

THE CLINESMITH INFORMATION SUGGESTS THAT JOHN DURHAM MISUNDERSTANDS HIS INVESTIGATION

Paragraph 2 of the Kevin Clinesmith Criminal Information reads:

On July 31, 2016, the FBI opened a Foreign Agents Registration Act ("FARA") investigation known as Crossfire Hurricane into whether individual(s) associated with Donald J. Trump for President Campaign were witting of and/or coordinating activities with the Russian government. By August 16, 2016, the FBI had opened individual cases under the Crossfire Hurricane umbrella on four United States persons including a United States person referred to herein as "Individual 1."

That paragraph is, at a minimum, deeply dishonest.

But I believe – and four experts I asked on the topic (which does not include Andrew Weissmann, who has since tweeted about this) agree – that it may be something worse. It appears to be evidence that John Durham doesn't understand his own investigation.

The paragraph is dishonest because it suggests that the investigation into Carter Page arose exclusively out of the Crossfire Hurricane predication. That's false.

As the DOJ IG Report made clear, the NY Field Office opened an investigation into Page during the spring of 2016 upon discovering that, when he was identified in the indictment of one of

the Russians trying to recruit him in 2013, he *went to other Russians* and apparently tried to reassure them that he had not told the FBI about their efforts (and when interviewed by the FBI, Page repeatedly said sharing non-public economic information with known Russian intelligence officers was a positive for him).

On March 2, 2016, the NYFO CI Agent and SDNY Assistant United States Attorneys interviewed Carter Page in preparation for the trial of one of the indicted Russian intelligence officers. During the interview, Page stated that he knew he was the person referred to as Male-1 in the indictment and further said that he had identified himself as Male-1 to a Russian Minister and various Russian officials at a United Nations event in "the spirit of openness." The NYFO CI Agent told us she returned to her office after the interview and discussed with her supervisor opening a counterintelligence case on Page based on his statement to Russian officials that he believed he was Male-1 in the indictment and his continued contact with Russian intelligence officers.

The FBI's NYFO CI squad supervisor (NYFO CI Supervisor) told us she believed she should have opened a counterintelligence case on Carter Page prior to March 2, 2016 based on his continued contacts with Russian intelligence officers; however, she said the squad was preparing for a big trial, and they did not focus on Page until he was interviewed again on March 2. She told us that after the March 2 interview, she called CD's Counterespionage Section at FBI Headquarters to determine whether Page had any security clearances and to ask for guidance as to what type of investigation to open on Page. 183 On April 1, 2016, the NYFO CI Supervisor received an email from the

Counterespionage Section advising her to open a [redacted] investigation on Page.

[snip]

On April 6, 2016, NYFO opened a counterintelligence [redacted] investigation on Carter Page under a code name the FBI assigned to him (NYFO investigation) based on his contacts with Russian intelligence officers and his statement to Russian officials that he was "Male-1" in the SONY indictment. Based on our review of documents in the NYFO case file, as well as our interview of the NYFO CI Agent, there was limited investigative activity in the NYFO investigation between April 6 and the Crossfire Hurricane team's opening of its investigation of Page on August 10. The NYFO CI Agent told the OIG that the steps she took in the first few months of the case were to observe whether any other intelligence officers contacted Page and to prepare national security letters seeking Carter Page's cell phone number(s) and residence information. The NYFO CI agent said that she did not use any CHSs to target Page during the NYFO investigation. The NYFO investigation was transferred to the Crossfire Hurricane team on August 10 and became part of the Crossfire Hurricane investigation.

Carter Page was the subject of a legitimate counterintelligence investigation months before Crossfire Hurricane got opened, based off conduct that continued three years after CIA had ended approval for Page as an operational contact, based off conduct with multiple Russians – at least one a known intelligence officer – that Page did not share with the CIA. Carter Page was the subject of a counterintelligence investigation started irrespective of all ties Page had formerly had with the CIA that is the issue at the core of

the Clinesmith Information.

By pretending that every investigation into Trump's flunkies (including the ongoing Money Laundering investigation into Paul Manafort) got opened by Crossfire Hurricane, Durham creates a narrative that is every bit as dishonest as the worst stories about Crossfire Hurricane.

Durham is doing precisely what he is tasked with investigating others for.

But Durham's mischaracterization of the investigation as a "FARA" investigation is far more troubling. Either he doesn't know what he's doing – replicating an error that DOJ IG had to fix in its Carter Page investigation – or he's deliberately misrepresenting what was a counterintelligence investigation that, at the start, envisioned the possibility that Page was unwittingly being cultivated.

And from this error, paragraph 4 of the Information creates the (again, false) impression that the suspicions that Carter Page might be a willing agent of Russia all came from the Crossfire Hurricane team.

Each of these FISA applications allege there was probable cause that Individual #1 was a knowing agent of a foreign power, specifically Russia.

Again, that's false! Page told the FBI, repeatedly, that he thought it was a good thing to share non-public information with people he knew to be Russian intelligence officers. He told the FBI that well before Kevin Clinesmith got involved at all. He told the FBI that years after CIA no longer considered him an approved operational contact. That was the basis for investigating him, long before any of the people Durham is investigating got involved.

As I've noted, it took DOJ IG eleven days after publishing its report in December before it discovered that it didn't know what FBI was investigating. After those eleven days, it

issued a correction for some (but not all) of the references where it incorrectly portrayed the investigation as limited to FARA.

On page 57, we added the specific provision of the United States Code where the Foreign Agents Registration Act (FARA) is codified, and revised a footnote in order to reference prior OIG work examining the Department's enforcement and administration of FARA.


But there remain incorrect treatments of this nuance, and the IG Report conducted a First Amendment analysis about Carter Page that should have been mooted as soon as he admitted he was sharing information – economic information with no political tie – with people he knew to be Russian intelligence officers.

Still, at least DOJ IG explained the source of confusion: for any investigation involving registering as a foreign agent, the FBI uses the same case file number.

Crossfire Hurricane was opened by CD and was assigned a case number used by the FBI for possible violations of the Foreign Agents Registration Act (FARA), 22 U.S.C. § 611, et seq., and 18 U.S.C. § 951 (Agents of Foreign Governments). 170 As described in Chapter Two, the AG Guidelines recognize that activities subject to investigation as “threats to the national security” may also involve violations or potential violations of federal criminal laws, or may serve important purposes outside the ambit of normal criminal investigation and prosecution by informing national security decisions. Given such potential overlap in subject matter, neither the AG Guidelines nor the DIOG require the FBI to differently label its activities as criminal investigations, national security investigations, or foreign intelligence collections. Rather, the AG

Guidelines state that, where an authorized purpose exists, all of the FBI's legal authorities are available for deployment in all cases to which they apply . 171

That's why the EC opening the investigation – which has subsequently been released – calls this a “FARA” investigation; because it's a bureaucratic detail that in no way circumscribes the scope of the investigation. But the EC opening the investigation into Flynn – and assuredly, the EC opening the investigation into Page, though no one has released that yet – specifically names 18 USC 951 as well.

 The goal of the investigation is to determine whether the captioned subject, associated with the Trump Team, is being directed and controlled by and/or coordinating activities with the Russian Federation in a manner which may be a threat to the national security and/or possibly a violation of the Foreign Agents Registration Act, 18 U.S.C section 951 et seq, or other related statutes.

[See the update below for the evolution of the case ID# 97 that was used with Crossfire Hurricane.]

From the start, this was about more than doing political work for Russians.

People who know how FBI filing systems work, or know how FARA overlaps with 951, or know what the “COUNTERINTELLIGENCE” label appearing before the designation of this as a FARA case, would understand that FARA's not a description of the actual investigation.

Apparently, Durham and his team (which does not include any National Security Division personnel, at least on the Clinesmith Information) don't know or don't care about any of that. His spokesperson did not return a call asking for clarification.

The point is, these were all counterintelligence investigations. As DOJ IG explained, the FBI may believe the investigation focuses on threats to national security and/or it may believe the investigation focuses on potential crimes. As

one person I spoke with characterized this error, it's like not knowing that the wall between intelligence and criminal investigations came down after 9/11.

And yet, Durham – who in December suggested he didn't believe this investigation that he still treats as a criminal investigation was not properly predicated as a full investigation – appears not to understand that very basic fact about this investigation.

If Durham believes, erroneously, that the FBI opening a *criminal* investigation into Page into something that overlaps with First Amendment protected activity, it might explain why he hasn't just closed up shop right now. It may explain why he claimed this was not a properly predicated full investigation. It may explain why he doesn't understand why FBI continued the investigation based on behavior entirely unrelated to the Steele dossier.

But now Durham has made an assertion that likely arises from a total misunderstanding of what he's investigating. He has betrayed that his entire investigation appears premised on a misunderstanding.

Update: I've fixed a reference to "operational contact," which I originally had as "operational conduct."

Update: Per a recently released Mike Flynn file, we know the case ID# for Crossfire Hurricane was 97F-HQ-063661. NARA describes how that case ID # started as a way to codify the Foreign Agents Registration Act. But then in 1950 it also came to include those who had knowledge of espionage, counter-espionage, or sabotage from a foreign country. Likewise, the FBI itself makes it clear that 97 covers both FARA and 18 USC 951. Durham only had to refer to a public FOIA document to understand his error.