

JOHN DURHAM ADMITS HE OVERSTATED EVIDENCE IN HIS MICHAEL SUSSMANN MATERIALITY STATEMENT

In my post laying out Michael Sussmann's motion for a Bill of Particulars, I expressed the following:

- His claim that he needed the exact quote of the lie he purported told Jim Baker was well-founded
- Durham would respond to Sussmann's demand for more specificity about materiality by saying that was up to the jury
- Sussmann surely knew the names of the other people at a CIA meeting where, Durham alleges, just two people present now claim that Sussmann lied about having a client
- Sussmann surely knew there were no people on the Clinton Campaign with whom he had – as Durham had insinuated in a materiality statement – [personally] coordinated; he knew any such communications happened

through Marc Elias

As I tweeted out here, Durham's response to Sussmann affirms all of those predictions.

- Durham responded to the request for the exact quote of the lie Sussmann purportedly told by block-quoting the indictment (which doesn't quote his lie), but not providing the actual lie he told or the context in which he allegedly told it; in the process, Durham seemed to commit that he was *not* charging Sussmann with a lie of omission but only alleging Sussmann omitted material information with an alleged affirmative lie
- Durham quoted the traditional definition of materiality (not the one DOJ espoused with Mike Flynn), and said it was up to the jury to decide
- Durham admitted that he introduced the CIA lie as 404b information, not an actual charge (and seemed to concede he has no proof that Sussmann told exactly the same lie to the CIA as he allegedly did to the FBI)

But it's Durham's response to the request for the names of the Clinton Campaign people with

whom Sussmann allegedly coordinated that I find most telling. Sussmann had asked for the identity of the Clinton Campaign people that Durham mentioned in a passage (bolded below) from paragraph 6 of the indictment that Durham used as one of three prongs in his materiality statement.

Finally, Mr. Sussmann seeks the identities of certain representatives and agents of the Clinton Campaign mentioned in the Indictment that the Special Counsel has refused to provide to date.⁷ The Indictment alleges that Mr. Sussmann, Tech Executive-1, and Law Firm-1 **“coordinated, and were continuing to coordinate, with representatives and agents of the Clinton Campaign with regard to the data and written materials that Sussmann gave to the FBI and the media.”** Indictment ¶ 6. The Indictment does not identify by name the alleged “representatives and agents of the Clinton Campaign.” Id.

The animating theory of the Special Counsel’s Indictment is that Mr. Sussmann was secretly working on behalf of the Clinton Campaign, and he intentionally and falsely stated that he was not acting on behalf of any client in order to conceal his ties to the campaign. The Special Counsel should not be permitted, on the one hand, to allege that Mr. Sussmann was working on behalf of the Clinton Campaign, but on the other hand, decline to identify the specific individuals with whom he was purportedly working. Among other things, Mr. Sussmann may wish to call such individuals as witnesses in his defense at trial, but, unless he knows of their identities, he will have no ability to do so. At base, an indictment must provide a defendant with the “essential facts constituting the offense charged.” Fed R. Crim. P. 7(c)(1). And no facts

could be more essential than the names of the witnesses involved.

Having made these allegations, the Special Counsel must illuminate them—by identifying the relevant individuals referenced—to allow Mr. Sussmann to decide how to respond appropriately. See *Butler*, 822 F.2d at 1193 (the indictment must enable the defendant to understand the charges against him and prepare a defense); cf. *Hubbard*, 474 F. Supp. at 80 (ordering bill of particulars to define “unnecessarily vague” phrases used in the indictment). Therefore, Mr. Sussmann respectfully asks this Court to order the Special Counsel to provide a bill of particulars identifying, by name, the “representatives and agents of the Clinton Campaign” with respect to Paragraph 6.

7 The Special Counsel has identified virtually all of the other anonymous individuals and entities referred to in the Indictment (except, as noted above, the Agency-2 employees).

In my post, I suggested that Sussmann isn't so much trying to get these names, but because he knows this claim is false, he's trying to get Durham to admit that there *are* no names – because (Sussmann knows) he didn't coordinate directly with the Clinton Campaign.

Sussmann likely doesn't really *need* these names because he likely knows that Durham has nothing to substantiate this claim. If he did, Durham would have described such evidence in his speaking indictment.

And Durham's response cedes the point: In response to a question about the “agents and representatives of the Clinton Campaign” with whom Sussmann directly coordinated referenced in

paragraph 6, Durham explains that that reference is just a “summary” of “facts” later alleged in paragraphs 25(e), 20(d), and 20(g).

Paragraph 6 is a portion of the “Introduction and Overview” section of the Indictment that summarizes facts later alleged with specificity. And the later parts of the Indictment provide details underlying the more generalized allegation in Paragraph 6. For example, Paragraph 25(e) of the Indictment states that [Elias] had exchanged emails about the [Alfa Bank] allegations with the Clinton Campaign’s campaign manager, communications director, and foreign policy advisor which the defendant had provided to a newspaper. Ind. ¶ 25(e). Indeed, the government also provided the true identities of each of those referenced individuals to defense counsel in a discovery letter dated October 20, 2021. Likewise, Paragraphs 20(d) and 20(g) allege that the defendant, one of his law partners, and [Rodney Joffe] each communicated via email with an investigative firm that was at the time acting as an agent of the Clinton Campaign. The government similarly has provided the identity of that investigative firm to the defense in its October 20 discovery letter, even though counsel was undoubtedly already aware of that firm’s identity. Moreover, it was a production of information *by the defendant’s counsel* (i.e., a privilege log) that first alerted the government to these cited emails. Accordingly, the defendant is neither entitled to, nor needs any greater detail, regarding the identities of the individuals identified in Paragraph 25(e) at this stage, and any further information in that regard will be disclosed in due course in discovery prior to trial. At bottom, the defendant’s demand here is not an

appropriate use of a motion for a bill of particulars and should be denied.

In response to the request for the identities of the Clinton Campaign people he was coordinating with, Durham pointed to the following allegations:

d. In or around the same time period [mid-August 2016], **SUSSMANN**, [Marc Elias], and personnel from [Fusion GPS] began exchanging emails with the subject line, "Connecting you all by email."

[snip]

g. Later in or about August 2016, [Rodney Joffe] exchanged emails with personnel from [Fusion GPS].

[snip]

e. On or about September 15, 2016, [Elias] exchanged emails with the Clinton Campaign's campaign manager, communications director, and foreign policy advisor concerning the [Alfa Bank] allegations that **SUSSMANN** had recently shared with [Franklin Foer]. [Elias] billed his time for this correspondence to the Clinton Campaign with the billing entry, "email correspondence with [Jake Sullivan], [name of campaign manager], [name of communications director] **re: [Alfa Bank] Article.**" [emphasis added by Durham]

That is, in response to a question, tell me what agents of the Clinton Campaign Sussmann and Joffe and Perkins Coie coordinated with, which is something (Durham claims) Sussmann lied to hide, Durham responded by pointing to 1) an email where Elias connected Fusion GPS and Sussmann via email (well after the identification of the Alfa Bank anomaly), 2) emails that Joffe exchanged with Fusion GPS, and 3) an email that Elias sent Jake Sullivan and

others about the Franklin Foer article.

Effectively, Durham's response admits that he has presented no evidence *either* Sussmann *or* Joffe ever spoke directly to members of the Clinton Campaign about the Alfa Bank allegations. He sustains the claim only by raising Elias, whom he doesn't mention in that materiality statement.

He also admits that he is treating Fusion GPS as an agent of the Clinton Campaign, which it arguably is, but only through Perkins Coie. The indictment presents no evidence that the Campaign was directly managing Fusion, or even aware of it. There's no place in this indictment where the Clinton Campaign provided directions into this effort that would amount to an instruction to feed information to the FBI, something that goes to the heart of whether or not Sussmann was representing Hillary at the meeting with Baker. (Right wing conspiracists have, in recent days, pointed back to Sussmann's June 2016 efforts to get the FBI to attribute the DNC hack to Russia, conflating an interest in attribution *to Russia* and a later effort to investigate Trump's ties to Russia.)

Durham might not even have the content of his emails with Fusion GPS or Elias' emails with Sullivan and others. He only knows of these communications, Durham explains, because Sussmann invoked privilege over them in a privilege log shared with Durham.

In the indictment, Durham makes much of something April Lorenzen (the security expert who used the name Tea Leaves during this project but whom Durham has needlessly referred to as Originator-1) said on August 20, 2016 that reflects an obvious technical point: "even if we found what [Joffe] asks us to find in DNS, we don't see the money flow, and we don't see the content of some message saying, 'send money here'." That is, the DNS traffic they were following was proof of some kind of messaging. But it was not proof of what was being said. Durham may have the same problem: he may not

have proof regarding what direction these communications flowed and what was really said.

I would not be remotely surprised if Durham used the fact that he obtained a false statements indictment as a basis to obtain a probable cause warrant to obtain these communications via other means (perhaps via whatever company hosts Perkins Coie's email) such that an FBI filter team could do their own privilege determination of them. Durham is working on a theory that this is all two parallel conspiracies to defraud the government, and would need to use a crime-fraud exception to get to content that, he believes as a matter of faith, would prove the case. A big part of this investigation is an exercise in exposing Hillary to the same invasive investigative scrutiny as Trump (as if the Clinton email and Clinton Foundation investigations didn't already do that), and Trump's attorneys keep having their communications seized. So I'm sure Durham would relish seizing the communications of Elias and Sussmann.

That said, for the existing indictment charging only Sussmann with a single false statement, Durham claims that Sussmann lied to James Baker by disclaiming that both his work to chase down this Alfa Bank anomaly and his scheduling of a meeting at which he gave Baker a heads up that a media outlet was going to publish the story in order to hide that he was "coordinating" with the Clinton Campaign. But Durham presents no evidence Sussmann ever spoke to anyone at the Clinton Campaign on this topic ... and the only evidence he presents that *anyone* spoke to Hillary's people comes well after the white papers provided to the FBI were substantially complete.

This doesn't really fly in an indictment charging just Sussmann. It effectively treats this as a conspiracy, without (yet) charging a conspiracy. With his response to Sussmann's motion for a Bill of Particulars, Durham has effectively accused and treated all the named

people of engaging in a conspiracy without showing any evidence that they were doing anything other than trying to understand an anomaly involving Trump's company and a Russian bank.