

# THE MISUNDERSTANDINGS OF THE ANTI- TRANSPARENCY HILLARY-EXONERATING LEFT

It wasn't enough for Matt Yglesias to write a widely mocked piece calling for less transparency, now Kevin Drum has too. It all makes you wonder whether there's some LISTERV somewhere – the successor to JOURNALIST, from which leaked emails revealed embarrassing discussions of putting politics above principle, perhaps – where a bunch of center-left men are plotting about how to finally end the email scandal that Hillary herself instigated with a stupid decision to host her own email. Especially given this eye-popping paragraph in Drum's piece:

Part of the reason is that Hillary Clinton is a real object lesson in how FOIA can go wrong when it's weaponized. Another part is that liberals are the biggest fans of transparency, and seeing one of their own pilloried by it might make them take a second look at whether it's gone off the rails. What we've seen with Hillary Clinton is not that she's done anything especially wrong, but that a story can last forever if there's a constant stream of new revelations. That's what's happened over the past four years. Between Benghazi committees and Judicial Watch's anti-Hillary jihad, Clinton's emails have been steadily dripped out practically monthly, even though there's never been any compelling reason for it. It's been done solely to keep her alleged corruption in the public eye.

Even setting aside that his piece generally ignores (perhaps, betrays no knowledge of) the widely-abused b5 exemption that already lets people withhold precisely the kinds of deliberations that Drum wants to kill FOIA over (and is used to withhold a lot more than that), this paragraph betrays stunning misunderstanding about the Clinton email scandal. Not least, the degree to which many of the delays have arisen from Clinton's own actions.

It led me to go back to read this post, which engages in some cute spin and selective editing, but really gives up the game in this passage.

Oddly, the FBI never really addresses the issue of whether Hillary violated federal record retention rules. They obviously believe that she should have used a State email account for work-related business, but that's about it. I suppose they decided it was a non-issue because Hillary did, in fact, retain all her emails and did, in fact, turn them over quickly when State requested them.

There's also virtually no discussion of FOIA. What little there is suggests that Hillary's only concern was that her *personal* emails not be subjected to FOIA simply because they were held on the same server as her work emails.

Of course the FBI never really addresses how Hillary violated the Federal Records Act. Of course the FBI never really addresses how Hillary tried to avoid FOIA. (Note too that Drum ignores that some of those "personal" emails have been found to be subject to FOIA and FRA and Congressional requests; they weren't actually personal.)

That's because this wasn't an investigation into violating the Federal Records Act. As I wrote in this post summarizing Jim Comey's testimony to Oversight and Government Reform:

The FBI investigation that ended yesterday *only pertained to that referral about classified information.* Indeed, over the course of the hearing, Comey revealed that it was narrowly focused, examining the behavior of only Clinton and four or five of her close aides. And it only pertained to that question about mishandling classified information. That's what the declination was based on: Comey and others' determination that when Hillary set up her home-brew server, she did not intend to mishandle classified information.

This caused some consternation, early on in the hearing, because Republicans familiar with Clinton aides' sworn testimony to the committee investigating the email server and Benghazi were confused how Comey could say that Hillary was not cleared to have her own server, but aides had testified to the contrary. But Comey explained it very clearly, and repeatedly. While FBI considered the statements of Clinton aides, they did not review their sworn statements to Congress for truth.

That's important because the committee was largely asking a different question: whether Clinton used her server to avoid oversight, Federal Record Act requirements, the Benghazi investigation, and FOIA. That's a question the FBI did not review at all. This all became crystal clear in the last minutes of the Comey testimony.

Chaffetz: Was there any evidence of Hillary Clinton attempting to avoid compliance with the Freedom of Information Act?

Comey: That was not the subject of our criminal investigation so I can't answer that sitting here.

Chaffetz: It's a violation of law, is it not?

Comey: Yes, my understanding is there are civil statutes that apply to that. I don't know of a crimin-

Chaffetz: Let's put some boundaries on this a little bit – what you didn't look at. You didn't look at whether or not there was an intention or reality of non-compliance with the Freedom of Information Act.

Comey: Correct.

Having started down this path, Chaffetz basically confirms what Comey had said a number of times throughout the hearing, that FBI didn't scrutinize the veracity of testimony to the committee *because the committee did not make a perjury referral.*

Chaffetz: You did not look at testimony that Hillary Clinton gave in the United States Congress, both the House and the Senate?

Comey: To see whether it was perjurious in some respect?

Chaffetz: Yes.

Comey: No we did not.

[snip]

Comey: Again, I can confirm this but I don't think we got a referral from Congressional committees, a perjury referral.

Chaffetz: No. It was the Inspector General that initiated this.

Now, let me jump to the punch and predict that OGR will refer at least Hillary's aides, and maybe Hillary herself, to FBI for lying to Congress. They might even have merit in doing so, as Comey has already said her public claims about being permitted to have her own email (which she repeated to the committee) were not true. Plus, there's further evidence that Hillary used her own server precisely to maintain control over them (that is, to avoid FOIA).

As I said in my earlier post, I'm loathe to admit this, because I'd really like to be done with this scandal (I'd like, even more, to come up with sensible policy proposals like fixing email and text archiving to prevent this from happening in every presidential administration). All the questions about whether Hillary chose to keep her own server to avoid oversight (or, as Chaffetz asked today, to obstruct OGR's investigation) has never been investigated by FBI. Those requests even have more merit than Democrats are making out – in part for precisely this reason, FBI has never considered at least some evidence to support the case Hillary deliberately avoided FRA, including a string of really suspicious timing. As I wrote in my other post, I also think they won't amount to anything, in part because these laws (including laws prohibiting lying to Congress) are so toothless. But they are a fair question.

All that said, it is incorrect to take a report showing the FBI not charging Hillary for intentionally mishandling classified information and conclude from that that hers is an example of FRA and FOIA gone amuck. On the contrary. Hillary has never been exonerated for trying to avoid FOIA and FRA. The evidence suggests it would be hard to do that.