

JUDGE COOPER PROBES ANDREW DEFILIPPIS' CONSPIRACY THEORY ABOUT "WORKER BEES" IN A "CABAL"

I'm certain that the hearing in the Michael Sussmann case the other day was not laugh-out-loud funny in real time. I'm certain that when Judge Christopher Cooper rules on what can and cannot come in, some of the conspiracy theory that John Durham is pursuing *may* come in to substantiate the motive he alleges Michael Sussmann had for allegedly hiding the existence of a client in a meeting with FBI General Counsel James Baker. I also recognize that Durham may moot many of these issues by bringing one or several interlocutory appeals before the trial to buy time to continue to spin his conspiracy theories some more.

But when I was reading the part of the transcript pertaining to whether Durham will be able to introduce researcher emails at trial, I started laughing out loud when Judge Cooper said this:

■ You could call Mr. Joffe.

The comment came *after* the discussion earlier in the hearing about what kind of evidence Durham might present to prove that Sussmann had a privileged relationship with both the Hillary campaign and Rodney Joffe.

It came *after* the discussion about whether Durham should be forced to immunize Rodney Joffe or not. That discussion had a lot more nuance than reports I had seen, including that Cooper floated the idea of prohibiting any Durham questions to Joffe about the allegations – that he had Sussmann share information showing the use of a YotaPhone by someone who was sometimes

in Donald Trump's presence – that Durham claims would be the basis of a contract fraud charge against Joffe if the data actually were only available as part of a DARPA contract that didn't already, for very good cybersecurity reasons, encourage the tracking of such things.

THE COURT: What if the Court were to grant your motion in limine to keep out the information that he provided later to the CIA, and all the YotaPhone stuff is not in the case? Do you believe that Mr. Joffe would – and seeing that that appears to be the basis of the government's position that there is some continuing exposure, do you think Mr. Joffe would see fit to change his position?

And the hearing, and so therefore this discussion on the conspiracy theory, came before Cooper turns to adjudicating Durham's bid to pierce privilege claims, a bid which – I have already noted – makes a solid case that Durham should immunize Joffe rather than Fusion GPS' Laura Seago, whom he plans to call as a witness.

So between the time when Cooper considered ways to make Joffe's testimony available to Sussmann and the time when he turns to Durham's false claim that the only possible way of accessing testimony about communications between Joffe and Seago is by calling Seago, the judge noted that one way of accomplishing what Durham claims to want to accomplish, rather than by introducing hearsay emails, would be to call Joffe.

Cooper made the comment to lay out that, if Durham really wanted to present the mindset researchers had as they attempted to understand a DNS anomaly involving a Trump marketing server and Alfa Bank, he could simply call the researchers directly.

And these emails, regardless of the words of any particular one, you're offering them to show that the

researchers had concerns about the data, right? And so you're offering them for the truth of that proposition, that the folks who were in on this common venture had concerns about the data that Mr. Sussmann wanted to keep in the dark and, therefore, did not reveal to Mr. Baker why he was there. And so, the truth of the emails is that we have concerns.

Now, you know, if that's a – if that's an acceptable basis – if that's relevant, right, you could certainly call those researchers. **You could call Mr. Joffe.** They could testify about how – you know, what was going on in, you know, those few weeks in August or whenever.

So, A, you know, why do you need the emails? [my emphasis]

In response to that, Andrew DeFilippis tried to spin that the government wasn't trying to introduce the emails for the truth, but to show the existence of what he claims amounts to a conspiracy. In doing so, DeFilippis described that the emails were critical to tie Joffe to the effort to collect the data.

All we're saying is that the existence of that written record itself might have provided a motive for Mr. Joffe or Mr. Sussmann to tell the lie that we allege he did. Now, that is the government's secondary argument. The principal argument we're making, Your Honor, is that these emails show a back-and-forth that tie Mr. Joffe to the data that went into the FBI, that tie Mr. Joffe to the white papers that went into the FBI, and tie Mr. Joffe to the entire effort which, absent that –

THE COURT: **Mr. Joffe or Mr. Sussmann?**

MR. DeFILIPPIS: First Mr. Joffe. And the reason why that's important, Your Honor,

is, again, because the defendant is alleged to have lied about whether, among other things, he had a relationship with Mr. Joffe, an attorney- client relationship. [my emphasis]

Cooper's response – Mr. Joffe or Mr. Sussmann – nodded to the fact that Sussmann's state of mind, not Joffe's, is what's on trial. Though shortly thereafter, he noted that the charged lie wasn't even an attempt to hide Joffe personally.

THE COURT: Well, let's just – you know, words matter, and let's just be clear. He wasn't asked "Are you here on behalf of Mr. Joffe?" and said no. He didn't say "I'm not here on behalf of Mr. Joffe."

He said generally, allegedly, he's not here on behalf of a client, so at this point I'm not sure how relevant Mr. Joffe actually is at the time of the statement.

Indeed, much later, Sussmann's lawyer noted that there's no contest Sussmann told Baker he had gotten the allegations from cybersecurity experts.

What do we know is undisputed? That Mr. Baker will testify that Mr. Sussmann said the information was from cyber experts, okay? Not whether it was a client or not, but it was from cyber experts.

Cooper's discussion of Durham's conspiracy theory continued through DeFilippis' effort to acknowledge that he's not alleging collecting political dirt is illegal – though it may be "improper" – and then admitting this is not a "standard drug case."

I have not seen one case where the charge is not conspiracy and the alleged conspiracy in which the statements are being made in furtherance of it is not criminal or improper in any way. Would this be the first time?

MR. DeFILIPPIS: Your Honor, I think – so we would not expressly allege to the jury that it was criminal. There are aspects of it that may be improper.

[snip]

And I think, Your Honor, that most – that this hasn't come up often should not cause the Court to hesitate just because these facts are a bit different than your standard drug case or, you know, your standard criminal case.

And it continued to DeFilippis' effort to describe why people whose actions preceded the alleged formation of a conspiracy and other people who expressed reservations about joining into this alleged conspiracy would be included in what Cooper dubbed "a cabal."

THE COURT: Okay. So who was part of this joint venture, in your view?

MR. DeFILIPPIS: So, Your Honor, it would be three principal categories of people. We have the researchers and company personnel who supported Mr. Joffe once they were tasked by Mr. Joffe.

THE COURT: Okay, but they were just tasked. You've made the point yourself that some of them, you know, had concerns. Some of them had issues with the data. Some had concerns that what they were doing was proper or not until they were satisfied that it was.

MR. DeFILIPPIS: That's true, Your Honor, but –

THE COURT: How are they members of this

cabal?

[snip]

MR. DeFILIPPIS: – just to distill it down as to each category of people. The thrust of this joint venture was that there was a decision and an effort to gather derogatory Internet-based data about a presidential candidate – about a presidential candidate among these folks. **There were the researchers who began doing that, it seems, before Perkins Coie became fully involved,** and there are emails we will offer that show that data was being pulled in late July and August. So the researchers were the engine of this joint venture in the sense that they were doing the work, and they were doing – and the emails make clear they were doing it for the express purpose of finding derogatory information in Internet data. So that's one category. [my emphasis]

I mean, even ignoring the fact that the record shows these researchers were not, in fact, analyzing data for “the express purpose of finding derogatory information in Internet data” – indeed, if one actually cares about national security, their actions might be better understood as an effort to protect Donald Trump from his dishonest campaign manager with a history of laundering money from Putin-linked oligarchs through Cyprus – DeFilippis admitted right here that the research into the data *preceded* the moment when DeFilippis wants to make it criminal (but not criminal in “your standard drug case” sense).

But Durham's frothy lead prosecutor wants to treat cybersecurity research as – in Cooper's word! – a cabal.

DeFilippis then went on to call some of the top cybersecurity researchers in the US, who found and started trying to understand an anomaly on

their own volition, “the worker bees who are bringing the data and funneling it into this effort.”

Maybe I have a twisted sense of humor. But I was guffawing at this point.

Judge Cooper, however, capped DeFilippis’ effort with the same question:

THE COURT: And assuming that I agree that it’s relevant, you could get that in by calling witnesses without the emails, correct?

Everything that DeFilippis wants to do – even before he wants to get Laura Seago (who, Sussmann attorney Sean Berkowitz revealed later, would testify that she doesn’t even know about key parts of DeFilippis’ conspiracy theory, starting with Christopher Steele’s involvement) to offer the non-unique testimony about her conversations with Joffe – is best done by calling Joffe as a witness.

I’m not the only one, it seems, who recognizes that some of what Durham wants to do actually depends on calling Joffe as a witness.