MICHAEL SUSSMANN'S LAWYERS COMPLAIN OF "WILDLY UNTIMELY" NOTICES FROM JOHN DURHAM [UPDATED, WITH CONFIRMATION]

Republished given confirmation that Durham is trying to point to privilege claims to insinuate wrong-doing.

On March 31, there was a combined motions and status hearing in the Michael Sussmann case. The parties started by arguing Sussmann's motion to dismiss (response; reply) based on a claim his alleged lie was not material. Here's my live-tweet of the hearing.

Judge Christopher Cooper observed that the dispute was "Well briefed and argued on both sides" and promised to rule quickly. But the odds are still really good that he'll rule against Sussmann because the standard for materiality is so thin. So that argument was perhaps more interesting for a few details that came out in the process, such as that the claim is that Sussmann offered up that he had no client, and that in all the discovery Sussmann has received, there's no evidence anyone every asked the source of the DNS data he shared with the government even while they repeatedly recognized that Sussmann was a lawyer for the DNC.

> We don't think Baker or anyone else at FBI ever asked, btw, where'd this info come from. If source mattered so much, you'd think someone would have said, where'd this come from, how'd they get it.

Both details would help Sussmann defeat a

materiality claim at trial, but Cooper can't take it into account.

It was in the status discussion where things got more interesting. Cooper asked why he hadn't seen any 404(b) notices (which is notice that the government wants to use otherwise incriminating information to prove its case in chief, often to prove motive), and AUSA Andrew DeFilippis said they had provided it to the defense. Sussmann's lawyer, Sean Berkowitz, described that they were going to file motions in limine about the notices, but observed that "one was untimely," meaning Durham's team missed the March 18 deadline.

DeFilippis then asked for extra time to deal with Sussmann's CIPA 5 motion, which is where he asks for classified information to be declassified to use at trial. Sussmann had little problem with that.

Then Berkowitz complained about an expert the government just informed Sussmann they wanted to call — an FBI agent whose primary purpose would be to explain the DNS and Tor technologies at the core of the tip Sussmann shared with the FBI. Cooper quipped, "aren't we going to have the jury understand the technical" aspects of the trial, and suggested he, himself, needed such a tutorial as well. Berkowitz noted that that deadline had passed weeks ago and the late notice didn't give Sussmann enough time to qualify their own expert to respond.

The real issue, it soon became clear, was that the government wants to reserve the right to use this witness to rebut any claim Sussmann would make that the data was "real." DeFilippis argued they need to be able to rebut Sussmann's claim that the allegation he made was "unsupported." "That's different," Judge Cooper noted, "than whether the data was accurate."

It's clear, based on what DeFilippis said, that he intends to conflate accurate data — a real, still unexplained anomaly — with an unpersuasive hypothesis about what that anomaly might be.

DeFilippis countered that *if* the data were "cherry picked or fabricated" — neither of which he has charged — then it might suggest a motive for Sussmann to lie. But Berkowitz argued that the only thing that matters it that Sussmann believed the data was accurate. Importantly, Durham's indictment falsely suggests that Sussmann was privy to some of the researchers discussion about this.

Berkowitz's frustration with all that was nothing compared to his fury that, just the night before, prosecutors had told them that they intended to use a motion *in limine* (which is supposed to deal with what evidence can and cannot be introduced at trial) to try to breach privilege claims that various witnesses have made. As Cooper noted, that's not a motion *in limine*, it's a motion to compel.

> Berkowitz: We learned last night that SC is challenging privilege. Only last night we learned they do intend to challenge privilege in motion in limine. Wildly untimely. Implicates underlying case.
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> DeFilippis: We've been working with asserted privilege holders. Those holders would be Tech Executive-1, Clinton campaign, another political organization. We have tried to understand theory of privilege. Unable to get comfort. We now intend to call witnesses from [Fusion] and [Perkins Coie].
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> Cooper: Not a motion in limine, it is a motion to compel.
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> Berkowitz: This issue is an issue that has been discussed for well over a year. Honestly to only now bring it up, 6 weeks before trial. Violations of due process, we're going to get new info, it's an ambush.

It's really hard to view this as anything but a

stunt to try to save Durham's conspiracy theories.

In a normal situation involving a big law firm like Perkins Coie, well-lawyered people associated with the Hillary campaign (because of PC's role as Sussmann's former employer, Hillary and the DNC would count as separate entities), as well as Fusion GPS (which has been fighting similar issues from Russian oligarchs for years now), such privilege claims would take at least three months to work out.

For sake of comparison, John Eastman's privilege fight, for a legal argument with none of the formal retainer agreements like those PC has, for emails inappropriately stored on Chapman University's cloud, in which there's substantive evidence — now affirmed by a judge — that Eastman himself has criminal exposure, has been going on since January 20, and it is nowhere near done.

As Berkowitz notes, the trial is six weeks away.

The most likely outcome of this effort would either be a delay of the trial and/or some inconclusive outcome, which Durham would undoubtedly use to sow more conspiracy theories without charging them, pointing to Democrats' defense of privilege to insinuate the privilege claims must hide some proof of conspiracy.

But it looks all the more intentional given the now-famous delayed waiver motion Durham went through in February. The waivers covered by Durham's filing include several of the witnesses he has belatedly said he wants to pierce privilege now:

- Whether Perkins Coie (which Latham represented along with Sussmann in the Durham investigation) knew how Sussmann was billing his time
- Perkins Coie's past claims

about the DNC's activities
- The advice Kathryn Ruemmler gave Sussmann when Kash Patel raised his meeting with the FBI in a December 2017 HPSCI appearance
- What Latham told a PR firm regarding public statements about the meeting in 2018

That is, *more than six weeks* before telling Sussmann that, after not formally attempting to pierce privilege in the last year, Durham now wants to do so, Durham made Sussmann waive any conflict with all the privileged relationships that Durham wants to pierce.

As I noted at the time, Durham was asking Sussmann to waive conflicts even without having pierced privilege.

> Latham also provided Perkins Coie advice regarding a PR statement that, Durham admits, he's not been able to pierce the privilege of and he knows those who made the statement had no knowledge that could implicate the statement in a conspiracy.

He's now trying to do that. It's really hard to believe that's a coinkydink.

And unlike the attorney-client waiver used in the Paul Manafort case, Durham is not citing independent proof that Sussmann lied to his lawyers. Unlike the waiver with Eastman or with Michael Cohen's hush payments, Durham is not citing participation in a conspiracy.

This is still a false statements case that Durham is sure, absent the evidence to charge it, is a conspiracy. And now at the last minute, he's attempting to salvage that conspiracy.

Update: A motion in limine from Sussmann confirms I was totally right about Durham's

ploy. He wants to submit privilege logs to the jury — privilege logs to which Sussmann is not the privilege holder and therefore is helpless to waive — to insinuate that he's covering something up.

> Again, there can be no mistake as to the purpose for the Special Counsel's tactics here. The animating theory of the Special Counsel's Indictment is that, in meeting with the FBI and Agency-2, Mr. Sussmann sought to conceal that he was secretly working on behalf of the Clinton Campaign and Mr. Joffe. Lacking actual evidence of Mr. Sussmann's guilt, the Special Counsel seeks instead to convict Mr. Sussmann by insinuating to the jury that such evidence must exist— by inviting them to draw the inference that, because Mr. Sussmann's alleged clients and co-conspirators have chosen to withhold information relating to the very same relationship the Special Counsel alleges they and Mr. Sussmann sought to conceal, that information must be inculpatory.
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> Permitting the Special Counsel to prejudice Mr. Sussmann and to shirk his burden of proof by leading the jury to an adverse inference would be impermissible under any circumstance. But it is particularly egregious here, because Mr. Sussmann is not the privilege holder. The Special Counsel's tactics would accordingly penalize Mr. Sussmann for another party's invocation of their own right to assert the privilege, a decision that was not his to make. Convicting him on the basis of such fundamentally unfair circumstances would amount to a miscarriage of justice.