

BY POPULAR DEMAND: JOHN DURHAM CLAIMS HIS MEMORY IS MORE SKEWED THAN JAMES BAKER'S

I've already written three posts about last week's remarkable filings (one, two) by John Durham. First I showed that John Durham didn't even know about a prior anonymous tip Michael Sussmann shared with DOJ (in this case, the Inspector General) on behalf of Rodney Joffe, showing that four months after Durham indicted Sussmann, he still has no understanding of the normal relationship between Sussmann, Joffe, and DOJ. Then I marveled that Durham would take a junket to Italy to get Joseph Mifsud's dated phones but never walk across DOJ to get the James Baker phones he had forgotten that DOJ IG had. Finally, I offered a possible explanation for Durham's confession that April Lorenzen thinks his lawyers have been bullying her.

But in spite of the multiple ways I've covered these serial confessions of some weaknesses to Durham's case, I've gotten multiple requests for something else: A comparison of how Durham now describes his own frail memory with what he claims about Baker's.

As I laid out here, Durham is forced to deal with the fact that his single witness against Sussmann gave sworn testimony that materially conflicts with the allegations against Sussmann. To do so, Durham will (and already has) argued that Baker's descriptions of the a September 2016 meeting he had with Sussmann closer to the date of the meeting are *less reliable* than the ones after more time passed.

As an initial matter, the defendant's motion provides a skewed portrayal of the purported Brady evidence at issue by

cherry-picking excerpts from the substantial discovery the Government has already provided to the defense. The defendant, for example, alleges that FBI General Counsel James Baker “contradict[ed] the Special Counsel’s allegation that Mr. Sussmann affirmatively [said] he was not meeting with him on behalf of any clients” in (i) a 2019 interview with the U.S. Department of Justice’s Office of Inspector General, and (ii) a 2020 interview with the Special Counsel team. (Mot. at 3). But as the defendant is aware from discovery, both of those interviews occurred years after the events in question, and Mr. Baker made these statements before he had the opportunity to refresh his recollection with contemporaneous or near-contemporaneous notes that have been provided to the defense in discovery. Indeed, the defendant’s motion entirely ignores law enforcement reports of Mr. Baker’s subsequent three interviews with the Special Counsel’s Office in which he affirmed and then re-affirmed his now-clear recollection of the defendant’s false statement.

Durham is actually soft-pedaling the extent of the problem. He’s saying that Baker’s memory in two separate appearances in 2018 (two years after the meeting), an appearance in 2019 (three years after the meeting), and the first meeting with Durham in 2020 (almost four years after the meeting) is less reliable than four later interviews, conducted under threat of prosecution, with Durham’s team.

Whatever: According to Durham – at least when it comes to key witnesses whose testimony you need to say a certain thing to fit your conspiracy theory – refreshed memory is better than memory closer to the events.

But here’s what Durham says – when trying to

correct an earlier incorrect statement – about his own memory:

Paragraph 10(a)(ii) states: “[I]n early January 2022, the Special Counsel’s Office learned for the first time that the OIG currently possesses two FBI cellphones of the former FBI General Counsel to whom the defendant made his alleged false statement, along with forensic reports analyzing those cellphones.” Id. The Government wishes to provide some additional context for this statement.

After reviewing the Special Counsel’s Office’s public filing, the DOJ Office of Inspector General (“OIG”) brought to our attention based on a review of its own records that, approximately four years ago, on February 9, 2018, in connection with another criminal investigation being led by then-Acting U.S. Attorney Durham, an OIG Special Agent who was providing some support to that investigation informed an Assistant United Attorney working with Mr. Durham that the OIG had requested custody of a number of FBI cellphones. OIG records reflect that among the phones requested was one of the two aforementioned cellphones of the then-FBI General Counsel. OIG records further reflect that on February 12, 2018, the OIG Special Agent had a conference call with members of the investigative team, including Mr. Durham, during which the cellphones likely were discussed. OIG records also reflect that the OIG subsequently obtained the then-FBI General Counsel’s cellphone on or about February 15, 2018. Special Counsel Durham has no current recollection of that conference call, nor does Special Counsel Durham currently recall knowing about the OIG’s possession of the former FBI General Counsel’s cellphones before

January 2022. [my emphasis]

For witnesses under threat of prosecution, Durham says, refreshed memory is better than the original.

For Special Counsels caught in a false statement, however, that kind of refreshment is useless for reminding someone of inconvenient facts.