

"JIM COMEY THINKS HE WAS HANDED A SHIT SANDWICH"

Upon this rock Comey's reputation stands—or it did until this past July.

That sentence appears deep inside a long Tim Weiner article suggesting, as I did on November 9, that Democrats might be better off if Jim Comey stayed on as FBI Director under Donald Trump.

Before Weiner gets there, he lays out the tradition of FBI Directors standing up to Presidential power (!), leading up to a truly epic rendition of the Comey hospital stairs myth, in which Comey ran up some hospital steps in March 2004, with seconds to spare, to save the Constitution.

The number of people who knew about Stellar Wind was vanishingly small at the start, but by early 2004 it was growing. Comey was read into the program's secret protocols. He became convinced that Stellar Wind was unworkable—and, worse, unconstitutional. (As the Supreme Court would later rule in a pivotal case, a state of war does not make a president king.) In turn, Comey converted Mueller. They agreed that the FBI could not continue to go along with the program. The scope of the searches had to be constrained to protect Americans' rights.

Bush disagreed, of course. So did his White House lawyers. The NSA was a military agency, and therefore, they said, Congress's authorization of military force gave the president the right to electronically eavesdrop on anyone, anywhere in America—free from the constraints of the Fourth

Amendment's protections against warrantless searches and seizures.

Comey and Mueller were caught between the president's command and the law of the land. Neither man had seen evidence that the surveillance program had saved a life, stopped an imminent attack, or unveiled an Al Qaeda member in the United States. They also thought it foolhardy that Bush was flouting the Foreign Intelligence Surveillance Court, which had been created after Watergate to oversee national-security wiretapping.

[snip]

The FBI agents who were guarding Ashcroft's room alerted Comey and Mueller that a showdown was imminent. The two men raced to the intensive-care unit in their black cars, sirens blaring. Comey, who is six foot eight, leaped up the stairs two steps at a time and got there first. Ashcroft was fading in and fading out. "I immediately began speaking to him," Comey later testified, "to see if he could focus on what was happening. And it wasn't clear to me that he could. He seemed pretty bad off."

Having presented how Acting Attorney General Comey **saved the Constitution** by refusing to reauthorize Stellar Wind, Weiner skips some details, most notably about how Comey then turned around and strong-armed FISA into authorizing most parts of the program, including the metadata dragnet that Comey had refused to approve on his own, arguing that DOJ couldn't go to Congress as the Constitution required.

Weiner's myth has no room in a long form article to explain that Comey needed to shred the Constitution's separation of powers to save the Constitution, it seems. After all, if he

presented those details, the claim that Comey's reputation still stood unblemished on a noble rock back in July would look silly.

Having, nevertheless, argued that Comey has consistently stood up to presidential powers on a scale never before seen, Weiner then tries to spin Comey's July decision to violate the norms of DOJ just a case of standing up to power gone bad. Weiner provides almost no explanation of what a big deal it was to make derogatory comments about Hillary even while he cleared her, to be followed by several sworn hearings before Congress in which he provided even more details.

Indeed, in a key paragraph, Weiner's hagiography gets muddled, with statements Comey made in July conflated with actions he then felt obliged to take in October, without much discussion of how one led to the other.

Clearly Comey's remark about Clinton being "extremely careless" was a blunder—carelessness is a sin of omission, not a federal crime—but the awful truth is that he thought he had no choice, or at least no good choice. When he sent the October 28 letter, Comey broke a long-standing Justice Department rule against meddling in presidential politics on the eve of an election. But if, as seems likely, Comey believed with everyone else that Clinton was on track to become the next commander in chief, he may have felt compelled by a custom of equally potent provenance. For decades the FBI has checked and confronted the power of the president. This tradition runs from our own time of political torment back through Bill Clinton's presidency all the way to the days of J. Edgar Hoover.

Having thus obscured how unprecedented the first decision was, Weiner then goes on to – I kid you not! – permit a Comey associate to claim that he

(!!!!) and not Hillary Clinton got dealt a shit sandwich.

In November, I put a question to Comey through the FBI's chain of command: Why did he feel obliged to tell Congress about the cache of unopened emails at the end of October, before his agents had a warrant to look at them? Comey declined to respond directly, but an FBI official familiar with his thinking explained the gist of the dilemma: The director stood at the fork of two bad roads. Route one: Comey sends the letter to Capitol Hill. A congressman hell-bent on harming Hillary Clinton leaks it. The evidence reveals no crime. Clinton is defeated. Route two: Comey doesn't send the letter. The existence of the emails leaks. Comey is doomed. Another official who works closely with the director put the conundrum in a pithy phrase: "Jim Comey thinks he was handed a shit sandwich."

Even the most Comey-friendly narrative of his actions this year has, up to this point, argued that Comey's choices in October were limited because of stupid, even unforgivable things, he did in July. But not here. Here, some entity that shall not be named handed poor Jim Comey a shit sandwich.

Weiner's piece ends with the promise that, this unfortunate incident behind him, Jim Comey will still get up for the next six plus years to protect our country and our Constitution.

For the next seven years, if he serves through the end of his statutory term, Comey will rise before dawn, read through overnight reports about threats to the United States, ride a black car to the White House, and brief the president, if the president will listen. He will report to congressional committees on life-and-death issues of

national security. The FBI is fighting battles across the nation and the world, surrounded by real and imagined enemies everywhere you look, and in places you can't see. There are terrorists and cyberwarriors. There are crooks and thieves. There are two houses of Congress. And then there's the White House. Our new president has a history of bending the law nearly to the breaking point. Trump might not like the cut of Jim Comey's jib. But the FBI director must stand up and say no to a president when the Constitution requires it. It's the law, and it's a tradition. We could do worse than having Comey in charge.

Look. As I noted at the beginning, I have made a version of this argument. I have argued that whoever Donald Trump would appoint to be FBI Director would be far worse than Comey, and Comey – not because he has great respect for the Constitution but because he's self-righteous and knows how to work the press – might stand up to the first or second Trump abuse of power. I don't expect many Democrats (the ones who rushed through Comey's appointment with very little scrutiny) to agree, but I have made that argument.

But spare me the misleading hagiography in making that case, please? If we would be better off if Comey stayed on, it would be as much because of Comey's flaws (and more importantly Trump's knack for finding the worst nominee for any given position) than any great deeds of the past.