

DURHAM PROSECUTOR ANDREW DEFILIPPIS CONFIRMED TO RODNEY JOFFE HE MAY CONTINUE INDEFINITELY

On Monday, both John Durham and Michael Sussmann submitted their motions in limine, which are filings to argue about what can be admitted at trial. They address a range of issues that I'll cover in several posts:

Sussmann:

- *Asks Judge Cooper to immunize Rodney Joffe or dismiss the case (addressed in this post)*
- *Asks to prohibit introduction of privilege logs (addressed in an update to this post predicting something similar would happen)*
- *Argues that Bill Priestap and Trisha Anderson's notes are inadmissible hearsay and unreliable (this post demonstrates similarities between these notes and those altered in the Mike Flynn docket)*
- *Asks to exclude allegations about the reliability of the DNS data or claims about Christopher Steele (see this post)*

Durham wants to:

- *Admit witnesses' contemporaneous notes of conversations with the FBI General Counsel*
- *Admit emails referenced in the Indictment and other, similar emails (see this post)*
- *Admit certain acts and statements (including the defendant's February 2017 meeting with a government agency, his December 2017 Congressional testimony, and his former employer's October 2018 statements to the media) as direct evidence or, alternatively, pursuant to Federal Rule of Evidence 404(b)*
- *Exclude evidence and preclude argument concerning allegations of political bias on the part of the Special Counsel (addressed in this post)*
- *Admit an October 31, 2016 tweet by the Clinton Campaign*

I will link my discussions in serial fashion.

In a motion to dismiss, Michael Sussmann just requested that Judge Christopher Cooper give Special Counsel Durham a choice: either immunize Rodney Joffe, or dismiss the case.

Sussmann wants to call Joffe to provide exculpatory testimony.

Mr. Joffe would offer critical exculpatory testimony, including that: (1) Mr. Sussmann and Mr. Joffe agreed that information should be conveyed to the FBI and to Agency-2 to help the government, not to benefit Mr. Joffe; (2) the information was conveyed to the FBI to provide a heads up that a major newspaper was about to publish a story about links between Alfa Bank and the Trump Organization; (3) in response to a later request from Mr. Baker, Mr. Sussmann conferred with Mr. Joffe about sharing the name of that newspaper before Mr. Sussmann told Mr. Baker that it was The New York Times; (4) the researchers and Mr. Joffe himself held a good faith belief in the analysis that was shared with the FBI, and Mr. Sussmann accordingly and reasonably believed the data and analysis were accurate; and (5) contrary to the Special Counsel's entire theory, Mr. Joffe was neither retained by, nor did he receive direction from, the Clinton Campaign.

But after Joffe's lawyer Steven Tyrell received Sussmann's trial subpoena, he asked Andrew DeFilippis if he remained a subject of the investigation – more than five years after his last action in this case – DeFilippis stated that he continued to chase vague claims about the YotaPhone allegations shared in the February 9, 2017 meeting with the CIA.

On March 31, the day after receipt of the subpoena, I spoke by telephone with representatives of the Office of Special Counsel ("OSC") in an effort to obtain sufficient information from which I could assess and advise my client whether he has a credible fear of prosecution. I then explained that I had

requested an update because my client had received your trial subpoena. Given the impending trial date, I stated that we wished to inform you as soon as possible whether Mr. Joffe intends to invoke his Fifth Amendment rights if called to testify. I indicated that Mr. Joffe has a desire to testify, but he has concerns about doing so if he is a subject of the OSC's investigation. In response, Mr. DeFilippis confirmed that Mr. Joffe remains a subject of the investigation (as he has been since our first contact with the OSC fifteen months ago). I then asked if Mr. DeFilippis could explain what basis remains for Mr. Joffe's possible prosecution. Rather than provide any additional information to aid in our assessment of the risk of prosecution, Mr. DeFilippis stated that in his view, Mr. Joffe's status in the investigation was sufficient to establish a good faith basis to invoke the privilege against self-incrimination. Mr. DeFilippis further stated that OSC did not want to get into any more detail, and presumed that Latham would understand if Mr. Joffe decided to invoke.

I then stated to Mr. DeFilippis that more than five years has elapsed since the events that are described in the indictment against your client and the OSC's related public filings, including the September 19, 2016, meeting with the FBI and the February 9, 2017, meeting with , and asked what other basis the OSC might have to charge Joffe with criminal conduct. Mr. DeFilippis replied in general terms that while it was fair to say that the Alfa-related allegations tied back to Sussmann's September 19, 2016 meeting, the Yota phone-related allegations continued to "percolate through various branches of the government and around the private sector

after that date, in various forms.” Defilippis further noted that certain fraud statutes have longer than a five-year limitations period, although he did not specify what statutes might be implicated by the events in question. Beyond that, Mr. Defilippis was unwilling to comment further. In light of Mr. Defilippis’ unwillingness to provide additional information, I asked whether he ever envisioned an end to my client’ status as a subject of the OSC’s investigation, and if so, when that might be. Mr. Defilippis indicated that he was unable to put an end date on the investigation at this point, and that it would depend upon various factors, including the conduct in question and the applicability of various limitations periods. [my emphasis]

According to Sussmann attorney Sean Berkowitz, just weeks ago, Durham was pressuring Joffe to testify against Sussmann.

Third, given the Special Counsel’s repeated entreaties to Mr. Joffe to cooperate in the Special Counsel’s investigation against Mr. Sussmann, including only weeks ago, the Special Counsel’s refusal to confer immunity on Mr. Joffe, and the Special Counsel’s insistence that Mr. Joffe continues to face criminal exposure, seems to be not only retaliatory, but tantamount to a “deliberate[] deni[al] [of] ‘immunity for the purpose of withholding exculpatory evidence and gaining a tactical advantage through such manipulation.’” Ebbers, 458 F.3d at 119 (citation omitted). As in Smith, “[i]f the witness were guilty of [the threatened offenses], he should have been charged with those offenses whether he testified or not. The [Special Counsel is] obviously threatening the

witness to stop him from testifying-even truthfully.” Simmons, 670 F.2d at 369 (describing Smith, 478 F.2 at 979).

The message is clear: John Durham will keep his investigation open indefinitely so he can threaten to prosecute anyone for testimony that doesn't confirm his preconceived prior beliefs, even on things that make the strained Sussmann charge look conventional by comparison.

Durham doesn't want truthful testimony. He wants testimony that will bolster his conspiracy theories. And he's willing to continue indefinitely to get it.