

Sean Berkowitz

What Happens Next – 06.19.2022

Sean Berkowitz:

My name's Sean Berkowitz, I was the attorney for Michael Sussmann in the recent prosecution by John Durham, the special prosecutor appointed by then-Attorney General Barr. I just want to make clear that the comments I'm about to give are my own and not my clients, and I'm also speaking, based on the public record, not on anything outside of the public records. That's for a couple reasons, including attorney-client information as well as the fact that there was a fair amount of classified and secure information that was accessed during discovery.

I want to talk about three things. Why did this prosecution happen? What happened at the trial and what the implications are?

Why did this happen? John Durham was appointed as a special prosecutor in October of 2020, shortly before the election between Biden and Trump. He had previously been assigned an investigation by Attorney General Barr into allegations made by Trump that the FBI and other individuals had created a hoax or a conspiracy of Trump's connections to Russia. Some people at the time said that he was investigating Mueller's investigation.

When the election was coming up, Barr wasn't certain who would win, and he wanted to appoint Durham as special counsel, which would make it difficult for Biden's attorney general to fire Durham.

And for years, John Durham conducted this investigation that was fairly wide-ranging. My role was relatively limited, I represented Michael Sussmann, who was an attorney at Perkins Coie. Michael Sussmann is a nationally-renowned, cybersecurity and data privacy expert who had done some work in connection with the election. He was not the main point of contact for Hillary Clinton's campaign. His law firm Perkins Coie was her outside general counsel, but Michael Sussmann's role was relatively limited.

The special counsel investigations, was far and wide and they weren't coming up with anything. They ultimately came up with the allegations that Michael Sussmann lied to the general counsel of the FBI, when he brought the FBI certain information showing potential connections between Trump and Russia and that he was not acting on behalf of any particular client.

The special counsel looked into those issues and found that Mr. Sussmann did bill a substantial amount of time to Hillary Clinton's campaign and concluded that he was attempting to pass these allegations off as a concerned public citizen rather than on behalf of the campaign. And they indicted him in September of 2021.

My own personal view as to why they charged him was that they were having trouble telling their story in a public forum, and although the charge against Mr. Sussmann was fairly narrow, lying to the FBI, they were able to in a 25-page indictment tell a wide-ranging political

conspiracy that fit the narrative that Hillary Clinton and others working at her behalf were attempting to create a false narrative of Trump's connections to Russia.

And so that set up the battle for the trial.

The government's case consisted largely of Jim Baker, the general counsel of the FBI testifying as to what Mr. Sussmann allegedly told him, information related to the FBI's investigation into the allegations, as well as the connections between Mr. Sussmann and Hillary Clinton and her campaign. Mr. Sussmann did not testify, and the jury was out about six hours, and quickly determined that the government had not met its burden of proof, proving that Sussmann had lied to the FBI.

The key issues in the trial were as follows. Number one, Mr. Sussmann told the FBI that he was not acting on behalf of a particular client when he was providing the information, that Mr. Sussmann had gotten the information from a client of his who was a cyber expert, that the information showed potential connections via DNS links to a Trump server and a server associated with Alfa Bank, which is a Putin affiliated entity.

Mr. Sussmann and his cybersecurity expert client, Rodney Joffe, went to the New York Times Pulitzer Prize-winning journalist named Eric Lichtblau, who indicated that he was to run a story. Mr. Sussmann and his client went to give the FBI a heads up. The FBI went to the New York Times after learning this information and asked to hold the story while they investigated it. The New York Times held the story, the FBI investigated it, and later told the New York Times they didn't think that it was substantiated or there were innocent explanations. The New York Times ended up not running any story. Another news organization about a month later, Slate ran a story that talked about the potential connections.

Sussmann had a client, but he wasn't there representing any clients' interests, that although he billed time to Hillary for America and the story that would have appeared in the New York Times would have benefited Hillary for America. All three witnesses from Hillary for America testified that they were not aware that Sussmann was going to the FBI, they didn't authorize him, and going to the FBI would've been against their interests.

The government was left with a largely circumstantial case that Mr. Sussmann had lied when he said he wasn't there on behalf of a client. The final piece of the of the trial was the FBI's investigation, which was in my own view, a joke. Within a couple hours of getting the information, they largely discounted the allegations. Nobody ever interviewed Sussmann, nobody ever interviewed the cyber expert that had provided him the information. The individuals who looked into this at the case agent level were denied who the source of the information was.

Both Democrats and Republicans have claimed some implications arising out of this that are reported in the press. The Republicans have said that the case was essentially dead from the start because of the jury pool in DC. Democrats have said this vindicates Hillary Clinton and

Trump has tweeted that this makes him more likely to want to run for President because of the information that came out of trial.

My own view is that it shows our jury system works. This was a case that shouldn't 've been brought. It was a politically motivated prosecution that was designed to use Sussmann to tell a broader conspiracy and that's inappropriate. And thankfully, the jury listened to the evidence, and they did what juries typically do, which is get it right and acquitted him.

Larry Bernstein:
Why did Durham bring this case?

Sean Berkowitz:
Durham was appointed to look into whether there was an effort to perpetrate false information associating Trump to Russia and he had been involved in Russian interference in the election. He brought this case because he was having trouble finding support for his mandate. He could very well have just issued a report that detailed all of the stuff that he found, but instead he chose to bring a prosecution that was incredibly wide ranging in its allegations.

He attempted to get the judge to allow evidence in as part of a broader conspiracy, his words, not mine, and the judge shut him down on the broader conspiracy evidence because the only crime charge was a simple one count, lying to the FBI. If he had gotten a conviction here, it likely would have emboldened him to have gone after other people, and he might've made an effort to immunize and get Mr. Sussmann to offer testimony to go after other people.

Larry Bernstein:
Politically speaking, nobody cares about Sussmann, it was always about bigger fish and the weaponizing of the FBI by political campaigns.

Sean Berkowitz:
This particular case was very narrowly focused, the evidence suggests that the FBI did nothing to interfere with or hurt the Trump campaign. Sussmann brought evidence of DNS links, which are essentially internet look-ups between a server connected to Trump and a server connected to Alfa Bank, that his client had concerns about these connections and it was going to come out in the New York Times and the FBI should literally do whatever they wanted with it. He said, "I'm not asking anything." And Jim Baker, the general counsel of the FBI said as much. "He didn't ask for anything, and he didn't ask me to get back to him. He said, 'Do with it whatever you want.'"

And the information was sent to agents in the counterintelligence division in Chicago, an FBI agent named Allison Sands. It was literally her first investigation ever, she was fresh out of Quantico.

The cybersecurity division didn't even look into it, and didn't talk to anybody. The Chicago agent in the first line of her report said that it was referred by the Department of Justice, which was

absolutely wrong. They spoke to an Alfa Bank paid expert to say that the connections were innocuous.

They asked to speak to the source of the information. But senior people at the FBI wouldn't tell them either who brought the information in, or what the ultimate source of the information was. And within two weeks they had essentially run its course. They said that the investigation was incomplete because they weren't allowed to speak to the appropriate people, and there was nothing more that could be done. And it's hard to think of the FBI doing anything less with this information than they actually did.

Larry Bernstein:

Was there anything to the allegations of a connection between Trump and Alfa Bank?

Sean Berkowitz:

What I can tell you is that Sussmann was concerned enough about the potential issues that when he didn't hear anything back from the FBI, in February, months after Trump won, Sussmann went to the CIA with essentially the same information. They said, "This isn't really in our wheelhouse." There was nothing in the trial to suggest that there was in fact a connection between the two, Larry. I don't want to suggest that there was anything hidden.

What I can say is that the FBI didn't do sufficient investigation to determine whether the issues were of more concern.

Larry Bernstein:

Why did Sussmann go to the FBI if he wasn't going for the Hillary campaign?

Sean Berkowitz:

Sussmann, his profession was based on his relationships with national security. He interacted regularly with the FBI and with other national security agencies. He had been hired by the DNC to represent them in connection with the hack that had gone on in the summer of '16.

The Russians hacked the Democratic National Committee's emails and were releasing those emails around the time of the Democratic National Convention. Sussmann was a known commodity with the FBI and other national security agencies. He was so closely connected to these entities, he had national security clearance, and he had a badge that allowed him access to the FBI without having to go through all the security protocols, that's how trusted he was and what a close relationship he had with them. That evidence came out at trial.

He was able to call somebody he felt was appropriate. He chose the general counsel who he felt was in a better position to determine what to do with this. He knew that there were rules relating to election issues, and if he gave it to an agent, it might have needed to be looked into. The fact that he gave them actual data to look into belies the fact that he was trying to hide anything. An analogy I used in closing was, we came in with a jar of jelly beans and said, "I think there's 5,427 jelly beans in here. But here are the jelly beans, count 'em yourself, and do with it

what you want." You take it and do with what you want but know that the New York Times is going to be publishing a story on this.

You want the public to provide information to the FBI. They can determine what they want to do with it. And the concept that he was trying to hide the fact that he had any relationship with Democratic parties is absurd. He says, "I'm not doing this on behalf of any particular client. I want to give you a heads up to help the bureau." But his connection to the Democrats was very well known. Within days he was meeting with the FBI on behalf of the DNC, and what's even more significant for purposes of this case is a concept called materiality.

Did this thing he say, even if it weren't true, matter. Everybody at the FBI knew he worked for the DNC. And most of the people that looked into this who knew he was the source, said he was a DNC lawyer, and so the concept that Clinton or the DNCs were trying to conceal that is absurd. The last person you would send in, if you were trying to conceal involvement would've been him. Similarly, if he was really working for the Hillary Clinton campaign, why did he go to the CIA four months after the election with the same information?

Larry Bernstein:

Did Sussmann bill the Hillary campaign for that fateful meeting with the FBI?

Sean Berkowitz:

What we introduced at trial is he actually didn't bill the meeting with the FBI, to Hillary for America. There were billing entries on a confidential project which was thought to be the Alfa Bank project, but then there's no evidence that there was any discussion of going to the FBI. And on the 18th, he texted Jim Baker saying he was coming on his own behalf not on behalf of a client. He then met with them on the 19th. He billed time on the 19th to Hillary for America but he did not bill a meeting with the FBI in his time entries. And one of the things that I thought was particularly powerful in our closing argument is the^{re} were a dozen entries both before and after September 19th where Sussmann did bill meetings with the FBI to the DNC or to HFA.

Those were related to the hacks. And in his time entries he said, "Meeting with FBI." Other times when he had meetings he billed, "Meeting." There was nothing on the 19th that either referenced a meeting or referenced the FBI. And, so, the fact that he billed time on the 19th to Hillary for America is immaterial from our perspective to whether he actually billed this 20-minute meeting with Jim Baker. And in fact, we introduced evidence that said that the car that he took to and from the meeting was billed to the firm and not to HFA.

Larry Bernstein:

Robby Mook said on the witness stand in the Sussmann trial that Hillary was involved in the decision to provide the media with the allegations about Trump and Alfa Bank. Why was this disclosure important in the trial?

Sean Berkowitz:

We called Robby Mook, who was the campaign manager for Hillary for America to establish that he was not aware of who Michael Sussmann was and that Sussmann was going to meet with the FBI to share these allegations, which undercut the suggestion that Hillary for America either wanted him to go to the FBI or knew he was going to the FBI.

On cross examination of our witness, the government elicited testimony from Mook that Hillary was in fact informed generally about information that the campaign had related to Trump's connections to Russia and was supportive of the release of that information.

And the fact that the candidate was aware that her staff were doing opposition research and putting out information that they believed was credible related to these issues is neither surprising, criminal nor relevant to the allegations in our case. It was given a tremendous amount of play in the press but it was kind of like a nothing in the courtroom, Larry.

I don't think it had any impact on the trial. They didn't even talk about it in their closing argument.

I think that given the press coverage of that remark, it was exactly what a lot of people on the conservative side of the aisle wanted to come out and were interested in having reported. I think that they read far too much into the remark. In other words, some sort of suggestion that the candidate was behind this huge effort to perpetrate a false narrative.

A lot of the confusion, I think, comes from the Steele dossier, but the Steele dossier had no real connection to our trial nor to the testimony that Robby Mook gave. That Hillary Clinton was aware of the Steele dossier, approved the dissemination of the Steele dossier, or anything of that nature.

People were mixing various narratives and taking what they wanted from that testimony. In terms of its implications for Hillary Clinton.

Larry Bernstein:

There was some chatter that Jim Baker who was GC at the FBI was buddies with Sussmann and that relationship undermined Durham's prosecution.

Sean Berkowitz:

I'm going to take issue with the question, Larry. In my view, Baker worked very hard to convict Sussmann. He testified that he was 100% confident that Michael Sussmann used these words in the meeting on September 19th, most people aren't 100% confident of something that was said two weeks ago, let alone six years ago. And, Baker testified multiple times beforehand, under oath and he said the issue of whether he had clients never came up. Another time he testified under oath in an Inspector General proceeding that Sussmann provided the information on behalf of cybersecurity clients of his, and only after the FBI showed him other people's notes did he start forming an opinion over time as to what was said.

What's significant about Baker is that he was under investigation criminally by John Durham in connection with the leak, himself for over a year, and in our view had concerns that Durham was going to come after him again. He said that he was friends with Michael Sussmann, and yet he met with the special prosecutor's office 10 times to prepare his testimony and he met with us zero times despite the fact that we made specific requests of his lawyer to meet with us.

He went out of his way to talk about how sure he was that these words were said. So, the concept that he wasn't working that hard is belied by what happened. I remarked in closing that he was afraid of being prosecuted, and he performed exactly as the special counsel wanted him to. That's my view of Jim Baker.

Larry Bernstein:

What Happens Next with Durham's investigation?

Sean Berkowitz:

My own view is that this ought to be the logical conclusion of his work. He's had several years to look into this. His two charges are against Michael Sussmann and Danchenko who is even a less relevant player in all of this, who's scheduled to go to trial later this year.

I think he ought to shut down his special counsel's office which is averaging about a million and a half dollars of tax payer money every three months in expenditures.

Larry Bernstein:

Any lessons on involving the FBI to investigate political campaigns?

Sean Berkowitz:

If you look at what happened with the investigation into Clinton's emails. I think it's fraught with danger.

The FBI's job, just like any US attorney's office job, is to follow the evidence and take it where it will, but to avoid publicizing investigations that are not fully formed and to do their job not in a political way. And It's a really difficult line to walk.

Larry Bernstein:

Sean you're a former prosecutor in the US attorney's office and the Enron special prosecutor, what is your evaluation of Durham's investigation?

Sean Berkowitz:

I was head of the Enron task force for the Department of Justice. The US attorney's office in Washington made the prosecution of crimes arising out of the downfall of Enron a strategic priority where they wanted to devote resources. The special prosecutor role that Durham is in is much different. It's a fairly autonomous situation.

I think both situations, Larry, come with some danger. If you task a particular group of people or entities with looking for a crime, there can be an incentive to find one or to do something because you've devoted a fair amount of time, energy, and resource into that. And I think that you need people who are responsible and people overlooking that work to make sure that the people do justice, not to convict somebody for the sake of convicting them. Accountability is super important. And that that can get lost in a special prosecutor type of situation.

Larry Bernstein:

Could Durham get a fair trial in a Blue DC court with a mostly Democratic Party supporting jury?

Sean Berkowitz:

The special prosecutor chose to bring this case in the District of Columbia and specifically said throughout it was not a political case. And their theory was that Michael Sussmann was a man of privilege who used those privileges to abuse the institution of the FBI.

That was their theory and their theme that they used, which if true, would have played very well to a jury in D.C. They could have brought the case in Virginia if they'd wanted to do that. The jury selection process, the government had the opportunity to exercise for cause strikes. There was a lengthy questionnaire that was handed out beforehand. The parties agreed to strike a number of jurors who both sides believed couldn't be fair. Each side then had the opportunity to question each individual juror with whatever they wanted and had an opportunity to make a for-cause strike, meaning a suggestion that there was a reason that they couldn't be fair. And then there were six strikes that the government could use for no reason at all. If this were an 11 to 1 situation with 11 voting to convict and one holdout, you could say it was a jury nullification situation. This jury came back in a split second (laughs).

You know, five or six hours and said that they were all aligned and that this was a case that the jury foreperson felt should never have been brought. This wasn't a failure of the jury system.

Larry Bernstein:

Why didn't Durham just publish a report about the findings in his investigation instead of bringing the Sussmann case?

Sean Berkowitz:

My speculation would be that it allowed him a vehicle to tell a larger narrative. I think they also thought they were going to win.

When you've got a group of people all looking for the same mission and not evaluating the evidence as fairly as they should, you end up in a situation like this. It's really difficult for a criminal defendant to win in a federal trial. It's very difficult. And I think they felt that they had the wind at their backs, and that they had a fairly straightforward, open and shut case, and that they would win and that this would vindicate some of what they'd been doing and that they would be able to tell their larger narrative. We worked very hard to ask them not to bring this

case, and I don't think that we ever got close to convincing them that this was an inappropriate case.

I think that this is an example of our system working the way that it should, at least in terms of the jury, but not necessarily working the way that it should in terms of a case being brought against somebody who had to undergo incredible hardship.

Having an investigation hanging over him for well over a year, and then eight months of uncertainty surrounding it. Every case is an incredible challenge. It was a privilege to do it. And I'm happy to be done with it and to move on.