

DURHAM PROSECUTOR BRITTAIN SHAW GETS CUTE WITH FORFEITED CLAIM

John Durham prosecutor Brittain Shaw just submitted a bunch of FEC filings from a settlement the Democrats reached in February; as with other documents designed to rile up the frothy right, she claimed the document was meant to be filed under seal but submitted it to the public docket.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :
 :
 v. : Criminal Case No. 21-582 (CRC)
 :
 MICHAEL A. SUSSMANN, : UNDER SEAL
 :
 Defendant. :

In the settlement, Democrats agreed to pay a fine because they did not list the purpose of Perkins Coie’s Fusion payments as opposition research.

In her filing, Shaw claimed that conciliation agreement and the exhibits to it “were made public” on April 28.

The Government, by supplementing its motion with the attached exhibits, seeks to provide notice to the Court of a Federal Election Committee (“FEC”) conciliation agreement with the Democratic National Committee (“DNC”) and the Hillary for America Campaign (“HFA”), and the FEC’s supporting findings, which were made public on April 28, 2022. Specifically, the FEC found “probable cause to believe” that the DNC and HFA improperly reported their payments to Perkins Coie for Fusion GPS’s opposition research as

“legal and compliance consulting.” [my emphasis]

That’s a dishonest claim – though a necessary one to excuse Durham not raising this issue in his April 6 motion to compel or his April 25 reply.

The FEC’s supporting backup may have only been posted last week (though the backup relies on the same kind of evidence, like billing records, that Durham already has).

But the settlement, with the language about “probable cause,” was first reported on March 30 and widely covered; most stories with links to the letter informing the complainant, which included the conciliation agreements that Shaw includes in her claim stating that this documentation only became available last week. As the letter to Marc Elias’ law firm sent on March 29 noted, “these matters are now public.”

And it has been discussed in the right wing press particularly as it pertains to this privilege challenge already. Kim Strassel dedicated an entire paragraph to it on April 21, well before Durham’s scheduled reply.

These are a few of the difficulties the parties face in trying to pound the oppo-research peg into the legal-services hole. Mr. Durham also got an assist from federal regulators. Last month the FEC fined the Clinton campaign and the DNC \$8,000 and \$105,000, respectively, for violating strict rules on disclosure. The FEC noted that Perkins Coie in 2016 hired Fusion to “provide research services” and improperly reported the work as “legal services.” The campaign and DNC made the same argument—that Fusion’s work was in support of legal advice—but settled with the FEC. (A DNC spokesperson told the Washington Post it had agreed to settle “silly complaints from the 2016

election.”)

Some other right wing outlet did an entire piece focused on this settlement, explicitly expecting Durham to raise it in his reply.

Shaw was dishonest about more than the availability of this information last month, and therefore the fact that Durham has forfeited this claim. She also did not mention that the backup notes that the Democrats still claim privilege over the Fusion work and the conciliation agreement did not concede the point. Notably, I believe “purpose” is defined differently under campaign finance law and under the precedents at issue here.

This is a totally hackish attempt to include this issue in a way that Durham can rely on it on appeal. But the claim that this settlement (as opposed to the underlying backup) hasn't been available to prosecutors since they first tried to pierce the Democrats' privilege is thoroughly dishonest as to the plain meaning of the claim.