

Comey Is a Constitutional Lightweight, and Donald Trump Remains the Only Scandal Worth Talking About

Together they're trashing not just Hillary Clinton but the rule of law.

[Akhil Reed Amar](#) Oct 31, 2016 2:43 PM



Donald Trump arrives at a campaign rally on Aug. 31 in Phoenix.

Ralph Fresno/Getty Images

With their usual double standards, false equivalences, and misdirected hype and hyperventilation, most pundits and politicians have missed the constitutional scandal staring us in the face this weekend. The real news is that one of the two people within realistic reach of supreme power has shown—once again and with fresh smoking-gun evidence—profound contempt for the rule of law and gross unfitness for America's highest position of honor and trust. That person is not Hillary Clinton but Donald Trump. The only principal here who seems more disastrously unaware of the constitutional issues in question is the man who set this latest tarantella in motion, FBI Director James Comey.

The real news about Clinton is that there is no news. We [know nothing new](#); all we have is speculation about what might or might not be in the emails found on a computer that was never in Clinton's possession. Nothing to see here, move along. [Generalissimo Francisco Franco is still dead](#), Clinton was still sloppy about her email hygiene way back when, Anthony Weiner is still a creep; and Huma Abedin is still a poignant human link in a chain that enables glib journalists to talk and write about sex while pretending to cover the presidential contest in sober fashion.

Simply because [Comey has made an enigmatic statement](#), the press now has license to spin more breathless commentary, with no new facts. True, we now perhaps know a bit more about what we don't know. But for any serious journalist or would-be voter, the real story today and every day should be that we still know almost nothing about Trump's tax returns—even though detailed tax information has always been made available by presidential candidates in the modern era and is especially important in Trump's case given that his main claim to competence is his business acumen.

Actually, it is not quite fair to Clinton to say that there is no real news about her and her fitness for the presidency. Here is the news: In response to a

sharp and seemingly negative turn of events, she has done the right things. She has huddled with her team of advisers—most of whom are people of competence and character. She has carefully calibrated her words and coordinated with allies and surrogates. She has properly raised pointed questions about Comey in particular and the FBI in general—questions that needed to be aired and that serious lawyers and legal ethicists tried to highlight long before Comey's latest screw-up. (See, for example, Matt Miller's outstanding *Washington Post* essay on July 6, "[James Comey's Abuse of Power](#)." Miller followed up with another outstanding *Post* piece on Saturday, "[James Comey Fails to Follow Justice Department Rules Yet Again](#).") In short, Clinton has acted like a pro. Indeed, she has acted like a president, for this is what presidents (and first ladies and secretaries of state, for that matter) do daily: respond to sharp (and often seemingly negative) turns of events in deliberate fashion by saying the right thing at the right time in the right way after consulting the right people.

Comey himself has begun to receive serious scrutiny this weekend, but the press and political conservatives have for months mangled the basic constitutional principles at stake. Our Constitution, our laws, and our legal traditions do not vest and never have vested the FBI director, nor his minions in the FBI, with the power to decide who should and should not be prosecuted. Rather, this power is part of "the executive power," which is explicitly vested by Article II of the Constitution in the person of the president of the United States, who is also explicitly given the power to pardon (and thus to decline prosecution in any case he deems unsuitable for prosecution). As commander- and intelligence gatherer-in-chief, the president also has the authority to declassify secret documents at any time for sound *raisons d'état*, and this legal fact provides additional proof that he, and not Comey or his underlings, is the ultimate decider.

The first Congress under George Washington created a top legal adviser to

the president, the attorney general, who was by statutory mandate in 1789, and who remains by our constitutional tradition, a person "[learned in the law](#)." Later laws created a Justice Department and put the AG in charge of this professional legal department. Legally and constitutionally, the FBI director reports to the AG, the Justice Department, and the president. The director may recommend, but that is all he may do. If he believes that wrongdoing is being improperly covered up by the Justice Department, he should resign and become a whistleblower. But Comey has presented no evidence of a Justice Department or presidential cover-up, and absent such evidence, Comey's conduct has been wildly improper, violating [sound, well-established, and nonpartisan Justice Department rules](#) and attorney general directives [left](#) and [right](#). He shouldn't have gone freelancing [in July](#), and he certainly shouldn't have gone freelancing again.

Attorneys general have always been law-trained, and so have all the dedicated civil servants of both parties who occupy top positions in the Justice Department. By contrast, most FBI officers have no legal training, and these officers, while typically earnest and hardworking, are disproportionately right of center. Unlike America's first AG and virtually every AG since then, America's first FBI director, the infamous J. Edgar Hoover, was not chosen from the ranks of America's top lawyers.* True, Comey himself is a lawyer, but not a great one. He knows enough law to be dangerous but not enough law—especially not enough constitutional law—to be sound or wise. He fails to understand his proper place in the constitutional system, as one carefully designed cog within a larger piece of legal and constitutional machinery. There is no evidence that he is a hack or a clown. But there is reason to think that he's a bureaucratic blockhead and constitutional lightweight who (as with many bureaucrats) fails to understand the proper limits of his authority, formal and informal. In particular, he somehow sees himself as a freestanding and independent

constitutional officer positioned between the president and Congress. He is no such thing. He is a statutory officer entirely within the executive branch of government headed by the president of the United States and no one else—a statutory officer nested within a Justice Department that also answers directly to the president as a constitutional matter.

Now is not the right time for President Obama to sanction or sack Comey—there is still much that we do not know about what Comey did and why, and presidents should not rush to judgment. But Comey is removable at will by the president, and not merely [because a 1976 statute allows removal](#). The more basic point is that the Constitution requires that the president be in charge of his own branch, and the FBI is ultimately part of the executive branch. This is a core constitutional principle, brilliantly expounded by the late Justice Antonin Scalia in his most celebrated judicial opinion, in the 1988 case [Morrison v. Olson](#). True, Scalia was a dissenter in that case, but a more recent Supreme Court majority opinion, [Edmond v. United States](#), authored by Scalia himself, effectively canonized his *Morrison* dissent. Earlier this month, in a [powerful opinion](#) penned by Judge Brett Kavanaugh—a highly respected jurist appointed by George W. Bush—the U.S. Court of Appeals for the District of Columbia Circuit explicitly embraced and built upon Scalia's foundation.

If and when the time arrives for Comey to go, the president should not be afraid to reach across the political aisle once again—as Obama himself did in picking Comey, a Republican. If Clinton does win the presidency next week, she should thus consider moderates and conservatives but should seek out a Republican with real credentials as a constitutionalist—someone such as [Peter Keisler](#), a co-founder of the Federalist Society who served as acting attorney general under George W. Bush.

But Clinton may never become president, and if she falls short, the

constitutional cluelessness and moral fecklessness of the many journalists and pundits this weekend will be part of the story told, with chagrin, by future historians.

Over the past few days, Trump, once again, has outrageously gotten a pass—actually, a good grade—from various commentators, who have thus far failed to call out fresh smears that betoken tyranny and the breakdown of the rule of law.

Invoking Comey's recent letter, Trump [declared](#) to a raucous crowd in Phoenix on Saturday that Clinton's "criminal action was willful, deliberate, intentional, and purposeful ... and [she] lied to the FBI many times." Comey himself has repeatedly and emphatically said precisely the opposite both in a [formal written statement](#) and orally [under oath](#), but Trump keeps repeating his big lie again and again. Of course, this is not the first time Trump has said this. But it is news every time he repeats it, because it is so antithetical to our constitutional system. Unlike Trumpian birtherism and the many other big lies he's told throughout his public life, this big lie takes aim at the very heart of the rule of law. The rule of law is not violated when some guilty people go unprosecuted. The rule of law itself provides for pardons, nonprosecutions, and mercy on a massive scale. (Think about the tens if not hundreds of millions of Americans who have used or will use some illegal drug at some point in their lives.) No government official on facts closely analogous to Clinton's has ever been convicted; those who have been convicted have committed intentional wrongs and/or lied to investigators. So the rule of law is in no way violated by going easy on Clinton, despite her admitted mistakes. But the rule of law is imperiled by punishing people who are not guilty; the rule of law is violated when the prosecutor-in-chief (also known as the president) pronounces a person guilty by name when the facts utterly fail to support this smear; the rule of law is in mortal danger when an overheated crowd roars, as it did in Phoenix, "Lock her up!" This is news not because it

has not happened before, but because it is still happening—and getting worse. And the journalists are missing the headline.

So too is it news when Trump [once again](#) (in Phoenix) accuses a former president, Bill Clinton, and the current attorney general, Loretta Lynch, of conspiring to obstruct justice on a plane tarmac—apparently in full view of the attorney general's spouse!—despite the claims of all participants and eyewitnesses that nothing related to Clinton's emails came up in this exchange of pleasantries. The chance tarmac conversation was indeed ill-advised, but there is no evidence whatsoever that it was criminal, yet Trump keeps smearing, again and again.

And let's be clear: He is smearing blacks and women—Obama; Lynch; her predecessor, Eric Holder; and Clinton herself—in thinly veiled language. On Saturday in Golden, Colorado, he described today's Justice Department as [a "third world" system](#). To him and many in his audience, this is a system in which too many minorities are in charge. (Recall also Trump's comments [earlier this year](#) attacking the Mexican heritage of U.S. District Judge Gonzalo Curiel.) But to any sober person, the third-world system that we are at risk of falling into is a world of President Trump, flanked by the likes of Rudolph Giuliani, Chris Christie, and Newt Gingrich, smearing opponents daily with reckless charges of criminal conduct and no real facts to support these dangerous charges. Punishment now, facts later (or maybe never—whatever). Lock her up! Lock everyone up who disagrees with me or stands in my way!

As Ezra Klein reminded us months ago, this is an election not between left and right but between normal and abnormal. And the press, once more, in this most critical hour, is missing the story. Future historians will look at all this with incredulity. Wake up, America!

Correction, Nov. 1, 2016: *This story originally stated that J. Edgar Hoover did not have any legal training. Hoover earned a bachelor of laws degree and a master of laws degree from George Washington University. (Return.)*

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