

SCENE-SETTER FOR THE SUSSMANN TRIAL, PART TWO: THE WITNESSES

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In this post, I laid out the elements of the offense, a single count of a false statement to the FBI, which will drive the outcome of the Michael Sussmann trial, in which jury selection begins today. As I showed, John Durham has to prove that:

- Michael Sussmann said what Durham has accused him of saying, which is that he was not sharing information with the FBI on behalf of any client
- Sussmann said that on September 19, not just September 18
- Sussmann meant his statement to be understood to mean that no client of his had an interest in the data, as opposed to that he was not seeking any benefit for a client from the FBI
- The lie made a difference in how the FBI operates

In this post I'd like to say a bit about the expected witnesses. Before I do, remember the

scope of the trial, as laid out in several rulings from Judge Cooper.

- Durham can only raise questions about the accuracy of the Alfa Bank anomaly if Sussmann does so first
- He generally can only discuss how the data was collected via witnesses; with one exception, Cooper has ruled the emails between Rodney Joffe and researchers to be inadmissible in a trial about whether Sussmann lied
- While Cooper found that 22 of 38 Fusion emails over which Democrats had claimed privilege were not privileged, he also ruled that because Andrew DeFilippis got cute in delaying his request for such a review, Durham can't use those emails or pierce any related claims of privilege at trial
- That leaves the unprivileged emails between Fusion and journalists, which Cooper has ruled admissible; he even considered changing his decision and letting a tweet from Hillary come in as evidence (though note that the emails Durham got pre-

approved barely overlap with the emails Durham wants to use at trial, so there still could be problems admitting individual emails at trial)

- Cooper ruled the communications between Rodney Joffe, the person who shared the DNS anomaly with Michael Sussmann, and Laura Seago, his connection with Fusion, were privileged
- Cooper ruled that Sussmann can elicit testimony from witnesses, including Robby Mook and Marc Elias, about how Trump's request that Russia hack Hillary some more made him not just a campaign opponent, but a threat to national security

As I noted, a dispute over the final jury instructions suggests that Durham is beating a tactical retreat from his charged claim that Sussmann lied to cover up that he was representing *both* Hillary and Rodney Joffe.

Mr. Sussmann proposes modifying the last sentence as follows, as indicated by underlining: Specifically, the Indictment alleges that, on or about September 19, 2016, Mr. Sussmann, did willfully and knowingly make a materially false, fictitious, and fraudulent statement or representation in a matter before the FBI, in violation of 18 U.S.C. § 1001(a)(2), namely, that Mr. Sussmann stated to the General Counsel of the FBI that he was not acting on behalf of any client in

conveying particular allegations concerning Donald Trump, when, in fact, he was acting on behalf of specific clients, namely, Rodney Joffe and the Clinton Campaign.⁵ The government objects to the defense's proposed modification since it will lead to confusion regarding charging in the conjunctive but only needing to prove in the disjunctive.

Durham wants to be able to get a guilty verdict if the jury decides that Sussmann was hiding Hillary but not hiding Joffe. What Durham will really need to prove won't be finalized until sometime next week, meaning both sides will be arguing their cases without knowing whether Durham will have to prove that 1) the allegations pertained to Donald Trump personally 2) Sussmann had two clients 3) he lied to hide both of them, *or* whether he has to prove only that Sussmann lied to hide one or more client.

Durham's tactical retreat is likely dictated by the scope set by Cooper and will dictate the witnesses he wants to call.

This post laid out whom, as of last week, each side planned to call. Remember that it's not uncommon for a defendant not to put any witnesses on the stand (though I would be surprised if that happened in this case). Normally, the scope of a witness' testimony is set by the Direct examination of them. So, for example, if Durham puts Marc Elias on the stand to talk exclusively about his decision to hire Fusion GPS, then Sussmann could not ask him questions about other topics. But Sussmann incorporated Durham's entire witness list, and Cooper ruled that he would rather not have to call people twice. So for at least the Democratic witnesses, Sussmann will have the ability to ask about things that Durham would really prefer not to appear before the jury even though Durham called that witness as a government witness. Because Durham doesn't understand much of what really went on here,

that may be a really useful thing for Sussmann to exploit.

Summary Witness: It is typical for prosecutors to call one of their FBI agents at trial as a sort of omniscient narrator who can both introduce a vast swath of evidence (such as records the accuracy of which have been stipulated for emails that can be introduced without witness testimony) and provide some interpretation of what it all means. Usually, that agent is not the lead agent, because the lead agent knows things that the prosecutor wants to keep from the defendant and the public, either details of an ongoing investigation or major investigative fuck-ups that haven't been formally disclosed to the defendant. As of last week, DeFilippis maintained that, "It may be an agent who's our summary witness, but we're not looking to put a case agent on the stand." That suggests there is no agent *on his team* that is sufficiently compartmented from his secrets to take the stand. Judge Cooper seemed a bit surprised by that.

Jim Baker: Jim Baker is the single witness to Michael Sussmann's alleged crime. Durham is going to have a challenge walking him through the version of this story Durham wants to tell, not least because the materiality parts of it – whether Baker thought it unusual to hear from Sussmann, whether he thought it mattered who Sussmann's client was – are also recorded in Baker's past sworn testimony. Given the late discovery of a text showing that Sussmann wrote Baker on September 18 telling him he wanted to benefit the FBI, and given the even later discovery of March 2017 notes recording that the FBI understood that Sussmann *did* have an (undisclosed) client, Sussmann doesn't even have to trash Baker to call into question his memory: he can allow Baker to admit he can't separate out what happened in which of at least five communications he had with Sussmann that week, the sum total of which show that Sussmann wasn't hiding the existence of a client, did represent that he was trying to help the FBI, and did help

the FBI. The cross-examination of Baker will, however, be an opportunity for Sussmann to implicate Durham's investigative methods, both for building an entire case around Baker after concluding, years earlier, that he wasn't credible, and then, for refreshing Baker's memory only with the notes that said what Durham wanted Baker to say, and not what the FBI ultimately came to know.

Bill Priestap and Tisha Anderson, Mary McCord and Tasha Gauhar: This trial is expected to feature two sets of witnesses – the first set called by Durham and the second called by Sussmann – who will be asked to reconstruct from their own notes what was said in a meeting attended by Baker. Priestap and Anderson will say that the day of Baker's meeting with Sussmann, they wrote down that Sussmann didn't have a client (but not in the words Sussmann is known to have used or the words that Durham has charged). McCord and Gauhar will say that in March 2017, Andy McCabe stated, in front of Baker and with no correction, that the FBI did know Sussmann had a client. The only notes in question that use the same phrase – "on behalf of" – that Durham used in the indictment say that Sussmann *did* say he was meeting with FBI on behalf of someone. I expect at least several of these witnesses will be asked materiality questions: If they didn't ask who the client is, doesn't that prove it didn't matter? The notes of everyone involved, importantly, emphasized the import of Sussmann sharing an imminent newspaper article. Sussmann will also ask Priestap how and why he asked the NYT to hold the Alfa Bank story.

Agents Heide, Sands, and Gaynor, plus Agent Martin: Durham plans to call three of the FBI Agents who investigated the anomaly – for a couple of hours each, in the case of Heide and Sands – to talk about how they did so. Let me suggest that not only is this overkill, it may backfire in spectacular fashion, because the March 2017 notes make it clear that these agents did not take very basic steps to chase this

anomaly down and Heide, at least, is not a cyber agent (in the same period he was also investigating George Papadopoulos). In addition to having those hours and hours of testimony, Durham will call Agent Martin, ostensibly to explain what one could learn from the anomaly, though there's still a fight about the scope of his testimony, particularly with respect to misleading claims he would make about the scope of the data accessed to find the anomaly in the first place.

Antonakakis, Dagon, DeJong, and Novick:

According to what DeFilippis said last week, in the wake of Cooper's ruling excluding all but one of the researchers' emails, he likely will not call David Dagon, may or may not call Manos Antonakakis, but will call two employees of Rodney Joffe whom, DeFilippis claims, were "tasked by" Joffe, in the first case to pull some but not all of the data researchers used to test the anomaly, and in the second case to do research that may not have been presented to the FBI. If these decisions hold, his presentation of the data will be, as I understand it, affirmatively false. For that reason, Sussmann might have been able to challenge Durham's reliance on these witnesses in the absence of others; that Sussmann is not doing so may suggest he knows that the witnesses won't do what Durham thinks they will. If Durham persists in this plan, it means he'll have FBI agents spend 5 hours describing how they chased down an anomaly, without ever really explaining what the anomaly is (and how it could have easily been investigated using about two different steps that the FBI didn't take). Perhaps (given his tactical retreat), Durham may want to eliminate virtually all discussion of the anomaly at the heart of this case. Alternately, this is a tactical move to force Sussmann to call David Dagon (whom Durham has immunized) or Manos Antonakakis (whose status is unknown) in hopes that they'll help him make his YotaPhone case or explain the full scope of the data accessed (particularly if he gets Martin to make misleading comments about that topic first). But

if Durham forgoes his chance to call the researchers and Sussmann does so himself, it may allow Sussmann to rebut Durham's claims about what the anomaly was and what went into the two white papers presented to the FBI. In addition, Sussmann can have these witnesses explain how far before the involvement of the Democrats this research started and how Trump's open invitation to Russia to do more hacking meant the anomaly posed a possible national security threat worthy of sharing with the FBI.

Robby Mook, Marc Elias, and Debbie Fine: Rather than talking about the anomaly, Durham wants to talk about the Hillary campaign. At least as of last week (before Cooper excluded some of this stuff on privilege and belated privilege challenges), Durham will definitely call Mook, may call Elias, but may rely instead on a Hillary lawyer named Debbie Fine, who was on daily calls with Fusion. Durham wants to claim,

[T]he strategy, as the Government will argue at trial, was to create news stories about this issue, about the Alfa-Bank issue; and second, it was to get law enforcement to investigate it; and perhaps third, your Honor, to get the press to report on the fact that law enforcement was investigating it.

Sussmann, by contrast, knows he has a witness or witnesses who will rebut that.

[I]t's not the truth; and in fact, it's the opposite of the truth. We expect there to be testimony from the campaign that, while they were interested in an article on this coming out, going to the FBI is something that was inconsistent with what they would have wanted before there was any press. And in fact, going to the FBI killed the press story, which was inconsistent with what the campaign would have wanted.

As suggested above, Elias is a witness Sussmann will call even if Durham does not. Among other things, Sussmann will have Elias explain what it was like to have Donald Trump openly asking Russia to hack Hillary some more.

Laura Seago: Before Cooper ruled on privilege issues, DeFilippis (who doesn't know how to pronounce her last name) said he would call Seago. She was the pivot point between Fusion and Rodney Joffe. According to Fusion attorney Joshua Levy, Seago knows little about the white paper from Fusion that Sussmann shared with the FBI. "Seago didn't contribute to it, doesn't know who did, doesn't know who researched it, doesn't know who wrote it, doesn't know its purpose; and the government's aware of all that." So it's unclear how useful she'll be as a witness.

Eric Lichtblau: As I noted the other day, Durham is trying to prevent Lichtblau from testifying unless he's willing to testify to all his sources for the Alfa Bank story (which would include a bunch of experts never named in any charging documents). My *guess* is that Cooper will rule that forcing Lichtblau to talk about communications with Fusion would be cumulative, though he might force Lichtblau to talk about an in-person meeting he had at which Fusion shared information that did not derive from Joffe. If Sussmann succeeds in getting Lichtblau's testimony, however, he will be able to talk about what a serious story this was and what a disastrous decision agreeing to hold the story was for his own career and, arguably, for democracy.

Perkins Coie billing person and McMahon: As Durham has repeatedly confessed, most of the substance of his conspiracy theory is based off billing records. But there's a dispute about whether Sussmann fully billed his meeting with Baker (Sussmann has noted, for example, that he paid for his own taxi to and from the meeting). Durham will have a Perkins Coie person explain how they track billing and will call a former

DNC person with whom Sussmann had lunch immediately before his Baker meeting, either because Sussmann said something to him about the Baker meeting, or because he needs to rule out that Sussmann billed for the lunch meeting but not Baker.

Agent Grasso: In addition to the hours and hours of testimony about how the FBI did investigate the anomaly, Durham also wants to call an Agent Grasso, with whom Joffe shared a piece of the Alfa Bank allegations directly. This may actually be an important witness for Durham, because it might show that the packaged up allegations shared with Baker were substantially different than what Joffe was sharing when his identity was not hidden.

Kevin P: Durham only plans to call one of the two CIA personnel at the meeting in January 2017 (ironically meaning a meeting in March 2017 will get far more focus than a meeting that played a central role in the indictment). It sounds like Sussmann will get the one person to validate an email from another person who also recorded Sussmann saying he had a client.

Agent Gessford: One FBI Agent Sussmann will call will authenticate emails Sussmann will use with other witnesses to show what FBI's understanding of Sussmann's activities were in 2016. Not only will he use these emails to prove that the FBI knew well he was representing Hillary on cyber issues, but he will likely also use these emails to talk about what it looks like for a campaign to be systematically attacked through the entirety of a campaign by a hostile nation-state, which will make the potential seriousness of the Alfa Bank anomaly quite clear.

Agent Giardina: This is someone the scope of whose testimony Durham may have actually tried to limit by calling him himself. Sussmann will have Giardina explain that after the Frank Foer article, he tried to open an investigation, which Sussmann will use to prove that the FBI would have opened an investigation whether or not he shared the tip with the FBI.

Jonathan Moffa: Moffa, a senior FBI agent involved in the Crossfire Hurricane and Alfa Bank investigations will address materiality. He'll explain how, given the UNSUB investigation open to find out who in Trump's camp got a heads up to the hack-and-leak investigation, it was inevitable they would chase down this tip and treat it, like the CH investigation itself, as a Full Investigation.

DOJ IG Michael Horowitz: On paper, Horowitz's testimony will be limited to explaining how an anonymous tip from Joffe via Sussmann is supposed to work, which is that someone in a position to direct a tip to the right person does so and succeeds in addressing a national security concern. Joffe provided a tip to Horowitz in January 2017 that – we can assume given Horowitz's testimony – proved to be valuable. This tip will also demonstrate that DNS research is not as limited as Agent Martin will claim it is. But given the way that Durham has failed to understand basic aspects of Horowitz's investigation, including ones that disproved large swaths of Durham's conspiracy theories, this testimony might be somewhat contentious.

Update, 5/22: Very belatedly added Moffa after writing this post.