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## Was the Democratic Nominations Rigged? A Reexamination of the Clinton-Sanders Presidential Race

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WAS THE DEMOCRATIC NOMINATION RIGGED? A  
REEXAMINATION OF THE CLINTON-SANDERS  
PRESIDENTIAL RACE

*Anthony J. Gaughan\**

INTRODUCTION .....309

I. THE ORIGINS OF THE RIGGING ALLEGATIONS .....313

    A. *The DNC Presidential Nomination Rules* .....313

    B. *The Iowa Caucuses*.....320

    C. *The Superdelegate and DNC Memo Controversy* .....325

    D. *The Brazile-Warren Allegations*.....333

II. A RIGGED NOMINATION? .....336

    A. *Party Leader Preferences had Little Impact in 2016*.....337

    B. *A Strong Majority of Democratic Voters Supported Clinton* .....341

    C. *The Rules Benefited Sanders, not Clinton*.....347

III. THE DISTURBING POWER OF FALSE ELECTION FRAUD CLAIMS.....351

CONCLUSION.....356

INTRODUCTION

This Article examines one of the lingering controversies of the 2016 presidential race: whether the Democratic Party’s leaders corrupted the election process to ensure that Hillary Clinton secured the party’s presidential nomination. In May 2016, Bernie Sanders complained that his path to the nomination was blocked by a “rigged system” of superdelegates, party officials free to vote for any candidate at the presidential convention.<sup>1</sup> As the race drew to a close, a group of Sanders supporters filed a lawsuit against the Democratic National Committee (“DNC”) alleging that the party leadership defrauded Democratic voters

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1. Ian Schwartz, *Sanders: There Will Be A Contested Convention, System Is “Rigged,”* REAL CLEAR POL. (May 2, 2016), [https://www.realclearpolitics.com/video/2016/05/02/sanders\\_there\\_will\\_be\\_a\\_contested\\_convention\\_system\\_is\\_rigged.html](https://www.realclearpolitics.com/video/2016/05/02/sanders_there_will_be_a_contested_convention_system_is_rigged.html); *Sanders Takes Aim at “Rigged System” of Superdelegates*, REUTERS (May 2, 2016), <https://www.reuters.com/video/2016/05/02/sanders-takes-aim-at-rigged-system-of-su?videoid=368334396>.

by secretly working to get Clinton the nomination.<sup>2</sup> Although the district court ultimately dismissed the plaintiffs' claims on standing grounds, the outcome did not put an end to allegations of a rigged nomination.<sup>3</sup> In November 2017, former DNC Chair Donna Brazile revealed the existence of a fundraising agreement between the Clinton campaign and the national party that pre-dated the primary campaign.<sup>4</sup> Amid the uproar over Brazile's book, Senator Elizabeth Warren, a candidate for the Democratic nomination in 2020, asserted that the 2016 Democratic primary was "rigged" in Clinton's favor.<sup>5</sup>

The controversy over the 2016 race raised fundamental questions about the health of the nation's democratic institutions. For American voters, no decision is more consequential than the selection of the president. As both commander-in-chief of the armed forces and chief executive, the president exercises more power than any other single individual in the American system of government. Thus, the question of whether the Democratic Party's senior leadership subverted the nomination process bears directly on the integrity of the presidential election system. Do ordinary voters choose the party nominee, or do elites secretly control the process?

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2. First Amended Complaint at ¶ 171, *Wilding et al. v. DNC Servs. Corp. et al.*, 2016 WL 8813181, No. 16-cv-61511-WJZ (S.D. Fla. July 13, 2016) ("[I]n spite of the governing Charter and its multiple public statements, the DNC devoted its resources to propelling Clinton's candidacy ahead of all of her rivals, even if this meant working directly against the interests of Democratic Party members, including Bernie Sanders' supporters."). See also Chris Riotta, *Did The DNC Help Hillary Clinton Beat Bernie Sanders? Fraud Lawsuit Takes Aim at Leadership*, NEWSWEEK (May 15, 2017), <http://www.newsweek.com/dnc-fraud-lawsuit-claims-bernie-sanders-would-have-won-rigged-election-hillary-611165>; Chris Riotta, *Was The Election Rigged Against Bernie Sanders? DNC Lawsuit Demands Repayment For Campaign Donors*, NEWSWEEK (May 15, 2017), <http://www.newsweek.com/bernie-sanders-rigged-hillary-clinton-dnc-lawsuit-donald-trump-president-609582>.

3. See *Wilding v. DNC Servs. Corp.*, No. 16-61511-CIV, 2017 WL 6345492, at \*5 (S.D. Fla. Aug. 25, 2017) ("Just as donating to Sanders's campaign would not entitle the donor to dictate the campaign's platform, donating to the DNC or to Bernie Sanders's campaign does not entitle Plaintiffs to challenge the manner in which the DNC has conducted its affairs."); see also David Weigel, *Florida Judge Dismisses Fraud Lawsuit Against DNC*, WASH. POST (Aug. 25, 2017), [https://www.washingtonpost.com/news/powerpost/wp/2017/08/25/florida-judge-dismisses-fraud-lawsuit-against-dnc/?utm\\_term=.032be712a3c4](https://www.washingtonpost.com/news/powerpost/wp/2017/08/25/florida-judge-dismisses-fraud-lawsuit-against-dnc/?utm_term=.032be712a3c4).

4. DONNA BRAZILE, *HACKS: THE INSIDE STORY OF THE BREAK-INS AND BREAKDOWNS THAT PUT DONALD TRUMP IN THE WHITE HOUSE* 98 (2017) ("The fundraising arrangement with HFA and the victory fund agreement was not illegal, but it sure looked unethical. . . . This was not a criminal act, but as I saw it, it compromised the party's integrity.").

5. Annie Linskey & Victoria McGrane, *Warren's Charge that the Democratic Primary Was 'Rigged' Says More About 2020 Than 2016*, BOS. GLOBE (Nov. 3, 2017), <https://www.bostonglobe.com/news/politics/2017/11/03/elizabeth-warren-charge-that-democratic-primary-was-rigged-says-more-about-than/2L5IOAkxFal5tullKi9V6N/story.html>; Jaclyn Reiss, *Warren Says the 2016 Primary Was Rigged in Clinton's Favor*, BOS. GLOBE (Nov. 2, 2017), <https://www.bostonglobe.com/news/politics/2017/11/02/elizabeth-warren-says-primary-was-rigged-hillary-clinton-favor/yIvL7oNPVwsO9nKRNonBml/story.html>.

This Article makes three central points. First, it contends that the overwhelming weight of evidence makes clear the 2016 Democratic nomination process was not rigged in favor of Hillary Clinton.<sup>6</sup> A close examination of both the nomination rules and the popular vote demonstrates conclusively that the race was conducted in a fair manner and the outcome reflected the will of a large majority of Democratic voters. Lost in the controversy over Clinton's superdelegate support was the single most important fact of the nomination race: Clinton defeated Sanders by over 3 million votes. Indeed, whether measured by the popular vote or by pledged delegates, Clinton's margin of victory over Sanders in 2016 far exceeded Barack Obama's margin of victory over Clinton in 2008. Moreover, the joint fundraising agreement between the DNC and the Clinton campaign only involved the general election, not the primary campaign, and the DNC entered into a similar agreement with the Sanders campaign. Contrary to popular impression, therefore, Clinton won the nomination fairly.

Second, this Article argues that the Democratic Party rules and state election laws actually hurt Clinton and benefited Sanders.<sup>7</sup> Many Democratic caucuses and primaries permitted independents (i.e., non-Democrats) to vote, thus providing a critical lifeline to the Sanders campaign which depended heavily on the support of independent voters. In addition, the DNC's award of pledged delegates on a proportional basis slowed Clinton's path to the nomination even as she took a commanding lead over Sanders in the popular vote. If the Democratic Party used the Republican Party's delegate rules, which employ a winner-take-all system for a large number of their primaries and caucuses, Clinton would have secured a majority of delegates much earlier than she actually did. Instead of helping Clinton, Democratic Party rules dragged out the nomination race and gave rise to an unnecessary controversy over superdelegates. Ironically, however, a false narrative took hold in the public mind that the Democratic race was "rigged" in Clinton's favor. The widespread perception of illegitimacy tainted Clinton's nomination and gave Donald Trump a talking point he would use to great effect during the general election.<sup>8</sup>

Third, this Article concludes that the controversy over the Democratic nomination race reflects a broader, bipartisan decline in public confidence in the integrity of American elections.<sup>9</sup> During the 2016

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6. The arguments in this paragraph are discussed in detail in Parts II.A & II.B.

7. The arguments in this paragraph are discussed in detail in Part II.C.

8. See Part III.

9. Giovanni Russonello, *Voters Fear Their Ballot Won't Count, Poll Shows*, N.Y. TIMES (Oct. 25, 2016), <https://www.nytimes.com/2016/10/26/us/politics/voter-fraud-poll.html>; *The Economist/YouGov Poll*, YOUGov, at 59 (Dec. 17–20, 2016), [https://d25d2506sfb94s.cloudfront.net/cumulus\\_uploads/document/ljv2ohxmzj/econTabReport.pdf](https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/ljv2ohxmzj/econTabReport.pdf); Kathy Frankovic,

election and even into his presidency, Donald Trump falsely declared that American elections are rigged and that voter fraud occurs on a massive basis.<sup>10</sup> The president's irresponsible claims have been definitively debunked by scholars, courts, and election officials.<sup>11</sup> Nevertheless, an unfounded belief in rampant election fraud has become a prominent feature of the American political psyche. A 2017 poll found that only 32% of Americans believed Clinton won the nomination fairly.<sup>12</sup> The same poll found that even among Democratic voters, only 54% think Clinton won the nomination in a fair contest and 27% believe the nomination was rigged in her favor.<sup>13</sup> Moreover, nearly half of Republicans and 23% of Democrats accept as true the president's false allegation that millions cast illegal ballots in the 2016 election.<sup>14</sup> The bottom line is spurious claims of election fraud have found a receptive audience on both sides of the political aisle.<sup>15</sup>

At a time when the public doubts the trustworthiness of the American election process, it is more important than ever to separate fact from fiction. If we fail to correct the historical record, we risk permitting the baseless perception of election fraud to overshadow the reality of fair elections. In the internet age, false claims of fraud spread like wildfire

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*Belief in Conspiracies Largely Depends on Political Identity*, YOUgov (Dec. 27, 2016), <https://today.yougov.com/news/2016/12/27/belief-conspiracies-largely-depends-political-iden>.

10. Andrew Restuccia, *Trump's Baseless Assertions of Voter Fraud Called 'Stunning,'* POLITICO (Nov. 27, 2016), <http://www.politico.com/story/2016/11/trump-illegal-voting-clinton-231860>; Michael D. Shear & Maggie Haberman, *Trump Claims, With No Evidence, That 'Millions of People' Voted Illegally*, N.Y. TIMES (Nov. 27, 2016), <https://www.nytimes.com/2016/11/27/us/politics/trump-adviser-steps-up-searing-attack-on-romney.html>.

11. *Debunking the Voter Fraud Myth*, BRENNAN CTR. JUST. (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>; Philip Bump, *It Doesn't Matter How Trump 'Feels' about Voter Fraud. He's Wrong*, WASH. POST (Apr. 9, 2018), [https://www.washingtonpost.com/news/politics/wp/2018/04/09/it-doesnt-matter-how-trump-feels-about-voter-fraud-hes-wrong/?utm\\_term=.4e63e0a7fe63](https://www.washingtonpost.com/news/politics/wp/2018/04/09/it-doesnt-matter-how-trump-feels-about-voter-fraud-hes-wrong/?utm_term=.4e63e0a7fe63); Eli Rosenberg, *'The Most Bizarre Thing I've Ever Been a Part Of': Trump Panel Found No Voter Fraud, Ex-member Says*, WASH. POST (Aug. 3, 2018), [https://www.washingtonpost.com/news/politics/wp/2018/08/03/the-most-bizarre-thing-ive-ever-been-a-part-of-trump-panel-found-no-voter-fraud-ex-member-says/?utm\\_term=.34583720bd7d](https://www.washingtonpost.com/news/politics/wp/2018/08/03/the-most-bizarre-thing-ive-ever-been-a-part-of-trump-panel-found-no-voter-fraud-ex-member-says/?utm_term=.34583720bd7d).

12. *Just 32% Think Hillary Clinton Won Democratic Nomination Fairly*, RASMUSSEN REP. (Nov. 9, 2017), [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/november\\_2017/just\\_32\\_think\\_hillary\\_clinton\\_won\\_democratic\\_nomination\\_fairly](http://www.rasmussenreports.com/public_content/politics/general_politics/november_2017/just_32_think_hillary_clinton_won_democratic_nomination_fairly).

13. *Id.*

14. Kyle Balluck, *Half of Republicans in New Poll Say Millions of Ballots Were Cast Illegally in 2016*, HILL (May 27, 2018), <http://thehill.com/homenews/campaign/389569-half-of-republicans-in-new-poll-say-millions-of-ballots-were-cast-illegally>; Sam Levine & Ariel Edwards-Levy, *Almost Half Of Republicans Believe Millions Voted Illegally In The 2016 Election*, HUFFINGTON POST (May 27, 2018), [https://www.huffingtonpost.com/entry/republicans-voter-fraud\\_us\\_5b0850f8e4b0fdb2aa53791f](https://www.huffingtonpost.com/entry/republicans-voter-fraud_us_5b0850f8e4b0fdb2aa53791f); *HuffPost: Voter Fraud*, YOUgov (May 17–20, 2018), <https://big.assets.huffingtonpost.com/athena/files/2018/05/25/5b084adbe4b0568a880b4571.pdf>.

15. The arguments in this paragraph are discussed in detail in Part III.A.

and corrode public confidence in America's democratic institutions.<sup>16</sup> Misguided fears of voter fraud, for example, have led to the enactment of strict Voter ID laws in states across the country, a development that threatens to disenfranchise many voters without making elections any safer.<sup>17</sup> The Clinton-Sanders race must not become another example of election myths trumping facts. The truth of the 2016 election needs to be told.

## I. THE ORIGINS OF THE RIGGING ALLEGATIONS

The controversy over the Clinton-Sanders presidential race resulted from a perfect storm of rising populist anger, growing public distrust of institutions, and the rapid spread of conspiracy theories promoted by national figures. As a consequence, public confidence in the integrity of the Democratic Party's presidential nomination process was severely eroded. The story of the 2016 election highlights disturbing trends that threaten to undermine the foundations of American democracy.

### A. *The DNC Presidential Nomination Rules*

To understand what happened during the 2016 nomination contest, it is necessary to place the Clinton-Sanders race in historical context. The importance of primaries and caucuses in selecting presidential nominees is of relatively recent origin. From the 1830s through the 1950s, the Democratic Party selected its presidential nominees through backroom deals by senior party officials at the quadrennial national convention.<sup>18</sup> Elected officials and party bosses dominated the nomination process because they controlled the votes of the convention delegates.<sup>19</sup> Even

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16. See, e.g., Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL'Y 57, 64–74 (2017).

17. *Debunking the Voter Fraud Myth*, BRENNAN CTR. JUST. (Jan. 31, 2017), <https://www.justice.gov/file/1080281/download>.

18. ELAINE C. KAMARCK, PRIMARY POLITICS: HOW PRESIDENTIAL CANDIDATES HAVE SHAPED THE MODERN NOMINATING SYSTEM 7–8 (2009) (“For much of American history, beginning in the Jacksonian era and up until the catalytic turmoil of 1968 . . . getting the nomination meant winning the allegiance of enough major party leaders—who controlled delegates—to accumulate a majority of the delegates at the nominating convention. Presidential primaries, the most visible and public part of the campaign, were not an important part of this process.”); RHODES COOK, THE PRESIDENTIAL NOMINATING PROCESS: A PLACE FOR US? 15 (2004) (“But in 1832, a new era was launched in which parties determined their presidential nominations through national conventions”); BARBARA NORRANDER, THE IMPERFECT PRIMARY: ODDITIES, BIASES, AND STRENGTHS OF U.S. PRESIDENTIAL NOMINATION POLITICS 11–18 (2010).

19. KAMARCK, *supra* note 18, at 7 (“[M]ajor party leaders” determined the nomination because they “controlled delegates”) *id.* at 10 (“Delegates were controlled by powerful politicians, not primary voters.”); Steven S. Smith & Melanie J. Springer, *Choosing Presidential Candidates*, in REFORMING THE PRESIDENTIAL NOMINATION PROCESS 3 (Steven S. Smith & Melanie J. Springer, eds., 2009) (“This process generated insider nomination campaigns that drew on candidates’

after many states adopted primary election systems in the early 1900s, party leaders still possessed the lion's share of delegates at each presidential convention, which meant primary voters played only a marginal role at best in selecting the party's nominee.<sup>20</sup> Until the early 1970s, most Democratic state parties ignored primary and caucus results and instead empowered party officials to hand-select the convention delegates.<sup>21</sup> Accordingly, most serious candidates did not even bother to run in the primaries and caucuses, but instead focused their energies on swaying the opinion of the party's senior leadership at the presidential convention.<sup>22</sup>

The 1960s, however, ushered in changes that forced the Democratic Party to reform its nomination rules. The first blow to the old system came in 1960, when Massachusetts Senator John F. Kennedy used his sweeping primary victories to convince the party's leadership he was a viable general election candidate.<sup>23</sup> Kennedy's success endowed the primaries with new symbolic importance, even though party leaders still controlled the votes of most convention delegates. In 1968, Vice President Hubert Humphrey became the last candidate to win the Democratic presidential nomination without competing in the primaries and caucuses, but his strategy came at a price.<sup>24</sup> The 1968 Democratic

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personal relations with party leaders and usually involved building coalitions among party activities; it seldom involved appeals to the broad public in a meaningful way.”).

20. KAMARCK, *supra* note 18, at 8 (“The primaries were thus largely irrelevant to the outcome of the old-fashioned nominating contest.”); Thomas E. Mann, *Is This Any Way to Pick a President?*, in REFORMING THE PRESIDENTIAL NOMINATION PROCESS 153 (Steven S. Smith & Melanie J. Springer eds., 2009) (“In the early twentieth century, Progressives, in hopes of countering the influence of party bosses, championed the use of primary elections to select delegates. But that plebiscitary system never fully took hold, and conventions retained their role as the setting in which party elites decided who should lead the party in the general election campaign.”).

21. NELSON W. POLSBY, CONSEQUENCES OF PARTY REFORM 64 (1983); KAMARCK, *supra* note 18, at 14 (“[O]f the nine primaries that even listed the presidential candidates on the ballot, only three had been in states where the primary results were binding when it came to delegate selection.”).

22. KAMARCK, *supra* note 18, at 8 (“More often than not, presidential candidates didn’t even put their name on the ballots of primaries.”).

23. ROBERT DALLEK, AN UNFINISHED LIFE: JOHN F. KENNEDY, 1917–1963 at 239 (2003) (“Because there were only sixteen state primaries, the road to the nomination in 1960 principally involved winning over state party leaders. . . . [W]ith only sixteen primaries, they would need the backing of party ‘bosses’ as well as rank-and-file Democrats to have any realistic hope of being nominated.”); KAMARCK, *supra* note 18, at 10 (Kennedy “used stage one of the nominating system, the presidential primaries, to convince the party bosses who ruled stage two that he could win a general election despite his Catholic faith.”). *See also* THOMAS OLIPHANT & CURTIS WILKIE, THE ROAD TO CAMELOT: INSIDE JFK’S FIVE-YEAR CAMPAIGN 214–56 (2017).

24. KAMARCK, *supra* note 18, at 13 (“Humphrey was the last candidate to be nominated in the old-fashioned way.”); Smith & Springer, *supra* note 19, at 5 (“Humphrey won the nomination without participating in any primaries.”).

convention degenerated into chaos when Chicago police brutally suppressed Vietnam War protesters opposed to Humphrey's nomination.<sup>25</sup> Minnesota Senator Eugene McCarthy, who had run in the primaries and caucuses, refused to endorse Humphrey at the convention, adding to the sense of illegitimacy that tainted the nomination process.<sup>26</sup> The convention hall itself became a scene of disorder when McCarthy supporters condemned the "Gestapo tactics" of Richard Daley, the mayor of Chicago and a key Humphrey supporter.<sup>27</sup> As the historian Lewis Gould observed, "[t]he Democrats left Chicago with their party in a shambles."<sup>28</sup> Humphrey went on to lose the 1968 general election to the Republican nominee, Richard Nixon.<sup>29</sup>

The opaque, undemocratic process that enabled Humphrey's nomination created so much controversy that the Democratic Party found itself forced to make sweeping structural changes to its delegate selection rules.<sup>30</sup> A commission led by South Dakota Senator George McGovern and Minnesota Congressman Don Fraser proposed binding delegates to the results of the presidential primaries and caucuses, a reform that effectively ended the party leadership's control over the nomination process.<sup>31</sup> Approved by the DNC in 1971, the reforms went into effect for the 1972 election.<sup>32</sup> The revolutionary nature of the reforms became immediately apparent during the 1972 nomination race. On the strength of his primary election victories, the populist candidate George McGovern defeated Hubert Humphrey, once again the party establishment's preferred candidate.<sup>33</sup> Although McGovern lost the

25. JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974*, at 696–97 (1996); LEWIS L. GOULD, *1968: THE ELECTION THAT CHANGED AMERICA* 115–19 (2010).

26. PATTERSON, *supra* note 25, at 697 ("McCarthy refused to appear with Humphrey or to endorse him.").

27. GOULD, *supra* note 25, at 122.

28. PATTERSON, *supra* note 25, at 697 ("[T]he disorder at Chicago hurt Humphrey and the Democratic party, which limped out of Chicago more badly wounded than ever."); GOULD, *supra* note 25, at 122.

29. PATTERSON, *supra* note 25, at 704 ("Nixon won, but only barely.").

30. KAMARCK, *supra* note 18, at 14; Smith & Springer, *supra* note 20, at 5 ("Dissatisfaction with this outcome prompted liberals—mainly supporters of Eugene McCarthy and Bobby Kennedy—to call for reform of the nomination process.").

31. Mann, *supra* note 20, at 153 ("Most important, delegates would have to be selected in a timely fashion (that is, in the year of the presidential election) and in a manner that fairly reflected the candidate preferences of those participating in primary elections or party caucuses."); COOK, *supra* note 18, at 43–44; KAMARCK, *supra* note 18, at 14–15; NORRANDER, *supra* note 18, at 18–19.

32. COOK, *supra* note 18, at 44; KAMARCK, *supra* note 18, at 14.

33. STEPHEN E. AMBROSE, *NIXON: THE TRIUMPH OF A POLITICIAN* 554 (Vol. II, 1989) ("Still, on primary day, June 6, McGovern won by 5.4 percent, and with his California victory he had sufficient delegates to carry the convention[.]") *id.* at 579 ("Watching the 1972 Democratic National Convention on television from his living room at La Casa Pacifica gave Nixon great pleasure. By contrast, for many of the Democratic Party's professionals, also watching on



general election to Richard Nixon, McGovern's success in the primaries marked a turning point in the history of the Democratic Party. In response to the McGovern-Fraser Commission, state party committees throughout the country adopted rules to ensure that the outcome in each primary and caucus automatically determined which candidates received the state's national convention delegates, who became known as "pledged" delegates.<sup>34</sup> By switching to a pledged delegate system, the McGovern-Fraser reforms ensured that populist candidates like McGovern could parlay broad support with rank-and-file Democrats into a successful campaign for the party's nomination, even when opposed by party leaders.

In the years since 1972, there has been only one exception to the trend of empowering primary and caucus voters. In the early 1980s party leaders sought to temper mildly the democratizing effects of McGovern-Fraser by reasserting a small niche for themselves in the nomination process.<sup>35</sup> Starting with the 1984 election, and in response to the recommendations of a study group called the Hunt Commission, the DNC created the position of "superdelegate."<sup>36</sup> The superdelegates consisted of Democratic officeholders and party leaders authorized to participate in the nomination vote at the presidential convention.<sup>37</sup> Unlike pledged delegates, who must vote in accordance with the primary and caucus results in their respective states, party rules gave superdelegates a free

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television—because they had been excluded as a result of the McGovern reforms in the delegate selection process—viewing the proceedings gave them great pain. Amateurs had stolen their party.”).

34. COOK, *supra* note 18, at 8–9, 44–46; Mann, *supra* note 20, at 153–54 (“Even those that retained caucuses as mechanisms for the selection of delegates witnessed a shift in initiative and influence from party regulars to candidates and issue activities. Whether state parties turned to candidate primaries or participatory caucuses, they faced new constraints on how delegates were allocated to presidential candidates, demographic targets for the composition of delegates, and a prohibition on ex-officio delegates, the latter part of a larger effort to separate party officialdom from the delegate selection process.”).

35. Steven S. Smith & Melanie J. Springer, *Choosing Presidential Candidates*, in REFORMING THE PRESIDENTIAL NOMINATION PROCESS 6 (Steven S. Smith and Melanie J. Springer eds., 2009) (“Some Democrats, viewed as counter-reformers in some circles, wanted a stronger role for the party’s leaders and public officials to improve the odds that the party’s most effective candidate for the general election would be nominated.”); William G. Mayer, *Superdelegates: Reforming the Reforms Revisited*, in REFORMING THE PRESIDENTIAL NOMINATION PROCESS 91 (Steven S. Smith and Melanie J. Springer eds., 2009) (describing the effort “to give other elected officials and party leaders a greater voice in selecting the party’s presidential standard-bearer”).

36. Smith & Springer, *supra* note 19, at 6 (“A new commission, known as the Hunt Commission for its chair, Governor James Hunt Jr. of North Carolina, moved . . . to mandate the election of unpledged party leaders and elected officials, who were soon called superdelegates.”); Mayer, *supra* note 35, at 91.

37. Smith & Springer, *supra* note 19, at 6–7; Mayer, *supra* note 35, at 91 (as superdelegates “party and elected officials . . . were not required to indicate which presidential candidate they supported”).

hand to vote for the candidate of their choice.<sup>38</sup> In the years since, superdelegates have never represented more than a small fraction of the total number of delegates to the presidential convention. In 1984 there were 568 superdelegates, which constituted about 14% of the total number of delegates—3,933—at the DNC convention that year.<sup>39</sup> The number of superdelegates gradually rose until reaching a record high of 853 superdelegates in 2008.<sup>40</sup> But even in 2008 the superdelegates only constituted about 19% of the total convention delegates.<sup>41</sup> Pledged delegates made up the remainder.

As a consequence of their small numbers, superdelegates played a role in deciding the Democratic presidential nomination only twice before the 2016 election: 1984 and 2008.

The 1984 Democratic campaign gave rise to a long contest between former Vice President Walter Mondale, Colorado Senator Gary Hart, and civil rights leader Jesse Jackson.<sup>42</sup> Mondale entered the race as the heavy favorite, but he suffered surprising defeats to Hart in New Hampshire, Florida, Ohio, Massachusetts, Oklahoma, and California.<sup>43</sup> Mondale eventually rallied to retake the lead in both the popular vote and the pledged delegate race, but the campaign dragged on for months.<sup>44</sup> On June 6, 1984, the final day of the primary campaign, he finished with 1,927 delegates, a total that gave him a large lead over Hart and Jackson, but still left him 40 delegates short of securing the nomination.<sup>45</sup> After Mondale and his aides made a frenzy of phone calls, they secured enough commitments from superdelegates to win the nomination.<sup>46</sup> Thus, although Mondale finished the primaries with a larger share of the popular vote and more pledged delegates than any other candidate, he needed the support of superdelegates to avoid a floor fight at the convention.<sup>47</sup>

38. Mayer, *supra* note 35, at 91.

39. *Id.* at 94 (Table 5-4).

40. *Id.*

41. *Id.*

42. Nelson Polsby, *The Democratic Nomination and the Evolution of the Party System*, in *THE AMERICAN ELECTIONS OF 1984* at 51 (Austin Ranney ed., 1985); JULES WITCOVER, *PARTY OF THE PEOPLE: A HISTORY OF THE DEMOCRATS 622–25* (2003); JACK GERMOND & JULES WITCOVER, *WAKE US WHEN IT'S OVER: PRESIDENTIAL POLITICS OF 1984* at 343–44 (1985).

43. Polsby, *supra* note 42, at 50, 52 (Tables 2.10 & 2.11); WITCOVER, *supra* note 42, at 622–24; GERMOND & WITCOVER, *supra* note 42, at 317.

44. Mayer, *supra* note 35, at 100.

45. *Id.* (“1,967 delegates necessary to clinch the Democratic nomination. . .”).

46. *Id.* (“To get the final necessary votes, the Mondale campaign turned to the sizable bloc of uncommitted superdelegates. After several hours of frantic phone calling, Mondale acquired just enough commitments to put him seven votes above the critical threshold. . .”).

47. *Id.* at 100 (Mondale “had won more primary votes than either Hart or Jackson and had a large lead among ordinary (non-super) delegates”) *id.* at 103 (“There is evidence that superdelegates gave a valuable assist to Walter Mondale in 1984. The six Democratic contests

Superdelegates played no role in the outcome of the Democratic nomination races from 1988 through 2004.<sup>48</sup> Michael Dukakis in 1988, Bill Clinton in 1992 and 1996, Al Gore in 2000, and John Kerry in 2004 all won a decisive victory among pledged delegates, and thus did not need the assistance of superdelegates to secure the Democratic nomination.<sup>49</sup> During those years superdelegates faded into the background of the nomination process, drawing little attention from the media or the electorate.

But in 2008 superdelegates once again emerged as a significant factor in the Democratic nomination race. New York Senator Hillary Clinton entered the campaign as a heavy favorite, holding a 23-point polling lead over her principal challenger—Illinois Senator Barack Obama—in the fall of 2007.<sup>50</sup> But Obama's stunning upset victory in the Iowa Caucuses in January 2008 transformed the race,<sup>51</sup> giving rise to one of the closest nomination battles in Democratic Party history. During the course of the campaign, Obama won more primaries and caucuses overall, but Clinton won most of the states with the largest populations, including California, New York, Texas, Ohio, Pennsylvania, Florida, Michigan, and New Jersey.<sup>52</sup> The delegate race was equally close. By the end of the primary campaign, Obama had 1,766 pledged delegates to Clinton's 1,639

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since then, however, would have played out almost exactly as they did even if there had been no superdelegates.”); Priscilla L. Southwell, *The 1984 Democratic Nomination Process: The Significance of Unpledged Superdelegates*, 14 AM. POLITICS Q. 75 (1986).

48. Mayer, *supra* note 35, at 100 (“As ambiguous as the record is in 1984, this is actually the strongest case that can be made for the influence of superdelegates on the outcome of a Democratic nomination race.”).

49. Mayer, *supra* note 35, at 100 (noting that during the 1988-2004 period “one candidate so thoroughly dominated the primaries, and ended the primary-and-caucus season with such a substantial majority of the delegates, that the superdelegates were pretty clearly irrelevant to the final result.”) *id.* at 101, 103 (“There is evidence that superdelegates gave a valuable assist to Walter Mondale in 1984. The six Democratic contests since then, however, would have played out almost exactly as they did even if there had been no superdelegates”); KAMARCK, *supra* note 18, at 81.

50. JOHN HEILEMAN & MARK HALPERIN, *GAME CHANGE* 99 (2009) (“All along, Clinton had held a commanding lead over Obama in the national polls.”).

51. *Id.* at 4 (“First place, Hillary and Bill were told. A close second, at worst. Yet here she was, a far-off third”) *id.* at 6 (“Twenty-four hours earlier and all the previous year, she’d been the front-runner, the unstoppable, inevitable nominee. Now Obama stood as the most likely next president of the United States.”).

52. *Primary Season Election Results: Election 2008*, N.Y. TIMES (Dec. 6, 2016), <https://www.nytimes.com/elections/2008/primaries/results/votes/index.html>.

pledged delegates.<sup>53</sup> Neither candidate had the 2,118 delegates necessary to secure a majority at the DNC convention.<sup>54</sup>

Both candidates thus knew they required the support of superdelegates to win the nomination. Obama urged the superdelegates to support him, citing the fact that he finished the primary season with a slight lead among pledged delegates.<sup>55</sup> “[I]t would be problematic,” he warned “for the political insiders to overturn the judgment of the voters.”<sup>56</sup> Clinton, in contrast, called on the superdelegates “to exercise independent judgment,” clearly hoping they would view her as the stronger general election candidate.<sup>57</sup> Clinton’s appeal failed, and in early June 2008, Obama garnered enough superdelegates to reach the 2,118 delegates needed for the presidential nomination.<sup>58</sup>

Thus, as the 2016 campaign began, the basic rules of the DNC nomination process were clear. The candidate who carried a majority of the party’s delegates would win the party’s presidential nomination.<sup>59</sup> As in every nomination race since 1984, the Democratic delegates would come in two forms: pledged delegates, who would be determined on the basis of the caucuses and primaries, and superdelegates, who consisted of party leaders and elected officials authorized to vote for whichever candidate they preferred.<sup>60</sup> Although the Mondale and Obama precedents indicated that the candidate with a lead among pledged delegates would have a historical basis for expecting superdelegate support, superdelegates remained free agents under party rules. Two critical

53. 2008 *Delegates*, REAL CLEAR POLITICS (2008), [https://www.realclearpolitics.com/epolls/2008/president/democratic\\_delegate\\_count.html](https://www.realclearpolitics.com/epolls/2008/president/democratic_delegate_count.html). The Associated Press and New York Times delegate counts varied slightly. See *Election 2008 Results: Democratic Delegate Count*, N.Y. TIMES (Dec. 6, 2016), <https://www.nytimes.com/elections/2008/primaries/results/delegates/index.html>.

54. *Id.*

55. Mayer, *supra* note 35, at 101.

56. Mayer, *supra* note 35, at 101; Katharine Q. Seelye, *2 States May See Delegates*, N.Y. TIMES (May 29, 2008), <http://query.nytimes.com/gst/fullpage.html?res=9805E7D71230F93AA15756C0A96E9C8B63>.

57. Mayer, *supra* note 35, at 101; Marc Ambinder, *Clinton’s Closing Argument To Superdelegates*, THE ATLANTIC (May 28, 2008), <https://www.theatlantic.com/politics/archive/2008/05/clintons-closing-argument-to-superdelegates/53314/>.

58. Mayer, *supra* note 35, at 102, 103 (“Though a plurality of them ultimately supported Obama, it would be a mistake to say that, in some meaningful sense, they ‘gave him the nomination.’ All the superdelegates really did in 2008 was ratify a decision already reached in the primaries and caucuses.”).

59. D. Stephen Voss, *Will Superdelegates Pick the Democratic Nominee? Here’s Everything You Need to Know*, WASH. POST (Feb. 26, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/26/will-superdelegates-pick-the-democratic-nominee-heres-everything-you-need-to-know/?utm\\_term=.abcf8e45f485](https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/26/will-superdelegates-pick-the-democratic-nominee-heres-everything-you-need-to-know/?utm_term=.abcf8e45f485).

60. *Id.*; *The Charter & Bylaws of the Democratic National Party of the United States*, DEMOCRATIC NAT’L COMM. (as amended Aug. 28, 2015), Art. II, Sec. 4(h)(ii), [http://s3.amazonaws.com/uploads.democrats.org/Downloads/DNC\\_Charter\\_Bylaws\\_9.17.15.pdf](http://s3.amazonaws.com/uploads.democrats.org/Downloads/DNC_Charter_Bylaws_9.17.15.pdf).

numbers thus governed the 2016 Democratic nomination race: 4,763 and 2,382. There were a total of 4,763 delegates to the DNC presidential convention, including 4,051 pledged delegates and 712 superdelegates.<sup>61</sup> The candidate who won 2,382 delegates—a majority of the combined total of pledged and superdelegates—would secure the Democratic presidential nomination.<sup>62</sup>

### B. *The Iowa Caucuses*

The 2016 Democratic race was not expected to be competitive.<sup>63</sup> Most major Democratic candidates stayed out of the race because the conventional wisdom viewed former Secretary of State Hillary Clinton as the prohibitive favorite.<sup>64</sup> By the time the voting began in February 2016, only two candidates challenged Clinton: former Maryland Governor Martin O'Malley and Vermont Senator Bernie Sanders,<sup>65</sup> a self-described “democratic socialist” who was not even a member of the Democratic Party.<sup>66</sup> In December 2015, two months before the Iowa Caucuses, Clinton had a commanding polling lead of 61% to only 30% for Sanders and 2% for O'Malley.<sup>67</sup> Clinton also entered the primary

61. *Presidential Primaries 2016: Democratic Pledged and Unpledged Delegate Summary*, THE GREEN PAPERS (Mar. 22, 2018), <https://www.thegreenpapers.com/P16/D-PU.phtml>; Adam Hilton, *The Democratic Party's Latest Reform Commission Just Met. It's Likely to Slash the Power of Superdelegates*, WASH. POST (Dec. 12, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/12/the-democratic-partys-latest-reform-commission-just-met-its-likely-to-slash-the-power-of-superdelegates/?utm\\_term=.816c98934bed](https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/12/the-democratic-partys-latest-reform-commission-just-met-its-likely-to-slash-the-power-of-superdelegates/?utm_term=.816c98934bed); 2016 *Democratic National Convention: Delegate/Alternate Allocation*, DEMRULZ (Jan. 29, 2016), [https://demrulz.org/wp-content/files/DNC\\_Appendix\\_B\\_-\\_Allocation\\_Chart\\_1\\_29\\_16\\_3.pdf](https://demrulz.org/wp-content/files/DNC_Appendix_B_-_Allocation_Chart_1_29_16_3.pdf).

62. *Democratic National Convention, 2016*, BALLOTPEDIA [https://ballotpedia.org/Democratic\\_National\\_Convention\\_2016](https://ballotpedia.org/Democratic_National_Convention_2016) (“In order to win the 2016 Democratic presidential nomination, a candidate had to win 2,382 delegates at the national convention.”).

63. William G. Mayer, *The Nominations: The Road to a Much-Disliked General Election*, in THE ELECTIONS OF 2016 at 32 (Michael Nelson ed.) (“One factor that scared off many potential opponents was all the obvious assets that made Clinton not just a likely candidate, not just a strong front-runner, but also (or so most pundits informed us) an almost prohibitive favorite.”).

64. *Id.* at 32.

65. *Id.* at 35.

66. David Weigel & David A. Fahrenthold, *What is a Democratic Socialist? Bernie Sanders Tries to Redefine the Name*, WASH. POST (Oct. 17, 2015), [https://www.washingtonpost.com/politics/what-is-a-democratic-socialist-bernie-sanders-tries-to-redefine-the-name/2015/10/17/d722ba80-7370-11e5-9cbb-790369643cf9\\_story.html?utm\\_term=.7f08e6268c3b](https://www.washingtonpost.com/politics/what-is-a-democratic-socialist-bernie-sanders-tries-to-redefine-the-name/2015/10/17/d722ba80-7370-11e5-9cbb-790369643cf9_story.html?utm_term=.7f08e6268c3b); Paul Starr, *Bernie Sanders's Problem With Democrats*, THE ATLANTIC (Feb. 8, 2016), <https://www.theatlantic.com/politics/archive/2016/02/sanderss-party-problem/460293/>.

67. *Half Of U.S. Voters Embarrassed With Trump As President, Quinnipiac University National Poll Finds; Trump At Top Of GOP Pack, But Cruz Closes In*, QUINNIPIAC U. POLL, at 1 (Dec. 22, 2015), <https://poll.qu.edu/national/release-detail?ReleaseID=2311>.

season with a huge advantage among superdelegates, receiving more than 200 endorsements from Democratic officeholders.<sup>68</sup>

But starting with the first contest of the Democratic nomination race—the Iowa caucuses on February 1, 2016<sup>69</sup>—Sanders proved to be a much stronger challenger than expected.<sup>70</sup> Although Clinton won the Iowa caucuses,<sup>71</sup> the margin was exceedingly close. The Iowa Democratic Party declared Clinton the victor because she won slightly more precinct delegates than Sanders.<sup>72</sup> The margin was so small the media declared the caucuses a “virtual tie” between Clinton and Sanders,<sup>73</sup> and rightfully so. The chair of the Iowa Democratic Party deemed the race “the closest in Iowa Democratic caucus history.”<sup>74</sup>

Clinton’s victory, however, was overshadowed by the state party’s poor organization and ineffective administration of the caucuses.<sup>75</sup> Over 170,000 Democratic voters participated,<sup>76</sup> but many caucus sites were not prepared to handle the size of the crowds, forcing voters to wait in long lines before entering their precincts.<sup>77</sup> In cases where a single location

68. Aaron Bycoffe, *The Endorsement Primary*, FIVETHIRTYEIGHT (June 7, 2016), <https://projects.fivethirtyeight.com/2016-endorsement-primary/#endorsements>.

69. David Weigel, *Iowa Caucuses: Here’s How the Voting Works*, WASH. POST (Feb. 1, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/01/23/heres-how-the-iowa-caucuses-work/?utm\\_term=.b83afdde1df2](https://www.washingtonpost.com/news/post-politics/wp/2016/01/23/heres-how-the-iowa-caucuses-work/?utm_term=.b83afdde1df2).

70. Mayer, *supra* note 63, at 33 (“But something in the Sanders candidacy caught on.”).

71. Tami Luhby & Nia-Malika Henderson, *Hillary Clinton wins Iowa Caucuses*, CNN (Feb. 3, 2016), <http://www.cnn.com/2016/02/02/politics/new-hampshire-primary-2016/index.html>.

72. Ben Jacobs, *Iowa Democratic Party Altered Precinct’s Caucus Results During Chaotic Night*, THE GUARDIAN (Feb. 5, 2016), <https://www.theguardian.com/us-news/2016/feb/05/iowa-democratic-party-altered-precinct-caucus-results-clinton-sanders>.

73. Jose A. DelReal, Juliet Eilperin & David Nakamura, *Iowa Caucus: Cruz Tops Trump, While Clinton and Sanders Are in Virtual Tie*, WASH. POST (Feb. 2, 2016), [https://www.washingtonpost.com/politics/trump-clinton-cautiously-optimistic-ahead-of-iowa-caucuses/2016/02/01/914388ac-c88a-11e5-a7b2-5a2f824b02c9\\_story.html?utm\\_term=.88c069a016da](https://www.washingtonpost.com/politics/trump-clinton-cautiously-optimistic-ahead-of-iowa-caucuses/2016/02/01/914388ac-c88a-11e5-a7b2-5a2f824b02c9_story.html?utm_term=.88c069a016da).

74. Russell Berman, *Was the Iowa Caucus Decided by Coin Flips?*, THE ATLANTIC (Feb. 2, 2016), <https://www.theatlantic.com/politics/archive/2016/02/hillary-clinton-bernie-sanders-coin-flips-iowa-caucus/459429/>.

75. Sean J. Wright, *Time to End Presidential Caucuses*, 85 FORDHAM L. REV. 1127, 1138 (2016); Jacobs, *supra* note 72.

76. Abby Phillip, *Clinton Campaign says High Iowa Turnout Revealed Sanders’s Weakness*, WASH. POST (Feb. 2, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/02/02/clinton-campaign-says-high-iowa-turnout-revealed-sanders-weakness/?tid=a\\_mcntx&utm\\_term=.cbfc74f5cf68](https://www.washingtonpost.com/news/post-politics/wp/2016/02/02/clinton-campaign-says-high-iowa-turnout-revealed-sanders-weakness/?tid=a_mcntx&utm_term=.cbfc74f5cf68).

77. Jennifer Jacobs, *Iowa Nightmare Revisited: Was Correct Winner Called on Caucus Night?*, USA TODAY (Feb. 2, 2016) (“There were reports of disorganization and lack of volunteers Monday evening. . . . Democratic voters reported long lines, too few volunteers, a lack of leadership and confusing signage. In some cases, people waited for an hour in one line, only to learn their precinct was in a different area of the same building. The proceedings were to begin at 7 p.m. but started late in many cases.”), <https://www.usatoday.com/story/news/politics/elections/2016/02/02/missing-iowa-precinct-sanders-clinton/79693834/>.

housed multiple precincts, voters sometimes found themselves in the wrong room.<sup>78</sup> A shortage of volunteers and inadequate signage compounded the disorder.<sup>79</sup> The result was widespread confusion, especially among first-time participants in the caucuses.<sup>80</sup>

The complexity of the caucus rules exacerbated the disarray at the precinct sites. Like caucuses in other states,<sup>81</sup> the Iowa Democratic caucuses relied on byzantine rules that made the process far more complicated than a primary.<sup>82</sup> Unlike primary elections, in which voters cast secret ballots, the Iowa Democratic caucuses required voters to congregate in designated locations at precinct sites to express their support for a particular candidate.<sup>83</sup> After the first round of head counting, all candidates who received less than 15% support in the precinct were eliminated.<sup>84</sup> Supporters of eliminated candidates could then defect to other candidates, a process that often included scenes of cajoling, cheering, chanting, and shouting.<sup>85</sup> The results of the second round of head counting determined the final allocation of delegates from each precinct.<sup>86</sup> The rules thus lent themselves to an atmosphere of chaos at precinct sites.<sup>87</sup>

78. *Id.*

79. *Id.*

80. *Id.*

81. Richard L. Hasen, *Whatever Happened to "One Person, One Vote"?*, SLATE (Feb. 5, 2008), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2008/02/whatever\\_happened\\_to\\_one\\_person\\_one\\_vote.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2008/02/whatever_happened_to_one_person_one_vote.html).

82. HUGO WINNEBRENNER & DENNIS J. GOLDFORD, *THE IOWA PRECINCT CAUCUSES: THE MAKING OF A MEDIA EVENT* 338 ("The caucuses are not elections in any ordinary sense of the term (though delegates to county conventions are elected), but rather party business meetings") *id.* at 338–39 ("the Democrats use of preference groups, designed for the purpose of instituting proportional voting, complicate and confuse the democratic will because individual votes are not counted and reported directly") (3d ed. 2010).

83. Ben Jacobs, *How the Iowa Caucuses Work: A Confusing Election Process Explained*, THE GUARDIAN (Jan. 19, 2016) ("After attendees show up to a Democratic caucus, they are divided into preference groups based on candidates whom they support. Bernie Sanders supporters will stand in one area, Hillary Clinton supporters in another. Once everyone is separated, there is a first count of how many supporters each candidate has."), <https://www.theguardian.com/us-news/2016/jan/19/iowa-caucuses-explained-2016-election-democrats-republicans>.

84. Jacobs, *supra* note 83 ("To be viable in each precinct, a candidate usually needs to receive the support of 15% of those who attend, although in some small rural precincts, the threshold is higher.")

85. *See, e.g.*, CBS This Morning, *Unraveling the Mystery of the Iowa Caucuses*, YOUTUBE (Jan. 29, 2016), <https://www.youtube.com/watch?v=CaeLrJFo2qA>.

86. *Id.*

87. Darren Samuelsohn, *Inside the Iowa Caucus Chaos*, POLITICO (Feb. 8, 2016) ("Iowa Democrats had some similar problems the last time they ran a competitive caucus – they just got lucky the results were nowhere near as close."), <https://www.politico.com/story/2016/02/how-iowa-democrats-couldnt-handle-a-two-candidate-race-218934>.

Making matters worse, the Iowa Democratic caucuses contradicted the most basic principles of transparency.<sup>88</sup> As with previous caucuses,<sup>89</sup> no popular vote was reported or even tallied by the Iowa Democratic Party.<sup>90</sup> In keeping with long-standing precedent, the 1,681 precinct sites in the Iowa caucuses only reported how many delegates each candidate won, not the raw vote total in each caucus.<sup>91</sup> The number of delegates assigned to each precinct depended on the turnout in the preceding two elections, which meant the delegate assignment often did not reflect an accurate distribution of the 2016 precinct turnout.<sup>92</sup>

Adding to the opaque nature of the caucuses, the Iowa Democratic Party disclosed the results using a complicated formula to determine the ultimate delegate count. Instead of voting directly for the presidential candidates, caucus-goers voted for delegates to county conventions.<sup>93</sup> The county delegates then elected state convention delegates, who in turn elected delegates to the national convention. The upshot was on caucus night the party could only estimate the final delegate award through a convoluted calculation called State Delegate Equivalents (“SDEs”).<sup>94</sup> The state party determined the number of SDEs won by each candidate by calculating the ratio of state to county convention delegates.<sup>95</sup> In the 2016 Iowa caucuses, Clinton won 700.47 SDEs to Sanders’s 696.92

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88. Martina Stewart, *Des Moines Register: ‘Once Again the World is Laughing at Iowa,’* WASH. POST (Feb. 5, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/02/05/des-moines-register-once-again-the-world-is-laughing-at-iowa/?utm\\_term=.046b729b36bd](https://www.washingtonpost.com/news/morning-mix/wp/2016/02/05/des-moines-register-once-again-the-world-is-laughing-at-iowa/?utm_term=.046b729b36bd).

89. WINEBRENNER & GOLDFORD, *supra* note 82, at 338–39 (“[I]ndividual votes are not counted and reported directly, but rather appear in the form of ‘state delegate equivalents’ that reporters and the public never seem to understand. Despite repeated requests by the press for individual votes, Democratic leaders have consistently asserted that the delegate equivalents best represent what takes place at their caucuses, namely the selection of delegates to the county conventions.”).

90. David Weigel, *Iowa Caucuses: Here’s How the Voting Works*, WASH. POST (Feb. 1, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/01/23/heres-how-the-iowa-caucuses-work/?utm\\_term=.b83afdde1df2](https://www.washingtonpost.com/news/post-politics/wp/2016/01/23/heres-how-the-iowa-caucuses-work/?utm_term=.b83afdde1df2).

91. *Id.* (“There is no raw vote total released, only projections of how many Democrats turned out.”).

92. *Id.*; Jacobs, *supra* note 83 (“Each precinct is apportioned a number of delegates based on Democratic turnout in the past two elections . . . If a precinct is supposed to have five delegates to the county convention, it doesn’t matter if eight people show up to the Democratic caucus or 800. The precinct is still only getting five delegates.”).

93. Jenny Starrs & Justin Wm. Moyer, *Clinton Wins at Least Six Iowa Precincts by Coin Flip*, WASH. POST (Feb. 2, 2016) (“On caucus night, Iowans in each precinct elect delegates to their county conventions[.]”), [https://www.washingtonpost.com/news/morning-mix/wp/2016/02/02/clinton-wins-at-least-six-iowa-precincts-by-coin-flip/?utm\\_term=.06820080fdd3](https://www.washingtonpost.com/news/morning-mix/wp/2016/02/02/clinton-wins-at-least-six-iowa-precincts-by-coin-flip/?utm_term=.06820080fdd3).

94. WINEBRENNER & GOLDFORD, *supra* note 82, at 339; Starrs & Moyer, *supra* note 93 (“State delegate equivalents are calculated using a ratio of state to county convention delegates.”); Wright, *supra* note 75, at 1131–32.

95. *2016 Iowa Caucuses: About*, IOWA DEMOCRATIC PARTY, <https://web.archive.org/web/20171105021052/http://iowademocrats.org/about-iowa-caucuses/>.



SDEs,<sup>96</sup> a margin that ultimately translated into twenty-three DNC delegates for Clinton and twenty-one for Sanders.<sup>97</sup>

Although the 2016 caucuses used the same rules as previous caucuses, the close nature of the race and the confusing delegate award formula all but ensured that Clinton's victory would be viewed with suspicion.<sup>98</sup> The Iowa Democratic Party's policy of breaking precinct ties with coin flips added to the skepticism, particularly when the *Washington Post* erroneously reported that Clinton went 6-0 in coin flips.<sup>99</sup> In fact, Sanders also won several precincts through coin flips, and in any case the coin flip tiebreakers occurred at small precincts which had no bearing on the overall outcome of the caucuses.<sup>100</sup>

The byzantine and chaotic process of the Iowa caucuses, combined with the legend of Clinton's "undefeated" record in the coin flips, tainted the first contest of the 2016 nomination race.<sup>101</sup> The *Des Moines Register* editorial staff spoke for many Iowans when they sharply criticized the state Democratic Party's mismanagement of the caucuses, declaring: "What happened Monday night at the Democratic caucuses was a debacle, period."<sup>102</sup> Although responsibility for the incompetent administration of the caucuses rested solely with the Iowa Democratic Party—not the Clinton campaign or the DNC—the disorder in Iowa sowed seeds of distrust among Sanders's supporters that would emerge with a vengeance as the campaign unfolded.

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96. Josh Levitt, *Iowa Democratic Caucus Results Updated After IDP Completes Review*, IOWA DEMOCRATIC PARTY (Feb. 7, 2016), <https://web.archive.org/web/20170215130515/http://iowademocrats.org/iowa-democratic-caucus-results-updated-after-idp-completes-review/>.

97. *Iowa Caucus Results*, N.Y. TIMES (Sept. 29, 2016), <https://www.nytimes.com/elections/2016/results/primaries/iowa>.

98. Samuelsohn, *supra* note 87.

99. Starrs & Moyer, *supra* note 93.

100. Russell Berman, *Was the Iowa Caucus Decided by Coin Flips?*, THE ATLANTIC (Feb. 2, 2016), <https://www.theatlantic.com/politics/archive/2016/02/hillary-clinton-bernie-sanders-coin-flips-iowa-caucus/459429/>; Domenico Montanaro, *Coin-Toss Fact-Check: No, Coin Flips Did Not Win Iowa For Hillary Clinton*, NAT'L PUB. RADIO (Feb. 2, 2016), <https://www.npr.org/2016/02/02/465268206/coin-toss-fact-check-no-coin-flips-did-not-win-iowa-for-hillary-clinton>.

101. Philip Bump, *Here's Just How Unlikely Hillary Clinton's 6-for-6 Coin-Toss Victories Would Have Been*, WASH. POST (Feb. 2, 2018), [https://www.washingtonpost.com/news/the-fix/wp/2016/02/02/heres-just-how-unlikely-hillary-clintons-6-for-6-coin-toss-victories-were/?utm\\_term=.eb050a63c94e](https://www.washingtonpost.com/news/the-fix/wp/2016/02/02/heres-just-how-unlikely-hillary-clintons-6-for-6-coin-toss-victories-were/?utm_term=.eb050a63c94e).

102. *Editorial: Something Smells in the Democratic Party*, DES MOINES REG. (Feb. 3, 2016), <https://www.desmoinesregister.com/story/opinion/editorials/caucus/2016/02/03/editorial-something-smells-democratic-party/79777580/>.

### C. *The Superdelegate and DNC Memo Controversy*

One week after the Iowa caucuses, Sanders won a stunning victory in the New Hampshire primary.<sup>103</sup> The Vermont senator carried New Hampshire with 60% of the vote, an impressive margin<sup>104</sup> aided greatly by New Hampshire's open primary system, which permitted non-Democrats to vote.<sup>105</sup> For a moment, it looked like Sanders had a chance to win the nomination. As the political analyst Molly Ball explained, Sanders's victory in New Hampshire "made the once-impossible seem possible, and now all bets are off."<sup>106</sup>

New Hampshire gave Sanders an aura of viability that carried his campaign for months to come. The contrast between the first two contests of the 2016 season also left a lasting impression with the Democratic electorate. In the Iowa caucuses—a party-run event—Clinton won by the slightest of margins under chaotic circumstances. But in the New Hampshire primary, which was administered by state and county election officials and not by the Democratic Party, Sanders won a landslide victory. The difference between Iowa and New Hampshire seemed to suggest that in a fair election, one not administered by the Democratic Party, Sanders would have the upper hand over Clinton.

The New Hampshire victory also inspired the Sanders campaign to court the superdelegates, the great majority of whom had already committed to Clinton.<sup>107</sup> In mid-February 2016, Sanders senior strategist Tad Devine announced the campaign would "make our case to the superdelegates."<sup>108</sup> In an interview on the CBS *Face the Nation* program, Bernie Sanders declared:

I think if we continue to do well around the country and if superdelegates - whose main interest in life is to make sure that we do not have a Republican in the White House - if they understand that I am the candidate and I believe that I

103. Philip Bump, *Make No Mistake: Bernie Sanders's Win in New Hampshire Was Historically Massive*, WASH. POST (Feb. 10, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/02/10/make-no-mistake-bernie-sanders-win-in-new-hampshire-was-historically-massive/?utm\\_term=.9ce4ac102f64](https://www.washingtonpost.com/news/the-fix/wp/2016/02/10/make-no-mistake-bernie-sanders-win-in-new-hampshire-was-historically-massive/?utm_term=.9ce4ac102f64).

104. Mayer, *supra* note 63, at 42 tbl.2.4.

105. John Wagner & Anne Gearan, *Sanders Defeats Clinton in Decisive New Hampshire Primary Victory*, WASH. POST (Feb. 9, 2016) ("He also benefited from New Hampshire's open primaries, which allow independents to vote in either the Democratic or Republican contests, winning roughly 7 in 10 not registered as Democrats."), [https://www.washingtonpost.com/politics/sanders-defeats-clinton-in-decisive-new-hampshire-primary-victory/2016/02/09/cac42588-cf43-11e5-b2bc-988409ee911b\\_story.html?utm\\_term=.192f5158b8c8](https://www.washingtonpost.com/politics/sanders-defeats-clinton-in-decisive-new-hampshire-primary-victory/2016/02/09/cac42588-cf43-11e5-b2bc-988409ee911b_story.html?utm_term=.192f5158b8c8).

106. Molly Ball, *Bernie Sanders Wins New Hampshire*, THE ATLANTIC (Feb. 9, 2016), <https://www.theatlantic.com/politics/archive/2016/02/bernie-sanders-new-hampshire/462105/>.

107. Daniel Strauss, *Sanders Supporters Revolt Against Superdelegates*, POLITICO (Feb. 14, 2016), <https://www.politico.com/story/2016/02/bernie-sanders-superdelegates-democrats-219286>.

108. *Id.*

am who is best suited to defeat the Republican nominee I think they will start coming over to us.<sup>109</sup>

But the New Hampshire primary proved to be Sanders's high-water mark. After New Hampshire, the Democratic race moved dramatically in Clinton's favor. She won the Nevada caucuses on February 20, and then followed it up on February 27 with a decisive victory in the South Carolina primary, carrying the state by a landslide margin of 73% to 26%.<sup>110</sup> On March 1—the first “Super Tuesday” multistate primary and caucus day—Clinton won 6 major primaries: Alabama, Arkansas, Georgia, Massachusetts, Texas, and Virginia.<sup>111</sup> On that same day, Sanders won four smaller contests, the Oklahoma and Vermont primaries and the Colorado and Minnesota caucuses.<sup>112</sup>

Super Tuesday established a pattern that would continue for the rest of the race. Clinton won most of the high-turnout primaries, particularly in large urban states, whereas Sanders won most of the low-turnout caucuses, particularly in small rural states.<sup>113</sup> For example, during the remaining contests in March, Clinton won eight primaries decisively, including a 48-point victory in Louisiana, a 66-point victory in Mississippi, and a 31-point victory in Florida.<sup>114</sup> The only March primary Clinton lost was in Michigan, which Sanders carried by the exceptionally close margin of 49.7% to 48.3%.<sup>115</sup> Far more voters participated in the Democratic primaries than the caucuses,<sup>116</sup> which meant that Clinton's strength in the primary elections gave her a large lead over Sanders in both the popular vote and pledged delegates.

As Clinton's primary victories accumulated and her lead became insurmountable, Sanders stopped attempting to win superdelegates to his side. Instead, he began to allege that the Democratic nomination process did not give him a fair chance to win.<sup>117</sup> For example, during an April

109. *Id.*

110. Mayer, *supra* note 63, at 42 tbl.2.4.

111. *Id.*

112. *Id.* at 42–43 tbls.2.4 & 2.5.

113. For a detailed analysis of the distinctively regional and demographic appeals of the Clinton and Sanders campaigns, see Section II.B.

114. Mayer, *supra* note 63, at 42 tbl.2.4.

115. *Id.*

116. *Id.* at 41 (“Caucuses are almost always characterized by very small turnout rates—usually no more than about 2 or 3 percent of the party electorate—and are thus susceptible to domination by a small number of zealous candidate and issue activists.”).

117. Ron Elving, *Democrats Burned By Charges Of A Rigged Nomination, But Some In GOP Watch With Envy*, NAT'L PUB. RADIO (May 26, 2016) (“Sanders has spoken of the party's voting and delegate rules in the same terms he uses for the campaign finance system, implying the party is not only favoring Clinton but also corrupt—both at the national level and in many states.”), <https://www.npr.org/2016/05/26/479553092/democrats-burned-by-charges-of-a-rigged-nomination-but-some-in-gop-watch-with-en>.

2016 interview on NBC's *Meet The Press* program, Sanders complained that the party had been unfair to him by scheduling three of the first four presidential debates on weekends when fewer people watch television.<sup>118</sup> His complaints took a far more serious turn in early May when he claimed in an Evansville, Indiana speech that his campaign faced a "rigged system" of superdelegates.<sup>119</sup> He soon went even further with his criticism of the nomination process, asserting that the Democratic race was "more like an anointing process, not a nomination process."<sup>120</sup> As the Democratic convention approached, Sanders escalated his attacks, claiming that the Democratic nomination race was "an anointment process, not a democratic process with a small or large d."<sup>121</sup> Not surprisingly, the allegation that the nomination process was "rigged" for Clinton became a common refrain among some of Sanders's supporters.<sup>122</sup>

Despite Sanders's attacks, Clinton ultimately clinched the nomination in June 2016 when her pledged delegate and superdelegate total reached the required number of 2,382.<sup>123</sup> In July she formally accepted the nomination at the Democratic presidential convention in Philadelphia.<sup>124</sup>

But the nomination controversy was only beginning. Three days before the Democratic convention began, Wikileaks posted 44,000 DNC emails that Russian intelligence operatives had hacked from the

118. Nick Gass, *Sanders: Democratic Party Hasn't Been Fair to Me*, POLITICO (Apr. 24, 2016), <https://www.politico.com/story/2016/04/bernie-sanders-democratic-party-fairness-222355#ixzz4NkoRDa5a>.

119. Schwartz, *supra* note 1; *Sanders Takes Aim at "Rigged System" of Superdelegates*, *supra* note 1.

120. Chris Haire, Margot Roosevelt & Martin Wisckol, *Bernie Sanders in Orange County: Thousands Turn Out to Hear Him Campaign against 'Rigged' System*, THE ORANGE CTY. REG. (May 22, 2016), <https://www.oregister.com/2016/05/22/bernie-sanders-in-orange-county-thousands-turn-out-to-hear-him-campaign-against-rigged-system/>.

121. Eugene Scott, *Sanders: 'The Democratic National Convention Will Be a Contested Convention'*, CNN (June 4, 2016), <https://www.cnn.com/2016/06/04/politics/bernie-sanders-hillary-clinton-convention/index.html>.

122. Chris Moody, *Bernie Sanders, Democratic Establishment Battle Boils Over*, CNN (May 18, 2016), <http://www.cnn.com/2016/05/17/politics/bernie-sanders-democratic-establishment-battle-boils-over/index.html>; David Weigel, *Democratic Superdelegates: The Villains of a 'Rigged' System, According to Sanders's Supporters*, WASH. POST (June 7, 2016), [https://www.washingtonpost.com/politics/democratic-superdelegates-the-villains-of-a-rigged-system-according-to-sanders/2016/06/07/634f6df2-2cba-11e6-9b37-42985f6a265c\\_story.html?utm\\_term=.a95a5d509a1f](https://www.washingtonpost.com/politics/democratic-superdelegates-the-villains-of-a-rigged-system-according-to-sanders/2016/06/07/634f6df2-2cba-11e6-9b37-42985f6a265c_story.html?utm_term=.a95a5d509a1f).

123. Gabriel Debenedetti, *Clinton Clinches Democratic Nomination*, POLITICO (June 6, 2016), <https://www.politico.com/story/2016/06/ap-declares-clinton-winner-of-democratic-primary-223972>.

124. Patrick Healy & Jonathan Martin, *Democrats Make Hillary Clinton a Historic Nominee*, N.Y. TIMES, July 27, 2016, at A1.

Democratic Party computer system.<sup>125</sup> The hacked emails revealed that the DNC leadership overwhelmingly preferred Clinton because they viewed Sanders as a weak general election candidate.<sup>126</sup> As the Wikileaks story erupted into a national scandal, DNC Chairwoman Debbie Wasserman Schultz was forced to step down and former Gore campaign manager Donna Brazile replaced her.<sup>127</sup> The Democratic Party issued a formal statement of apology to Sanders:

“On behalf of everyone at the DNC, we want to offer a deep and sincere apology to Senator Sanders, his supporters, and the entire Democratic Party for the inexcusable remarks made over email. These comments do not reflect the values of the DNC or our steadfast commitment to neutrality during the nominating process. The DNC does not – and will not – tolerate disrespectful language exhibited toward our candidates.”<sup>128</sup>

The hacked emails intensified the bitterness many Sanders supporters felt for the DNC. Sanders campaign manager Jeff Weaver cited the emails as proof of “what many of us have known for some time, that there were certainly people at the DNC who were actively helping the Clinton effort and trying to hurt Bernie Sanders’s campaign.”<sup>129</sup> Rania Batrice, a Sanders campaign staffer, declared, “Everything our fans have been saying—and they were beaten down for and called conspiracy theorists—and now it’s in black and white.”<sup>130</sup> During the Philadelphia nominating convention, dozens of Bernie Sanders delegates staged a protest in the convention hall claiming Clinton won because of a “rigged system.”<sup>131</sup> One of the protesting Sanders delegates declared, “We’ve had enough of

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125. Eric Lipton, David E. Sanger & Scott Shane, *The Perfect Weapon: How Russian Cyberpower Invaded the U.S.*, N.Y. TIMES, Dec. 13, 2016, at A1.

126. Michael D. Shear & Matthew Rosenberg, *Released Emails Suggest the D.N.C. Derided the Sanders Campaign*, N.Y. TIMES, July 23, 2016, at A10.

127. Jonathan Martin & Alan Rappoport, *Debbie Wasserman Schultz to Resign D.N.C. Post*, N.Y. TIMES, July 25, 2016 at A1.

128. Sabrina Siddiqui, Lauren Gambino & Dan Roberts, *DNC Apologizes to Bernie Sanders Amid Convention Chaos in Wake of Email Leak*, THE GUARDIAN (July 25, 2016), <https://www.theguardian.com/us-news/2016/jul/25/debbie-wasserman-schultz-booed-dnc-fbi-email-hack>.

129. Maquita Peters, *Leaked Democratic Party Emails Show Members Tried To Undercut Sanders*, NAT’L PUB. RADIO (July 23, 2016), <https://www.npr.org/sections/thetwo-way/2016/07/23/487179496/leaked-democratic-party-emails-show-members-tried-to-undercut-sanders>.

130. Mary Alice Parks, *Bernie Sanders Campaign Chief Says Someone Must Be ‘Accountable’ for What DNC Emails Show*, ABC NEWS (July 23, 2016), <https://abcnews.go.com/Politics/bernie-sanders-campaign-chief-accountable-dnc-emails-show/story?id=40825318>.

131. Daniel Bush, *Sanders Supporters Walk off Convention Floor, Blame ‘Rigged System’ for His Loss*, NAT’L PUB. RADIO (July 26, 2016), <https://www.pbs.org/newshour/politics/sanders-supporters-walk-off-convention-floor-blame-rigged-system-for-his-loss>.

them shoving Hillary Clinton down our throats.”<sup>132</sup> Another Sanders delegate warned that “under no circumstances will I back Hillary Clinton,” adding that “the whole system is rigged.”<sup>133</sup> Some Sanders delegates even chanted “lock her up” on the convention floor.<sup>134</sup>

The allegations of a “rigged” nomination undermined Clinton even after Sanders conceded defeat.<sup>135</sup> As the *New York Times* columnist Charles Blow pointed out, “the ‘rigged’ idea stuck.”<sup>136</sup> The Sanders campaign’s relentless attacks on the integrity of the nomination process created a lasting perception that the DNC had ignored the will of the Democratic electorate. As *Time* magazine observed in July 2016, “Sanders, who has spent the past 15 months condemning a ‘rigged system’ and lambasting Clinton’s Establishment credentials, has conjured a spirit of resentment that he can’t dispel.”<sup>137</sup> For example, at the Nevada Democratic Party convention in May, angry Sanders supporters shouted down Clinton’s supporters and used social media to threaten the state party chair for supporting Clinton.<sup>138</sup> The presidential convention failed to heal those divisions within the party. An analysis by FiveThirtyEight in August 2016 found that one-third of Sanders supporters still had not decided to vote for Clinton in the November election.<sup>139</sup>

Further evidence that the “rigged” nomination idea would not go away came in federal court. In the summer of 2016, a group of Sanders voters and campaign contributors filed a class action suit against the DNC and Debbie Wasserman Schultz alleging that the defendants had violated their duty of “impartiality and evenhandedness” during the Democratic primaries.<sup>140</sup> In support of their fraud claims, the plaintiffs cited Article

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132. *Id.*

133. *Id.*

134. Charlotte Alter & Sam Frizell, *Bernie Sanders Has Lost Control of His Political Revolution*, TIME (July 26, 2016), <http://time.com/4423362/democratic-convention-bernie-sanders-revolution/>.

135. Dan Roberts, *Bernie Sanders Officially Endorses Hillary Clinton for President*, THE GUARDIAN (July 12, 2016), <https://www.theguardian.com/us-news/2016/jul/12/bernie-sanders-supports-hillary-clinton-president>.

136. Charles M. Blow, *Clinton’s Specter of Illegitimacy*, N.Y. TIMES (Oct. 24, 2016), <https://www.nytimes.com/2016/10/24/opinion/clintons-specter-of-illegitimacy.html>.

137. Alter & Frizell, *supra* note 134.

138. Moody, *supra* note 122.

139. Harry Enten, *About A Third Of Bernie Sanders’s Supporters Still Aren’t Backing Hillary Clinton*, FIVETHIRTYEIGHT (Aug. 8, 2016), <http://fivethirtyeight.com/features/about-a-third-of-bernie-sanders-supporters-still-arent-backing-hillary-clinton/>.

140. Wilding et al., *supra* note 2, at ¶ 159; see also Riotta, *Did the DNC Help Hillary Clinton Beat Bernie Sanders? Fraud Lawsuit Takes Aim at Leadership*, *supra* note 3; Riotta, *Was The Election Rigged Against Bernie Sanders? DNC Lawsuit Demands Repayment For Campaign Donors*, *supra* note 3.

5, Section 4 of Democratic Party Charter and Bylaws, which directed that:

the [DNC] Chairperson shall exercise impartiality and evenhandedness as between the Presidential candidates and campaigns. The Chairperson shall be responsible for ensuring that the national officers and staff of the Democratic National Committee maintain impartiality and evenhandedness during the Democratic Party Presidential nominating process.<sup>141</sup>

In support of their claims of bias, the plaintiffs cited to a leaked DNC Memo from May 2015, which stated: “Our goals in the coming months will be to frame the Republican field and the eventual nominee early and to provide a contrast between the GOP field and HRC [Hillary Rodham Clinton].”<sup>142</sup> The plaintiffs saw the memo as a smoking gun that proved the DNC’s bias in favor of Clinton eight months before the Iowa caucuses. The complaint concluded that “[r]ather than reflecting an ‘impartial’ or ‘evenhanded’ approach to the nominating process, as required by the Charter, the DNC Memo strongly indicates that the DNC’s entire approach to the process was guided by the singular goal of elevating Clinton to the general election contest.”<sup>143</sup>

Donald Trump, the Republican nominee, made full use of the controversy to his own benefit. As Trump explained in a May 2016 Tweet: “I would rather run against Crooked Hillary Clinton than Bernie Sanders and that will happen because the books are cooked against Bernie!”<sup>144</sup> In May 2016, Trump tweeted: “Bernie Sanders is being treated very badly by the Dems. The system is rigged against him. He should run as an independent! Run Bernie, run.”<sup>145</sup> Trump repeatedly claimed that the Democratic primaries were rigged in favor of Clinton. On May 17, 2016, he Tweeted: “I look so forward to debating Crooked Hillary Clinton! Democrat Primaries are rigged, e-mail investigation is rigged - so time to get it on!”<sup>146</sup> Three days later he returned to the same theme, Tweeting: “Crooked Hillary can’t even close the deal with Bernie

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141. Wilding et al., *supra* note 2, at ¶ 159.

142. *Id.* at ¶ 167.

143. *Id.* at ¶ 169.

144. Tara Golshan, *Donald Trump Keeps Saying the System is Rigged against Bernie Sanders. Here’s Why*, VOX (June 7, 2016), <https://www.vox.com/2016/5/6/11590174/trump-sanders-system-rigged>.

145. Tom Liddy, *Donald Trump: The Things He Said Are “Rigged” and “Not Rigged,”* ABC NEWS (Oct. 12, 2016), <http://abcnews.go.com/Politics/donald-trump-things-rigged-rigged/story?id=42738506>.

146. *Id.*

- and the Dems have it rigged in favor of Hillary. Four more years of this? No way!”<sup>147</sup>

Keenly aware of the potency of the “rigged system” claims, Trump exploited the issue throughout the general election. In July 2016, he Tweeted: “[a]n analysis showed that Bernie Sanders would have won the Democratic nomination if it were not for the Super Delegates.”<sup>148</sup> Trump’s allegation was demonstrably false since Clinton, not Sanders, carried a majority of both pledged delegates and the popular vote. But the facts did not matter to Trump. He knew that by attacking the legitimacy of the Democratic nomination race, he could impugn Clinton’s character and honesty in a way that would resonate with Sanders voters. For example, in August he Tweeted: “President Obama should ask the DNC about how they rigged the election against Bernie.”<sup>149</sup> Throughout the fall campaign, Trump referred to Clinton as “Crooked Hillary,”<sup>150</sup> claiming, “[s]he is as crooked as they come.”<sup>151</sup> During the second presidential debate, he revived the allegation that Clinton did not win the Democratic nomination “fair and square.”<sup>152</sup> Trump even warned that the general election would be rigged for Clinton. During an August 2016 speech in Columbus, Ohio, he declared that the Democratic primary nomination “was rigged, and I’m afraid the [general] election is going to be rigged.”<sup>153</sup>

A second wave of Russian-hacked DNC emails<sup>154</sup> further boosted Trump’s efforts to portray Clinton as an illegitimate Democratic nominee. In early October the Trump campaign faced an existential crisis when NBC News discovered a 2005 tape of Donald Trump making crude and misogynistic statements to the host of the television program *Access*

147. *Id.*

148. Philip Bump, *Donald Trump’s ‘Analysis’ Showing that Clinton Won Because of Superdelegates Is . . . Bad*, WASH. POST (July 25, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/07/25/donald-trumps-analysis-showing-that-clinton-won-because-of-super-delegates-is-bad/?utm\\_term=.b1ca496d0045](https://www.washingtonpost.com/news/the-fix/wp/2016/07/25/donald-trumps-analysis-showing-that-clinton-won-because-of-super-delegates-is-bad/?utm_term=.b1ca496d0045).

149. Liddy, *supra* note 145.

150. Mark Abadi, *There’s an Interesting Reason why Donald Trump’s Nicknames for his Enemies Are So Effective*, BUS. INSIDER (Nov. 2, 2016), <http://www.businessinsider.com/why-donald-trump-gives-nicknames-to-his-political-enemies-2016-11>.

151. Jenna Johnson, *At Florida Rally, Trump Resumes Attacking ‘Crooked Hillary Clinton,’* WASH. POST (Sept. 27, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/09/27/at-florida-rally-trump-resumes-attacking-crooked-hillary-clinton/?utm\\_term=.b90f66de4e54](https://www.washingtonpost.com/news/post-politics/wp/2016/09/27/at-florida-rally-trump-resumes-attacking-crooked-hillary-clinton/?utm_term=.b90f66de4e54).

152. Liddy, *supra* note 145.

153. John Santucci & Candace Smith, *Trump Says He’s ‘Afraid the Election Is Going to Be Rigged,’* ABC NEWS (Aug. 1, 2016), <http://abcnews.go.com/Politics/trump-afraid-election-rigged/story?id=41050425>.

154. For the U.S. intelligence community’s determination that Russian President Vladimir Putin ordered the hacking of the DNC to undermine Hillary Clinton, see Director of National Intelligence, *Intelligence Community Assessment: Assessing Russian Activities and Intentions in Recent US Elections* (Jan. 6, 2017), [https://www.dni.gov/files/documents/ICA\\_2017\\_01.pdf](https://www.dni.gov/files/documents/ICA_2017_01.pdf).



*Hollywood*.<sup>155</sup> The tape drove Trump's poll numbers down so sharply that Clinton surged to an 8-point lead in mid-October.<sup>156</sup> But just hours after the public disclosure of the *Access Hollywood* tape, Wikileaks posted a new series of emails, this time from the account of Clinton campaign manager John Podesta.<sup>157</sup> According to a post-election report by the U.S. intelligence community, Wikileaks received the emails from the Russian government as part of Vladimir Putin's campaign to "denigrate Secretary Clinton, and harm her electability and potential presidency."<sup>158</sup> One of the emails revealed that Donna Brazile, as a CNN analyst, had shared in advance with the Clinton campaign a debate question regarding the death penalty.<sup>159</sup> Shortly after the Wikileaks release, Trump resumed his attacks on Clinton, alleging that she benefited from a "rigged system,"<sup>160</sup> the exact phrase Sanders had used during the nomination campaign. The disclosure of the Podesta emails revived the allegations of a fixed nomination, and Clinton's poll numbers fell accordingly.<sup>161</sup> Adding fuel to the fire, FBI Director James Comey announced that the FBI had reopened its investigation into Clinton's use of a private server for her State Department emails, a development that accelerated Clinton's sudden drop in the polls.<sup>162</sup>

Clinton never recovered. On November 8, 2016, Trump won the presidential election in one of the biggest upsets in American history.<sup>163</sup>

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155. David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation about Women in 2005*, WASH. POST (Oct. 8, 2016), [https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4\\_story.html?utm\\_term=.fceb69387a37](https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html?utm_term=.fceb69387a37).

156. Chris Kahn, *Trump Trails Clinton by 8 Points after Tape Scandal, Debate: Reuters/Ipsos Poll*, REUTERS (Oct. 11, 2016), <https://www.reuters.com/article/us-usa-election-poll/trump-trails-clinton-by-8-points-after-tape-scandal-debate-reuters-ipsos-poll-idUSKCN12B2PV>.

157. Kyle Cheney & Sarah Wheaton, *The Most Revealing Clinton Campaign Emails in WikiLeaks Release*, POLITICO (Oct. 7, 2016), <https://www.politico.com/story/2016/10/john-podesta-wikileaks-hacked-emails-229304>.

158. Director of National Intelligence, *supra* note 154, at ii.

159. Eliza Collins, *Four of the Juiciest Leaked Podesta Emails*, USA TODAY (Oct. 13, 2016), <https://www.usatoday.com/story/news/politics/onpolitics/2016/10/13/four-juiciest-leaked-podesta-emails/92014368/>.

160. Olivia Beavers, *Trump Tweeted about Podesta Emails 15 Minutes after WikiLeaks Asked Trump Jr. to Report*, THE HILL (Nov. 13, 2017), <http://thehill.com/homenews/administration/360189-trump-tweeted-about-podesta-emails-15-minutes-after-wikileaks-asked>.

161. Harry Enten, *How Much Did WikiLeaks Hurt Hillary Clinton?*, FIFTYTHREEEIGHT (Dec. 23, 2016), <https://fivethirtyeight.com/features/wikileaks-hillary-clinton/>.

162. *Id.*

163. Shane Goldmacher & Ben Schreckinger, *Trump Pulls Off Biggest Upset in U.S. History*, POLITICO (Nov. 9, 2016), <https://www.politico.com/story/2016/11/election-results-2016-clinton-trump-231070>; Karen Tumulty, Philip Rucker & Anne Gearan, *Donald Trump Wins the Presidency in Stunning Upset over Clinton*, WASH. POST (Nov. 9, 2016), [https://www.washingtonpost.com/politics/election-day-an-acrimonious-race-reaches-its-end-point/2016/11/08/32b96c72-a557-11e6-ba59-a7d93165c6d4\\_story.html?utm\\_term=.925653a0ee76](https://www.washingtonpost.com/politics/election-day-an-acrimonious-race-reaches-its-end-point/2016/11/08/32b96c72-a557-11e6-ba59-a7d93165c6d4_story.html?utm_term=.925653a0ee76).

Although Clinton won the popular vote by 65.8 million votes to 62.9 million votes for Trump (a difference of 48% to 45.9%), Trump secured an Electoral College majority by carrying states with a total of 306 electoral votes to only 232 for Clinton.<sup>164</sup>

The outcome of the presidential election, however, did not end the debate over the fairness of the Democratic nomination race. As president, Donald Trump would continue to describe Clinton as a crook and claim that the Democratic nomination was “rigged.” Accordingly, the legitimacy of Clinton’s nomination remained a topic of public debate long after the 2016 election faded into history.

#### D. *The Brazile-Warren Allegations*

One year after the 2016 election, the Democratic nomination race stormed back into the national headlines. In November 2017, Donna Brazile published a book in which she revealed that as DNC Chair she looked for evidence that the party “rigged” the presidential nomination for Clinton.<sup>165</sup> As Brazile explained, “I had promised Bernie [Sanders] when I took the position of interim chair of the DNC that I would get to the bottom of whether or not Hillary’s team had rigged the party process in her favor so that only she would win the nomination.”<sup>166</sup> By early September 2016, Brazile asserted, “I had found my proof and what I had found broke my heart.”<sup>167</sup> The “proof” was a joint financial agreement between the DNC and the Clinton campaign dating to August 2015, almost six months before the Iowa caucuses.<sup>168</sup> The agreement gave the Clinton campaign extensive control over the DNC’s fundraising and financial expenditures during the 2016 general election.<sup>169</sup> “If the fight had been fair,” Brazile wrote, “one campaign would not have control of the party before the voters had decided which one they wanted to lead.”<sup>170</sup>

Crucially, however, Brazile emphasized she found no evidence that “the DNC was rigging the system to throw the primary to Hillary.”<sup>171</sup> The joint fundraising agreement simply reflected the DNC’s presumption that Clinton would be the nominee, as the polling data overwhelmingly indicated would be the case.<sup>172</sup> Lost amid the ensuing uproar was the fact that the DNC had also entered into similar joint fundraising agreements

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164. *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 9, 2017), <https://www.nytimes.com/elections/results/president>.

165. BRAZILE, *supra* note 4, at 95 (“From the moment I walked in the door of the DNC a month earlier I had my suspicions, based on the leaked emails.”).

166. *Id.*

167. *Id.* at 96.

168. *Id.* at 97.

169. *Id.*

170. *Id.* at 98.

171. *Id.*

172. *Id.*

with the Sanders and O'Malley campaigns.<sup>173</sup> Apart from the unusually early fundraising agreement between Clinton and the DNC, Brazile detected nothing else during the primary campaign beyond “the normal order of political business. The party did nothing different than previous presidential cycles.”<sup>174</sup> Indeed, as she explained, the DNC leaders and staff “were constantly in touch with Bernie’s director of delegate operations and anything they sent to Hillary they also sent to the other candidates.”<sup>175</sup>

Nevertheless, the book’s publication triggered a storm of false and misleading news stories reviving the idea of a “rigged” nomination. The headlines of major publications, including *Newsweek*, erroneously claimed Brazile had accused the DNC of rigging the nomination for Clinton:

“Longtime Clinton Ally Says DNC Rigged Primary for Hillary.”<sup>176</sup>

“Donna Brazile Says She Has ‘Proof’ Clinton Rigged The Primary Against Sanders.”<sup>177</sup>

“Donna Brazile: Clinton campaign rigged the DNC.”<sup>178</sup>

“Hillary Clinton Denies Donna Brazile Accusations of DNC Rigging Vote Against Bernie Sanders.”<sup>179</sup>

The media’s mischaracterization of Brazile’s book gave President Trump an opportunity to once again attack the integrity of the Democratic presidential race. In a Tweet on November 2, 2017, the president declared: “Donna Brazile just stated the DNC RIGGED the system to illegally steal the Primary from Bernie Sanders. Bought and paid for by

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173. *Id.* at 97–98 (“The other campaigns—Martin O’Malley and Bernie—also signed victory fund agreements that kicked in should they secure the nomination, not seven months before. They also did not specify as much immediate control from the campaign as the one Hillary signed with the DNC.”).

174. *Id.* at 98.

175. *Id.*

176. Eric Levitz, *Longtime Clinton Ally Says DNC Rigged Primary for Hillary*, N. Y. MAG. (Nov. 2, 2017), <http://nymag.com/daily/intelligencer/2017/11/longtime-clinton-ally-says-dnc-rigged-primary-for-hillary.html>.

177. Abigail Tracy, *Donna Brazile Says She Has “Proof” Clinton Rigged The Primary Against Sanders*, VANITY FAIR (Nov. 2, 2017), <https://www.vanityfair.com/news/2017/11/donna-brazile-hillary-clinton-bernie-sanders>.

178. Alexi McCammond, *Donna Brazile: Clinton Campaign Rigged the DNC*, AXIOS (Nov. 2, 2017), <https://www.axios.com/donna-brazile-clinton-campaign-rigged-the-dnc-1513306623-f8dfc4f9-e488-4295-abc9-1ef71c8b3caa.html>.

179. Linley Sanders, *Hillary Clinton Denies Donna Brazile Accusations Of DNC Rigging Vote Against Bernie Sanders*, NEWSWEEK (Nov. 9, 2017), <http://www.newsweek.com/hillary-clinton-denies-rigged-claims-donna-brazile-706742>.

Crooked H.”<sup>180</sup> He continued the attack the next day, Tweeting: “I always felt I would be running and winning against Bernie Sanders, not Crooked H, without cheating, I was right.”<sup>181</sup> The rigging controversy offered the president a convenient way to distract attention from the Special Counsel Robert Mueller’s criminal investigation into Russian meddling in the 2016 presidential election.<sup>182</sup> In a November 3 Tweet, President Trump wrote: “The real story on Collusion is in Donna B’s new book. Crooked Hillary bought the DNC & then stole the Democratic Primary from Crazy Bernie!”<sup>183</sup> Trump called for a criminal investigation into the DNC, asking, “where is our Justice Department?”<sup>184</sup>

Like President Trump, many Sanders supporters viewed the Brazile book as evidence the Democratic nomination was rigged, even though the book contained no such allegation. For example, former Sanders campaign manager Jeff Weaver declared: “I think this just validates what many of us already knew about what was happening.”<sup>185</sup> Democratic Congressman Keith Ellison agreed, explaining that he and other Sanders supporters “still feel hurt and betrayed” by the Democratic nomination race.<sup>186</sup> Ellison called on the Democratic Party “to enact real reforms that ensure a fair, open and impartial nominating process in elections to come.”<sup>187</sup>

180. Michael Scherer, David Weigel & Karen Tumulty, *Democrats Express Outrage over Allegations of Early Party Control for Clinton in 2016*, WASH. POST (Nov. 2, 2017), [https://www.washingtonpost.com/politics/democrats-express-outrage-over-allegations-of-early-control-for-clinton-in-2016/2017/11/02/84e949da-c000-11e7-97d9-bdab5a0ab381\\_story.html?utm\\_term=.5a0fc09f7246](https://www.washingtonpost.com/politics/democrats-express-outrage-over-allegations-of-early-control-for-clinton-in-2016/2017/11/02/84e949da-c000-11e7-97d9-bdab5a0ab381_story.html?utm_term=.5a0fc09f7246); Joshua Gillin, *Donald Trump said Donna Brazile Called Democratic Primary ‘Rigged,’ but Did She?*, POLITIFACT (Nov. 3, 2017), <http://www.politifact.com/truth-o-meter/article/2017/nov/03/donald-trump-said-donna-brazile-called-democratic/>.

181. Z. Byron Wolf, *Could Bernie Sanders Have Won a Primary that Wasn’t ‘Rigged’? Um.*, CNN (Nov. 4, 2017), <https://www.cnn.com/2017/11/04/politics/bernie-sanders-2016-election-donna-brazile/index.html>.

182. Matt Zapposky, *Here Are the People Investigating Russian Meddling in the 2016 Election*, WASH. POST (July 5, 2017), [https://www.washingtonpost.com/news/post-politics/wp/2017/07/05/who-is-on-the-special-counsel-team-investigating-russian-meddling-in-the-2016-election/?utm\\_term=.c8b3914d2763](https://www.washingtonpost.com/news/post-politics/wp/2017/07/05/who-is-on-the-special-counsel-team-investigating-russian-meddling-in-the-2016-election/?utm_term=.c8b3914d2763).

183. Dartunorro Clark, *Trump Seizes on Brazile Book Excerpt, Revives Cries of ‘Rigged’ DNC Primary*, NBC NEWS (Nov. 3, 2017), <https://www.nbcnews.com/politics/white-house/trump-seizes-brazile-book-excerpt-revives-cries-rigged-dnc-primary-n817246>.

184. *Trump Calls for Criminal Probe after Donna Brazile Claims Clinton Campaign Took ‘Control’ of DNC*, L.A. TIMES (Nov. 2, 2017), <http://www.latimes.com/politics/la-pol-updates-trump-tweets-donna-brazile-rigged-htmlstory.html>.

185. Clark, *supra* note 183.

186. *Id.*

187. *Id.*

Even some elected officials who stayed neutral during the Clinton-Sanders race<sup>188</sup> embraced the conspiracy theory of a rigged nomination. When asked during a November 2017 CNN interview whether the Democratic presidential nomination race was “rigged” in favor of Clinton, Massachusetts Senator Elizabeth Warren answered, “Yes.”<sup>189</sup> Warren went on to say that the rigged nomination process was a “real problem” and “what we’ve got to do as Democrats now is we’ve got to hold this party accountable.”<sup>190</sup> President Trump wasted no time in taking advantage of Senator Warren’s claims. In a Tweet, he wrote: “Pocahontas just stated that the Democrats, lead by the legendary Crooked Hillary Clinton, rigged the Primaries! Lets go FBI & Justice Dept.”<sup>191</sup>

Warren later backed off her claims of a “rigged” nomination, belatedly conceding that the nomination process was “fair.”<sup>192</sup> But most voters disagreed. A November 2017 poll found that only 32% of Americans overall believed that Hillary Clinton won the 2016 nomination in a fair race.<sup>193</sup>

## II. A RIGGED NOMINATION?

In light of the continuing controversy over the Democratic race, it is understandable that so many Americans believe the DNC rigged the nomination for Hillary Clinton. But the facts tell a very different story. Contrary to the allegations of President Trump, the 2016 Democratic

188. Nora Kelly, *Why Elizabeth Warren Is Backing Hillary Clinton*, THE ATLANTIC (June 9, 2016), <https://www.theatlantic.com/politics/archive/2016/06/elizabeth-warren-endorsement-hillary-clinton/486527/>.

189. Aaron Blake, *Elizabeth Warren and Donna Brazile Both Now Agree the 2016 Democratic Primary was Rigged*, WASH. POST (Nov. 2, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/11/02/ex-dnc-chair-goes-at-the-clintons-alleging-hillarys-campaign-hijacked-dnc-during-primary-with-bernie-sanders/?utm\\_term=.f87d413d2fb1](https://www.washingtonpost.com/news/the-fix/wp/2017/11/02/ex-dnc-chair-goes-at-the-clintons-alleging-hillarys-campaign-hijacked-dnc-during-primary-with-bernie-sanders/?utm_term=.f87d413d2fb1); Cristiano Lima, *Opposites Agree: Trump, Warren say Democratic Primary Was ‘Rigged’*, POLITICO (Nov. 2, 2017), <https://www.politico.com/story/2017/11/02/elizabeth-warren-democratic-primary-rigged-clinton-244487>.

190. Sophie Tatum, *Asked if DNC System Was Rigged in Clinton’s Favor, Warren Says ‘Yes’*, CNN (Nov. 3, 2017), <http://www.cnn.com/2017/11/02/politics/elizabeth-warren-dnc-rigged/index.html>.

191. Wolf, *supra* note 181.

192. Annie Linskey, *Warren Reins in ‘Rigged’ Comment about 2016 Primary*, BOSTON GLOBE (Nov. 9, 2017) (“Senator Elizabeth Warren walked back her explosive comments that the Democratic primary process in 2016 was ‘rigged,’ telling a local newspaper in Massachusetts this week that the process was ‘fair.’”), <https://www.bostonglobe.com/news/politics/2017/11/09/warren-changes-view-democratic-primary-from-rigged-fair/AFmRnFJIGhs2dBrpISYJwK/story.html>; Olivia Beavers, *Warren Walks Back Claim Democratic Primary Was Rigged*, THE HILL (Nov. 9, 2017), <http://thehill.com/homenews/senate/359645-warren-walks-back-claim-democratic-primary-was-rigged>.

193. *Just 32% Think Hillary Clinton Won Democratic Nomination Fairly*, RASMUSSEN REP. (Nov. 9, 2017), [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/november\\_2017/just\\_32\\_think\\_hillary\\_clinton\\_won\\_democratic\\_nomination\\_fairly](http://www.rasmussenreports.com/public_content/politics/general_politics/november_2017/just_32_think_hillary_clinton_won_democratic_nomination_fairly).

nomination was not rigged in Hillary Clinton's favor. It was conducted in an honest and fair manner that gave Bernie Sanders every opportunity to win the nomination. Public distrust of the 2016 nominating process is thus completely unfounded.

### A. Party Leader Preferences had Little Impact in 2016

There is no question the DNC leadership clearly preferred Hillary Clinton to Bernie Sanders. The DNC viewed Clinton as a far stronger general election candidate than Sanders, citing his poor management skills and undisciplined and disorganized campaign.<sup>194</sup> For example, in a May 2016 email to a colleague, a senior DNC communications official scornfully observed that "Bernie never ever had his act together" and "his campaign was a mess."<sup>195</sup> Many Democratic Party officials also openly criticized the Vermont Senator's lack of international experience and his failure to author significant domestic legislation during twenty-five years in Congress.<sup>196</sup>

Although the leaked DNC emails understandably angered Sanders and his supporters,<sup>197</sup> there was nothing unusual or remarkable in the fact that Democratic Party leaders had a preferred candidate in 2016. The principal mission of national political party organizations is to win presidential elections. Accordingly, it is normal and expected for the party leaders to assess the strength of the primary field and identify early in the process which primary candidate offers the best chance of winning the general election. As the authors of a 2008 study explained, "parties remain major players in presidential nominations. They scrutinize and winnow the field before voters get involved, attempt to build coalitions behind a single preferred candidate, and sway voters to ratify their choice."<sup>198</sup> Thus, when DNC leaders identified Clinton as the strongest general election candidate, they were not doing something out of the ordinary.<sup>199</sup>

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194. Michael D. Shear & Matthew Rosenberg, *Released Emails Suggest the D.N.C. Deided the Sanders Campaign*, N.Y. TIMES (July 22, 2016), <https://www.nytimes.com/2016/07/23/us/politics/dnc-emails-sanders-clinton.html>; Carl Hulse, *Democratic Party's Chairwoman Was Seen as Loyal to a Fault*, N.Y. TIMES (July 25, 2016), <https://www.nytimes.com/2016/07/26/us/politics/debbie-wasserman-schultz-democratic-national-committee.html?ref=topics>.

195. Shear & Rosenberg, *supra* note 194.

196. Michael Crowley, *Bernie's Foreign Policy Deficit*, POLITICO (Jan. 30, 2016), <https://www.politico.com/story/2016/01/bernie-sanders-foreign-policy-deficit-218431>; Edward-Isaac Dove, *Sanders Had Big Ideas But Little Impact on Capitol Hill*, POLITICO (Mar. 12, 2016), <https://www.politico.com/story/2016/03/bernies-record-220508>.

197. Amita Kelly, *Debbie Wasserman Schultz To Step Down As Democratic Chair After Convention*, NAT'L PUB. RADIO, <https://www.npr.org/2016/07/24/487242426/bernie-sanders-dnc-emails-outrageous-but-not-a-shock>.

198. MARTY COHEN, DAVID KAROL, HANS NOEL, & JOHN ZOLLER, *THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM 3* (2008).

199. Bycoffe, *supra* note 68 ("Before any votes are cast, presidential candidates compete for the support of influential members of their party, especially elected officials like U.S.

Nor did senior Democrats conceal their strong preference for Clinton in the nomination race. In the spring of 2015—several months before the Iowa caucuses—167 House Democrats and 41 Democratic Senators endorsed Clinton’s campaign.<sup>200</sup> The number of Clinton endorsements grew throughout the nomination contest. For example, one week after the New Hampshire primary, the Congressional Black Caucus endorsed Clinton during a widely publicized Capitol Hill press conference.<sup>201</sup> Similarly, major pro-Democratic Party interest groups endorsed Clinton with great fanfare, including Planned Parenthood and the Human Rights Campaign.<sup>202</sup> Ultimately, more than 400 hundred Democratic officeholders endorsed Clinton during the course of the nomination race.<sup>203</sup> By any measure, therefore, the Russian-hacked DNC emails simply reinforced a point that was already abundantly clear: Democratic leaders overwhelmingly preferred Clinton over Sanders.

But as the 2016 campaign demonstrated in memorable fashion, party leaders possess much less influence than they did in the pre-1972 era. In the modern era of primaries and caucuses, backroom deals between party leaders no longer determine who wins the nomination. Instead, the Democratic electorate chooses the nominee, even if the party leadership prefers another candidate. For example, in 1972 Democratic leaders preferred Ed Muskie and Hubert Humphrey, but George McGovern won the nomination.<sup>204</sup> In 1976, the underdog Jimmy Carter won the nomination despite having virtually no support from the party leadership.<sup>205</sup> Most recently and quite ironically, in 2008 the Democratic establishment initially preferred Hillary Clinton, but Barack Obama

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representatives, senators and governors. During the period known as the ‘invisible primary,’ these ‘party elites’ seek to coalesce around the candidates they find most acceptable as their party’s nominee.”).

200. The Hill Staff, *Hillary Racks Up Endorsements for 2016*, THE HILL (Apr. 15, 2015, 11:59 AM), <http://thehill.com/homenews/campaign/238912-2016-hillary-endorsement-list>.

201. Corrine McConaughy, *Why the Congressional Black Caucus Endorsement of Hillary Clinton is a Really Big Deal*, WASH. POST (Feb. 15, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/15/why-the-congressional-black-caucus-endorsement-of-hillary-clinton-is-a-really-big-deal/?utm\\_term=.62095cb61fc2](https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/15/why-the-congressional-black-caucus-endorsement-of-hillary-clinton-is-a-really-big-deal/?utm_term=.62095cb61fc2).

202. Emily Crockett, *Why Bernie Sanders is Fighting with Planned Parenthood and the Human Rights Campaign*, VOX (Jan. 20, 2016), <https://www.vox.com/2016/1/20/10801412/bernie-sanders-planned-parenthood-human-rights-campaign-establishment>.

203. Bycoffe, *supra* note 68.

204. NELSON W. POLSBY & AARON WILDAVSKY, *PRESIDENTIAL ELECTIONS: STRATEGIES OF AMERICAN ELECTORAL POLITICS* 81–82 (5th ed. 1980).

205. Julian E. Zelizer, *How Jimmy Carter Revolutionized the Iowa Caucuses*, THE ATLANTIC (Jan. 25, 2016) (“In late 1975, almost no one thought that Jimmy Carter, the former governor of Georgia, could ever be the Democratic nominee. . . . But what Carter and his advisers understood from day one was that the old rules of campaigning no longer applied. The power of the party bosses, who used to decide on the candidate during the convention, had been destroyed as a result of reforms that were pushed by McGovern after the disastrous 1968 convention.”), <https://www.theatlantic.com/politics/archive/2016/01/jimmy-carter-iowa-caucuses/426729/>.

overcame the leadership's doubts and won the nomination.<sup>206</sup> Even in the two cases in which superdelegates played a role in selecting the nominee—Mondale in 1984 and Obama in 2008—the superdelegates ultimately sided with the candidate who had accumulated the most pledged delegates, thus honoring the electorate's will.<sup>207</sup>

The 2016 nomination race illustrated how marginalized party leaders have become in modern American campaigns. For example, before the New Hampshire primary, the *Washington Post* observed that “the entire political establishment of New Hampshire publicly lined up behind Hillary Clinton.”<sup>208</sup> Nevertheless, Sanders won New Hampshire by twenty-two points.<sup>209</sup> Nor did Clinton's establishment support give her a significant financial advantage over Sanders. In fact, by the end of the Democratic nomination race, the Sanders campaign had outspent the Clinton campaign by a margin of \$220 million to \$196 million.<sup>210</sup> Despite the Vermont senator's lack of support among Democratic Party leaders, Sanders had no trouble raising money.

The Republican contest demonstrated the point even more dramatically. Republican leaders opposed Donald Trump's nomination,<sup>211</sup> and not a single incumbent Republican governor or senator endorsed him prior to the GOP primaries.<sup>212</sup> The party's biggest campaign donors described Trump as an “utterly unacceptable” nominee and refused to donate funds to his campaign.<sup>213</sup> Senior officials openly

206. Stephen K. Medvic, in ROBERT P. WATSON & COLTON CAMPBELL, *CAMPAIGNS AND ELECTIONS: PLAYERS AND PROCESSES* (2014) (“In 2008 Democratic insiders backed Hillary Clinton early in the process, but then rallied behind Obama as he showed signs of strength”).

207. See Part I.A.

208. James Hohman, *Do Endorsements Matter?* WASH. POST (Jan. 21, 2016), [https://www.washingtonpost.com/news/powerpost/wp/2016/01/21/the-daily-202-do-endorsements-matter/?utm\\_term=.cc39a8a770b3](https://www.washingtonpost.com/news/powerpost/wp/2016/01/21/the-daily-202-do-endorsements-matter/?utm_term=.cc39a8a770b3).

209. Philip Bump, *Make No Mistake: Bernie Sanders's Win in New Hampshire Was Historically Massive*, WASH. POST (Feb. 10, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/02/10/make-no-mistake-bernie-sanderss-win-in-new-hampshire-was-historically-massive/?utm\\_term=.9ce4ac102f64](https://www.washingtonpost.com/news/the-fix/wp/2016/02/10/make-no-mistake-bernie-sanderss-win-in-new-hampshire-was-historically-massive/?utm_term=.9ce4ac102f64).

210. *Which Presidential Candidates Are Winning the Money Race*, N.Y. TIMES (June 22, 2016), <https://www.nytimes.com/interactive/2016/us/elections/election-2016-campaign-money-race.html>; Josh Stewart, *Following the Money Behind the Nearly \$500 Million 2016 Democratic Primary*, SUNLIGHT FOUND. (June 21, 2016), <https://sunlightfoundation.com/2016/06/21/following-the-money-behind-the-nearly-500-million-2016-democratic-primary/>.

211. MJ Lee, *Donald Trump vs. the Republican Establishment*, CNN (Oct. 26, 2015, 4:48 PM), <https://www.cnn.com/2015/10/26/politics/donald-trump-republican-establishment/index.html>.

212. Hohman, *supra* note 208.

213. Alexander Burns, Maggie Haberman & Jonathan Martin, *Inside the Republican Party's Desperate Mission to Stop Donald Trump*, N.Y. TIMES (Feb. 27, 2016), <https://www.nytimes.com/2016/02/28/us/politics/donald-trump-republican-party.html> (“Resistance to Mr. Trump still runs deep. The party's biggest benefactors remain totally opposed to him. At a recent presentation hosted by the billionaires Charles G. and David H. Koch, the country's most prolific conservative donors, their political advisers characterized Mr. Trump's record as utterly unacceptable”).



urged primary voters to vote for anyone but Trump.<sup>214</sup> For example, in a January 2016 op-ed in the *Wall Street Journal*, former Bush campaign manager Karl Rove warned, “If Mr. Trump is its standard-bearer, the GOP will lose the White House and the Senate, and its majority in the House will fall dramatically.”<sup>215</sup> Former Republican National Committee Chairman Haley Barbour bemoaned the fact that Trump was “not good for the party” because he has “disgusted so many people and he has said such terrible things about so many people it’s hard to know who he hasn’t taken a shot at.”<sup>216</sup> Republican officials even considered forming a Super PAC with the sole mission of attacking the Trump campaign.<sup>217</sup> As the *New York Times* reported in March 2016:

Republican leaders adamantly opposed to Donald J. Trump’s candidacy are preparing a 100-day campaign to deny him the presidential nomination, starting with an aggressive battle in Wisconsin’s April 5 primary and extending into the summer, with a delegate-by-delegate lobbying effort that would cast Mr. Trump as a calamitous choice for the general election.<sup>218</sup>

The crucial point is Republican leaders’ *public* attacks on Trump far exceeded in intensity and ferocity the Democratic leaders’ *private* criticisms of Sanders in the leaked DNC emails. For example, in March 2016, former GOP nominee Mitt Romney gave a speech in which he declared that “Donald Trump is a phony” and “a fraud” who was “playing the members of the American public for suckers.”<sup>219</sup> Romney not only attacked Trump’s fitness to serve as president, he implied that Trump was evil:

Donald Trump lacks the temperament to be president. After all, this is an individual who mocked a disabled reporter, who attributed a reporter’s questions to her menstrual cycle, who mocked a brilliant rival who happened to be a woman due to her appearance, who bragged about his

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214. Alexander Burns & Jonathan Martin, *Republican Leaders Map a Strategy to Derail Donald Trump*, N.Y. TIMES (Mar. 19, 2016), <https://www.nytimes.com/2016/03/20/us/politics/donald-trump-republican-party.html>.

215. Mark Hensch, *Karl Rove: If Trump is Nominee, GOP Will Lose White House and Senate*, THE HILL (Jan. 8, 2016, 12:54 PM), <http://thehill.com/blogs/ballot-box/presidential-races/265223-karl-rove-trump-would-cost-gop-the-wh-senate>.

216. Ben Schreckinger, *GOP Leaders: Trump Sets Us Back on Race*, POLITICO (Sept. 23, 2015, 11:42 AM), <https://www.politico.com/story/2015/09/donald-trump-gop-black-leaders-213950>.

217. Burns, Haberman, & Martin, *supra* note 213.

218. *Id.*

219. *Transcript of Mitt Romney’s Speech on Donald Trump*, N.Y. TIMES (Mar. 3, 2016), <https://www.nytimes.com/2016/03/04/us/politics/mitt-romney-speech.html>.

marital affairs, and who laces his public speeches with vulgarity. Donald Trump says he admires Vladimir Putin, at the same time he has called George W. Bush a liar. That is a twisted example of evil trumping good. . . . Dishonesty is Donald Trump's hallmark.<sup>220</sup>

Nothing Bernie Sanders faced in the Democratic primary campaign came remotely close to the severity of the GOP establishment's attacks on Trump.

Yet, despite the ferocious opposition of the Republican establishment, Trump still went on to win the nomination.<sup>221</sup> In fact, Trump won 13.3 million votes in the primary campaign, far more votes than any other Republican candidate in history.<sup>222</sup> Trump's nomination victory made it undeniably clear that the populist politics of 2016 rendered the opinions of party leaders largely irrelevant. The opposition of Democratic Party leaders did not prevent Sanders from winning the nomination. Instead, his failure to win the support of a majority of Democrats is why his campaign ultimately fell short.

### B. *A Strong Majority of Democratic Voters Supported Clinton*

The most important fact of the 2016 Democratic nomination race was that Hillary Clinton defeated Bernie Sanders in all of the key metrics of popular support: she won more election contests than Sanders, she received more popular votes than Sanders, and she secured more pledged delegates than Sanders. In the end, Clinton won 55% of the vote, amassing 3.7 million more votes than Sanders.<sup>223</sup> Clinton's decisive victory in the popular vote gave her 359 more pledged delegates than Sanders, which meant she would have won the nomination even if the

220. *Id.*

221. Patrick Healy & Jonathan Martin, *His Tone Dark, Donald Trump Takes G.O.P. Mantle*, N.Y. TIMES (July 21, 2016), <https://www.nytimes.com/2016/07/22/us/politics/donald-trump-rnc-speech.html>.

222. Will Doran, *Donald Trump Set the Record for the Most GOP Primary Votes Ever. But That's Not His Only Record*, POLITIFACT (July 8, 2018, 7:18 PM), <https://www.politifact.com/north-carolina/statements/2016/jul/08/donald-trump/donald-trump-set-record-most-gop-primary-votes-eve/>; Philip Bump, *Trump Got the Most GOP Votes Ever—Both For and Against Him—and Other Fun Facts*, WASH. POST (June 8, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/06/08/donald-trump-got-the-most-votes-in-gop-primary-history-a-historic-number-of-people-voted-against-him-too/?utm\\_term=.367e50eff283](https://www.washingtonpost.com/news/the-fix/wp/2016/06/08/donald-trump-got-the-most-votes-in-gop-primary-history-a-historic-number-of-people-voted-against-him-too/?utm_term=.367e50eff283).

223. Boris Heersink, *No, the DNC Didn't 'Rig' the Democratic Primary for Hillary Clinton*, WASH. POST (Nov. 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/04/no-the-dnc-didnt-rig-the-democratic-primary-for-hillary-clinton/?utm\\_term=.55a9a49f830b](https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/04/no-the-dnc-didnt-rig-the-democratic-primary-for-hillary-clinton/?utm_term=.55a9a49f830b); Nate Silver, *Was The Democratic Primary A Close Call Or A Landslide?*, FIVETHIRTYEIGHT (July 27, 2016, 7:00 AM), <http://fivethirtyeight.com/features/was-the-democratic-primary-a-close-call-or-a-landslide/>.

party had completely eliminated superdelegates from the nomination process.<sup>224</sup>

Clinton's popular vote victory reflected the fact that she was the preferred choice of urban and diverse voters, the two key demographic groups in the Democratic Party.<sup>225</sup> For example, Clinton won the primaries in nine of the ten most populous states in the country: California (1st in the nation in population), Texas (2nd), Florida (3rd), New York (4th), Illinois (5th), Pennsylvania (6th), Ohio (7th), Georgia (8th), and North Carolina (9th).<sup>226</sup> She also won twenty of the twenty-five most populous states in the country.<sup>227</sup> Equally important, Clinton won the primaries and caucuses in eighteen of the twenty states with the largest minority populations.<sup>228</sup>

In striking contrast, the great majority of Sanders's primary and caucus victories came in predominantly rural states with small populations.<sup>229</sup> The only state in the top ten in population Sanders carried was Michigan,<sup>230</sup> and even then he only prevailed by the razor thin

224. Mayer, *supra* note 63, at 40 (“In light of the controversy over the role of the superdelegates, it is important to emphasize that Clinton did *not* win the 2016 Democratic nomination because of them. Had there been no superdelegate provision in the Democratic Party rules, Clinton would still have won a solid majority of the convention delegates.”).

225. David Lauter, *Democratic, Republican Voter Bases Are More Different Than Ever*, L.A. TIMES (Mar. 20, 2018, 11:00 AM), <http://www.latimes.com/politics/la-na-pol-voter-groups-20180320-story.html>.

226. Mayer, *supra* note 63, at 42–43; *North Carolina Becomes Ninth State With 10 Million or More People, Census Bureau Reports*, U.S. CENSUS BUREAU (Dec. 22, 2015), <https://www.census.gov/newsroom/press-releases/2015/cb15-215.html>.

227. Mayer, *supra* note 63, at 42–43; *U.S. States Ranked by Population*, WORLD ATLAS (New Jersey (11th), Virginia (12th), Washington (13th), Arizona (14th), Massachusetts (15th), Tennessee (16th), Missouri (18th), Maryland (19th), Colorado (21st), South Carolina (23rd), Alabama (24th), and Louisiana (25th)) <https://www.worldatlas.com/articles/us-states-by-population.html> (last updated Sept. 14, 2018).

228. Mayer, *supra* note 63, at 42–43; *Population Distribution by Race/Ethnicity: 2016*, KAISER FAMILY FOUND. (New Mexico (2nd most diverse, 37% white), California (3rd, 38%), the District of Columbia (4th, 38%), Texas (5th, 43%), Georgia (6th, 52%), Nevada (6th, 52%), Maryland (8th, 53%), Arizona (9th, 54%), Florida (10th, 55%), New York (11th, 57%), Mississippi (12th, 58%), New Jersey (12th, 58%) Louisiana (14th, 59%), Alaska (15th, 60%), Illinois (16th, 61%), North Carolina (16th, 61%), Virginia (16th, 61%), and Delaware (19th, 62%)), <https://www.kff.org/other/state-indicator/distribution-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22White%22,%22sort%22:%22asc%22%7D>.

229. Mayer, *supra* note 63, at 42–43; *U.S. States Ranked by Population*, *supra* note 227 (Wyoming (50th in population, behind Puerto Rico and the District of Columbia), Vermont (49th in population), Alaska (48th), North Dakota (47th), Montana (44th), New Hampshire (41st in nation in population), Rhode Island (43rd), Maine (42nd), Hawaii (40th), Idaho (39th), West Virginia (38th), Nebraska (37th), Kansas (35th), Utah (31st), Oklahoma (28th), and Oregon (27th)). In addition, Sanders carried four states with populations at or slightly above the national average: Colorado (22nd), Minnesota (21st), Wisconsin (20th in population) and Indiana (16th in population).

230. See *U.S. States Ranked by Population*, *supra* note 227 (ordering States by population).

margin of 49.7% to 48.3%.<sup>231</sup> Besides depending on support from rural, low population states, Sanders also drew the vast majority of his support from non-diverse states with overwhelmingly white populations. For example, during the nomination contest, he won fifteen of the twenty states with the lowest percentage of racial minorities.<sup>232</sup> Thus, as Nate Silver of FiveThirtyEight explained during the nomination race, “Sanders is winning states that are much whiter than the Democratic electorate as a whole, Clinton is winning states that are much blacker than the Democratic electorate as a whole.”<sup>233</sup>

Moreover, most of Sanders’s victories came in caucuses, which have much lower participation rates than primary elections.<sup>234</sup> The 2016 Democratic primaries saw a turnout rate of 32.4%, far higher than the 9.9% turnout rate in Democratic caucuses.<sup>235</sup> The turnout discrepancy was consistent with previous nomination races. In 2008, for example, turnout in the Democratic caucuses was only 9%, whereas turnout in the Democratic primaries was 35%.<sup>236</sup> Caucuses deter many voters from participating because they require a much larger time commitment than primary elections and they do not permit absentee ballots.<sup>237</sup>

Stark racial differences in voting patterns also played a key role in the outcome. Clinton’s base of support rested on minority voters with deep ties to the Democratic Party, whereas Sanders’s base was independent, working-class white voters who did not belong to the Democratic

231. Mayer, *supra* note 63, at 42–43.

232. Mayer, *supra* note 63, at 42–43. See generally *Population Distribution by Race/Ethnicity: 2016*, *supra* note 63 (States’ racial minority population).

233. Nate Silver, *Clinton Is Winning The States That Look Like The Democratic Party*, FIVETHIRTYEIGHT (Apr. 15, 2016), <https://fivethirtyeight.com/features/clinton-is-winning-the-states-that-look-like-the-democratic-party/>; see also Issac J. Bailey, *How Bernie Sanders Exposed the Democrats’ Racial Rift*, POLITICO (June 8, 2016), <https://www.politico.com/magazine/story/2016/06/2016-bernie-sanders-hillary-clinton-democrats-race-racial-divide-213948> (discussing how Sanders’ supporters are primarily white and how Sanders is losing elections within diverse States).

234. See BARBARA NORRANDER, *THE IMPERFECT PRIMARY* 69 (2010) (“Turnout in caucuses is very, very low.”); see also Christopher Karpowitz & Jeremy Pope, *The Problems with Caucuses and Conventions*, WASH. POST (Feb. 10, 2014) (“Caucuses attract not just a smaller group of voters, but a group that is the most committed and ideological.”).

235. Jeff Stein, *The Real Obstacle to Voter Turnout in Democratic Primaries: Caucuses*, VOX (May 2, 2016), <https://www.vox.com/2016/5/2/11535648/bernie-sanders-closed-primaries-caucuses>.

236. NORRANDER, *supra* note 234, at 69–70.

237. See, e.g., Costas Panagopoulos, *Are Caucuses Bad for Democracy*, 125 POL. SCI. Q. 425, 427 (2010); Sean J. Wright, *Time to End Presidential Caucuses*, 85 FORDHAM L. REV. 1127, 1132–34 (2016); see also Daniel Nichanian, *Clinton’s Delegate Lead Would Triple Under GOP Rules*, FIVETHIRTYEIGHT (Apr. 28, 2016) (“[T]urnout is lower in caucuses, where it’s harder to vote.”), <https://fivethirtyeight.com/features/clintons-delegate-lead-would-triple-under-gop-rules/>.

Party.<sup>238</sup> Indeed, although he claimed to be the victim of a “rigged system,” Sanders never forthrightly acknowledged his failure to appeal to the Democratic Party’s minority voters. For example, in April 2016, Sanders attempted to downplay Clinton’s strength in southern states with large black populations by saying:

Look, let me acknowledge what is absolutely true: Secretary Clinton cleaned our clock in the Deep South, no question about it. We got murdered there. That is the most conservative part of this great country. That’s the fact.<sup>239</sup>

But Sanders did not lose the Democratic primaries in the South because of the region’s conservatism. A large majority of white southerners belong to the Republican Party and thus voted in the GOP primaries, not the Democratic.<sup>240</sup>

Sanders thus lost the southern primaries because its Democratic electorate was heavily African American, a key constituency for whom the Sanders campaign had little appeal.<sup>241</sup> As the *Washington Post* explained:

“An awkward reality has defined the nominating contest between Sanders and Clinton this year: his failure to win over African American voters—or the states where they represent large portions of the electorate. As a result, Sanders in recent weeks has focused almost exclusively on winning in whiter states, where his campaign has resonated among younger and working-class voters.”<sup>242</sup>

The bottom line is Clinton won the nomination because she appealed to more Democratic voters than Sanders did. Accordingly, amending the Democratic Party’s nomination rules to suit Sanders would not have changed the race’s outcome. For example, if every superdelegate from a state won by Sanders supported him at the nominating convention,

238. See, e.g., Bailey, *supra* note 233; see also Dan Hopkins, *Why Sanders Does Better With Independents*, FIVETHIRTYEIGHT (Apr. 18, 2016), <https://fivethirtyeight.com/features/why-sanders-does-better-with-independents/>.

239. Eliza Collins, *Sanders: We Lost Deep South Because It Was ‘Conservative,’* POLITICO (Apr. 14, 2016), <https://www.politico.com/blogs/2016-dem-primary-live-updates-and-results/2016/04/bernie-sanders-deep-south-conservative-222000>.

240. See generally Nate Cohn, *Southern Whites’ Loyalty to G.O.P. Nearing That of Blacks to Democrats*, N.Y. TIMES (Apr. 23, 2014), <https://www.nytimes.com/2014/04/24/upshot/southern-whites-loyalty-to-gop-nearing-that-of-blacks-to-democrats.html>.

241. Silver, *Clinton Is Winning The States That Look Like The Democratic Party*, *supra* note 233.

242. Vanessa Williams and John Wagner, *Awkward reality for Bernie Sanders: A strategy focused on whiter states*, WASH. POST (Mar. 7, 2016), [https://www.washingtonpost.com/politics/an-awkward-reality-for-bernie-sanders-a-strategy-focused-on-whiter-states/2016/03/07/311ad3e4-e412-11e5-b0fd-073d5930a7b7\\_story.html?utm\\_term=.f891f3d7bf8e](https://www.washingtonpost.com/politics/an-awkward-reality-for-bernie-sanders-a-strategy-focused-on-whiter-states/2016/03/07/311ad3e4-e412-11e5-b0fd-073d5930a7b7_story.html?utm_term=.f891f3d7bf8e).

Clinton would still have led Sanders by a margin of 2,721 delegates to 2,019.<sup>243</sup> Likewise, eliminating superdelegates entirely would still have seen Clinton ahead of Sanders by a margin of 2,205 pledged delegates to 1,846.<sup>244</sup> The simple fact is Sanders lost the race because Democratic voters preferred Clinton. As the political scientist William Mayer observed, “whatever criticisms Sanders and his supporters may have about the 2016 presidential nomination process, they cannot reasonably complain that Hillary Clinton won even though the voters really preferred him. The primary results, in particular, speak loudly to the contrary.”<sup>245</sup>

Indeed, Clinton won the nomination by a far more decisive margin than Barack Obama did eight years before. Clinton received 55% of the vote in 2016, whereas Obama only won 47% when he won the nomination in 2008.<sup>246</sup> Even more striking, Clinton won over three million more votes than Sanders did.<sup>247</sup> Obama, in contrast, only carried about 151,000 more votes than Clinton in the 2008 race.<sup>248</sup> She also won a much larger share of pledged delegates, defeating Sanders by a margin of 359 pledged delegates (8% of the 4,051 total pledged delegates).<sup>249</sup> In 2008, Obama only defeated Clinton by 127 pledged delegates (3% of the 3,405 total pledged delegates).<sup>250</sup> If Obama’s narrow victory over Clinton

243. Linda Qiu, *No, Donald Trump, Bernie Sanders Wouldn’t Have Won Even If Super Delegates Were Nixed*, POLITIFACT (July 25, 2016, 3:43 PM), <http://www.politifact.com/truth-ometer/statements/2016/jul/25/donald-trump/no-donald-trump-bernie-sanders-wouldnt-have-won-ev/>.

244. Mayer, *supra* note 63, at 40; *Presidential Primaries 2016: Democratic Pledged and Unpledged Delegate Summary*, THE GREEN PAPERS, <https://www.thegreenpapers.com/P16/D-PU.phtml> (last modified Sept. 18, 2018, 2:21 AM) [hereinafter *Presidential Primaries 2016*]. The New York Times and Associated Press delegate counts gave Clinton an even larger lead. See Wilson Andrews, Kitty Bennett & Alicia Parlapiano, *2016 Delegate Count and Primary Results*, N.Y. TIMES, <https://www.nytimes.com/interactive/2016/us/elections/primary-calendar-and-results.html> (last updated July 5, 2016).

245. Mayer, *supra* note 63, at 41.

246. Silver, *supra* note 223.

247. Heersink, *supra* note 223; Silver, *supra* note 223.

248. Brooks Jackson, *Clinton and the Popular Vote*, FACTCHECK.ORG (June 5, 2008), <https://www.factcheck.org/2008/06/clinton-and-the-popular-vote/>. Technically, Clinton actually carried more votes overall than Obama in 2008, but that was only because he did not qualify for the ballot in Michigan. See *id.*; *2008 Presidential Primaries, Caucuses, and Conventions*, THE GREEN PAPERS, <https://www.thegreenpapers.com/P08/D.phtml> (last modified Feb. 14, 2011, 3:55 PM).

249. Mayer, *supra* note 63, at 40; *Presidential Primaries 2016*, *supra* note 244. The New York Times and Associated Press delegate counts gave Clinton an even larger lead. See Andrews, Bennett & Parlapiano, *supra* note 244.

250. *2008 Democratic Delegates*, REALCLEARPOLITICS (2008), [https://www.realclearpolitics.com/epolls/2008/president/democratic\\_delegate\\_count.html](https://www.realclearpolitics.com/epolls/2008/president/democratic_delegate_count.html). The Real Clear Politics final 2008 delegate count varied slightly from the New York Times and Associated Press delegate estimates. See *Results: Democratic Delegate Count*, N.Y. TIMES: ELECTION GUIDE 2008 (Dec. 6, 2016) <https://www.nytimes.com/elections/2008/primaries/results/delegates/index.html>.

in 2008 did not merit controversy, then certainly Clinton's much larger victory over Sanders in 2016 should not have either.

If the DNC had rigged the nomination process against Bernie Sanders, logic would suggest Hillary Clinton should have swept the caucuses and Sanders should have performed best in the primaries. After all, the state Democratic Party organizations administer the caucuses, whereas state and local election authorities administer primary elections.<sup>251</sup> Instead, the reverse proved to be true. Clinton won twenty-nine out of the thirty-nine primaries, whereas Sanders won twelve out of the fourteen caucuses.<sup>252</sup> Ironically, therefore, Sanders ran strongest in the election contests administered by the Democratic Party.

Even Sanders's complaints over the number of debates exaggerated the extent to which it disadvantaged him. There were nine DNC sanctioned debates during the 2016 nomination race, which prompted criticism from Sanders because he wanted more opportunities to debate Clinton.<sup>253</sup> But the DNC only sanctioned six debates in 2004, the year John Kerry won the nomination, and in 2008, the year Barack Obama won the nomination.<sup>254</sup> In 2004 and 2008, there were far more unsanctioned debates (i.e., debates administered by the media rather than by the DNC),<sup>255</sup> but Clinton had no obligation to agree to more debates. As Harry Enten of FiveThirtyEight observed before the 2016 primaries began: "Clinton is the strongest nonincumbent front-runner in the modern era. She has less incentive to put herself out there and make a potentially fatal mistake."<sup>256</sup>

Most important of all, the debates did not give Sanders a boost at the ballot box. Quite the reverse in fact. During the nomination race, the DNC hosted debates in eight states: Nevada, Iowa, New Hampshire (twice),

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251. WINEBRENNER & GOLDFORD, *supra* note 82, at 339 ("In Iowa, unlike states holding primary elections where state officials administer the electoral process, the political parties conduct the caucuses and collect and process their own caucus results with no independent checks."); Harry J. Enten, *Primaries v. Caucuses: A Handy Primer*, THE GUARDIAN (Mar. 2, 2012, 6:41 PM), <https://www.theguardian.com/commentisfree/cifamerica/2012/mar/02/primaries-caucuses-handy-primer> ("Caucuses are run by state parties, which give them great autonomy in the process. Primaries are run by the state itself, which potentially leads to a smoother vote count.") (citation omitted).

252. Mayer, *supra* note 63, at 41, 43 tbl.2.4; Andrews, Bennett & Parlapiano, *supra* note 244.

253. Mayer, *supra* note 63, at 47.

254. Harry Enten, *Is Six Democratic Debates Too Few?*, FIVETHIRTYEIGHT (May 6, 2015, 1:51 PM), <https://fivethirtyeight.com/features/is-six-democratic-debates-too-few/> ("That's what [sic] most interesting about the DNC's decision this cycle: It calls for the the [sic] same number of sanctioned debates Democrats scheduled in the 2004 and 2008 election cycles.")

255. *Id.* ("Sanctioned debates are exactly what they sound like. They are hosted by the parties themselves, and the parties set the rules for who is included and who isn't.")

256. *Id.*

South Carolina, Wisconsin, Michigan, Florida, and New York.<sup>257</sup> Clinton carried five of those eight states.<sup>258</sup> Nor did the debates lead to a better showing for Sanders nationally. For example, on March 9, Sanders and Clinton debated in Miami, Florida in a nationally televised debate.<sup>259</sup> Six days later, Clinton won every primary on Super Tuesday II, including Florida, Illinois, Missouri, North Carolina, and Ohio.<sup>260</sup> Similarly, on April 14 in a nationally televised event, Sanders and Clinton debated in Brooklyn, New York.<sup>261</sup> Over the course of the following two weeks, Clinton won every nomination contest—including New York, Connecticut, Delaware, Maryland, and Pennsylvania—with one exception, Rhode Island, which Sanders carried by 14,000 votes.<sup>262</sup>

Whatever metric one applies, Sanders's claims of a "rigged system" ring hollow. He lost the race because millions more Democrats preferred Clinton as their nominee.

### C. *The Rules Benefited Sanders, not Clinton*

The ultimate irony of the 2016 presidential contest was the fact that the Democratic rules benefited Bernie Sanders far more than Hillary Clinton. Two election rules in particular provided critical assistance to the Sanders campaign. The first was the Democratic Party's award of delegates on a proportional basis, which enabled Sanders to come away with delegates even in states he lost by hundreds of thousands of votes. The second pro-Sanders rule was the large number of "open" primaries and caucuses in the Democratic race, which permitted independent voters—a key Sanders constituency—to participate in the Democratic nomination process.

The Democratic Party's proportional delegate award system contrasted sharply with that used by the Republican Party. Since 1992,

257. *The 2016 Primary Debate Schedule*, DEMOCRATIC NATIONAL COMMITTEE <https://www.democrats.org/more/the-2016-primary-debate-schedule>.

258. Andrews, Bennett & Parlapiano, *supra* note 244.

259. Patrick Healy & Amy Chozick, *In Democratic Debate, Hillary Clinton and Bernie Sanders Clash on Immigration*, N.Y. TIMES (Mar. 9, 2016), <https://www.nytimes.com/2016/03/10/us/politics/democratic-debate.html>.

260. David A. Fahrenthold & Rosalind S. Helderman, *Super Tuesday II: Clinton Sweeps Florida, Illinois, Ohio and North Carolina; Rubio Quits After Trump Wins Florida*, WASH. POST (Mar. 15, 2016), [https://www.washingtonpost.com/politics/florida-ohio-primaries-march-15-voting-campaign/2016/03/14/5c14965e-ca41-11e5-b0fd-073d5930a7b7\\_story.html?utm\\_term=.6a0c19940fd3](https://www.washingtonpost.com/politics/florida-ohio-primaries-march-15-voting-campaign/2016/03/14/5c14965e-ca41-11e5-b0fd-073d5930a7b7_story.html?utm_term=.6a0c19940fd3); Abby Phillip, *Hillary Clinton Wins Missouri, Securing a Clean Sweep of Tuesday's Primaries*, WASH. POST (Mar. 17, 2016), [https://www.washingtonpost.com/politics/hillary-clinton-wins-missouri-securing-a-clean-sweep-of-march-15-primaries/2016/03/17/12592750-ec8f-11e5-b0fd-073d5930a7b7\\_story.html?utm\\_term=.2096b518b072](https://www.washingtonpost.com/politics/hillary-clinton-wins-missouri-securing-a-clean-sweep-of-march-15-primaries/2016/03/17/12592750-ec8f-11e5-b0fd-073d5930a7b7_story.html?utm_term=.2096b518b072).

261. Healy & Chozick, *supra* note 259.

262. Andrews, Bennett & Parlapiano, *supra* note 244; *Rhode Island Primary Results*, N.Y. TIMES: ELECTION 2016 (Sept. 29, 2016, 10:38 AM) <https://www.nytimes.com/elections/2016/results/primaries/rhode-island>.



every Democratic state party has awarded its presidential delegates on a proportional basis depending on a candidate's share of the popular vote in each contest.<sup>263</sup> For example, if a candidate wins 60% of the vote in a Democratic primary, the candidate receives 60% of the delegates. Most Republican state parties take a different approach. Only one quarter of GOP state parties exclusively use a proportional system.<sup>264</sup> The rest use either a pure winner-take-all system or a hybrid system that includes both winner-take-all and proportional components.<sup>265</sup> Thus, in many Republican primaries and caucuses, the candidate with the largest number of votes in a primary or caucus receives 100% of the state's presidential delegates, even if the candidate wins with less than 50% of the popular vote.

The Democrats' proportional system had a major impact on the 2016 race. It prevented Clinton from quickly establishing a commanding lead in delegates even as she built a huge lead in the popular vote. For example, in the New York Democratic Primary, which Clinton won by nearly 300,000 votes, the proportionality rules required her to split the state's delegates with Sanders.<sup>266</sup> Thus, despite her crushing victory at the polls, she only came away with 139 New York delegates to 108 for Sanders.<sup>267</sup> Similarly, in the Texas Democratic primary, Clinton won decisively with 65% of the popular vote, defeating Sanders by 935,080 votes to 475,561.<sup>268</sup> But rather than take all 222 of the state's presidential delegates—as she would in a winner-take-all system—Clinton once again had to split them with Sanders.<sup>269</sup> The same phenomenon played out over and over. For example, in the Florida Democratic primary, Clinton won with 64% of the popular vote, exceeding Sanders by more than 500,000 votes.<sup>270</sup> But as in New York, Texas, and every other state, Clinton's landslide victory in the popular vote translated to a much more

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263. See KAMARCK, *supra* note 18, at 81, 82.

264. Kevin Uhrmacher, Kevin Schaul, & Ted Mellnik, *Republicans Adjusted Rules for Their Primaries After 2012, and It's Helping Trump*, WASH. POST: CAMPAIGN 2016 (Mar. 9, 2016) <https://www.washingtonpost.com/graphics/politics/2016-election/primaries/explaining-the-presidential-primary-process/>; see KAMARCK, *supra* note 18, at 84 tbl.4-2, 85.

265. Uhrmacher, Schaul, & Mellnik, *supra* note 264; see KAMARCK, *supra* note 18, at 85 (“Republicans specifically rejected mandating proportional representation, arguing that they wanted the nominating system to mirror the winner-take-all aspects of the general election and the Electoral College system. . . . Republican opposition to proportional representation has lasted for many decades.”).

266. *New York Primary Results*, N.Y. TIMES: ELECTION 2016 (Sept. 29, 2016, 10:37 AM), <https://www.nytimes.com/elections/2016/results/primaries/new-york>.

267. *Id.*

268. *Texas Primary Results*, N.Y. TIMES: ELECTION 2016 (Sept. 29, 2016, 10:38 AM), <https://www.nytimes.com/elections/2016/results/primaries/texas>.

269. *Id.*

270. *Florida Primary Results*, N.Y. TIMES: ELECTION 2016 (Sept. 29, 2016, 10:37 AM), <https://www.nytimes.com/elections/2016/results/primaries/florida>.

modest victory among pledged delegates, as she received 141 Florida delegates to seventy-three for Sanders.<sup>271</sup>

To be sure, Sanders also had to share delegates with Clinton. But the proportionality rule cost Sanders far fewer delegates than it did Clinton. The reason was because most of his victories came in smaller states with relatively few delegates. For example, Sanders's victories included Oklahoma, which had only thirty-eight total delegates at stake, Kansas with thirty-three, West Virginia with twenty-nine, Nebraska and Maine with twenty-five each, New Hampshire with twenty-four, Montana with twenty-one, and North Dakota with eighteen.<sup>272</sup> The only large-population state that Sanders won was Michigan, with 130 total delegates.<sup>273</sup> Thus, when compared to the hundreds of delegates Sanders received from the states Clinton carried, the DNC's proportional award system clearly worked in the Sanders campaign's favor.<sup>274</sup>

The 2016 Republican primary and caucus results offered a case in point of how the "winner-take-all" system benefits candidates who win the popular vote.<sup>275</sup> Although Donald Trump averaged 45% of the vote in the GOP contests, he received 100% of the delegates in many states, including South Carolina, Florida, Arizona, Pennsylvania, Indiana, California, and New Jersey.<sup>276</sup> The South Carolina primary provided a striking example of the difference between the Republican and Democratic delegate rules. In the South Carolina GOP primary, Trump only won 32% of the popular vote, but because he finished in first, he received all fifty of the state's delegates.<sup>277</sup> In stark contrast, Hillary Clinton won the South Carolina Democratic primary with 73% of the vote, but only received thirty-nine delegates to fourteen for Sanders.<sup>278</sup> Thus, although Clinton won the Democratic primary in far more decisive fashion than Trump won the Republican primary, Clinton only received a net total of twenty-five South Carolina delegates, whereas Trump emerged with a net total of fifty delegates.

The key point is that the DNC's proportional system kept the Sanders's campaign viable for much longer than would have been the case in a winner-take-all system like that adopted by many Republican state parties. If the Democratic rules awarded 100% of a state's delegates to the popular vote winner, Clinton would have been in an extremely strong position much earlier in the race, because she carried 55% of the

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271. *Id.*

272. Andrews, Bennett & Parlapiano, *supra* note 244.

273. *Id.*

274. *See id.*; *see also* Mayer, *supra* note 63, at 42–43 tbl.2.4.

275. Andrews, Bennett & Parlapiano, *supra* note 244.

276. *Id.*

277. *South Carolina Primary Results*, N.Y. TIMES: ELECTION 2016 (Sept. 29, 2016, 10:38 AM), <https://www.nytimes.com/elections/2016/results/primaries/south-carolina>.

278. *Id.*

popular vote during the Democratic primaries.<sup>279</sup> The proportional system slowed Clinton's accumulation of delegates to such an extent that she did not clinch the Democratic nomination until June 6, more than four months after the Iowa Caucuses.<sup>280</sup> In short, far from "rigging" the system against Sanders, the Democratic delegate award rules kept Sanders in the race even as he fell progressively further behind Clinton in the popular vote.

The delegate system was not the only Democratic nomination rule that provided crucial support to the Sanders campaign. The other pro-Sanders rule came in the form of open primaries and caucuses. In 2016, nineteen Democratic primaries and caucuses were open to voters regardless of political affiliation, and ten additional states placed only modest restrictions on voter eligibility.<sup>281</sup> The remarkable consequence was 22% of all voters in the Democratic primaries were independents.<sup>282</sup>

The presence of so many independent voters in the primaries and caucuses gave Sanders a critical lifeline. As the longest serving independent in Congress,<sup>283</sup> Sanders focused his appeal on voters unaligned with either major party.<sup>284</sup> In fact, he never formally joined the Democratic Party<sup>285</sup> and later admitted that he chose to run as a Democrat in order to attract media coverage to his campaign.<sup>286</sup> The large number of open primaries and caucuses in the Democratic presidential race thus fit the independent senator's strategy perfectly.<sup>287</sup>

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279. Nichanian, *supra* note 237; Mayer, *supra* note 63, at 43 tbl.2.4.

280. DeBenedetti, *supra* note 123.

281. Scott Detrow, *Making Democrats' Primaries More Open Could Be Harder Than You Think*, NPR (May 21, 2016, 8:25 AM), <https://www.npr.org/2016/05/21/478875217/making-democrats-primaries-more-open-could-be-harder-than-you-think>.

282. Mayer, *supra* note 63, at 45.

283. Edward-Isaac Doveve & Gabriel DeBenedetti, *Inside Bernie's Wild Ride: How Sanders Went from Socialist Also-Ran to Nearly Overthrowing the Democratic Party*, POLITICO (Mar. 1, 2016), <https://www.politico.com/magazine/story/2016/03/bernie-sanders-2016-inside-213692>.

284. Ben Kamisar, *Sanders: I Don't Consider Myself a Democrat*, THE HILL (Apr. 18, 2017, 9:09 PM), <http://thehill.com/homenews/campaign/329418-sanders-i-do-not-consider-myself-a-democrat>; Nicole Gaudiano, *Sen. Bernie Sanders: 'I Am an Independent'*, USA TODAY, <https://www.usatoday.com/story/news/politics/onpolitics/2017/10/23/bernie-sanders-i-am-an-independent/792186001/> (last updated Oct. 23, 2017, 6:08 PM).

285. Dan Hopkins, *supra* note 238; Kamisar, *supra* note 284; Gaudiano, *supra* note 284.

286. Brianna Ehley, *Sanders Says He Ran as a Democrat for 'Media Coverage'*, POLITICO (Mar. 14, 2016, 7:12 PM), <https://www.politico.com/blogs/2016-dem-primary-live-updates-and-results/2016/03/bernie-sanders-independent-media-coverage-220747>; Doveve & DeBenedetti, *supra* note 283.

287. Alex Seitz-Wald, *Why Bernie Sanders Holds Potential Appeal for Trump Voters*, NBC NEWS: POLITICS (Dec. 30, 2015, 2:10 PM), <https://www.nbcnews.com/politics/2016-election/why-bernie-sanders-holds-potential-appeal-trump-voters-n488051>; Cassie Spodak, *Donald Trump or Bernie Sanders? Some Voters Can't Decide*, CNN: POLITICS, <https://www.cnn.com/2016/02/08/politics/new-hampshire-primary-independent-voters/index.html> (last updated Feb. 8, 2016, 6:43 PM).

The overall vote totals revealed the extent to which independent voters boosted the Sanders campaign. In the 2016 nomination race, Clinton carried 66% of registered Democrats, whereas Sanders only received 33% of the Democratic vote.<sup>288</sup> But Sanders dominated among independent voters, which enabled him to drive down Clinton's total share of all votes cast (independents and registered Democrats combined) to 55%.<sup>289</sup> In other words, if the state Democratic parties had closed their contests to only permit registered Democrats to participate, Clinton would have won the nomination much earlier.<sup>290</sup> Open primaries thus kept Sanders in the race despite the fact that he lost registered Democrats by a 2-to-1 margin.<sup>291</sup>

Instead of bemoaning the Democratic rules, therefore, Sanders had grounds to thank the Democrats for holding their nomination contests open to independent voters and for establishing a delegate system so congenial to candidates who finished a distant second in the popular vote.

### III. THE DISTURBING POWER OF FALSE ELECTION FRAUD CLAIMS

If there was no truth to the allegations of a “rigged” nomination, why did the Sanders and Trump campaigns embrace the idea? The answer is because the public has become disturbingly receptive to false claims of a

288. Mayer, *supra* note 63, at 45.

289. Philip Bump, *Independents Just Delivered Another State for Bernie Sanders*, WASH. POST (May 11, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/05/11/independents-just-delivered-another-state-for-bernie-sanders/?utm\\_term=.692274c56dc5](https://www.washingtonpost.com/news/the-fix/wp/2016/05/11/independents-just-delivered-another-state-for-bernie-sanders/?utm_term=.692274c56dc5) (“[P]eople who describe themselves in exit poll surveys as independents are much more likely to back Sanders, while those who identify as Democrats like Clinton.”); Philip Bump, *The Sanders-Clinton Race Shows There Really Are 2 Democratic Parties*, WASH. POST (May 4, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/05/04/the-split-in-the-democratic-party-may-be-more-clear-cut-than-in-the-gop/?utm\\_term=.c9fc9a58fb0d](https://www.washingtonpost.com/news/the-fix/wp/2016/05/04/the-split-in-the-democratic-party-may-be-more-clear-cut-than-in-the-gop/?utm_term=.c9fc9a58fb0d) [hereinafter Bump, *The Sanders-Clinton Race*] (“In states for which we have exit poll data, people who identify as independents have voted for Sanders over Clinton 23 out of 26 times. (The exceptions: Georgia, Mississippi and Alabama.) People who identify as Democrats, meanwhile, have voted for Clinton over Sanders in 23 out of 26, excepting Vermont, New Hampshire and Wisconsin, where the two tied.”); Mayer, *supra* note 63, at 41; David R. Jones, *Independent Voters Play Big Role in Primary Outcomes*, N.Y. TIMES: ELECTION 2016 (Feb. 9, 2016, 10:44 PM), <https://www.nytimes.com/live/new-hampshire-primary-2016-election/independent-voters-play-big-role-in-primary-outcomes/>.

290. Bump, *The Sanders-Clinton Race*, *supra* note 289 (“In states for which we have exit poll data, people who identify as independents have voted for Sanders over Clinton 23 out of 26 times. (The exceptions: Georgia, Mississippi and Alabama.) People who identify as Democrats, meanwhile, have voted for Clinton over Sanders in 23 out of 26, excepting Vermont, New Hampshire and Wisconsin, where the two tied.”).

291. Harry Enten & Nate Silver, *The System Isn't 'Rigged' Against Sanders*, FIVETHIRTYEIGHT: 2016 ELECTION (May 26, 2016, 1:36 PM), <https://fivethirtyeight.com/features/the-system-isnt-rigged-against-sanders/> (“If the Democratic nomination were open to as many *Democrats* as possible—through closed primaries—Clinton would be dominating Sanders. And if the nomination were open to as many *voters* as possible—through open primaries—she'd still be winning.”).

rigged election system. Accordingly, tarring opponents with unfounded charges of election fraud is a highly effective political tactic.

In the case of Bernie Sanders, political opportunism clearly motivated his claims of a “rigged system.” Originally, he had no objection to superdelegates. In fact, on the heels of his victory in the New Hampshire primary in February 2016, he publicly appealed for the superdelegates to support his campaign.<sup>292</sup> He even described superdelegates in favorable terms, explaining that the main point of superdelegates is “to make sure that we do not have a Republican in the White House.”<sup>293</sup>

Only when Clinton began to pull away in the nomination race did Sanders attack the “rigged system” of superdelegates.<sup>294</sup> Instead of accepting the reality that he lost the race because Democratic voters preferred Clinton, Sanders changed the focus of public debate to a false narrative about election fraud. Although Sanders’s claims unnecessarily eroded public confidence in the integrity of the election system, the superdelegate controversy benefited Sanders politically. By positioning himself as the victim of an unfair process, he staved off public pressure to admit defeat and drop out of the race.<sup>295</sup> As Toni Monkovic of the New York Times observed:

Bernie Sanders has benefited from the caucus system; it’s a major reason he has been competitive. If Hillary Clinton had dominated caucuses instead of primaries, I suspect that he would have complained that caucuses were flawed—that they were less democratic than primaries and less accessible to the working class. And if Sanders had dominated with Democrats and lost among independents, instead of the other way around, I suspect we wouldn’t be hearing calls from him to open more primaries to independents.<sup>296</sup>

The idea of a “rigged system” thus served a useful political purpose for Sanders by taking the focus off of Clinton’s victories in the nomination race.

Sanders’s “rigged system” claims played directly into Donald Trump’s hands. The accusation that the DNC rigged Clinton’s

292. Daniel Strauss, *supra* note 107.

293. *Id.*

294. Schwartz, *supra* note 1; *Sanders Takes Aim at “Rigged System” of Superdelegates*, *supra* note 1.

295. Callum Borchers, *No, the Pressure on Bernie Sanders to Drop out Isn’t a Media Creation*, WASH. POST (May 25, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/05/25/no-pressure-on-bernie-sanders-to-drop-out-isnt-a-media-creation/?utm\\_term=.43259dbc9368](https://www.washingtonpost.com/news/the-fix/wp/2016/05/25/no-pressure-on-bernie-sanders-to-drop-out-isnt-a-media-creation/?utm_term=.43259dbc9368).

296. Nate Cohn & Toni Monkovic, *Bernie Sanders and Rigged Elections: Sometimes You Just Lose*, N.Y. TIMES (June 1, 2016), <https://www.nytimes.com/2016/06/02/upshot/bernie-sanders-and-rigged-elections-sometimes-you-just-lose.html?action=click&contentCollection=The%20Upshot&module=RelatedCoverage&region=EndOfArticle&pgtype=article>.

nomination greatly enhanced Trump's appeal to Sanders's voters during the general election.<sup>297</sup> Keenly aware of the electorate's susceptibility to misinformation, Trump relentlessly promoted the idea that the nomination was stolen from Sanders, alleging that "the Democratic nominating process is totally rigged and crooked Hillary Clinton and Deborah Wasserman Schultz will not allow Bernie Sanders to win."<sup>298</sup> In June 2016, Trump announced: "To all of those Bernie Sanders voters who have been left out in the cold by a rigged system of superdelegates, we welcome you with open arms."<sup>299</sup> In a New York speech, he declared:

We'll never be able to fix a rigged system by counting on the same people who rigged it in the first place. The insiders wrote the rules of the game to keep themselves in power, and in the money. That's why we're asking Bernie Sanders' voters to join our movement: so together we can fix the system for all Americans.<sup>300</sup>

Trump further implied that Clinton would "rig" the general election as well when, during an Ohio campaign speech, he warned, "I'm afraid the election's going to be rigged. I have to be honest[.]"<sup>301</sup> Time and again he returned to the election fraud theme, declaring: "Remember folks, it's a rigged system . . . That's why you've got to get out and vote, you've got to watch. Because this system is totally rigged."<sup>302</sup>

Trump's appeals worked.<sup>303</sup> Trump's allegations of a "rigged election" resonated with voters, helping him cut Clinton's polling lead

297. Qiu, *supra* note 243. John Sides, *Did Enough Bernie Sanders Supporters Vote for Trump to Cost Clinton the Election?*, WASH. POST (Aug. 24, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/24/did-enough-bernie-sanders-supporters-vote-for-trump-to-cost-clinton-the-election/>.

298. Yamiche Alcindor, *Donald Trump Rejects Offer to Debate Bernie Sanders*, N.Y. TIMES (May 27, 2016), <https://www.nytimes.com/2016/05/28/us/politics/donald-trump-bernie-sanders-debate.html>.

299. Russell Berman, *Who Will Grab the Bernie-or-Bust and the Never-Trump Vote?*, THE ATLANTIC (June 9, 2016), <https://www.theatlantic.com/politics/archive/2016/06/who-will-grab-the-bernie-or-bust-and-the-never-trump-vote/486254/>.

300. Donald Trump, Presidential Candidate, Speech in New York City (June 22, 2016), <https://www.politico.com/story/2016/06/transcript-trump-speech-on-the-stakes-of-the-election-224654>.

301. Jeremy Diamond, *Trump: 'I'm Afraid the Election's Going to Be Rigged'*, CNN, <https://www.cnn.com/2016/08/01/politics/donald-trump-election-2016-rigged/> (last updated Aug. 2, 2016, 9:21 PM).

302. Emily Stephenson & Chris Kahn, *Trump Gains on Clinton, Poll Shows 'Rigged' Message Resonates*, REUTERS (Oct. 21, 2016, 10:48 AM), <https://www.reuters.com/article/us-usa-election-idUSKCN12L1UI>.

303. Tribune News Services, *Donald Trump Warns of 'Rigged Election', Calls Hillary Clinton 'the Devil'*, CHI. TRIBUNE (Aug. 2, 2016, 6:58 AM), <http://www.chicagotribune.com/news/nationworld/politics/ct-donald-trump-hillary-clinton-devil-20160802-story.html>.

from seven points to four points in less than a week.<sup>304</sup> A Reuters/Ipsos poll in October 2016 found that almost 70% of Republicans believed a Clinton victory could only come through election fraud and vote rigging.<sup>305</sup> Most important of all, post-election studies found that somewhere between 6% and 12% of Sanders supporters ultimately voted for Donald Trump in the general election.<sup>306</sup> The percentage may seem insignificant until one considers that Trump's Electoral College majority depended on his razor-thin margin of victory in three states: Wisconsin, which Trump won by about 22,000 votes out of 2.9 million cast; Michigan, which Trump won by about 11,000 votes out of 4.8 million cast; and Pennsylvania, which Trump won by about 44,000 votes out of 6.1 million cast.<sup>307</sup> The number of Sanders supporters who voted for Trump exceeded Trump's margin of victory in each of those three critical states.<sup>308</sup>

Trump continued his allegations of fraud after the election, falsely claiming he lost the popular vote because of voter fraud.<sup>309</sup> In the November election, Clinton won the nationwide popular vote by 2.8 million votes,<sup>310</sup> a fact that may have embarrassed Trump. However, on November 27, 2016, the President-elect Tweeted: "In addition to winning

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304. Stephenson & Kahn, *supra* note 302.

305. Katie Reilly, *Donald Trump Supporters Agree with 'Rigged Election' Claims, Poll Shows*, FORTUNE: ELECTION 2016 (Oct. 22, 2016), <http://fortune.com/2016/10/22/hillary-clinton-donald-trump-poll-rigged-election/>.

306. John Sides, *Did Enough Bernie Sanders Supporters Vote for Trump to Cost Clinton the Election?*, WASH. POST (Aug. 24, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/24/did-enough-bernie-sanders-supporters-vote-for-trump-to-cost-clinton-the-election/?utm\\_term=.9d45eda6fd0e](https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/24/did-enough-bernie-sanders-supporters-vote-for-trump-to-cost-clinton-the-election/?utm_term=.9d45eda6fd0e); *2016 Presidential Election Panel Survey*, RAND CORP.: RAND AM. LIFE PANEL PROJECTS, <https://www.rand.org/labor/alp/projects/2016-election-panel-survey.html>.

307. Gerhard Peters & John T. Wooley, *Election of 2016*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=2016> (last updated Feb. 16, 2017, 6:30 PM); *Official 2016 Presidential General Election Results*, FED. ELECTION COMM'N (Jan. 30, 2017), <https://transition.fec.gov/pubrec/fe2016/2016presgeresults.pdf>; *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 9, 2017, 9:00 AM), <https://www.nytimes.com/elections/results/president>.

308. Jason Le Miere, *Bernie Sanders Voters Helped Trump Win and Here's Proof*, NEWSWEEK (Aug. 23, 2017, 5:04 PM), <http://www.newsweek.com/bernie-sanders-trump-2016-election-654320>; Sides, *supra* note 306 ("Even if we assume that the overall percentage of Sanders supporters who voted for Trump was 6 percent and not 12 percent, and assume therefore that we can cut every state estimate in half, the estimated number of Sanders-Trump voters would still exceed Trump's margin of victory.")

309. Glenn Kessler, *Donald Trump's Bogus Claim That Millions of People Voted Illegally for Hillary Clinton*, WASH. POST (Nov. 27, 2016), [https://www.washingtonpost.com/news/fact-checker/wp/2016/11/27/trumps-bogus-claim-that-millions-of-people-voted-illegally-for-hillary-clinton/?utm\\_term=.c325b03c53dd](https://www.washingtonpost.com/news/fact-checker/wp/2016/11/27/trumps-bogus-claim-that-millions-of-people-voted-illegally-for-hillary-clinton/?utm_term=.c325b03c53dd).

310. *Official 2016 Presidential General Election Results*, *supra* note 307; *Presidential Election Results: Donald J. Trump Wins*, *supra* note 307.

the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally.”<sup>311</sup> Two months later he told members of Congress that Clinton received 3 to 5 million illegal votes.<sup>312</sup> There was absolutely no truth to Trump’s allegations.<sup>313</sup> In fact, a voter fraud commission that President Trump himself established to investigate his claims quietly disbanded in January 2018, having found no evidence whatsoever to support the President’s allegations.<sup>314</sup>

Nevertheless, a large segment of the electorate believed the baseless charges of election fraud.<sup>315</sup> An October 2016 poll found that only 43% of Americans felt confident their ballots would be counted correctly.<sup>316</sup> Post-election polls found that 48% of Republicans and 23% of Democrats believed Trump’s false allegation that millions of people cast illegal ballots in the 2016 election.<sup>317</sup> Similarly, a November 2017 poll found that only 54% of Democratic voters, and 32% of Americans overall, believed Hillary Clinton won the Democratic nomination in a fair race.<sup>318</sup> A *Washington Post* survey reported that the percentage of Americans who were “not proud of the way the country’s democracy is working” doubled from 18% in 2014 to 36% in 2017.<sup>319</sup> The trend lines continue to head in a troubling direction. According to a March 2018 survey, 37% of

311. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 27, 2016, 3:30 PM), <https://twitter.com/realdonaldtrump/status/802972944532209664?lang=en>.

312. Abby Phillip & Mike DeBonis, *Without Evidence, Trump Tells Lawmakers 3 Million to 5 Million Illegal Ballots Cost Him the Popular Vote*, WASH. POST (Jan. 23, 2017), [https://www.washingtonpost.com/news/post-politics/wp/2017/01/23/at-white-house-trump-tells-congressional-leaders-3-5-million-illegal-ballots-cost-him-the-popular-vote/?utm\\_term=.b62824eb1458](https://www.washingtonpost.com/news/post-politics/wp/2017/01/23/at-white-house-trump-tells-congressional-leaders-3-5-million-illegal-ballots-cost-him-the-popular-vote/?utm_term=.b62824eb1458).

313. Nicholas Fandos, *Trump Won’t Back down from His Voting Fraud Lie. Here Are the Facts.*, N.Y. TIMES (Jan. 24, 2017), <https://www.nytimes.com/2017/01/24/us/politics/unauthorized-immigrant-voting-trump-lie.html> (“There is no evidence to support the claim, which has been discredited repeatedly by numerous fact-checkers.”).

314. Jane C. Timm, *Trump Again Claims Massive Vote Fraud. A Massive Search for Evidence Finds None.*, NBC NEWS (Apr. 5, 2018, 4:46 PM), <https://www.nbcnews.com/politics/donald-trump/trump-again-claims-massive-vote-fraud-massive-search-evidence-finds-n863096>; Eli Watkins, *Trump Repeats Debunked Voter Fraud Claim*, CNN, <https://www.cnn.com/2018/04/05/politics/trump-voter-fraud-california/index.html> (last updated Apr. 5, 2018, 7:19 PM); *Trump Scraps His Own Voter Fraud Commission*, BBC: NEWS (Jan. 4, 2018), <https://www.bbc.com/news/world-us-canada-42561699>.

315. *Views of the Primaries, Press Coverage of Candidates, Attitudes About Government and the Country*, PEW RES. CTR. (Mar. 31, 2016), <http://www.people-press.org/2016/03/31/1-views-of-the-primaries-press-coverage-of-candidates-attitudes-about-government-and-the-country/>.

316. Russonello, *supra* note 9.

317. Balluck, *supra* note 14; Levine & Edwards-Levy, *supra* note 14; *HuffPost: Voter Fraud*, *supra* note 14.

318. *Just 32% Think Hillary Clinton Won Democratic Nomination Fairly*, *supra* note 12.

319. John Wagner & Scott Clement, *‘It’s Just Messed up’: Most Think Political Divisions as Bad as Vietnam Era, New Poll Shows*, WASH. POST (Oct. 28, 2017), [https://www.washingtonpost.com/graphics/2017/national/democracy-poll/?utm\\_term=.0f1eb69c8cb6](https://www.washingtonpost.com/graphics/2017/national/democracy-poll/?utm_term=.0f1eb69c8cb6).



Americans have “lost faith in American democracy.”<sup>320</sup> Perhaps most disturbing of all, a June 2018 bipartisan study found that 55% of Americans believe the state of our democracy is “weak” and 68% believe it is in decline.<sup>321</sup> By any measure, the 2016 campaign left American democracy in a state of crisis, one severely exacerbated by demonstrably false claims of election fraud.

Unfortunately, the political potency of “rigged” election claims mean they are likely to resurface in the future.<sup>322</sup> As the *New York Times* columnist Charles Blow observed, Sanders and Trump placed a “[s]pecter of . . . [i]llegitimacy” over Hillary Clinton’s campaign by asserting that “the system — from the media to the electoral apparatus—was ‘rigged’ and unfairly tilted in her favor.”<sup>323</sup> The success of such attacks does not bode well for the future of American democracy. If 2016 is any guide, Clinton will not be the last candidate falsely accused of rigging an election.

## CONCLUSION

Former Secretary of State Cordell Hull once observed that “[a] lie will gallop halfway round the world before the truth has time to pull its breeches on.”<sup>324</sup> Hull’s observation is particularly true in the internet age, which facilitates the spread of false claims with amazing speed. In fact, a 2018 study in the journal *Science* found that lies spread six times faster on social media than the truth.<sup>325</sup> Political falsehoods spread especially fast. The authors found that “[f]alsehood diffused significantly farther, faster, deeper, and more broadly than the truth in all categories of information, and the effects were more pronounced for false political news than for false news about terrorism, natural disasters, science, urban legends, or financial information.”<sup>326</sup>

The 2016 election demonstrated the disturbing ease with which

320. Mike Allen, *Nearly 40% of Americans Say They’ve Lost Faith in American Democracy*, AXIOS (Mar. 10, 2018), <https://www.axios.com/americans-lose-faith-democracy-754a034d-2a8a-4b20-b1d4-fbd4127385a5.html>.

321. James Hohmann, *The Daily 202: A Poll Commissioned by Bush and Biden Shows Americans Losing Confidence in Democracy*, WASH. POST (June 26, 2018), [https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2018/06/26/daily-202-a-poll-commissioned-by-bush-and-biden-shows-americans-losing-confidence-in-democracy/5b318a5030fb046c468e6f48/?utm\\_term=.6d11c7a565a8](https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2018/06/26/daily-202-a-poll-commissioned-by-bush-and-biden-shows-americans-losing-confidence-in-democracy/5b318a5030fb046c468e6f48/?utm_term=.6d11c7a565a8).

322. Blow, *supra* note 136.

323. *Id.*

324. 1 CORDELL HULL, *THE MEMOIRS OF CORDELL HULL* 220 (1948).

325. Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCI. 1146, 1148 (Mar. 9, 2018), <http://science.sciencemag.org/content/359/6380/1146>; Maggie Fox, *Fake News: Lies Spread Faster on Social Media Than Truth Does*, NBC NEWS, <https://www.nbcnews.com/health/health-news/fake-news-lies-spread-faster-social-media-truth-does-n854896> (last updated Mar. 9, 2018, 7:51 AM).

326. Vosoughi et al., *supra* note 325, at 1146.

political falsehoods spread. At a time of profound public distrust of institutions, baseless claims of election fraud have undermined public confidence in American democracy. It is therefore more important than ever to document the historical record accurately. The myth of a “rigged” nomination must not be left unchallenged. In defense of America’s democratic institutions, we must tell the truth about what happened in the 2016 election.

