and

records whenever the information they contain meets the statutory and regulatory definition of a record.⁷⁸ Almost all of Mrs. Clinton's work-related emails constitute federal records, a fact that she acknowledged when she delivered the printouts to the State Department on December 5, 2014.⁷⁹ In addition, as Under Secretary of State for Management Patrick F. Kennedy explained in the October 28, 2014 letter requesting copies of all federal records in Mrs. Clinton's possession, the State Department considers almost all documents in whatever form that touch upon the work of a Secretary of State to be federal records that must be permanently preserved.⁸⁰

Given the nature of electronic information and the special requirements needed to ensure its preservation over time, NARA has promulgated a series of regulations that uniquely apply to electronic records, including emails. In particular, it requires that agencies set up a reliable recordkeeping system to capture and preserve electronic records⁸¹ and that this system be built to

that the method of recording may be manual, mechanical, photographic, electronic, or any other combination of these or other technologies.”); *see also* State IG Report on the SMART System, *supra* note 45, at 2 (“Whether the written information creates a record is a matter of content, not form.”); *infra* note 89 (outlining State Department regulations to the same effect). Even Mrs. Clinton admitted to the same. *See Statement from the Office of Former Secretary Clinton*, *supra* note 4, at 2 (agreeing that “[u]nder the Federal Records Act, records are defined as recorded information, regardless of its form or characteristics, ‘made or received by a Federal agency under Federal law or in connection with the transaction of public business.’ [44 U.S.C. § 3301]”).

⁷⁸ *See* 36 C.F.R. § 1220.18 (“*Electronic record* means any information that is recorded in a form that only a computer can process and that satisfies the definition of a Federal record under the Federal Records Act. The term includes both record content and associated metadata that the agency determines is required to meet agency business needs.”).

⁷⁹ *See* Letter from Cheryl Mills, Lawyer for Hillary Clinton, to Patrick F. Kennedy, Under Sec’y of State for Mgmt. (Dec. 5, 2014), *available at* <http://goo.gl/hm6WOM> (forwarding “those electronic mails we believe respond to your request”); Letter from Patrick F. Kennedy, Under Sec’y of State for Mgmt., to Cheryl Mills, Lawyer for Hillary Clinton (Nov. 12, 2014), *available at* <http://goo.gl/C4EV9q> (requesting that should Mrs. Clinton or her representative “be aware or become aware in the future of a federal record, such as an email sent or received on a personal email account while serving as Secretary of State, that a copy of this record be made available to the Department. . . . We ask that a record be provided to the Department if there is reason to believe it may not otherwise be preserved in the Department’s recordkeeping system.”).

⁸⁰ Letter from Patrick F. Kennedy, Under Sec’y of State for Mgmt., to Cheryl Mills, Lawyer for Hillary Clinton (Nov. 12, 2014), *available at* <http://goo.gl/C4EV9q>. Under the NARA-approved records disposition schedule for Secretary of State records, all correspondence, briefing books, notes, agendas, memos, drafts, minutes, reports, talking points, and other such documentation relating to her diplomatic activities, appearances, briefings, speeches, travel, telephone calls, scheduling, staff meetings, and other matters relating to the responsibilities of the Secretary of State must be preserved permanently. U.S. Dep’t of State Records Schedule, Chapter 01: Secretary of State, *available at* <http://goo.gl/1Nto0L>. The only records that may be deleted or destroyed after a time are certain declined invitation and event files. *Id.*

⁸¹ *See* 36 C.F.R. § 1236.12(b), (d) (requiring electronic records to “be retrievable and usable for as long as needed to conduct agency business (i.e., for their NARA-approved retention period). Where the records will need to be retained beyond the planned life of the system, agencies must plan and budget for the migration of records and their associated metadata to new storage media or formats in order to avoid loss due to media decay or technology obsolescence” and implementation of “a standard interchange format (e.g., ASCII or XML) when needed to permit the exchange of electronic documents between offices using different software or operating systems”); *id.* § 1236.20(b)(6) (requiring a preservation method that ensures “all records in the system are retrievable and usable for as long as needed to conduct agency business and to meet NARA-approved dispositions. Agencies must develop procedures to enable the migration of records and their associated metadata to new storage media or formats in order to avoid loss due to media decay or technology obsolescence.”).

ensure reliability, authenticity, integrity, usability, content, context and structure. These elements are defined as follows:

- a) *Reliability*: Controls to ensure a full and accurate representation of the transactions, activities or facts to which they attest and can be depended upon in the course of subsequent transactions or activities.
- (b) *Authenticity*: Controls to protect against unauthorized addition, deletion, alteration, use, and concealment.
- (c) *Integrity*: Controls, such as audit trails, to ensure records are complete and unaltered.
- (d) *Usability*: Mechanisms to ensure records can be located, retrieved, presented, and interpreted.
- (e) *Content*: Mechanisms to preserve the information contained within the record itself that was produced by the creator of the record;
- (f) *Context*: Mechanisms to implement cross-references to related records that show the organizational, functional, and operational circumstances about the record, which will vary depending upon the business, legal, and regulatory requirements of the business activity; and
- (g) *Structure*: controls to ensure the maintenance of the physical and logical format of the records and the relationships between the data elements.⁸²

With respect to emails in particular, NARA prohibits the use of “an electronic mail system to store the recordkeeping copy of electronic mail messages identified as Federal records unless that system has all of the features specified by [the applicable regulations]”⁸³ and requires that agencies “instruct staff on how to copy Federal records from the electronic mail system to a recordkeeping system.”⁸⁴ Where an agency allows its personnel to send and receive official emails on a system not operated by the agency, that agency “must ensure that Federal records sent or received on such systems are preserved in the appropriate agency recordkeeping system.”⁸⁵

Under the above regulations, which were in place during Mrs. Clinton’s tenure, an individual government official such as Mrs. Clinton is not authorized to set up her own recordkeeping system or to maintain email records on a personal server or email account without ensuring that such electronic records concurrently are archived in the official agency

⁸² 36 C.F.R. § 1236.10.

⁸³ 36 C.F.R. § 1236.22(d)(1); *see also id.* § 1236.20(c) (“*Backup systems*. System and file backup processes and media do not provide the appropriate recordkeeping functionalities and must not be used as the agency electronic recordkeeping system.”).

⁸⁴ 36 C.F.R. § 1236.22(d)(2).

⁸⁵ 36 C.F.R. § 1236.22(b).

recordkeeping system.⁸⁶ A State Department official's failing to transfer emails to the State Department's official recordkeeping system would violate these regulations.

C. The State Department Implements Its Federal Records Obligations through Regulations Set Forth in Its Foreign Affairs Manual, Which Applied to Mrs. Clinton

To comply with its records management requirements under the Federal Records Act and its implementing regulations, the State Department has established a “an active, continuing program for the effective, economical, and efficient life cycle management of records and information within the Department of State,”⁸⁷ which it has set forth in its Foreign Affairs Manual.⁸⁸ Among other matters, the Foreign Affairs Manual, in provisions that were put in place before Mrs. Clinton's tenure as Secretary of State, explains that email and other electronic media constitute federal records if the information therein contained meets the statutory definition of a record,⁸⁹ that such electronic records must be preserved in their electronic form through backing up, copying, and reformatting to ensure their usability throughout their life-cycle,⁹⁰ and that “[e]lectronic records may be destroyed only in accordance with a records disposition authority approved by the Archivist of the United States.”⁹¹

Mrs. Clinton violated this last regulation when she deleted the electronic versions of the email records she delivered to the State Department on December 5, 2015. Contrary to her allegation that the regulations only required her to print hard copies of her emails, the State Department has an approved disposition schedule that applies specifically to the Secretary of State (and no one else), and that schedule does not permit wholesale destruction of original electronic records.⁹² Under Secretary of State Patrick F. Kennedy also made this requirement

⁸⁶ See also 36 C.F.R. §§ 1222.20(b) & 1222.34(g) (requiring that personal files be maintained separately from records); *id.* § 1230.3(b) (defining “removal” as any act “allowing a record to leave the custody of a Federal agency without the permission of the Archivist of the United States.”).

⁸⁷ 5 Foreign Affairs Manual (“FAM”) 411(1).

⁸⁸ See 5 FAM 411-443; 751-756; see also 1 FAM 011.1(a) (“The functional statements or organizational responsibilities and authorities assigned to each major component of the Department are described in this volume of the Foreign Affairs Manual. They comprise the basic organizational directive of the Department of State.”).

⁸⁹ See, e.g., 5 FAM 415.1; 443.1(a), 443.2; 754(e) (defining a record and when emails meet that definition); *id.* 443.1(c) (“All employees must be aware that some of the variety of the messages being exchanged on E-mail are important to the Department and must be preserved; such messages are considered Federal records under the law.”).

⁹⁰ 5 FAM 441(h)(2). Mrs. Clinton has admitted her obligation to preserve her emails. *Statement from the Office of Former Secretary Clinton*, *supra* note 4, at 2 (stating and agreeing that “[i]n 2009, the National Archives and Record Administration issued guidance reaffirming a prior regulation (36 CFR § 1234.24) on the need to preserve work emails”).

⁹¹ 5 FAM 441(i)(1). The Foreign Affairs Manual further states that the authority to dispose of electronic records must be “obtained through the Records Management Branch (OIS/RA/RD). This process is exclusive, and records of the United State Government, including electronic records, may not be alienated or destroyed except through this process.” *Id.* 441(i)(1)-(2).

⁹² See *id.*; U.S. Dep't of State Records Schedule, Chapter 01: Secretary of State, available at <http://goo.gl/1Nto0L> (requiring permanent retention of all Secretary of State records except the electronic versions of certain declined invitation and event files); U.S. Dep't of State, Records Disposition Schedules, <http://goo.gl/DdOyEu> (“Records Disposition Schedules documents the major records series (including electronic records) related to the activities of each office, identifies temporary and permanent records, and provides mandatory instructions for the retention and

clear to Mrs. Clinton in a March 23, 2015 letter to her lawyer, Mr. Kendall, in which he responded to Mrs. Clinton's request for permission to retain copies of the email records she had delivered to the State Department.⁹³ In that letter, Mr. Kennedy explained that Mrs. Clinton could retain the records, but only "provided that . . . steps are taken to safeguard against loss or unauthorized access . . . and there is agreement to return the documents to the Department upon request. Additionally, following NARA's counsel, we ask that, to the extent the documents are stored electronically, they continue to be preserved in their electronic form."⁹⁴

Mrs. Clinton violated other provisions of the State Department's regulations as well. In discussing the State Department's requirements regarding email records, Under Secretary Kennedy explained in a recent Department Notice that, consistent with long-standing Department regulations, all Department employees "at every level" have a legal obligation to capture, preserve, manage and protect their federal records, including email, and that these records must be "accessible in official government systems."⁹⁵ Similar information was repeated in an August 28, 2014 memorandum from Under Secretary Kennedy that was appended to the April 2, 2015 report to NARA. As that memorandum stated, the Secretary of State is considered a "Senior Official," all such Senior Officials are responsible "for the proper management and preservation of their records," "[t]hese responsibilities are applicable to all records made or received in the conduct of agency business regardless of physical format or media," and "[a]s a general matter, to ensure a complete record of their activities, senior officials should not use their private e-mail accounts (*e.g.* Gmail) for official business."⁹⁶

On this last point, Mrs. Clinton must have been aware during her tenure that State Department policy forbade the regular or exclusive use of personal email accounts for official business, as a June 28, 2011 cable sent out under her name to all diplomatic and consular posts emphasized, among other things, that personnel should "[a]void conducting official Department

disposition (retirement or destruction) of each records series based on their temporary or permanent status. All Records Disposition Schedules are approved by the Archivist of the United States, National Archives and Records Administration (NARA)"); *see also* 36 C.F.R. § 1222.12(d) ("The determination as to whether a particular document is a record does not depend upon whether it contains unique information. Multiple copies of the same document and documents containing duplicative information may each have record status depending on how they are used in conducting agency business.").

⁹³ Letter from Patrick F. Kennedy, Under Sec'y of State for Mgmt., to David E. Kelly, Lawyer for Mrs. Clinton (Mar. 23, 2015), attached to Letter from David E. Kendall, Lawyer for Hillary Clinton, to Trey Gowdy, Chairman of the H. Select Comm. on Benghazi (Mar. 27, 2015), *available at* <http://goo.gl/jXpS5x>.

⁹⁴ *Id.* at 1.

⁹⁵ U.S. Dep't of State, *Department Notice, A Message from Under Secretary for Management Patrick F. Kennedy regarding State Department Records Responsibilities and Policy*, at 1 (Oct. 17, 2014) ("State Dep't Notice"), <http://goo.gl/sDixrN>. Secretary of State John Kerry repeated this same language in an October 30, 2014 cable to all diplomatic and consular posts. U.S. Dep't of State, Diplomatic Cable MRN 14 STATE 128030 from Sec'y of State Kerry to All Diplomatic & Consular Posts (Oct. 30, 2014), *available at* <http://goo.gl/VNFC3I>.

⁹⁶ Memorandum from Patrick F. Kennedy, Under Sec'y of State for Mgmt., re: Senior Officials' Records Management Responsibilities, at 1, 3 (Aug. 28, 2014), *available at* <http://goo.gl/bT6qLz>; *see also* Michael Hirsh, *Clinton private email violated 'clear-cut' State Dept. rules*, Politico, Mar. 5, 2015, <http://goo.gl/w19WHc> (discussing State Department guidelines for sensitive but unclassified information that prevented the routine use of private email accounts for official Department business).

business from your personal e-mail accounts.”⁹⁷ In addition, at the midpoint of her tenure, the State Department Inspector General publically reprimanded an Ambassador for “disregard[ing] Department regulations on the use of commercial email for official government business.”⁹⁸

As noted above, the SMART system, implemented in 2009, is the current official recordkeeping system for electronic cables and emails at the State Department.⁹⁹ This system was jointly developed with NARA to ensure that it met all requirements for agency recordkeeping and, according to the State Department, it “replace[d] an outdated cable communication system and contains an email management component for capturing record email.”¹⁰⁰ During Mrs. Clinton’s tenure, however, the SMART system did not automatically capture record emails. To comply with their recordkeeping obligations, each State Department employee, including Mrs. Clinton, was required to transfer or archive their record emails to the SMART system. As the applicable provision in the Foreign Affairs Manual explains: “Email originators and recipients are required to determine if an email is appropriate for preservation and, to the extent necessary, properly archive the email outside their email mailboxes. Placing an email in personal folders is NOT an adequate substitute for preserving the item as a record.”¹⁰¹

Thus, contrary to her assertion,¹⁰² not only was Mrs. Clinton’s exclusive use of a private email account and server unauthorized and contrary to established regulations, she could not have met (and in fact did not meet) her recordkeeping obligations by sending her work-related emails to the email accounts of other government personnel.

Moreover, by her own admission,¹⁰³ at least 10 percent of Mrs. Clinton’s email messages were sent to or received from email addresses outside of the State Department and thus these would not have been properly archived even if the State Department had implemented a system to automatically capture agency emails during her tenure.

⁹⁷ U.S. Dep’t of State, Diplomatic Cable MRN 11 STATE 65111 from Sec’y of State Clinton to All Diplomatic & Consular Posts (June 28, 2011), *available at* <http://goo.gl/aYwi7c>.

⁹⁸ U.S. Dep’t of State Office of Inspector General, Office of Inspections: Inspection of Embassy Nairobi, Kenya, at 7 (ISP-I-12-38A Aug. 2012), <http://goo.gl/TmY9Vb>.

⁹⁹ *See supra* note 45 and accompanying text; 1 FAM 273; U.S. Dep’t of State, Agency Response to Presidential Memorandum *Managing Government Records*, at 2 (Mar. 27, 2012), *available at* <http://goo.gl/jXCv1u>.

¹⁰⁰ U.S. Dep’t of State, Agency Response to Presidential Memorandum *Managing Government Records*, at 2 (Mar. 27, 2012), *available at* <http://goo.gl/jXCv1u>.

¹⁰¹ 5 FAM 754(b) (emphasis in original); *see also* State IG Report on the SMART System, *supra* note 45, at 2 (“Every employee in the Department has the responsibility of preserving emails that should be retained as official records.”); State Dep’t Notice, *supra* note 95, at 2 (“In addition to the responsibility for preserving the documentation of official activities insofar as it is captured in email, employees should not use private e-mail account (e.g., Gmail, AOL, Yahoo, etc.) for official business. However, in those very limited circumstances when it becomes necessary to do so, the email messages covering official business sent from or received in a personal account must be captured and preserved in one of the Department’s official electronic records systems (i.e., SMART or POEMS).”).

¹⁰² *See Statement from the Office of Former Secretary Clinton*, *supra* note 4, at 2 (asserting that “[i]n meeting the record-keeping obligations, it was Secretary Clinton’s practice to email government officials on their ‘.gov’ accounts, so her work emails were immediately captured and preserved.”).

¹⁰³ *Id.*

State Department regulations also make clear that, consistent with the Federal Records Act, the records created and received by Department officials are the property of the State Department, not the personal property of those who create or receive them. As stated in the August 28, 2014 memorandum mentioned above, “[a]ll records generated by Senior Officials belong to the Department of State.”¹⁰⁴ In addition, this memorandum makes clear that it has been State Department policy since 2009 (*i.e.*, from the beginning of Mrs. Clinton’s tenure) that the Department must “capture *electronically* the e-mail accounts of the senior officials . . . as they depart their positions.”¹⁰⁵ State Department regulations further require that all departing personnel undergo a security debriefing and sign a separation statement (Form OF-109), which “is mandatory to ensure that separating personnel are aware of the requirement to return all classified material and of a continuing responsibility to safeguard their knowledge of any classified information.”¹⁰⁶ A State Department spokesman, however, has declared that Mrs. Clinton’s failed to sign this required exit paperwork¹⁰⁷ and it is clear from the above recitation of the facts that she did not turn over all of her records upon leaving office.

As the above summary makes clear, the State Department had an established policy during Mrs. Clinton’s tenure, which she knew or should have known, designed to 1) limit the use of personal emails for official government business, 2) capture within its own official system any email records that, for whatever reason, were sent to or from a personal email account; 3) properly archive all record emails and other electronic records in its official recordkeeping system (*i.e.*, the SMART system); and 4) electronically secure the email accounts and electronic records of departing personnel, especially Senior Officials such as the Secretary of State.

A State Department official knowingly disregards and violates applicable NARA and State Department regulations by 1) exclusively using a personal email account for official government business; 2) storing, without authorization, record emails created and received on the individual’s own server rather than in the State Department’s official recordkeeping system; 3) failing to turn over email records in their electronic form, which were and are the property of the State Department, upon leaving office; and 4) deleting the electronic versions of records without proper authorization.

¹⁰⁴ Memorandum from Patrick F. Kennedy, *supra* note 96, at 1; *see also* State Dep’t Notice, *supra* note 95, at 2 (“All records generated by Senior Officials belong to the Department of State.”).

¹⁰⁵ Memorandum from Patrick F. Kennedy, *supra* note 96, at 3 (emphasis added); *see also* 5 FAH-4 H-217,1(c) (“Departing officials must ensure that all record material that they possess is incorporated in the Department’s official files and that all file searches for which they have been tasked have been completed, such as those required to respond to FOIA, Congressional, or litigation-related document requests. Fines, imprisonment, or both may be imposed for the willful and unlawful removal or destruction of records as stated in the U.S. Criminal Code (e.g., 18 U.S.C., section 2071).”).

¹⁰⁶ 12 FAM 564.4(a).

¹⁰⁷ *See* Josh Gerstein, State: No record Hillary Clinton signed exit form, Politico (Mar. 17, 2013), <http://goo.gl/KL9XhR>.

D. Exclusive Control over and Destruction of Official Email Records Violates 18 U.S.C. § 2071(b)

Federal law makes it a crime to steal government records.¹⁰⁸ Larceny, however, is not the only act proscribed by the federal criminal code. Under 18 U.S.C § 2071, it also is a crime to conceal, remove or destroy federal records and other government documents. In relevant part, 18 U.S.C § 2071(b) provides:

Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined under this title or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States.¹⁰⁹

This statute is not aimed at prohibiting and punishing larceny. Rather, its purpose “is to prevent any conduct which deprives the Government of the use of its documents, be it by concealment, destruction, or removal.”¹¹⁰ After analyzing the statute’s predecessor provisions and the manner in which it had been prosecuted, the District Court for the Southern District of New York found that “the essence of the offense charged in such prosecutions has not been larceny, for which Section 641 was available, but the rendering of information unavailable to the Government.”¹¹¹ The court therefore concluded that “Section 2071 does not embrace any and all instances of removal of Government records; it proscribes that removal which deprives the Government of the use of the records.”¹¹²

The case law also shows that the term “record” in this context refers to any document or record belonging to a federal agency,¹¹³ while the term “custody” embraces all individuals who gain or have access to the record(s) in question in the course of their government employment.¹¹⁴

¹⁰⁸ 18 U.S.C. § 641.

¹⁰⁹ 18 U.S.C § 2071(b). The first part of this statute defines “such” record, proceeding, etc. as that which is “filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States.” *Id.* § 2071(a) (emphasis added).

¹¹⁰ *United States v. Rosner*, 352 F. Supp. 915, 919 (S.D.N.Y. 1972).

¹¹¹ *Rosner*, 352 F. Supp. at 921.

¹¹² *Id.*

¹¹³ *United States v. Poindexter*, 725 F. Supp. 13, 19 (D.D.C. 1989) (the term “public office” does not simply refer to an office “to which the public customarily comes, as, for example, a Post Office window or a welfare office.... There is not the slightest reason to suppose that, when Congress sought to protect governmental documents from destruction, concealment, or mutilation, it meant to single out those offices that are customarily visited by members of the public, while leaving unprotected those offices not accessible to the public where normally the more important and vital government records are kept.”); *United States v. Lang*, 364 F.3d 1210, 1222 (10th Cir. 2004), *vacated on other grounds* 543 U.S. 1108 (2005), (finding that “a copy of a government record itself functions as a record for purposes of § 2071”).

¹¹⁴ *Poindexter*, 725 F. Supp. at 20 (“There is no warrant for supposing, and no legislative history suggesting, that Congress meant to subject to punishment under section 2071 only those who are the custodians of records in the technical sense, such as clerks or librarians, but to permit others working in a government agency who have access to sensitive documents to destroy or alter them with impunity. The obvious purpose of the statute is to prohibit the impairment of sensitive government documents by those officials who have access to and control over them, and no court has ever held to the contrary.”).

Mrs. Clinton’s relevant emails constitute documents and records belonging to the State Department.¹¹⁵ She both created and received such records during the course of her employment at the State Department, and thus had “custody” of them within the meaning of the statute. Rejecting the use of a State Department email account and instead setting up an unauthorized personal account housed on a private server may be determined to be a deliberate creation and storage of federal records in such a way as to retain sole custody of them and prevent their use by the Government. Mrs. Clinton failed to turn over the only copies of these email records in accordance with standard State Department policy and instead retained exclusive custody of them for 22 months. During that time, the State Department did not have access to the records, either for its own purposes or to meet its requirements to produce documents in response to Congressional inquiries and FOIA requests, a fact confirmed by the Select Committee on Benghazi¹¹⁶ and the State Department when officials admitted in court that the agency did not have the email records (whether in electronic or paper form) in its system until after Mrs. Clinton returned the 55,000 pages of printouts on December 5, 2014.¹¹⁷ Mrs. Clinton wiped her server clean of the electronic versions of these emails without authorization.

Moreover, because the State Department by its own admission did not have any process in place to capture and archive email messages automatically until February 2015¹¹⁸ and the applicable State Department regulations and recordkeeping systems required its personnel to make a deliberate decision as to what email records to archive,¹¹⁹ a reviewing jury might determine that Mrs. Clinton could not have had any expectation that her email records would have been properly preserved simply because she sent email correspondence to a “state.gov” email account. And, by her own admission, at least 10 percent of her email messages were sent to or received from email addresses outside of the State Department and thus could not have been saved even if the State Department had implemented such a system during her tenure.

E. Use of a Private Server and Destruction of Official Email Records Implicate other Provisions of Federal Criminal Law

Mrs. Clinton’s actions in setting up a private server to send, receive and store official email records without authorization from NARA and without being tied into the State Department’s official recordkeeping system, and her subsequent decision to delete all email records from her server may raise other criminal law provisions.

1. Mishandling Classified Information

18 U.S.C § 793(f) makes it a crime for anyone “having lawful possession or control” of any document or other item relating to the national defense to permit its removal “from its proper

¹¹⁵ See Memorandum from Patrick F. Kennedy, *supra* note 96, at 2 (“All records generated by Senior Officials belong to the Department of State.”); State Dep’t Notice, *supra* note 95, at 2 (“All records generated by Senior Officials belong to the Department of State.”).

¹¹⁶ See *supra* § II.C and note 61.

¹¹⁷ See *supra* notes 50-55 and accompanying text.

¹¹⁸ See *supra* note 49 and accompanying text.

¹¹⁹ See *supra* notes 98-100 and accompanying text.

place of custody.” A failure to report that the item has been removed from its proper place of custody also constitutes a violation of this provision. The penalty for violation of this provision is a fine or imprisonment up to ten years.

Similarly, under 18 U.S.C. § 1924(a), “[w]hoever, being an officer. . . 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.” Section 1924(c) defines “classified information” as “information originated, owned, or possessed by the United States Government concerning the national defense or foreign relations of the United States that has been determined pursuant to law or Executive order to require protection against unauthorized disclosure in the interests of national security.”

On July 24, 2015, news outlets reported that the Inspectors General of the State Department and of the Intelligence Community had raised serious concerns about the mishandling of classified information in conjunction with Mrs. Clinton’s use of a private email account and server for her official government work.¹²⁰ This was followed by an official statement from the two inspectors general explaining that they had made a security referral “for counterintelligence purposes” because, out of a sample of 40 emails taken from the larger cache of emails that Mrs. Clinton had delivered to the State Department, investigators had discovered four emails containing classified information.¹²¹ The official statement noted that the emails in question had contained this classified information when they were generated, that this information remains classified to the present time, and that “[t]his classified information should never have been transmitted via an unclassified personal system.”¹²² On August 11, 2015, the Intelligence Community Inspector General reported to Congress that two of these four emails were classified at the Top Secret level.¹²³ Another report from the Intelligence Community Inspector General indicated that all of the emails that Mrs. Clinton delivered to the State Department had also been copied to a thumb drive in the custody of her lawyer, David

¹²⁰ See, e.g., Bryon Tau, *Hillary Clinton Sent Classified Information Over Email While at State Department, Review Finds*, Wall St. J. (July 24, 2015), <http://goo.gl/kJZpLn>.

¹²¹ Statement from the Inspectors General of the Intelligence Community and the Department of State Regarding the Review of Former Secretary Clinton’s Emails (July 24, 2015), <http://goo.gl/MO9DXl>; see also Memorandum from the Inspector General of the Intelligence Community (July 23, 2015), <http://goo.gl/akkp73> (noting that that the classified information “should have been marked and handled at the SECRET level”); Memorandum from Steve A. Linick, Inspector General, U.S. Dep’t of State, to Patrick F. Kennedy, Under Sec’y of State for Mgmt., U.S. Dep’t of State (July 17, 2015), <https://goo.gl/X3gLxD> (“ICIG has received confirmation from IC FOIA officials that several of [Mrs. Clinton’s] emails contained classified IC information, though they were not marked as classified.”).

¹²² Statement from the Inspectors General of the Intelligence Community and the Department of State Regarding the Review of Former Secretary Clinton’s Emails (July 24, 2015), <http://goo.gl/MO9DXl>.

¹²³ Memorandum from the Inspector General of the Intelligence Community (Aug. 11, 2015), available at <http://goo.gl/A91Y4v>; see also *Clinton turns over private server to Justice Dept amid report it contained ‘top secret’ emails*, FoxNews.com (Aug. 12, 2015).

Kendall.¹²⁴ This report stated further that there are “potentially hundreds of classified emails within the approximately 30,000 provided by former Secretary Clinton.”¹²⁵

A jury might find these facts legally relevant to provisions criminalizing the mishandling of classified information. However, a jury must first determine that Mrs. Clinton deliberately structured an email system to ensure that her official email correspondence would be stored not in its proper place of custody with the State Department but on her personal server, which was not authorized or set up to store or handle classified material. Mrs. Clinton was not authorized to copy her records to a thumb drive given to her lawyer. Public reports confirm that some of the information contained in her emails was indeed classified at the time it was generated and that the emails were stored on and sent from a nongovernmental, unclassified email system.

It is also known that Mrs. Clinton communicated with State Department officials and others about the Benghazi terrorist attack,¹²⁶ including on such matters as when to announce the death of Ambassador Chris Stevens.¹²⁷ Given the subject and sensitivity of that attack and its aftermath, as well as the many other subjects on which she would have corresponded as Secretary of State, there is a strong likelihood that a several of her emails contained classified information.

2. Obstruction of Justice

In a March 30, 2015 news report, the *Washington Examiner* explained that on September 20, 2012, less than two weeks after the Benghazi terrorist attack, “the House Government Oversight Committee sent a letter to Secretary of State Hillary Clinton requesting that she turn over ‘all information . . . related to the attack on the consulate’” and that Mrs. Clinton responded on October 2, 2012 with a promise to cooperate fully with the investigation.¹²⁸ Mrs. Clinton confirmed this news report in an October 10, 2012 interview with the Wall Street Journal’s Monica Langley by stating that “we’re working hard to be responsive to the Congress in their

¹²⁴ Memorandum of the Inspector General of the Intelligence Community, at 2 (July 23, 2015), <http://goo.gl/akkp73>.

¹²⁵ *Id.*; see also Memorandum from Steve A. Linick, Inspector General, U.S. Dep’t of State, to Patrick F. Kennedy, Under Sec’y of State for Mgmt., U.S. Dep’t of State (June 29, 2015), included as Attachment D to Memorandum from Steve A. Linick, Inspector General, U.S. Dep’t of State, to Patrick F. Kennedy, Under Sec’y of State for Mgmt., U.S. Dep’t of State (July 17, 2015), <https://goo.gl/X3gLxD> (“On June 26 and June 27, 2015, Department staff responsible for FOIA issues further reviewed a portion of the 55,000 pages that have been or are to be reviewed. They report discovering hundreds of potentially classified emails within the collection.”).

¹²⁶ See, e.g., Michael S. Schmidt, *First Batch of Hillary Clinton Emails Captures Concerns Over Libya*, N.Y. Times (May 21, 2015), <http://goo.gl/xGefIp>; Michael S. Schmidt, *A Closer Look at Hillary Clinton’s Emails on Benghazi*, N.Y. Times (May 21, 2015), <http://goo.gl/1Eb70O>.

¹²⁷ See, e.g., Abigail James, *Hillary Clinton’s released emails reveal her thoughts during the night of the Benghazi terror attack*, Catholic Online (June 1, 2015), <http://goo.gl/9w0EwM>.

¹²⁸ Byron York, *Hillary Clinton withheld information from Congress. Now what does Congress do?*, Wash. Examiner (Mar. 30, 2015), <http://goo.gl/p37RBG>; see also Bryon York, *Clinton email answers don’t answer key question*, Wash. Examiner (July 17, 2015), <http://goo.gl/pbkWCC> (explaining that the September 20, 2012 letter from the Oversight Committee stated that “[i]n complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf” and that it specified emails as included in the scope of the request).

requests on our terrible tragedy in Benghazi, and give them information, and try to run an effective, accurate, investigation so we can get to the bottom of what happened.”¹²⁹

According to the original *Washington Examiner* news report, “House investigators made repeated appeals to the State Department for documents and information on Benghazi. After much haggling and legal maneuvering, State turned over a significant amount of material. Officials there not only pledged cooperation but told the House that they had turned over all the documents requested.”¹³⁰ As explained above, however, in response to the November 18, 2014 and December 2, 2014 document requests from the Select Committee on Benghazi, the State Department delivered an additional 847 pages relating to Benghazi on February 13, 2015.¹³¹ These never-before-seen documents had been found among the 55,000 pages of email printouts that Mrs. Clinton delivered to the State Department on December 5, 2014, proof that Mrs. Clinton had withheld the same from the earlier congressional inquiries. And then, according to Mrs. Clinton’s own statements, following the delivery of the paper copies of her emails, she allegedly deleted all electronic versions of her emails, both work-related and personal.¹³²

In addition, after the Select Committee on Benghazi subpoenaed Mr. Blumenthal prior to its meeting with him on June 16, 2015, it was revealed that there were additional emails relating to Libya created or received by Mrs. Clinton that she had not previously produced to the Committee or otherwise released to the public.¹³³ The evidence also suggests that Mrs. Clinton selectively edited some of her email records before they were produced to the Committee.¹³⁴

Two principal laws apply to the withholding of and tampering with relevant documents and the failure to preserve records in the face of congressional inquiries.

18 U.S.C. § 1001: Under this statute, it is a crime if anyone knowingly and willfully “falsifies, conceals, or covers up by any trick, scheme, or device a material fact” or “makes any materially false, fictitious, or fraudulent statement or representation” in the course of “any

¹²⁹ Transcript of Hillary Clinton Interview with Monica Langley, transcribed in Email from Caroline E. Adler, State Dep’t ComMrs. Dir., to Thomas R. Nides, Deputy Sec’y of State, and Philippe I. Reines, Senior Adviser to Secy’ of State (Oct. 11, 2012), available at <https://goo.gl/zkcvD0>; see also Monica Langley, *For Clinton as Top Diplomat, Tumultuous Closing Chapter*, Wall St. J. (Oct. 25, 2012), <http://goo.gl/dghBDL> (reporting that “Mrs. Clinton also worked on damage control at home, particularly with Congress. She went to Capitol Hill for all-member private sessions with senators and representatives.”).

¹³⁰ Byron York, *Hillary Clinton withheld information from Congress. Now what does Congress do?*, Wash. Examiner (Mar. 30, 2015), <http://goo.gl/p37RBG> (also reporting that “‘The State Department actively told us that they were cooperating with us,’ recalls one knowledgeable Hill Republican. ‘They made representations that the documents [turned over] were complete and responsive.’”).

¹³¹ See *supra* note 26 and accompanying text.

¹³² See *supra* notes 8-9 and accompanying text.

¹³³ See Rachael Bade, *Some of Clinton’s Libya emails said to be withheld from Benghazi Committee*, Politico (June 15, 2015), <http://goo.gl/261kHJ>; Rachael Bade, *Hillary Clinton emails mentioning Benghazi kept from panel*, Politico (June 17, 2015), <http://goo.gl/3DojtP>; Karen DeYoung, *State Department says 15 e-mails missing from pages Hillary Clinton provided*, Wash. Post (June 25, 2015), <http://goo.gl/YYrY09>.

¹³⁴ Sarah Westwood, *Records show Clinton withheld emails about oil, terrorism*, Wash. Exam. (June 27, 2015), <http://goo.gl/sX3b3E>.

investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.”

18 U.S.C. §§ 1505, 1515(b): Under penalty of fine, imprisonment up to eight years, or both, federal law prohibits the obstruction of congressional or federal administrative proceedings, and defines three essential elements for this crime: 1) there must be an inquiry or investigation by either the House of Representatives or the Senate, or any congressional committee or joint committee; 2) the defendant must be aware of the pending proceeding; and 3) the defendant must have intentionally endeavored, among other things, to withhold or destroy documentary evidence, or to corruptly endeavor to influence, obstruct, or impede the pending proceeding.¹³⁵ To act “corruptly” in this context means to act “with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.”¹³⁶

In the present case, Mrs. Clinton has been aware of congressional investigations into the Benghazi terrorist attack since September (or, at the latest, October) 2012 and has been the subject of repeated requests since then for documents and information in her possession relating to that attack. The withholding of the sole existing copies of responsive documents until February 13, 2015 or the statement that all responsive documents had previously been produced, when they may not have, may constitute obstruction of Congress. Knowledge of an ongoing congressional investigation, combined with the wiping clean of all of responsive emails residing on a personal server, both work-related and personal, without any independent verification that all pertinent and responsive documents had been turned over to the investigators, further supports an allegation of obstruction.

IV. Conclusion

Former Attorney General Mukasey’s claims are supported by the following facts: 1) Mrs. Clinton’s exclusively using a private email account for correspondence relating to her official duties; 2) Mrs. Clinton’s storing, without authorization, those email records on a private server over which she retained exclusive control and failing to archive them in the State Department’s official recordkeeping system during her tenure and for 22 months thereafter; 3) Mrs. Clinton’s failing to turn over those email records to the State Department upon leaving the office of Secretary of State; 4) Mrs. Clinton’s failing or delaying to turn over responsive documents in her possession upon request from congressional committees investigating the Benghazi terrorist attacks; and 5) Mrs. Clinton’s wiping the electronic versions of the email records without authorization. Only upon a proper indictment and trial, would a jury, receiving proper judicial

¹³⁵ 18 U.S.C. § 1505.

¹³⁶ 18 U.S.C. § 1515(b); *see also United States v. Senffner*, 280 F.3d 755, 762 (7th Cir. 2002) (to prove the requisite mental state, it is sufficient to show only that the defendant’s actions had the “natural and probable” effect of interfering with the proceeding); *United States v. Laurins*, 857 F.2d 529, 536-37 (9th Cir. 1988) (to act “corruptly” means “that the act must be done with the purpose of obstructing justice” and failure to provide or concealing documents constitutes a violation); *United States v. Presser*, 187 F. Supp. 64, 66 (N.D. Ohio 1960) (upholding an indictment alleging that the defendant “(a) . . . altered, defaced, partially destroyed and concealed a certain invoice, and (b) concealed and withheld from the Committee an envelope containing a memorandum” that bore a reasonable relation to the subject matter of the Senate committee’s inquiry).

instructions, be able to make any legal findings based upon the known facts. Independent of any legal liability, the consequence of Mrs. Clinton's actions concealed the only copies of the federal records in her possession from the State Department throughout her tenure and for 22 months thereafter and prevented the State Department during that time from accessing those records and fulfilling its obligations to respond fully to document requests under FOIA and from Congress.