

HOW DURHAM GETS TO INTENT ON FALSE STATEMENTS WITH KEVIN CLINESMITH

A lot of skeptics of the John Durham investigation have raised questions about the false statements charge against Kevin Clinesmith and intent.

Clinesmith claimed to DOJ IG that he did not intend to mislead when he altered an email saying that Carter Page was a “source” for CIA, but that he did so because he believed Page *not* to be a recruited asset but instead some kind of sub-source.

The OGC Attorney told us that- his belief that Page had never been a source for the other U.S. government agency, but instead interacted with a source-was based on telephone conversations with the Liaison. He said he recalled the Liaison “saying that [Page] was not a source of theirs,” but rather “incidentally reporting information via a source of theirs” and that they “ended up not actually opening him.”³⁹⁶

[snip]

We asked the OGC Attorney about this instant message exchange with SSA 2 in which he told SSA 2 that Carter Page was never a source. The OGC Attorney stated, “That was my, the impression that I was given, yes.” We also asked why he told SSA 2 in the instant message exchange that the other U.S. government agency “confirmed explicitly that he was never a source.” The OGC Attorney explained that his statement was just “shorthand” for the information provided by the other agency about Page and that he had no particular reason to use the word

“explicitly.”

[snip]

We asked the OGC Attorney about the alteration in the email he sent to SSA 2. He initially stated that he was not certain how the alteration occurred, but subsequently acknowledged that he made the change. He also stated it was consistent with his impression of the information that he had been provided by the Liaison.

Clinesmith’s lawyer told a similar story to the NYT, so he either still believes that or has settled on that story to avoid further legal exposure.

Mr. Clinesmith’s argued that he did not change the document in an attempt to cover up the F.B.I.’s mistake. His lawyers argued that he had made the change in good faith because he did not think that Mr. Page had been an actual source for the C.I.A.

Neither Michael Horowitz nor Durham appear to believe this story. Durham quotes the CIA liaison saying that Clinesmith had no basis to formulate that belief.

The Liaison focused on the portion of the exchange in which the OGC Attorney stated that Page “was never a source.” The Liaison told us that this statement was wrong, as was the OGC Attorney’s statement that Page “was a U.S. sub-source of a source.” The Liaison said that such an assertion is “directly contradictory to the [documents]” the agency provided to the FBI. The Liaison also said it was inaccurate to describe Carter Page as “like a sub-source of [a digraph]” and to state that the other agency had “confirmed explicitly that [Page] was never a source.” We asked the

Liaison whether the Liaison ever told the OGC Attorney that Page was not a source. The Liaison said that, to the best of the Liaison's recollection, the Liaison did not and would not have characterized the status of a "[digraph]" without either first reaching out to the other agency's experts responsible for the underlying reporting, or relying on the proper supporting documentation for an answer. The Liaison stated, "I have no recollection of there being any basis for [the OGC Attorney] to reach that conclusion, and it is directly contradicted by the documents."

And Horowitz subtly suggested that Clinesmith formulated this belief without reading the documents that the CIA liaison had told him to refer to to understand Page's tie with the CIA.

The Liaison responded that same day by providing the OGC Attorney with a list of documents previously provided by the other agency to the FBI mentioning Page's name, including the August 17 Memorandum.

[snip]

We asked the OGC Attorney if he read the documents identified by the Liaison in her June 15, 2017 email. The OGC Attorney told the OIG that he "didn't know the details of...the content of the [documents]" and did not think he was involved in reviewing them. He also said he "didn't have access to the [documents] in the OGC space," but that the investigative team was provided the list of documents and that they would have been reviewing them.

This is a detail that Durham repeated in the Criminal Information charging Clinesmith.

Later that same day, the OGA Liaison responded by email in which the liaison provided the defendant with a list (but not copies) of OGA documents.

Both seem to suggest that Clinesmith provided no credible explanation for how he came to conclude that Page was not a source, even if he maintains that he believed in good faith that an operational contact was not a source.

Still, the only proof of that is (at least as far as the public record goes) the CIA liaison's imperfect memory of that conversation. He says, she says. Not a strong case that Clinesmith intentionally changed the email to mislead.

So how, a number of Durham skeptics are rightly asking, will Clinesmith allocute to guilt in changing the document, when he has consistently claimed he did not intend to mislead anyone by changing the email.

That's not how Durham has formulated this false statements charge.

Clinesmith is not charged with lying about whether Page was a source. Rather, he's charged under 18 USC 1001(a)(3), which reads:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter

109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

That is, he's not charged with lying, but instead with using a false document that he knew to contain a materially false statement.

The Information explains that,

Specifically, on or about June 19, 2017, the defendant altered the OGA Liaison's June 15, 2017 email by adding that Individual #1 "was not a source" and then forwarded the email to the SSA, when in truth, and in fact, and as the defendant well knew, the original June 15, 2017 email from the OGA Liaison did not contain the words "not a source."

This shifts the burden on intent significantly, because while Clinesmith contends he did not intend to mislead, he doesn't deny altering the email, for whatever purpose. SSA 2 (SSA in the Information) has already testified to the IG (and presumably said the same thing to Durham) that that altered verbiage was material *to him*.

We discussed the altered email with SSA 2, who told us that the OGC Attorney was the person he relied upon to resolve the issue of whether Carter Page was or had been a source for the other U.S. government agency. SSA 2 told us that the statement inserted into the Liaison's email-that Page was "not a source"- was the most important part of the email for him. SSA 2 said "if they say [he's] not a source, then you know we're good." SSA 2 also said that if the email from the Liaison had not contained the words "not a source" then, for him, the issue would have remained unresolved, and he would have had to seek further clarification. SSA 2

stated: "If you take out 'and not a source,' it's not wrong, but it doesn't really answer the question." He also said that something lesser, such as a verbal statement from the Liaison through the OGC Attorney, would not have resolved the issue for him. SSA 2 also told us it was important to him that the OGC Attorney had first sent the Liaison's response email to the 01 Attorney, because if they discussed the issue and they have "decided we don't have to do a footnote that he's not a source ... we've resolved this. We're good to move forward." He also said that he "would assume that the [OI Attorney]. .. received exactly what [SSA 2] received since it was a forward."

SSA 2 has testified, then, that Clinesmith's alteration of the email was material to his understanding of Page's status; anything less than those words would have led him to include a footnote in the fourth Page application.

While I know a lot of Durham skeptics (including bmaz, who'll promptly call me and yell at me) think Durham has a problem with allocution here, I think by crafting this under 18 USC 1001(a)(3), Durham avoids those problems. It doesn't matter *why* Clinesmith altered the email (whether you believe him or not – and again, I don't think Durham does). All Clinesmith is charged with is intentionally altering the email, which he has already admitted to.

One more point about intent. The frothy right has falsely claimed Clinesmith newly implicated his colleagues in altering this email. There's nothing new here. The DOJ IG Report stated that Clinesmith forwarded the email, unaltered, to people who weren't the affiants on the FISA application.

That same day, the OGC Attorney forwarded the Liaison's email response to Case Agent 6 and an FBI SSA assigned

to the Special Counsel's Office, without adding any explanation or comment. The SSA responded by telling Case Agent 6 that she would "pull these [documents] for you tomorrow and get you what you need."

This passage doesn't get the frothy right where they think it does, either, at least not yet. They forget, for example, that Mueller has testified that he was not involved in the FISA process. And the information about Page's role with the CIA was important to Mueller's team for different reasons – most notably because in June 2017, Mueller's team would be trying to assess what to make of FBI 302s where Page is recorded as equivocating about whether he had told anyone he was Male-1 in the Victor Podobnyy indictment, which would amount to an attempt to deny that he had gone out of his way to maintain contact with Russia even after it became clear those contacts were with intelligence officers.

It's possible Durham thinks that something these two people did led Clinesmith to start lying about what kind of source Page was. But in addition to working with them, he also immediately told his boss that Page was a subsource—the explanation he has offered since.