SOME LEGISLATIVE RESPONSES TO CLINTON'S EMAIL SCANDAL

The Republicans have reverted to their natural "Benghazi witchhunt" form in the wake of Jim Comey's announcement Tuesday that Hillary Clinton and her aides should not be charged, with Comey scheduled to testify before the House Oversight Committee at 10 AM.

Paul Ryan wrote a letter asking James Clapper to withhold classified briefings from Hillary. And the House Intelligence Committee is even considering a bill to prevent people who have mishandled classified information from getting clearances.

> In light of the FBI's findings, a congressional staffer told The Daily Beast that the House Intelligence Committee is considering legislation that could block security clearances for people who have been found to have mishandled classified information in the past.
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> It's not clear how many of Clinton's aides still have their government security clearances, but such a measure could make it more difficult for them to be renewed, should they come back to serve in a Clinton administration.
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> "The idea would be to make sure that these rules apply to a very wide range of people in the executive branch," the staffer said. (Clinton herself would not need a clearance were she to become president.)

It's nice to see the same Republicans who didn't make a peep when David Petraeus kept — and still

has — his clearance for doing worse than Hillary has finally getting religion on security clearances.

But this circus isn't really going to make us better governed or safer.

So here are some fixes Congress should consider:

Add some teeth to the Federal/Presidential Records Acts

As I noted on Pacifica, Hillary's real crime was trying to retain maximal control over her records as Secretary of State — probably best understood as an understandable effort to withhold anything potentially personal combined with a disinterest in full transparency. That effort backfired spectacularly, though, because as a result all of her emails have been released.

Still, every single Administration has had at least a minor email scandal going back to Poppy Bush destroying PROFS notes pertaining to Iran-Contra.

And yet none of those email scandals has ever amounted to anything, and many of them have led to the loss of records that would otherwise be subject to archiving and (for agency employees) FOIA.

So let's add some teeth to these laws — and lets mandate and fund more rational archiving of covered records. And while we're at it, let's ensure that encrypted smart phone apps, like Signal, which diplomats in the field *should* be using to solve some of the communication problems identified in this Clinton scandal, will actually get archived.

Fix the Espionage Act (and the Computer Fraud and

Abuse Act)

Steve Vladeck makes the case for this:

> Congress has only amended the Espionage Act in detail on a handful of occasions and not significantly since 1950. All the while, critics have emerged from all corners—the academy, the courts, and within the government—urging Congress to clarify the myriad questions raised by the statute's vague and overlapping terms, or to simply scrap it and start over. As the CIA's general counsel told Congress in 1979, the uncertainty surrounding the Espionage Act presented "the worst of both worlds":
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> > On the one hand the laws stand idle and are not enforced at least in part because their meaning is so obscure, and on the other hand it is likely that the very obscurity of these laws serves to deter perfectly legitimate expression and debate by persons who must be as unsure of their liabilities as I am unsure of their obligations.
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> In other words, the Espionage Act is at once too broad and not broad enough—and gives the government too much and too little discretion in cases in which individuals mishandle national security secrets, maliciously or otherwise.
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> To underscore this point, the provision that the government has used to go after those who shared classified information with individuals not entitled to receive it (including Petraeus, Drake, and Manning), codified at 18 U.S.C. § 793(d), makes it a crime if:
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> > Whoever, lawfully having possession of, access to,

> > control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted … to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it …

This provision is stunningly broad, and it's easy to see how, at least as a matter of statutory interpretation, it covers leaking—when government employees ("lawfully having possession" of classified information) share that information with "any person not entitled to receive it." But note how this *doesn't* easily apply to Clinton's case, as her communications, however unsecured, were generally with staffers who *were*"entitled to receive" classified information.

Instead, the provision folks have pointed to in her case is the even more strangely worded § 793(f), which makes it a crime for:

> > Whoever, being entrusted with or having lawful possession or control of [any of the items

> > mentioned in § 793(d)], (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of its trust, or lost, or stolen, abstracted, or destroyed … fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer …

Obviously, it's easy to equate Clinton's "extreme carelessness" with the statute's "gross negligence." But look closer: Did Clinton's carelessness, however extreme, "[permit] … [classified information] to be removed from its proper place of custody or delivered to anyone in violation of [her] trust"? What does that even *mean* in the context of intangible information discussed over email? The short answer is nobody knows: This provision has virtually never been used at least partly because no one is really sure what it prohibits. It certainly appears to be focused on government employees who dispossess the government of classified material (like a courier who leaves a satchel full of secret documents in a public place). But how much further does it go?

There's an easy answer here, and it's to not use Clinton as a test case for an unprecedented prosecution pursuant to an underutilized criminal provision, even if some of us think what she did was a greater sin than the conduct of some who

> have been charged under the statute. The better way forward is for Congress to do something it's refused to do for more than 60 years: carefully and comprehensively modernize the Espionage Act, and clarify exactly when it is, and is not, a crime to mishandle classified national security secrets.

Sadly, if Congress were to legislate the Espionage Act now, they might codify the attacks on whistleblowers. But they should not. They should distinguish between selling information to our adversaries and making information public. They should also make it clear that intent matters — because in the key circuit, covering the CIA, the Pentagon, and many contractors, intent hasn't mattered since the John Kiriakou case.

Eliminate the arbitrariness of the clearance system

But part of that should also involve eliminating the arbitrary nature of the classification system.

I've often pointed to how, in the Jeffrey Sterling case, the only evidence he would mishandle classified information was his retention of 30-year old instructions on how to dial a rotary phone, something far less dangerous than what Hillary did.

Equally outrageous, though, is that four of the witnesses who may have testified against Sterling, probably including Bob S who was the key witness, have also mishandled classified information in the past. Those people not only didn't get prosecuted, but they were permitted to serve as witnesses against Sterling without their own indiscretions being submitted as evidence. As far as we know, none lost their security clearance. Similarly, David Petraeus hasn't lost his security clearance. But Ashkan Soltani was denied one and therefore can't work

at the White House countering cyberattacks.

Look, the classification system is broken, both because information is over-classified and because maintaining the boundaries between classified and unclassified is too unwieldy. That broken system is then magnified as people's access to high-paying jobs are subjected to arbitrary review of security clearances. That's only getting worse as the Intelligence Community ratchets up the Insider Threat program (rather than, say, technical means) to forestall another Manning or Snowden.

The IC has made some progress in recent years in shrinking the universe of people who have security clearances, and the IC is even making moves toward fixing classification. But the clearance system needs to be more transparent to those within it and more just.

Limit the President's arbitrary authority over classification

Finally, Congress should try to put bounds to the currently arbitrary and unlimited authority Presidents claim over classified information.

As a reminder, the Executive Branch routinely cites the Navy v. Egan precedent to claim unlimited authority over the classified system. They did so when someone (it's still unclear whether it was Bush or Cheney) authorized Scooter Libby to leak classified information — probably including Valerie Plame's identity — to Judy Miller. And they did so when telling Vaughn Walker could not require the government to give al Haramain's lawyers clearance to review the illegal wiretap log they had already seen before handing it over to the court.

And these claims affect Congress' ability to do their job. The White House used CIA as cover to withhold a great deal of documents implicating the Bush White House in authorizing torture. Then, the White House backed CIA's efforts to

hide unclassified information, like the already-published identities of its torture-approving lawyers, with the release of the Torture Report summary. In his very last congressional speech, Carl Levin complained that he was never able to declassify a document on the Iraq War claims that Mohammed Atta met with a top Iraqi intelligence official in Prague.

This issue will resurface when Hillary, who I presume will still win this election, nominates some of the people involved in this scandal to serve in her White House. While she can nominate implicated aides — Jake Sullivan, Huma Abedin, and Cheryl Mills — for White House positions that require no confirmation (which is what Obama did with John Brennan, who was at that point still tainted by his role in torture), as soon as she names Sullivan to be National Security Advisor, as expected, Congress will complain that he should not have clearance.

She can do so — George Bush did the equivalent (remember he appointed John Poindexter, whose prosecution in relation to the Iran-Contra scandal was overturned on a technicality, to run the Total Information Awareness program).

There's a very good question whether she should be permitted to do so. Even ignoring the question of whether Sullivan would appropriately treat classified information, it sets a horrible example for clearance holders who would lose their clearances.

But as far as things stand, she could. And that's a problem.

To be fair, legislating on this issue is dicey, precisely because it will set off a constitutional challenge. But it should happen, if only because the Executive's claims about Navy v. Egan go beyond what SCOTUS actually said.

Mandate and fund improved

communication system

Update, after I posted MK reminded me I meant to include this.

If Congress is serious about this, then they will mandate and fund State to fix their decades-long communications problems.

But they won't do that. Even 4 years after the Benghazi attack they've done little to improve security at State facilities.

Update: One thing that came up in today's Comey hearing is that the FBI does not routinely tape non-custodial interviews (and fudges even with custodial interviews, even though DOJ passed a policy requiring it). That's one more thing Congress could legislate! They could pass a simple law requiring FBI to start taping interviews.