

# The Durham Investigation: What We Know and What It Means

By Jack Goldsmith, Nathaniel Sobel Thursday, July 9, 2020, 9:58 AM

In May 2019, Attorney General William Barr tapped Connecticut's U.S. Attorney John Durham to look into issues related to the origins of the FBI's Trump-Russia investigation. Durham is a longtime federal prosecutor in Connecticut known for leading organized crime and public corruption cases. In 2008, Attorney General Michael Mukasey tasked Durham with investigating the CIA's destruction of interrogation videotapes. A year later, Attorney General Eric Holder expanded Durham's mandate to examine CIA torture allegations.

Now, Durham is conducting a comprehensive global probe of the U.S. government's investigation of the Trump Campaign's connections with Russia. The investigation covers pre- and post-election matters, and reportedly has come to include the unmasking of former national security adviser Michael Flynn, and the basis for the intelligence community's assessment that Russia tried to help Donald Trump win the election in 2016. These are all matters on which President Trump has publicly commented. Before and after Durham began his investigation, Trump has often claimed, in fiery rhetoric, that the Trump campaign investigation, and the unmasking of Flynn, and the intelligence community's assessment, were illegitimate. He has also charged that some of the people apparently under investigation by Durham engaged in misconduct on matters under investigation. Attorney General Barr has also publicly commented that some of the people under investigation engaged in serious wrongdoing.

The fruits of the Durham investigation will reportedly be disclosed later this summer, or in the fall. This post does a deep dive into what has been publicly reported about the Durham investigation, and then offers analysis. We include Barr's commentary on the investigation, but not the president's. The bottom line is that (1) the probe as it developed is not one that should have been conducted by a federal prosecutor conducting a criminal investigation, and (2) Barr's tendentious running commentary on the investigation violates Justice Department rules, politicized the investigation and damaged the credibility of whatever Durham uncovers. (The post is long. If you want to skip the lengthy factual recitation and jump to the analysis, click [here](#).)

## Before the Durham Appointment Becomes Public

Barr first alluded to what would become the Durham investigation in his confirmation hearing on Jan. 15, 2019. He promised Senate Judiciary Chairman Lindsey Graham that he would examine the FBI's counterintelligence investigation against Trump and on the same issue he told Sen. John Kennedy "the best policy is to allow light to shine in."

On March 22, about a month after Barr was sworn in as attorney general, Special Counsel Robert Mueller closed his investigation and submitted his final report to Barr. Two days later, on a Sunday, Barr issued his controversial summary of the report. On the following Monday afternoon, Justice Department records indicate that Barr and his close advisors met with Durham, along with three members of the department's division that handles logistics and staffing. The records do not indicate what Barr and Durham discussed, but it was almost certainly the investigation that Durham would soon lead. (Department records indicate Barr and Durham would have 18 subsequent scheduled meetings and three scheduled phone calls in 2019; the number of their unscheduled communications is not publicly known. Other records show that Durham was in relatively frequent contact with top Justice Department officials in 2019.)

On April 10, Barr testified before a Senate Appropriations subcommittee. He announced that he would review "both the genesis and the conduct of intelligence activities directed at the Trump campaign during 2016." He also suggested that the inquiry would cover the FBI's investigation of Trump and "intelligence agencies more broadly." When Sen. Jean Shaheen asked Barr to justify the inquiry, he stated that "spying on a political campaign is a big deal" and "did occur" in the 2016 Trump campaign inquiry, and that "[t]he question was whether it was adequately predicated." He added at the end of the hearing that: "I am not saying that improper surveillance occurred. I am saying that I am concerned about it and looking into it."

Two days after that hearing, on April 12, records show that one of Barr’s top aides—possibly with Durham as well—spoke with Justice Department Inspector General Michael Horowitz “to explain what [Durham was] working on” and schedule a future meeting. It thus appears that Durham’s work had begun by this point. By this time, Horowitz had been conducting his own investigation for more than a year into the origins and operational aspects of the FBI’s Trump campaign investigation, known as “Crossfire Hurricane.” Two weeks later, Barr told another Senate panel that he had “people in the department helping [him] review the activities over the summer of 2016” and that he envisioned “some kind of reporting at the end.”

### **Durham’s Review Becomes Public**

On May 13, the New York Times reported that Barr had selected Durham to “examine the origins of the Russia investigation.” The Times later confirmed that Barr had appointed Durham “several weeks” earlier. (The official Order initiating the investigation, if any, has never been disclosed. Nor has the official date of the appointment.) The Wall Street Journal additionally reported that, according to a “person familiar with the decision,” Durham was charged with helping to evaluate “whether the government’s intelligence-gathering efforts in the early stages of the probe were legal and appropriate.” At this stage Durham was conducting a review of the matter, not a criminal investigation, which meant, among other things, that he lacked subpoena power.

The next day, the Wall Street Journal wrote that Barr—who was “heavily involved” in the review—had enlisted CIA Director Gina Haspel, Director of National Intelligence Dan Coats and FBI Director Christopher Wray in the Durham investigation. But details remained sparse. An unidentified person “familiar with the investigation” said that the review was “broader” than the then-ongoing inspector general’s review and the probe led by Utah’s U.S. Attorney John Huber into a range of “Republican grievances.”

On May 23, Trump announced that, at Barr’s request, he had “directed the intelligence community to quickly and fully cooperate with the Attorney General’s investigation into surveillance activities during the 2016 Presidential election.” Through a presidential memorandum, Trump authorized Barr to “declassify, downgrade, or direct the declassification or downgrading of information or intelligence that relates [to the investigation].”

In three interviews in May, Barr offered additional clues about the focus of the Durham review and his thinking about it. In an interview with the Wall Street Journal on May 15, Barr said (as the Journal paraphrased it) that “he is interested in the underlying intelligence that sparked the bureau’s decision to open the counterintelligence investigation, as well as the actions officials took based on that intelligence.” Barr told Fox News on May 16 that he was trying to figure out whether “government officials abused their power and put their thumb on the scale” during the early stages of the Russia probe. “I’ve been trying to get answers to the questions and I’ve found that a lot of the answers have been inadequate and some of the explanations I’ve gotten don’t hang together, in a sense I have more questions today than when I first started,” Barr added.

Barr gave the third interview to CBS’s Jan Crawford on May 31. He justified the Durham probe on the ground that “the use of foreign intelligence capabilities and counterintelligence capabilities against an American political campaign to me is unprecedented and it’s a serious red line that’s been crossed.” Barr added that he wanted to understand the basis for the “counterintelligence activities undertaken against the Trump campaign” and “make sure it was legitimate.” Barr said Durham was investigating questions that included:

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[W]hat was the predicate for it? What was the hurdle that had to be crossed? What was the process? Who had to approve it? And including the electronic surveillance, whatever electronic surveillance was done. And was everyone operating in their proper lane?

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Barr declined to answer some of Crawford’s questions, citing Durham’s ongoing review. But when pressed, Barr signaled that he had concerns with senior former FBI officials and other government officials, and implied that he believed these former officials had engaged in wrongdoing. (We will not repeat Barr’s many insinuations here, but interested readers can read Goldsmith’s detailed analysis of them.)

### **Barr and Durham Focus on the CIA and Foreign Governments**

The New York Times reported on June 12, 2019, that Durham’s team was seeking interviews with one senior counterintelligence official and a senior CIA analyst who were both “involved in the agency’s work on understanding the Russian campaign to sabotage the election in 2016.” The paper suggested that investigators were focused on the intelligence community’s assessment that Russian President Vladimir Putin interfered to benefit Trump. According to an unnamed official, “Mr. Barr [wanted] to know more about the CIA sources who helped inform

its understanding of the details of the Russian interference campaign” and “better understand the intelligence that flowed from the CIA to the FBI in the summer of 2016.” The Times also reported that Haspel had agreed to permit the interviews.

Through the spring and summer, Barr and Durham sought assistance from foreign officials involved in the initial stages of the Trump-Russia investigation. Barr would later explain his efforts abroad as making introductions for Durham and establishing a “channel by which Mr. Durham can obtain assistance from those countries.” The Justice Department also added in statement that “[a]t Attorney General Barr’s request, the president has contacted other countries to ask them to introduce the Attorney General and Mr. Durham to appropriate officials.”

In a letter dated May 28, Australia’s ambassador to the United States wrote Barr that his government would support Barr’s investigation, including by providing information related to Alexander Downer—the Australian diplomat who reportedly met Trump campaign foreign policy advisor George Papadopoulos at a London bar. (The inspector general later determined that the FBI opened the Crossfire Hurricane investigation based on Papadopoulos’s suggestion to an official of a friendly foreign government—almost certainly Downer—that the Trump campaign had received indications from the Russian government that it could help the campaign through the anonymous release of information that would be damaging to Hillary Clinton). In October, the Australian government rejected Sen. Lindsey Graham’s suggestion that Downer had been “directed to contact” Papadopoulos. That same month, Durham reportedly interviewed Downer in London.

The Washington Post later reported that Barr met with British officials in London during the summer of 2019—and the British press added that Trump contacted Prime Minister Boris Johnson for help. According to an unnamed British official, “Barr expressed a belief that the U.S. investigation of Russian interference in the 2016 election stemmed from some corrupt origin.” That official also noted that “[i]t was not clear what Barr thought was amiss, but he expressed a suspicion that information had been improperly gathered overseas about people connected with the Trump campaign and that the British may have unwittingly assisted those efforts.” In addition, an Oct. 2019 letter Graham sent to the British prime minister suggested that Barr was specifically interested in the Steele dossier—the collection of research memos about Trump authored by former British intelligence agent Christopher Steele. In May 2019 and March 2020, Reuters reported that Steele declined to cooperate with Durham.

The fallout from President Trump’s infamous July 25 phone call with Ukrainian President Volodymyr Zelensky revealed a Ukraine connection to Durham’s investigation. On the call, Trump might have referred to the Durham investigation when he asked Zelensky for assistance to determine “what happened with this whole situation with Ukraine” and insisted that Zelensky speak with Barr and Rudy Giuliani. (Then-White House Chief of Staff Mick Mulvaney later suggested that Trump’s queries to Zelensky related to Durham’s review.)

But the Justice Department attempted to distance Barr and Durham from Trump’s Ukraine phone call. After the contents of the call were made public in late September, the Justice Department released a statement that Barr had not spoken to Giuliani about “anything related to Ukraine.” It added:

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A Department of Justice team led by U.S. Attorney John Durham is separately exploring the extent to which a number of countries, including Ukraine, played a role in the counterintelligence investigation directed at the Trump campaign during the 2016 election. While the Attorney General has yet to contact Ukraine in connection with this investigation, certain Ukrainians who are not members of the government have volunteered information to Mr. Durham, which he is evaluating.

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In a letter to Chairman of the House Judiciary Committee Jerrold Nadler in February 2020, Assistant Attorney General for Legislative Affairs Stephen Boyd wrote that “the [above] statement remains accurate.”

Barr and Durham’s international focus continued into the fall of 2019. Barr visited Rome at least twice—once with Durham—to meet with senior Italian officials. People “familiar with the matter” told the Washington Post that Barr and Durham showed “sustained interest” in Maltese professor Joseph Mifsud, who had allegedly informed Papadopoulos that the Russians had “dirt” on Hillary Clinton. The Mueller report (Vol. I, p. 83 ff.) details Mifsud’s contacts with Russia (and the Mueller Team in 2017 secured a guilty plea from Papadopoulos for lying to the FBI about his interactions with Mifsud). Rudy Giuliani has suggested that Mifsud was a Western intelligence plant, and Papadopoulos stated that he “was an Italian operative handled by the CIA.” But anonymous former American officials told the New York Times that Mifsud “worked for neither the FBI nor the CIA.” The Mueller Report (Vol. I, p. 83) said that Court papers filed in the Mueller investigation stated Papadopoulos was interested in Mifsud because he “claimed to have substantial connections with Russian government officials.”

In October, Italian Prime Minister Giuseppe Conte confirmed that Barr's inquiry was focused on the role of American and Italian intelligence surrounding Papadopoulos's 2016 meeting with Mifsud. "The [second] meeting clarified ... that our intelligence is unrelated to the affair," Conte said. He later said that the country's intelligence services had no connection to Mifsud. In a recent interview, Barr was asked whether Mifsud has worked with Western intelligence. "You know, I can't get into that," he replied.

### **The Durham Inquiry Expands**

Two articles published on Oct. 19 indicated that Durham's review had progressed significantly. The New York Times reported that Durham had interviewed about two dozen former and current FBI officials, although top FBI officials such as former FBI director James Comey had not been questioned. According to the article, Durham was asking about anti-Trump bias and "whether CIA officials might have somehow tricked the FBI into opening the Russia investigation." The story added that Durham's investigators "appeared focused at one point on Peter Strzok," a former senior FBI official involved in the Trump investigation, and that Durham also "asked witnesses about the role of Christopher Steele." Later the same day, NBC reported that Durham "expressed his intent to interview a number of current and former intelligence officials involved in examining Russia's effort to interfere in the 2016 presidential election, including former CIA director John Brennan and former director of national intelligence James Clapper."

Then on Oct. 24, the New York Times broke the news that the Durham inquiry had morphed into a criminal probe. The Times, the Post and the Journal all noted that it was not clear what crime Durham was investigating, nor when the criminal probe had been initiated. It later appeared that the criminal investigation was at least in part a consequence of Inspector General Michael Horowitz's referral to Durham of his finding that an FBI lawyer altered an email that officials used in an application to surveil former Trump campaign advisor Carter Page.

### **Barr and Durham Respond to the Inspector General's Report**

On Dec. 4, the Washington Post reported that a near-final draft of Inspector General Horowitz's report on the Crossfire Hurricane investigation noted that Durham was not able to provide any evidence that Mifsud was "a U.S. intelligence asset deployed to ensnare the campaign." This story added that, according to people familiar with the draft, "[i]t was not immediately clear whether Horowitz has examined possible ties between Mifsud and other Western governments outside the United States."

The inspector general's Crossfire Hurricane report, issued on Dec. 9, found no evidence that Mifsud was an FBI informant. It also noted, in a footnote originally redacted but later declassified, that the "FBI also requested information on Mifsud from another U.S. government agency, and received a response from that agency indicating that Mifsud had no relationship with that agency."

The Horowitz report made no reference to the Durham investigation. The aspect of the report that is most relevant to the Durham investigation is Horowitz's conclusion that the Crossfire Hurricane was adequately authorized and predicated under extant Justice Department and FBI policy. Shortly after the report was released, however, Barr stated: "The Inspector General's report now makes clear that the FBI launched an intrusive investigation of a U.S. presidential campaign on the thinnest of suspicions that, in my view, were insufficient to justify the steps taken." About thirty minutes later, Durham offered his own statement that "[l]ast month, we advised the inspector general that we do not agree with some of the report's conclusions as to predication and how the FBI case was opened." Durham added that, unlike the inspector general, his team had access to "developing information from other persons and entities, both in the U.S. and outside of the U.S."

Testifying before the Senate Judiciary Committee a few days later, Horowitz revealed that Durham informed him that he "did not necessarily agree" with the report's conclusion that there were sufficient grounds for the FBI to open the Crossfire Hurricane probe as a full counterintelligence investigation, but did believe there was enough information to open a preliminary investigation.

Following the release of the Horowitz report, Barr gave interviews to NBC's Pete Williams, the Wall Street Journal's Gerard Baker and Fox's Martha MacCallum. He emphasized two major points related to Durham. First, since (according to Barr) Horowitz's inquiry left open the possibility that the errors uncovered at the FBI could be attributed to "bad faith," Durham's review was necessary to determine whether there was "improper motive." Barr said that Durham's inquiry had not reached a conclusion on that matter, but Barr seemed to tip his own hand when he said: "I think there are episodes there that cannot be squared with innocent mistakes." He also said that Durham could uncover what motivated certain officials because he's able to not only look at the evidence within the FBI, but also "to require people to testify" and "to talk to other agencies" and "private parties."

Second, Barr disagreed with Horowitz that Papadopoulos's conversation with Downer could have formed the basis of the investigation. "I just think this was very flimsy," he said. Barr characterized Papadopoulos's comments as a "somewhat vague statement ... made in a bar" to a "foreign official" who "couldn't remember exactly what was said." And he said it was a "big stretch" that Papadopoulos's comments "showed pre-knowledge of the DNC hack and dump." Barr said that the FBI should have taken its concerns to the Trump campaign directly.

### **Barr and Durham Focus on the Intelligence Community**

In late December, the New York Times reported that Durham was "examining the role of the former CIA director John O. Brennan in how the intelligence community assessed Russia's 2016 election interference," according to three unnamed sources who were "briefed on the inquiry." More specifically, the Times maintained that Durham—who had "requested Mr. Brennan's emails, call logs and other documents from the CIA"—was investigating three aspects of Brennan's tenure at CIA.

First, Durham was interested in what Brennan told officials like Comey about his and CIA's views of the Steele dossier. In particular, "Durham's investigators also want to know more about the discussions that prompted intelligence community leaders to include Mr. Steele's allegations in the appendix of their assessment." According to the Times, Brennan had wanted to omit the dossier entirely. Second, Durham was looking into whether Brennan had privately contradicted public comments he had made, including to Congress after leaving office, regarding the CIA's conclusions about Russian interference. And third, Brennan had "come into Durham's sights" as Durham focused on the intelligence community's joint assessment that was made public in January 2017 that the Russian influence operation was intended to help Trump. The CIA and the FBI reported high confidence in the conclusion, while the NSA had a moderate degree of confidence.

A few months later, in February, the Times updated Durham's intelligence community focus, according to "people familiar with aspects of the inquiry." The paper reported that "[i]n recent months, Mr. Durham and his team have examined emails among a small group of intelligence analysts from multiple agencies, including the CIA, FBI and National Security Agency, who worked together to assess the Russian operation." It added that "Durham appears to be pursuing a theory that the CIA, under its former director John O. Brennan, had a preconceived notion about Russia or was trying to get to a particular result—and was nefariously trying to keep other agencies from seeing the full picture lest they interfere with that goal," but it noted that unnamed FBI and NSA officials contested this point.

The Times gave a flavor of the depth of Durham's probe into intelligence sources and analysis when it summarized "clashes between analysts at different intelligence agencies over who could see each other's highly sensitive secrets." The first concerned "the identity and placement" of a CIA source inside the Kremlin. The CIA was initially reticent to share details about the source's identity with the NSA but ultimately relented. After that, the two agencies disagreed about the relative reliability of the source's information. The paper added that it was not clear whether Durham had interviewed the source.

The second fight concerned a data set. According to the Times, "The nature of the data and of the dispute remains unclear, though one person suggested that the disagreement concerned whether NSA analysts could see the raw information or whether the CIA, before sharing it, needed to filter the data to mask names and other identifying details about Americans and American organizations."

The third appears to have involved "access to unclassified emails of American officials [including Obama and members of Congress] that the Russian government had previously hacked." The Times reported that while FBI investigators wanted to access the emails, "Obama's White House counsel, W. Neil Eggleston, decided that investigators should not open the drives, citing executive privilege and the possibility of a separation-of-powers uproar if the FBI sifted through lawmakers' private messages."

Responding to the Times story on MSNBC, Brennan called the Durham investigation "silly" and said that it showed that Trump is "using the Department of Justice to go after his enemies in any way that he can." He also said that while he was willing to speak with Durham's team, he had not yet been contacted.

### **The Durham Investigation During the Pandemic**

In early April 2020, the Wall Street Journal reported that Durham's probe was proceeding on "multiple fronts" despite the coronavirus pandemic. The story confirmed previously reported details, and added that Durham had looked at individuals working at the National Intelligence Council, a unit of the director of national intelligence's office that coordinated the U.S. intelligence community's assessment of Russia's 2016 election interference. An official described those interviews as "aboveboard and 'not adversarial.'" The paper also reported that

“people familiar with the matter” said that “[i]ncreasingly, investigators are focused on former CIA Director John Brennan, examining whether he pushed for a blunter assessment about Russia’s motivations than others in the intelligence community felt was warranted.”

On April 10, Barr discussed the Durham investigation with Fox’s Laura Ingraham. He stated that while Durham will likely produce a report “as a byproduct of his activity,” his “primary focus” was not to “prepare a report.” Instead, Barr said Durham “is looking to bring to justice people who are engaged in abuses if he can show that they were criminal violations, and that’s what the focus is on.” Barr added: “My own view is that the evidence shows that we’re not dealing with just mistakes or sloppiness. There is something far more troubling here, and we’re going to get to the bottom of it. And if people broke the law, and we can establish that with the evidence, they will be prosecuted.” Barr also told Ingraham:

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I think what happened to [Trump] was one of the greatest travesties in American history. Without any basis they started this investigation of his campaign, and even more concerning, actually is what happened after the campaign, a whole pattern of events while he was president. So I—to sabotage the presidency, and I think that— or at least have the effect of sabotaging the presidency.

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On April 24, the New York Times reported on a new focus of the investigation: leaks. According to “three people familiar with the inquiry,” Durham’s team asked witnesses about news articles published in 2017 that the Trump camp “blame[d] for prompting the chaos that dominated the early days of the Trump presidency.” One incident involves David Ignatius’s Washington Post column which revealed that former national security adviser Michael Flynn called Russian Ambassador Sergey Kislyak several times on a particular day in December 2017.

Durham has also investigated the list of former Obama administration officials who allegedly requested the “unmasking” of Michael Flynn in intelligence intercepts. According to the Justice Department spokeswoman Kerri Kupec, Durham was “already looking at this issue of unmasking as part of this broader review.” (In addition, Barr has also assigned St. Louis U.S. Attorney Jeff Jensen, and prosecutors in the deputy attorney general’s office, to do what appears to be a full review of the Flynn investigation.) In mid-May, Barr confirmed in an interview that issues related to Flynn are in Durham’s “portfolio.” More recently, Kupec in an interview with Sean Hannity announced that John Bash, the U.S. attorney in the Western District of Texas, is “support[ing]” Durham’s examination of the unmasking issue. She added that “when you’re looking at unmasking as part of a broader investigation—like John Durham’s investigation—looking specifically at who was unmasking whom, can add a lot to our understanding about motivation and big picture events.”

On May 18, Barr announced during a press conference that neither Obama nor Biden is the focus of Durham’s criminal probe. “Our concern over potential criminality is focused on others,” he said. And in an interview with the New York Times Magazine, Barr again referenced Comey, saying that “the record will be clear” that Comey’s public account of the Russia investigation does not “hold water.”

In Barr’s most recent interview on June 21, he told Fox’s Maria Bartiromo that Durham’s work had slowed due to the pandemic. When Bartiromo asked if the delay was because of the inability to convene a grand jury during the health crisis, Barr responded: “Well, I don’t want to suggest there has been or is a grand jury. But it is a fact that there have not been grand juries in virtually all districts for a long period of time. And, also, people have been reluctant to travel for interviews and things like that. So, it has slowed things down.”

In discussing the events of 2016, Barr called “the Russian collusion story” the “closest we have come to an organized effort to push a president out of office,” but also said that he was “not reaching a judgment as to what the motivations there were.” Repeating past claims, he called “the official version of what happened ... a very slender reed” to open an investigation into “the campaign of one’s political opponent.” Barr did not offer the basis for his assertions, but suggested that he knows facts that are not yet in the public record. Referring to why the FBI launched its investigation of Trump, Barr said that “[s]ome of it may become evident as [...] more facts are disclosed.”

In terms of a timeline, Barr said that he expects there to be “some developments, hopefully before the end of the summer.” He also added that the investigation will not stop because of the election. However, “[w]hat happens after the election may depend on who wins the election,” he said.

### **Analysis**

There were good reasons for a comprehensive inquiry into the criminal and counterintelligence investigations of the Trump campaign and the president himself. The investigation was unprecedented and controversial, even if justified. We know from Horowitz’s review that the investigators made many mistakes and that the standing Justice Department guidance on such matters was (according to Horowitz) imprecise, underdeveloped and procedurally inadequate. A comprehensive review was warranted not only for the American public to know what

happened, but also as a basis for intelligent reform of FBI and Justice Department investigative processes going forward.

To say that a comprehensive investigation was warranted is not to say that the Barr/Durham investigation, as it has developed, was the right one, or has been conducted well. (Goldsmith early on took a hopeful view of the investigation that, for reasons explained below, has not been borne out by events.) Two large problems stand out from the lengthy recitation of reported facts recounted above.

### 1. *Durham's Competence*

Durham is a seasoned and undoubtedly competent federal prosecutor who entered this investigation with bipartisan credibility. He has an unusually rich understanding of the intelligence community from his days investigating the CIA tapes destruction and elements of the CIA black site and interrogation program. And there are precedents for reviews of the type Durham initially undertook—for example, federal prosecutor Randy Bellows' review of the mishandling of the Wen Ho Lee case. But fifteen months after Durham was appointed, it has become clear that he was not the right man for the investigation that developed.

Durham's review began as an effort to understand what happened in the genesis and conduct of the Trump campaign investigation. There was no inkling at the outset that crimes had been committed; Durham's initial probe was a "review" to gather and assess facts. This function could and perhaps should have been done by a congressional committee. In April 2020, the Senate Intelligence Committee issued a bipartisan report that found that the intelligence community's assessment of "unprecedented Russian interference in the 2016 presidential election" was "coherent and well-constructed" and that "the Committee heard consistently that analysts were under no politically motivated pressure to reach specific conclusions." This approach to the broader questions related to the Russia campaign investigation would have yielded more credible conclusions than Durham possibly could.

A more comprehensive investigation also would have been an appropriate task—at the core of their expertise and competence—for inspectors general. Inspectors general across the government could have reviewed and assessed Crossfire Hurricane, as Horowitz did for a slice of it. There is a precedent for this. Six inspectors general worked together to produce a government-wide assessment of the Bush administration's Stellar Wind collection program. If the input of foreign governments became necessary, as Durham and Barr believed it did, that could have been arranged by the State Department or by the agency whose liaison agency's information is sought (for example, by the director of national intelligence if information from foreign intelligence services is needed). And if evidence of crimes arose in such an investigation, it could have been referred to a prosecutor—again, as happened with Horowitz's investigation.

An investigation by a prosecutor is especially inappropriate for what appears to be one large focus of Durham's investigation: the nature and validity of the intelligence assessment that the Russian intervention in the 2016 election sought to aid Trump rather than merely sow confusion. Durham has experience examining the intelligence community. But he is neither personally nor institutionally expert in intelligence assessments or the intelligence assessment process, and a prosecutorial focus is not the right one to understand or second-guess the basis for the assessment. As former intelligence officials Robert Litt and John McLaughlin wrote in the *Washington Post*, "[i]f analysts fear they may come under criminal investigation for judgments the president does not like, our nation will be less safe."

One weakness with the inspector general approach is that former employees can cooperate voluntarily but cannot typically be coerced through legal process into cooperation. This is one reason a congressional process would have been better in theory to develop a "what happened" narrative and a list of "lessons learned." But while this is a limitation in the inspector general approach, it does not justify a criminal prosecutor, in what is now a criminal investigation, poring over every decision, document, communication and the like that had any relationship to the Trump campaign investigation, the intelligence community's assessment of Russian motives and the controversies related to the presidential transition.

To be sure, we do not know the scope of Durham's criminal investigation or whether and how he is using coercive prosecutorial tools. The reporting suggests that the criminal side of the probe has been quiet. It remains unclear whether a grand jury has been convened or, if so, how it has been used. But as recently as May, Barr spoke about the department's "concern over criminality" in connection with matters that Durham was investigating. Having a prosecutor under the rubric of a criminal investigation diving so deeply into these events for an ex post assessment is a menacing and invariably distorting approach.

It is also an approach that is not designed to produce legitimate outcomes. There are obvious dangers in one administration using the prosecutorial process to examine a counterintelligence and related investigation conducted by a prior administration. Those dangers were exacerbated enormously by the fact that the investigation from the outset focused on individuals and processes that the president had virulently and repeatedly criticized and insisted had engaged in criminal behavior. Durham began this process as a credible figure, even if

one not fully qualified for the task as it developed. But his investigation was burdened at the outset with the appearance of using law enforcement tools to carry the president's water and harass his enemies. And it grew much more heavily politicized due to the actions of the attorney general.

## *2. Barr's Role*

No contemporary attorney general has, like Barr in the Durham investigation, offered such extended, opinionated, factually unsupported and damning public commentary, naming names and drawing conclusions, about an ongoing investigation that is at least in part a criminal investigation.

Barr's commentary on the Durham investigation violates several Justice Department rules and norms. The department's media contacts policy, which applies to "all [Justice Department] personnel," prohibits "respon[s]es to questions about the existence of an ongoing investigation or comment[s] on its nature or progress before charges are publicly filed." None of the exceptions, such as for public safety, apply to the Durham investigation. Department regulations also prohibit information disclosure "relating to the circumstances of an ... investigation [that] would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public." It is hard to see the law enforcement function of Barr's public commentary.

Barr knows all this. He knows what he is doing is contrary to the rules and traditions of the Justice Department. He knows he is doing reputational harm to people nominally under investigation. He must know that the way he is comporting himself does damage to the department and will make whatever Durham finds more contestable than it otherwise would have been. In short, Barr has acted in ways that foreseeably politicize and damage the investigation that he initiated and has devoted so much time to. The question is: Why?

One possibility is that the evidence Durham has uncovered is objectively so damning that Barr's commentary cannot delegitimize it. Perhaps, but we doubt it. No matter what problems Durham finds, assuming he finds some, they will be tainted due to the combined behavior of the president (who might not know better and who cannot control himself) and the attorney general (who does know better and can control himself but has chosen not to). If Barr and Durham have an October (or earlier) surprise, Barr's actions now are diminishing its impact.

Another possibility is that Barr's judgment is distorted by zeal. He has made clear that he thinks the people who investigated the Trump campaign and transition team were engaged in illegitimate efforts to reverse the outcome of the election. Perhaps he thinks that what happened was so bad, and that the department's rules and processes were so abused, that he is justified in publicly damning and injuring the participants no matter what. Two wrongs make a right, perhaps, or the ends justify the means. Again, this logic makes little sense, for Barr is only hurting the case he is trying to build. And, if Trump loses in November, Barr is acting in ways that will invite an investigation of the Barr/Durham investigation of the Trump campaign investigation.

A third possibility is that Barr is an out and out partisan hack—a Sean Hannity equivalent operating from the Fifth Floor of the Justice Department to try to fire up the president's base or give the president other short-term political advantages. This widely held view is difficult to square with Barr's reputation for probity and establishment credentials, and with his recent description of the prosecution of Trump friend Roger Stone as "righteous," but it is consistent with other aspects of his behavior and the Department's (for example, the announcement of the Bash probe of the Flynn unmasking on the Hannity show).

When Durham announces the results of his investigation we will surely have a better sense about which (or which combination) of these three possibilities, or another one, is correct.

*Editor's Note (July 10, 2020, 11:00 a.m.): This piece has been updated to note Durham's contacts with Department of Justice officials.*

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