OLD FRIENDS: SCOOTER LIBBY AND CIPA

Judge Christopher Cooper will not have a media call-in line for this afternoon's hearing in the Michael Sussmann case, so I'll have to rely on the reporting of others and a delayed review of a transcript of the case.

But before then, I'd like to make two points about developments to supplement this post on the fight over what evidence will be presented at trial.

Judge Cooper rules that Durham must share two classified items with Sussmann

First, behind closed doors, the parties have begun the Classified Information Procedures Act, the process by which the government limits what classified information gets shared with the defendant and what information gets introduced at trial. I provided some background on how that might work in the (far more CIPA-dependent) Igor Danchenko trial, but for our purposes, there are three steps:

- Section 4, which allows the government to withhold evidence from Sussmann or substitute classified information to protect classified information.
- Section 5, which requires the defendant to list in advance what classified information he wants to use at trial.

- Section 6, which requires the judge to make admissibility decisions on classified information before trial.

There are several things that might be included in the universe of classified evidence in Sussmann's case. Durham has always explained there was highly classified information in the investigative case file itself.

> The entirety of the FBI's electronic case file for the investigation of the Russian Bank1 allegations – in both classified and unclassified form – with only minor redactions to protect especially sensitive and/or highly classified information;

This could pertain to Alfa Bank itself; many other public filings (such as FOIAed Mueller records or the SSCI Report) redact information pertaining to Alfa. And that would explain why Durham had to delay his CIPA filing because the people who needed to sign off were busy keeping the country safe *from* Russia, not safe *for* Russia.

Sussmann also asked for details of Rodney Joffe's cooperation with the FBI and another agency that might be the NSA, much of which would also pertain to highly sensitive investigations. And Durham seems likely to attempt to use this CIA intelligence report to make claims that were questioned in real time about why Hillary's campaign might respond to Trump asking for her to be hacked by trying to discover the multiple back channels with Russia that existed. (Yesterday, Peter Strzok, who is named in the document, raised questions about whether Durham even has the correct document.) That's the kind of classified information these fights are likely about.

Yesterday, the government filed a sealed motion

asking for a 6a hearing — basically an opportunity to challenge the information that Sussmann wants to use to defend himself. They also appear to be challenging the specificity with which he described the information he needs. None of that is surprising, but given how scrappy things have gotten (to say nothing of the vastly different understanding each side has of this case), this fight could get interesting.

Potentially more consequential, Judge Cooper issued a ruling finding that, of a body of classified evidence prosecutors had identified that might be relevant to Sussmann's case in discovery, he agrees with prosecutors that the information is classified and not helpful to the defense, and so can be withheld in its entirety under CIPA. However, with respect to two items, Cooper found that the information *might* be helpful and so Durham has to provide it or a classified summary to Sussmann's cleared defense counsel.

> WHEREAS the Court finds that two of the Government's proposed substitutions of certain Classified Information do not adequately inform the defense of information that arguably may be helpful or material to the defense, in satisfaction of the Government's discovery obligations; it is hereby
>
> [snip]
>
> IT IS FURTHER ORDERED that the Government is directed, as explained at the *ex parte* hearing, to disclose to cleared defense counsel either the underlying classified material or a classified summary of the material from which the two proposed summaries were derived.

Several things could happen here. Sussmann could look at it and decide he doesn't want to use it at trial, mooting the issue. Prosecutors could go back to the national security officials who

are busy punishing Russia for its attack on democracy and try to get them to agree to a more fulsome substitution or declassification.

But one of the possibilities is that Durham can appeal Cooper's decision, which likely would delay the trial.

Judge Cooper adopts Libby as the standard for evidentiary disputes

The other recent development was Judge Cooper's decision to admit Durham's FBI Agent witness, but to limit what he can testify to unless Sussmann attempts to argue there *really was* a back channel communication between Alfa Bank and Trump. Contrary to what dishonest frothy lawyers say on Twitter, this was a reasonable and expected decision basically laying initial guidelines as to the evidence admissible at trial.

This decision will not end things. Cooper's decision left a lot of room for dispute. For example:

- Cooper permitted the government to argue the Alfa Bank allegations were "unsubstantiated," but Andrew DeFilippis in the hearing wanted to argue they were untrue (this ironically flips the frother stance about the Mueller investigation, which did not substantiate conspiracy charges against Trump, but nevertheless found plenty of

evidence of one)
- Cooper did not distinguish between the accuracy of the DNS data (which Sussmann would happily prove at trial) and the reasonableness of the inferences researchers drew from it (about which there is great dispute)

So expect this to come back up at trial.

The most important part of the opinion, in my opinion, however, came in how Cooper closed it, generally excluding lots of the data collection evidence Durham wanted to introduce by citing *Reggie Walton's CIPA decision* on Scooter Libby.

> [A]dditional testimony about the accuracy of the data—expert or otherwise—will not be admissible just because Mr. Sussmann presents evidence that he "relied on Tech Executive-1's conclusions" about the data, or "lacked a motive to conceal information about his clients." Gov's Expert Opp'n at 11. As the Court has already explained, complex, technical explanations about the data are only marginally probative of those defense theories. The Court will not risk confusing the jury and wasting time on a largely irrelevant or tangential issue. See United States v. Libby, 467 F. Supp. 2d 1, 15 (D.D.C. 2006) (excluding evidence under Rule 403 where "any possible minimal probative value that would be derived . . . is far outweighed by the waste of time and diversion of the jury's attention away from the actual issues").

Back in the day, this Libby opinion was actually a ruling *against* Libby. As some of you old-

timers may recall, Dick Cheney's former Chief of Staff was attempting a graymail defense, basically arguing that he needed stacks and stacks of classified information to explain to the jury that he didn't mean to lie about discussing Valerie Plame's identity and other classified information during the week the Bush Administration launched an attack on Plame and Joe Wilson. Rather, his brain was so filled with scary information — with an emphasis on Terror! Terror! Terror! — presented in the Presidential Daily Briefs, that he did not retain a memory of burning the Wilsons when asked by investigators.

And Libby was a CIPA opinion, not a 404(b) opinion, the matter ostensibly before Cooper. But it's important because Libby's case, like Sussmann's, is about his state of mind when he allegedly lied, in Libby's case, to both the FBI and a grand jury. Ultimately, the cited passage of the decision was about ways to apply Rule 403, which limits confusing information, to CIPA. To get there, however, Judge Walton focused on the PDBs and other classified documents pertinent to the days when Libby was speaking to journalists about the Wilsons and the days when he was lying to investigators, thereby excluding years of PDBs from periods before or after his lies that didn't need to be declassified for trial.

> In fact, there is a "danger of unfair prejudice, confusion of the issues, or misleading the jury," in providing the jury details of the defendant's activities falling outside the critical time periods. Specifically, permitting the defendant to testify as to the details of what consumed his time outside the critical time periods discussed above would likely confuse the jury concerning what events actually allegedly consumed the defendant's attention at the times that he had the conversations that form the basis for this prosecution. Accordingly, while the defendant will be permitted to testify

> generally about the matters that consumed his time and attention during those periods outside of the dates identified in the indictment, permitting detailed descriptions of events occurring during such periods will be excluded pursuant to Federal Rule of Evidence 403.

Walton also ruled that *testimony* is more probative than submitting the PDBs or Libby's own notes.

> As indicated during the Section 6(a) proceedings, many, if not most, of the documents themselves are unlikely to be admitted as evidence during the trial for several reasons. First, the documents would be cumulative of the testimony provided by the defendant. And second, it would appear at this time that the information contained in many of the documents will pose substantial hearsay problems.

You can already see how this citation may be indicative of how Judge Cooper imagines he'll get through the evidentiary swamp ahead of him. The government is asking to introduce a bunch of highly technical concepts, inflammatory names, and emails to which Sussmann was not a party, and asking to do so for a period that is totally attenuated from the day Sussmann went in to meet with James Baker.

But it's relevant for another reason.

Sussmann has cited it over and over and over. In his April 4 filing moving to exclude information on data collection and Christopher Steele, Sussmann cited the opinion six times, including for:

- Walton's exclusion of what President Bush said in front of Libby

- Walton's exclusion of the scary terrorists Libby fought
- The import of the defendant's state of mind when he allegedly lied
- Details of what others were told

Sussmann cited Libby again in his April 8 motion to exclude Durham's expert, citing Walton's exclusion of "the foreign affairs of the country, which is totally irrelevant to this case." Sussmann cited it again in his April 15 omnibus response to Durham's motions in limine, in a section aiming to exclude a bunch of Fusion GPS emails, for the argument that what others were told is simply irrelevant to the defendant's state of mind in a false statements case. And he cited it again in his April 18 opposition to Durham's motion to compel production of a bunch of privileged communications to which he was not party.

Unless I missed it, during that entire period in which Sussmann was citing Libby Libby Libby Libby Libby Libby Libby Libby Libby Libby, Durham didn't address the precedent at all.

As I noted, the Walton's Libby decision worked against Libby; it prevented him from turning his trial into a debate over the War on Terror.

In this case, however, Durham is the one attempting to turn a single count false statement trial into a conspiracy trial implicating Hillary Clinton, Christopher Steele, and Donald Trump. Which suggests the Libby decision may not help him.