

## LEGAL MEMORANDUM

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# Things We Hope to Learn from the DOJ Review of “Crossfire Hurricane”

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### KEY TAKEAWAYS

The unorthodox and abusive manner in which Crossfire Hurricane was conducted must be fully explored and exposed.

Those involved used very poor judgment at several key points in the investigation, even if their actions were technically within their discretion.

Future presidential hopefuls must be assured that incumbent political opponents will not investigate their campaigns for political purposes.

It has been four years since the Obama Administration opened the “Crossfire Hurricane” investigation into the presidential campaign of its political rival, Donald Trump, yet many questions relating to the instigation and execution of that investigation remain unanswered.

On April 10, 2019, Attorney General William Barr confirmed during Senate testimony that he had initiated a review into “both the genesis and the conduct of intelligence activities directed at the Trump campaign during 2016.”<sup>1</sup> Barr appointed U.S. Attorney for Connecticut John Durham, a widely respected prosecutor, to conduct the review. Separately, in January 2020, the Attorney General directed U.S. Attorney for the Eastern District of Missouri Jeffrey Jensen to review the prosecution of former National Security Adviser Michael Flynn.<sup>2</sup>

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This paper, in its entirety, can be found at <http://report.heritage.org/lm270>

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It is unclear what their full scope will be or when they will be completed, but in the interests of justice and closure, both of these reviews must answer four overriding questions.

### **QUESTION 1: Did the FBI have sufficient predicate for opening an investigation into the Trump campaign?**

At the height of the hotly contested 2016 election, the FBI, then headed by James Comey, launched an investigation into Donald Trump's presidential campaign. The investigation was allegedly based on a conversation that occurred in a London bar. Over drinks, junior Trump campaign aide George Papadopoulos gossiped to Australian Ambassador to the United Kingdom Alexander Downer that someone had told him that Russia intended to help the Trump campaign. Michael Horowitz, the Justice Department's Inspector General, described the conversation as follows: "Trump campaign foreign policy advisor George Papadopoulos '*suggested*' the Trump team had received *some kind of a suggestion*' from Russia that it could assist in the election process...."<sup>3</sup>

Based on that "suggestion of a suggestion" triple hearsay—and *solely on that triple hearsay*—the FBI launched the Crossfire Hurricane investigation into Trump's campaign.<sup>4</sup> Once this "umbrella" investigation was opened, FBI Counterintelligence Section Chief Peter Strzok, whose text messages revealed a deep and abiding contempt for candidate Trump, flew to London to interview Downer. It turned out that Downer had no additional names to provide, so the FBI reviewed "open source" information about other Trump campaign officials to fish for any "ties" whatsoever with Russia, including having merely travelled there.<sup>5</sup> Subsequently, the FBI opened additional investigations into Trump campaign individuals Carter Page, Paul Manafort, and Michael Flynn.<sup>6</sup>

Incredibly, Inspector General Horowitz concluded that Papadopoulos's bar-talk gossip with Downer was a sufficient predicate for opening a full FBI investigation into the presidential campaign of the opposition candidate mere months before Election Day.<sup>7</sup> True, the predicate traditionally needed to open an investigation is very low, but even if, as Horowitz concluded, this weak evidence technically met the threshold for opening an investigation, given the timing and nature of the investigation, it certainly seems (to put it charitably) like a poor exercise of discretion on the part of FBI officials to move forward based solely on such flimsy evidence.

John Durham has already voiced skepticism about Horowitz's conclusion: "Based on the evidence collected to date...we do not agree with some of the report's conclusions as to predication and how the FBI case was opened."<sup>8</sup> Although we do not know specifically what evidence Durham possesses, it is clear that his investigation is more far-ranging than Horowitz's. "Because the activities of other agencies were not within the scope of this review," Horowitz said, "we did not seek to obtain records from them that the FBI never received or reviewed, except for a limited amount of State Department records relating to Steele."<sup>9</sup> Durham, however, has said explicitly that his review "is not limited to developing information from within component parts of the Justice Department. [It] has included developing information from other persons and entities, both in the U.S. and outside of the U.S."<sup>10</sup>

It is hoped that Durham's final report will tell the full story of why the FBI thought it was prudent to investigate a political rival of the sitting President's party at the height of a presidential campaign.

## **QUESTION 2: Why was candidate Trump not given a defensive briefing regarding possible Russian designs on his campaign?**

In July–August 2016, the FBI determined that certain members of the Trump campaign "may...be involved in activity on behalf of the Russian Federation which may constitute a federal crime or threat to the national security."<sup>11</sup> Putting aside for the moment the validity of that determination, why did the FBI not warn candidate Trump of this possible infiltration?<sup>12</sup> The Russians were allegedly conspiring with individuals on Trump's campaign to interfere in the 2016 election, yet the FBI took no steps that would allow Trump to take defensive actions to protect his campaign. The FBI could also have warned high-level, well-known officials of his campaign such as Senator Jeff Sessions (R-AL) and New Jersey Governor Chris Christie, but it did not do so. Why?

The FBI's then-Counterintelligence Division Assistant Director Bill Priestap told Inspector General Horowitz that he considered providing a defensive briefing to the Trump campaign but ultimately decided not to, stating that such a briefing created a risk that "if someone on the campaign was engaged with the Russians, he/she would very likely change his/her tactics and/or otherwise seek to cover-up his/her activities, thereby preventing us from finding the truth."<sup>13</sup>

But the FBI had no such qualms when it gave a defensive briefing to Senate Intelligence Committee member Dianne Feinstein (D-CA) in 2013. In that case, Russell Lowe, the director of Feinstein's San Francisco office, had been approached by Chinese intelligence for possible recruitment. In Feinstein's case, the FBI was very helpful. Feinstein explained: "The FBI reviewed the matter, shared its concerns with me and the employee immediately left my office."<sup>14</sup> That is how it is supposed to work.

Did the FBI worry that Lowe would try to change his tactics or seek to cover-up his activities? Of course not. The FBI gave a defensive briefing to Feinstein to prevent Chinese penetration of her office and to warn her of Chinese designs. Why did Feinstein seem to get the benefit of the doubt while candidate Trump was treated to a full-blown investigation? After all, Feinstein and her husband have a long record of ties to China.<sup>15</sup>

More evidence of this apparent double standard was revealed in recently released documents showing that the FBI gave candidate Hillary Clinton's campaign a defensive briefing in October 2015. Specifically, the FBI approached Clinton's representatives and warned them that a foreign government "is attempting to influence [Hillary Clinton] through lobbying efforts and campaign contributions."<sup>16</sup> Clinton's representatives "were advised the FBI was providing them with this briefing for awareness and so Ms. Clinton could take appropriate action to protect herself."<sup>17</sup>

These measures were, of course, the proper steps for the FBI to take. So why not warn Trump (or Sessions or Christie) of possible Russian penetration of his campaign in the same way that Hillary Clinton and Senator Feinstein were warned? The answer appears to be self-evident, but Durham's efforts may shed at least some light on this mystery.

### **QUESTION 3: What role, if any, did the intelligence community play in the conduct of Operation Crossfire Hurricane?**

Since leaving office, Obama-era national intelligence officials have been highly critical of President Trump and his Administration. Former Director of National Intelligence James Clapper and former CIA Director John Brennan have been especially vocal critics.<sup>18</sup> Both clearly disdain Trump, and Brennan has even gone so far as to say that "Mr. Trump's claims of no collusion are, in a word, hogwash."<sup>19</sup> Later, after the Mueller report showed no evidence of collusion,<sup>20</sup> Brennan attributed his blunder to "bad information."<sup>21</sup> Clapper, despite his dire public warnings, similarly gave a much more muted response as far back as 2017 when appearing before the House

Intelligence Committee, where he testified that he “never saw any direct empirical evidence that the Trump campaign or someone in it was plotting [or] conspiring with the Russians to meddle with the election.”<sup>22</sup>

Given the daylight between Brennan’s and Clapper’s inflammatory public statements and under-oath testimony, Durham obviously should explore what role the Office of the Director of National Intelligence and the CIA played in this debacle and whether they employed any operatives or resources in efforts to infiltrate the Trump campaign.

#### **QUESTION 4: Why did the FBI continue to pursue Michael Flynn even after a memorandum closing the “Crossfire Razor” investigation was drafted?**

On January 4, 2017, an FBI “Closing Communication” memorandum was drafted, explaining why the Flynn investigation (“Crossfire Razor”) should be closed.<sup>23</sup> The FBI had very good reasons to close it: After five months of investigation, the Crossfire Hurricane team had found no “derogatory information” on Flynn. The FBI had reviewed its information databases; requested other government agencies (likely within the intelligence community) to review their databases; gathered information from a confidential human source; analyzed Flynn’s travel; and surveilled “a certain Russian subject” for any contacts with Flynn. In the end, however, the Crossfire Hurricane team “determined that CROSSFIRE RAZOR was no longer a viable candidate as part of the larger CROSSFIRE HURRICANE umbrella case.”<sup>24</sup>

Why, then, did the Flynn investigation continue? The short answer, based on recently released text messages from January 4, 2017,<sup>25</sup> is that Strzok successfully scrambled to prevent the Flynn investigation from being closed. He texted a colleague, “if you haven’t closed RAZOR, don’t do so yet.”<sup>26</sup> He followed up, saying, “7th floor involved,” presumably hinting that FBI leadership had a hand in keeping the case open.

Why? We can only guess, but some have speculated that it was around this time that the FBI became aware of Flynn’s phone calls with Russian Ambassador to the United States Sergey Kislyak and kept the investigation open on that basis.<sup>27</sup> If true, that is troubling. An examination of the content of the Flynn–Kislyak transcripts shows that those phone calls did not provide a reason to continue the investigation. In his calls with Kislyak, Flynn made no mention whatsoever of the 2016 election, gave no assurances that the Obama Administration’s sanctions would be lifted or softened, and made no promises that Russia would be given favorable treatment.<sup>28</sup>

So what did Flynn say? Flynn cautioned Kislyak to respond to President Obama's sanctions only in a reciprocal manner and not to escalate the situation. Flynn said that "we need cool heads to prevail" and "let's keep this at a level that...is even keeled" so that the incoming Trump Administration could assess its relationship with Russia.<sup>29</sup> There is nothing criminal or harmful to U.S. national security in those statements. In an attempt to justify its actions, the Justice Department implied that it was investigating a potential violation of the Logan Act, a 200-year-old constitutionally dubious statute under which no one has ever been successfully prosecuted—with the last attempted prosecution occurring in 1852.<sup>30</sup>

The Durham–Jensen reviews must ask why cautioning Russia not to retaliate disproportionately against the U.S. was a reason for continuing an FBI investigation that had gone on fruitlessly for five months.<sup>31</sup> Should Flynn have urged Kislyak to *escalate* the situation and expel large numbers of U.S. diplomats from Russia? Of course not. Moreover, it was perfectly appropriate for Flynn to hold such a conversation as the incoming national security adviser for the President-elect.

Were Strzok and other FBI officials frustrated that they had come up dry after five months of investigating Flynn and used his phone calls with Kislyak as a pretext for continuing Crossfire Razor? That seems troubling, especially given the subsequent history of the investigation, including the violations of standard FBI procedures during the ambush interview of Flynn at the White House that ultimately resulted in his criminal prosecution for making false statements to FBI agents—including Strzok.

## Conclusion

We cannot hope that all of the improprieties that occurred during the waning days of the Obama Justice Department will be fully answered by the Durham and Jensen reviews. The misconduct ranges from wanton abuses of power (Comey sending FBI agents to ambush Michael Flynn without notifying White House Counsel) to outright criminality (misrepresenting information relied on in applications submitted under the Foreign Intelligence Surveillance Act and leaking the content of the phone calls between Flynn and Kislyak to the press). But Durham and Jensen must get to the bottom of several key unanswered questions, most importantly the four listed above.

It may turn out that no criminal misconduct occurred, but at a minimum, the unorthodox and abusive manner in which Crossfire Hurricane was conducted must be fully explored and exposed. There is little doubt

that those involved used very poor judgment at several key points in the investigation, even if their actions may have been technically within their discretion. Future presidential hopefuls must be assured that incumbent political opponents will not investigate their campaigns based on the slenderest of reeds or pursue those investigations even after it is clear that no wrongdoing occurred.

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## Endnotes

1. *Justice Dep't Fiscal Year 2020 Budget Request Before the Subcomm. on Commerce, Justice, Science, and Related Agencies of the S. Comm. on Appropriations*, 116th Cong. (2019) (testimony of William Barr, Att'y Gen. of the United States), available at <https://www.c-span.org/video/?459640-1/attorney-general-barr-thinks-spying-occurred-trump-campaign>.
2. Letter from Timothy J. Shea, United States Attorney for the District of Columbia, and Jocelyn Ballantine, Assistant United States Attorney for the District of Columbia, to Sidney Powell and Jesse Binnall, Counsel for Michael T. Flynn (Apr. 24, 2020), available at <https://www.courtlistener.com/recap/gov.uscourts.dcd.191592/gov.uscourts.dcd.191592.180.1.pdf>.
3. Michael E. Horowitz, Office of the Inspector General, U.S. Dept. of Justice, Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation 51–52 (Dec. 2019) (emphasis added) [hereinafter “IG Report”].
4. IG Report at 56–57 (“We also asked those FBI officials involved in the decision to open Crossfire Hurricane whether the FBI received any other information, such as from members of the [U.S. intelligence community], that the FBI relied upon to predicate Crossfire Hurricane. All of them told us that there was no such information and that predication for the case was based solely on the [friendly foreign government] information.”).
5. See, e.g., FBI FD-1057 “Closing Communication” (Jan. 4, 2017) at 1 (draft closing communication document on “Crossfire Razor,” which we now know to be Michael T. Flynn) [hereinafter “Closing Communication”], available at <https://www.courtlistener.com/recap/gov.uscourts.dcd.191592/gov.uscourts.dcd.191592.189.1.pdf>.
6. IG Report at 59 (“After conducting preliminary open source and FBI database inquiries, intelligence analysts on the Crossfire Hurricane team identified three individuals—Carter Page, Paul Manafort, and Michael Flynn—associated with the Trump campaign with either ties to Russia or a history of travel to Russia.”). These, of course, were in addition to the investigation into Papadopoulos.
7. IG Report at 410 (“While the information in the FBI’s possession at the time was limited, in light of the low threshold established by Department and FBI predication policy, we found that Crossfire Hurricane was opened for an authorized investigative purpose and with sufficient factual predication.”).
8. Statement of U.S. Attorney John H. Durham (Dec. 9, 2019) [hereinafter “Durham Statement”], available at <https://www.justice.gov/usao-ct/pr/statement-us-attorney-john-h-durham>.
9. IG Report at 11–12. This, of course, refers to Christopher Steele, the former British spy who supplied a dubious “dossier” supposedly linking the 2016 Trump presidential campaign to Russia. See Paul Roderick Gregory, *Steele’s Dossier: “Clown Show” or the Greatest Russian Coup?*, The Hill (Aug. 5, 2020, 12:30 PM), <https://thehill.com/opinion/white-house/510635-steeles-dossier-clown-show-or-the-greatest-russian-coup>.
10. Durham Statement, *supra* note 8.
11. Closing Communication at 1.
12. Statement by Attorney General William P. Barr on the Inspector General’s Report of the Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation (Dec. 9, 2019) (Attorney General Barr stating that “It is also clear that, from its inception, the evidence produced by the investigation was consistently exculpatory. Nevertheless, the investigation and surveillance was pushed forward for the duration of the campaign and deep into President Trump’s administration”), available at <https://www.justice.gov/opa/pr/statement-attorney-general-william-p-barr-inspector-generals-report-review-four-fisa>.
13. IG Report at iii, 55.
14. Peter Hasson, *All Signs Point to One Man as Chinese Spy in Feinstein’s Staff, and He Wasn’t a Driver*, Daily Caller (Aug. 6, 2018, 7:09 PM), <https://dailycaller.com/2018/08/06/feinstein-chinese-spy/>.
15. See, e.g., Glenn F. Bunting, *Feinstein, Husband Hold Strong Chine Connections*, L.A. Times (March 28, 1997, 12 AM), <https://www.latimes.com/archives/la-xpm-1997-03-28-mn-43046-story.html>; see also Ben Weingarten, *Sen. Dianne Feinstein’s Ties to China Go Way Deeper Than an Alleged Office Spy*, The Federalist (Aug. 8, 2018), <https://thefederalist.com/2018/08/08/sen-dianne-feinsteins-ties-china-go-way-deeper-alleged-office-spy/>.
16. Letter from Stephen E. Boyd, Assistant Attorney General, Office of Legislative Affairs, U.S. Dept. of Justice, to Chairmen and Ranking Members on the Senate Judiciary and Intelligence Committees (Aug. 21, 2020) (attaching documents related to the defensive briefing provided to Hillary Clinton’s campaign), available at <https://www.judiciary.senate.gov/imo/media/doc/2020-08-21%20Submission%20JC%20SSCI.pdf>.
17. *Id.*
18. See, e.g., Eli Watkins, *Two Former Intelligence Chiefs Blast Trump over Russia Comments*, CNN (Nov. 13, 2017, 9:04 AM), <https://www.cnn.com/2017/11/12/politics/james-clapper-john-brennan-trump-russia-cnn/index.html>.
19. John O. Brennan, *John Brennan: President Trump’s Claims of No Collusion Are Hogwash*, N.Y. Times (Aug. 16, 2018), <https://www.nytimes.com/2018/08/16/opinion/john-brennan-trump-russia-collusion-security-clearance.html>.
20. Liam Quinn, *Ex-CIA Director John Brennan Admits He May Have Had “Bad Information” Regarding President Trump and Russia*, Fox News (March 26, 2019), <https://www.foxnews.com/entertainment/ex-cia-director-john-brennan-admits-he-may-have-had-bad-information-regarding-president-trump-and-russia>.
21. *Id.*



22. Emily Jacobs, *Obama's Top Brass Contradict Public Statements About "Collusion" Under Oath*, N.Y. Post (May 11, 2020, 4:41 PM), <https://nypost.com/2020/05/11/obamas-top-brass-contradict-statements-about-collusion-under-oath/>.
23. Closing Communication, *supra* note 5.
24. *Id.* at 3.
25. Attachments to Second Supplement to Motion to Dismiss for Egregious Government Misconduct, No. 17-232-EGS (D.D.C. Apr. 30, 20), ECF 189-1 at 10-12, available at <https://www.scribd.com/document/459210360/April-30-2020-Michael-Flynn-files>.
26. Tobias Hoonhout, *Records Show Strzok Intervened When FBI Moved to Close Flynn Investigation Due to Lack of "Derogatory Information"*, National Review (Apr. 30, 2020, 3:32 PM), <https://www.nationalreview.com/news/records-show-peter-strzok-intervened-when-fbi-moved-to-close-investigation-of-flynn-after-finding-no-derogatory-information/>.
27. See Adam Goldman, *Trump Attacks Flynn Inquiry Amid New Revelations on F.B.I.*, N.Y. Times (Updated May 13, 2020), <https://www.nytimes.com/2020/04/30/us/politics/trump-flynn-stone.html?smid=tw-share>; Of course, the lengthy anti-Trump texts exchanged between Strzok and his lover, FBI lawyer Lisa Page, shed light on the pair's strong disdain for Trump. See *Read FBI's Strzok, Page Texts About Trump*, Fox News (Updated Jan. 23, 2018), <https://www.foxnews.com/politics/read-fbis-strzok-page-texts-about-trump>.
28. Letter from John Ratcliffe, Director of National Intelligence, to Chairmen of the Senate Committee on Finance and the Senate Committee on Homeland Security (May 29, 2020) (attaching redacted and declassified Flynn-Kislyak call transcripts and summaries), available at <https://d3i6fh83elv35t.cloudfront.net/static/2020/05/FlynnTranscripts.pdf>.
29. *Id.*
30. See John G. Malcolm, Zack Smith, and Hans von Spakovsky, *Michael Flynn Seems to Finally Be Getting the Justice He Deserves*, The National Interest (May 8, 2020), <https://nationalinterest.org/feature/michael-flynn-seems-finally-be-getting-justice-he-deserves-152206>.
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