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The Cutting Edge:
Issues in White Collar Crime and Corporate Governance
Episode 2: "Special Counsel: Whose Interests Do They Serve?"

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John Coffee: This is John Coffee, and this is the second installment of our *The Cutting Edge* series in which we focus on issues in white collar crime and corporate governance that we believe present difficult issues in legal ethics and professional standards. Again, I'm serving as moderator, and I'm joined by the Honorable Jed Rakoff, who is senior United States district judge in the Southern District of New York and also an adjunct professor at Columbia Law School. An expert in white collar crime, he has presided as judge over 300 or more criminal trials and serves as our special commentator and resident philosopher king. Our focus today will be on the role of special counsel. Who are these special counsel? They are counsel appointed, once, by the president and, today, by the attorney general to conduct an investigation and prepare a report, prosecuting alleged lawbreakers along the way. Although their constitutional status is still unresolved, the Department of Justice's rules state that they are largely beyond the reach of an incoming president, absent special cause for removal. The rationale for a special counsel is that sometimes a person of unimpeachable integrity and professionalism is needed because of a conflict that might affect or compromise the Department of Justice's own ability to conduct an adequate investigation.

The very first special counsel was appointed by President Ulysses Grant in 1875 to investigate the Whiskey Ring, which had corrupt associations with members of President Grant's own administration. Still, not long thereafter, President Grant fired his special prosecutor, as he called him. And that reminds us that tension between the president and special counsel has a long history and does not begin with Donald Trump and Robert Mueller. Now, once special counsel were governed by a statute, which Congress let expire, and today the only rules are those specified in the Code of Federal Regulations by the Department of Justice. And these rules, as we will see, appear to be sometimes ignored, and they're not enforceable by private parties.

Our special guest today is Michael Bosworth, who was a partner at the firm of Latham & Watkins, a very respected law firm, at the time of an important criminal trial that he and his fellow counsel there won this May over John Durham, a special counsel for the Department of Justice. Durham had prosecuted Bosworth's client Michael Sussman for allegedly making a false statement to the FBI in the final days of the 2016 presidential campaign. Mr. Durham had been informally authorized to conduct an investigation in 2019 and later was formally special counsel on October 19, 2020—really, close before

the presidential election. This appointment by a Republican attorney general presumably recognized that Mr. Durham, as a special counsel, could not be easily removed by any new Democratic administration and thus could continue a politically sensitive investigation and prosecute those who had allegedly induced the FBI to investigate the Trump campaign for its Russian connection.

Basically, the indictment alleged that Mr. Sussman met with Jim Baker, the FBI general counsel, at the end of the Obama administration in September 2016 in an effort to coerce the FBI to open an investigation into arguably suspicious communications between the Trump Organization and a Russian bank. More specifically, the indictment alleged that, during this meeting, Sussman "stated falsely that he was not acting on behalf of any client" and "was conveying the allegations as a good citizen". At bottom then, we have a fairly simple false-statement case buried in a much longer indictment, which makes a number of political charges. According to Durham in the indictment, Sussman was in fact an agent for the Clinton campaign. But although Mr. Sussman had been a partner at the law firm Perkins Coie, which represented the Clinton campaign, others associated with the campaign say they had never asked him to conduct such a meeting with the FBI, and they had no interest in trying to establish such an investigation. Now, despite an elaborate buildup and intense press attention, the government failed at trial to convince the jury, which acquitted Mr. Sussman after only a few hours of deliberation. Here are Sussman's comments, made on the courthouse steps only a few moments after the jury's acquittal:

> I have a few thoughts to share now that the trial has ended. I told the truth to the FBI, and the jury clearly recognized that with their unanimous verdict today. I'm grateful to the members of the jury for their careful and thoughtful service. Despite being falsely accused, I'm relieved that justice ultimately prevailed in my case. As you can imagine, this has been a difficult year for my family and me, but right now we are just grateful for the love and support of so many during this ordeal. And I'm looking forward to getting back to the work that I love. Thank you.

Coffee: While acquitted, Mr. Sussman is no longer associated with any law firm and presumably experienced some economic and reputational injury. This leads us to a question on which we will really focus today: Do special counsel push too hard and indict in marginal or weaker cases that ordinary prosecutors would decline to prosecute? For example, one law professor, Professor [Saikrishna] Prakash at the University of Virginia, writing in the *Harvard Law Review*, has recently observed, "Special counsels (and their teams) have all the wrong incentives. Give a prosecutor an unlimited budget and a rather narrow set of targets and they will be hell-bent on prosecutions. Special prosecutors who do not secure convictions are judged failures, and no one takes the job to be a flop." Now, we will return to this issue later. It's one that deserves close examination to address these questions.

We now turn to Michael Bosworth, who served as co-counsel along with his fellow partner at Latham & Watkins, Sean Berkowitz, for defendant Sussman. To give him a too brief introduction, let me note that among his impressive credentials are service from 2014 to 2020 as deputy counsel to the president and from 2013 to 2014 as special counsel to the director of the FBI. He's also served as an assistant United States attorney in the Southern District of New York, and he has clerked, in reverse order, for

Justice Stephen Breyer of the Supreme Court, the late Chief Judge Robert Katzmann of the Second Circuit Court of Appeals, and Judge Rakoff of the Southern District of New York. From a poker perspective, he holds three aces in his hand. Michael, we're delighted to have you here and appreciate your taking the time.

Now, let me start at the beginning, with the pretrial stage. Mr. Sussman is not a household name, and it seems plausible, at least, that Mr. Durham wanted to use him primarily as the means by which to go higher up on the ladder. A standard practice among prosecutors is to start low on the ladder and seek to flip low-ranking defendants to testify against higher-level officials. Is this an illustration of that kind of practice?

Michael Bosworth: Thanks, professor, for having me on. You know, the question of cooperation, I think, is a very interesting one. And in the ordinary case, you're right, a prosecutor might bring a charge against someone who's not as well known or not as culpable as some others. I don't think that's what this case was about. For there to be a real chance of having a cooperator, the prosecutors need to actually charge a crime that could involve other people, and there's got to be a universe of more culpable or more interesting participants in the crime to go after. That's just not what this case was about. Mr. Sussman – who's a respected national security lawyer, someone who's himself a Department of Justice alum – wasn't charged with defrauding the government. He wasn't charged with a substantive crime other than making a single false statement. And the government got it wrong. There wasn't even a crime there, but there just simply wasn't the kind of crime that Mr. Sussman could or would cooperate against others on.

Coffee: Let me put a bottom line on this: Did Durham ever really seek to gain cooperation from Sussman, or was that topic no more than tangentially ever mentioned?

Bosworth: You know, I don't want to get into conversations that we might have had with the government about any topic, just because I still have attorney-client confidences to protect. But needless to say, this was not a case in which Mr. Sussman was ever going to admit his guilt. He wasn't guilty of anything, nor was he going to accuse others of guilt, because to his knowledge, no one else did anything wrong either.

Coffee: So we don't have the facts of the classic flipping methodology. But now a critical question: Mr. Durham was a career federal prosecutor over 25 years at the Department of Justice, not a politician or a celebrity from private practice. He had won notable Department of Justice awards and had risen to the position of U.S. attorney for the state of Connecticut. Now, you have also been a federal prosecutor. Do you have the sense that an ordinary federal prosecutor working in a U.S. attorney's office, possibly in a political corruption section, would have prosecuted this case if it came to him in the ordinary course of business?

Bosworth: You know, when Mr. Sussman was first indicted in the fall of 2021, one of the initial statements that my partner, Sean Berkowitz, and I put out touched on exactly this issue: that this is a case that the Department of Justice ordinarily never would have charged, and that the case was brought because of politics, not facts. In a false statement case, the government's got to prove a number of things: They've got to prove there was a statement; they've got to prove the statement was false; they have to prove

that the defendant intended to make a false statement; and they have to prove that the statement mattered. Our view was the government couldn't prove any of that. And to give you an example of why, take just the question of what the statement was. At the time that Mr. Sussman was charged, Mr. Durham had no evidence of what statement Mr. Sussman might have made to Jim Baker other than Jim Baker's own words. The statement that Mr. Sussman was alleged to have made was an oral statement made at the time, five years ago, to a single witness that wasn't recorded, that wasn't observed by any other witness. It was a he-said, he-said case at best. And what made it even worse for the special counsel was that Mr. Baker, who's someone I worked with and respect, had given wildly conflicting accounts of what Mr. Sussman actually said to him. He said, for example, under oath at one point, that Mr. Sussman DID speak about having clients, when Sussman was charged with saying he didn't have clients. So this is the kind of case that the Department of Justice, in my view, never would have brought, because they've got to be able to prove a case beyond a reasonable doubt. And a one-witness case where the one witness has given wildly conflicting accounts is not the kind of case that federal prosecutors usually bring.

Coffee: Now, that begins to suggest that there might have been ulterior motivations for this prosecution because the strength of the evidence, as you characterize it, is very thin, nowhere near the kind of smoking gun that prosecutors might want in this kind of case. Now, as we move on, the Department of Justice's rules require that special counsel come from outside government. It is not clear that private parties have any standing to assert violations of these rules. Yet, as a U.S. attorney for Connecticut, Mr. Durham did not really come from outside government and seems to have been holding an office that he was not legally qualified to possess. Did you ever consider making that kind of argument, or was that outside of your basic trial strategy?

Bosworth: So the question of the legality of Durham's appointment is one that academics and other commentators certainly have spent a lot of time analyzing. There are some who make exactly the argument you just made: that in order to become a special counsel, someone's got to be appointed from outside government. But there are others who say that the order appointing Mr. Durham actually wasn't itself an order based on the regulations but was rather something based on the attorney general's supervisory powers to appoint people as prosecutors, in which case a special counsel wouldn't have to come from outside government. It's an interesting debate. Our strategy generally was to focus on critical issues and to spend time and resources on the things that really mattered, the things that we thought we had a real chance of winning in order to build credibility both with the court and ultimately with the jury. This was not an area that we thought made sense to focus on when there were other riper targets to explore.

Coffee: But the bottom line here is that, even if we have rules in the Department of Justice regulations, they don't necessarily apply because the attorney general can rely on basic supervisory authority. So it's an interesting status of what the legal rules mean. Now, early in your defense, you made a pretrial motion to dismiss the indictment, and you alleged any misstatement by Sussman as to his motivation or associations were necessarily immaterial. Now, this motion failed, and that's what usually happens to motions to dismiss at criminal trial, and there are other reasons why it was maybe a difficult motion to win. But even though you lost the motion, did you win the war? Did

you have another purpose in making these motions? And did you effectively realize that purpose?

Bosworth: Yeah. You know, we did not file a slew of pretrial motions. The only pretrial motion, you're right, that we filed was a challenge to the materiality of the statement that Sussman was alleged to have made. And our argument was that, as a matter of law, the statement he's alleged to have made was not material, because whether or not he had a client was irrelevant to the sorts of decisions that the FBI had to make. And, notably, one of the arguments we made is that never before, to our knowledge, and the government never said otherwise, has someone who gave a tip to the government about a potential crime been charged with making a false statement unless they're charged with making up the tip itself, like someone calling in a fake bomb threat, let's say, to the FBI. No one was ever charged with making a false statement or a statement other than the false tip, which just underscores what an unprecedented prosecution this was. Nevertheless, you're right, it's tough to win a materiality motion pretrial. Our view was it was worth making, even though we thought we might not win one, because it was important to educate the court on an issue that was going to be critical in this case, whether the statement Sussman allegedly made mattered to the FBI, and because it gave us a chance to really spend time developing our view of what materiality means. And that was something that did pay off, we think, because, when it came time to charge the jury, the judge relied on some of the law that we cited, some of the analysis that we provided, when instructing the jury, for example, telling them that as a matter of law, someone couldn't be held to have made a material misstatement if it was something that was trivial or not important to the government decision. Getting that language in the ultimate jury charge was, to our minds at least, a really important victory. So you're right, it was a really important long-term strategic move.

Coffee: Now, let me bring in Judge Rakoff here. Is this increasingly common, that defense counsel use motions to dismiss, not to get the indictment dismissed, but to educate the judges about what's really going to matter in the forthcoming trial.

Jed S. Rakoff: So I don't think it's increasingly common. I think it has been a well-known tactic from time immemorial. But it is a good tactic, in my view, because early on a judge will have only the most rudimentary idea of what the facts of the case are. If it's an important case or a high-profile case, they'll know the general allegations. They'll have read the indictment, but they won't have a nitty-gritty sense. And a motion to dismiss can give a judge a much more detailed view of where the real clash between the two parties focuses. And I think from, frankly, from both standpoints, but particularly from a defense standpoint, that's a useful thing to educate the judge.

Bosworth: And if I may just add one thing to Judge Rakoff's comment. The goal of educating the court was the goal that we had from the indictment itself. So even well before our motion to dismiss, mere weeks into the case, we filed a motion for a bill of particulars that was quite lengthy on a number of points, in part because we did want more information from the government and in part because it gave us an opportunity to showcase our view of the facts of the case, which we also thought was important right from the outset in order to educate the court about the tremendous flaws in the prosecution that was brought here.

Rakoff: And I'll add one thing as well, with apologies. What's important is to bring only one or two such motions. If you bring a slew of motions, most of which are going to be denied, the judge will be left with the sense of, these guys are just throwing everything they can at me and they don't really have a coherent view of where they're going. So it is very important to make a good impression with the judge by limiting yourself to just one or two motions.

Coffee: Well, the bottom line was that it seems to have worked. Now, let me move on to the indictment, and there's a little twist here that raises a question. The Trump administration has sometimes suggested the Democrats and the FBI have colluded to implicate Trump and to link him with Russia in a way that might be politically damaging. This was a consistent view, and sometimes the Trump administration even argued that the Deep State bureaucracy conspired with the Democrats to block or obstruct Trump initiatives. But Durham's indictment was quite different. It didn't see the FBI as a co-conspirator with the defendant; rather it saw them as the victim. The FBI was lied to and thus was [not] the villain. Was it just easier to allege the case this way, or do you have any sense of whether there was some other motivation?

Bosworth: Yeah, no. It's a really important shift, I think you're right. When the special counsel was initially appointed, he was appointed with the mandate of figuring out why it was that the government spent any time investigating potential connections between candidate Trump and Russia, in particular, trying to investigate whether someone engaged in wrongdoing in connection with the Mueller investigation. And the point from the beginning was, the FBI might have been a deliberate, intentional participant in some kind of Russia hoax, to use some of the popular language. In this case, the FBI wasn't the bad actor, at least as charged, but was kind of the hapless victim, it was the general counsel who was duped by Mr. Sussman about who Mr. Sussman represented. I think the reason that that kind of shift occurred is because that was the only role the FBI could play if Mr. Durham wanted to bring this case. The false statement only made sense if Sussman had somehow lied to the FBI and tricked them into investigating something they otherwise wouldn't have investigated. Now, that made no sense based on the evidence, and it was particularly problematic, I think, as the trial played out because one of the things that we showed was that the FBI wasn't duped about anything. And if the claim was somehow Mr. Sussman tricked the FBI and led them not to understand that he was associated with partisan causes, we produced a ton of evidence during the trial that the FBI knew full well that Mr. Sussman had represented the Clinton campaign, had represented the Democratic National Committee, and that all the people making the important decisions in the investigation knew it, so they weren't tricked about anything. And so the idea that the FBI was a victim here really, I think, backfired as the evidence came in over the course of the trial.

Coffee: Now, let me move on to the trial stage. There's a *New Yorker* article about this case which characterizes the indictment as flimsy. Now, as defense counsel, I expect you agree with that. But typically, and particularly in white collar cases, prosecutors and defense counsel can agree on some things, can have normal conversations. Here, in discussions with Durham and his staff, did you ever seek to assert to them, either early on or on the eve of trial, that this case was just beyond the pale and really shouldn't have been brought by any stretch of the imagination. What was your relationship with them?

Bosworth: Now, the special counsel's investigation, as you note, went on for years. Without getting into the specific details of conversations we had, I think it is fair to say, of course, we made full-throated arguments to them about why Mr. Sussman hadn't done anything wrong, why this case would be unprecedented, why it would be unlawful, why it would be improper. We made all those arguments, including many of the arguments that we ultimately made to the jury. Special counsel, and it's his prerogative, just didn't agree. And I think it was the failure to engage on these issues that was one of the reasons why they lost so spectacularly at trial.

Coffee: Well, we have seen increasing polarization in many areas. But here in this case, it looks like defense counsel and prosecutors couldn't agree on anything and were really quite distant from each other, each pursuing a very different path. Is that a fair characterization?

Bosworth: In part. Obviously, we had very different positions on the major issues in the case, and we disagreed on substance, we disagreed on process. But I think it's important, where possible, for all lawyers to engage, especially with adversaries, as professionals, and as colleagues. So we certainly had open lines of communication with the Durham team. We think that was really important, and it was important both for Mr. Sussman and I'm sure for the court to see that both sides could treat each other as officers of the court, as professionals, even though we were adversaries.

Coffee: How big a legal team did Mr. Durham assemble to investigate and try this case?

Bosworth: The trial team ultimately consisted of four different prosecutors, as well as Mr. Durham, who sat with the prosecutors at the government table during the trial. But it was the four prosecutors that really did the work of the case.

Coffee: Can you explain to our audience that that is a larger than normal investment of personnel?

Bosworth: It's not a little investment of personnel. It's hard for me to say whether that's too much or just enough. You know, they were prosecutors from different offices, one from main justice. You know, there are some cases where the government does marshal their resources and really put a good number of prosecutors and agents on a case. Typically, a one-count false-statement case isn't one of them. But that's how we got here. Now, by contrast, the lion's share of the work on the defense side was done by myself and Sean Berkowitz, the partner, and two associates, Natalie Rao and Catherine Yao. That was it. Whether it was the right lineup, you know, I couldn't say, but obviously the result was good for us.

Coffee: What I'm trying to get to, and I think maybe you agree, is that there was a significant investment of resources by the government in a case against a fairly low-level person. Correct? Not correct?

Bosworth: Yeah. No, no question, there was a significant investment of resources on the special counsel's part. I mean, I think that they have spent millions of dollars on this

investigation with, at this point, not a whole lot to show for it. As of this point, the special counsel has brought three—only three—cases, each of them a variety of false statement cases. The special counsel has not proved up or brought charges showing that there was the kind of Deep State conspiracy that people spoke about when he was appointed. They've got three false-statement cases. One, an FBI lawyer pled guilty and got probation. Second, Mr. Sussman, who was acquitted at trial. The third, a researcher who's about to stand trial in the Eastern District of Virginia. What comes of that? We don't know. But if you look at the results versus the investment of resources, it's not a very favorable ratio for the special counsel.

Coffee: Let me talk for a moment about what might have been the most difficult tactical problem for you in this case. It was a factual issue. Your position was that your defendant was never an agent of the Clinton campaign, but he appeared to have billed some hours investigating his claim of suspicious contact between the Trump computer and the Russian bank to the Clinton campaign. Having billed the Clinton campaign, that tends to undercut your ability to say you were not an agent of the Clinton campaign. That's a problem for you. How did you address it? Obviously, it succeeded. But how did you address it?

Bosworth: Sure. So a friendly amendment to the question. Our position wasn't that Mr. Sussman was never an agent of the Clinton campaign, that he never represented the Clinton campaign. Our position was he wasn't representing the Clinton campaign when he met with the FBI general counsel. And this, I think, actually highlights one of the main differences between the special counsel and the defense in this case. The special counsel's theory was that Mr. Sussman went to the FBI on behalf of the Clinton campaign to get the FBI to investigate. That's just not our view of what happened. We readily conceded that Mr. Sussman represented the Clinton campaign in the summer of 2016, in looking into this issue and in trying to get a newspaper interested enough in the issue to publish a big story about it. And so the billing records show that Sussman spent time in the summer of 2016 working on this story to try to pitch it to a newspaper. And in September of 2016, the *New York Times*, to Mr. Sussman's view, was ready to publish a big story. That was work Mr. Sussman did for the campaign. Going to the FBI was something very different. That was something Mr. Sussman did on his own because of his respect for the FBI and because he didn't want them to get caught flat footed when this story came out. So when you look at the billing records, which I agree, the special counsel treated as some of their best evidence, it actually was evidence that supported the defense position, not the government. The record showed that in the summer of 2016, Mr. Sussman billed the campaign for work he was doing to try to get a story published. But when it came time for the FBI meeting, the records show he didn't bill the Clinton campaign for that FBI meeting. And in fact, there were records that showed when he went to the FBI, he didn't bill anybody. There were taxicab receipts, for example, that showed he was billing the law firm, not the Clinton campaign, for costs associated with the meeting. So we were able to show that the billing records were actually some of our best evidence, not the special counsel's best evidence.

Coffee: Now, I want to take on one other tactical issue and bring in Judge Rakoff at this point too. First of all, Mr. Sussman did not testify at trial. Unlike the typical Mafia don, it was conceivable that he could testify. He had not left bodies buried around the New York landscape and didn't have some extremely damaging things he'd have to admit if

he testified. But the decision was made not to have him testify. And this is, frankly, an increasingly common decision made these days by defendants. But what were the considerations in this case that you can discuss?

Bosworth: Sure. You know, I think the ultimate, obviously the decision whether or not to testify was ultimately a decision for Mr. Sussman to make. But the real question, to our minds, was what did he gain by testifying? In this case we thought that the special counsel had failed to prove the case, that there was reasonable doubt all over the place. And it wasn't just that the special counsel failed to prove up his theory of the case. We thought that the evidence was really strong and proving our theory of what happened, including through Mr. Sussman's own words, because he had testified before Congress about some of these issues. Not only that, the jury heard really good testimony about what an honest and ethical and professional person Mr. Sussman was. Testimony from character witnesses that we called. The testimony from witnesses that the government called, including Mr. Baker himself. When you put that together, it seemed like a pretty good set of evidence for the defense. It just wasn't clear that Mr. Sussman would gain anything by testifying, when, in fact, taking the stand could actually present some risks. It can be challenged on every little piece of evidence. The government could give a lengthy summation through its questioning of Mr. Sussman. We sort of liked where the evidence sat before Mr. Sussman had to make the decision whether or not to testify. And I think it explains his ultimate decision.

Coffee: Let me ask you this variation on that question, and then I'll turn to Judge Rakoff. Once you put the defendant on the stand, there's a view that most of the evidence that's earlier been heard drops out of the picture. And what the jury really focuses on is whether they believe the defendant is trustworthy or not. You agree or disagree with that?

Bosworth: I think there is a lot of truth to that. We certainly had no concern about Mr. Sussman's credibility or his likability. But you're right. I mean, it creates like a whole new theater of action, and it wasn't a theater we felt it was necessary to explore.

Coffee: Now, I want to turn to someone who has seen a hundred of these kinds of trials. But what's your view about the defendant taking the stand, judge?

Rakoff: So there's been a big shift in the philosophy of criminal defense lawyers in white-collar cases. Forty, 50 years ago, the prevailing view was that in a white-collar case, you should always put your client on the stand because the jury expected this was a case against often a person of some repute, certainly a person with a positive image in many respects. And the theory was that the jury expected him to take the stand, and no amount of instruction from the judge saying you can't hold that against them would really substitute for how the jury really thought. Now, in most of those cases, the defendants who took the stand were nevertheless convicted. So the theory began to change. And the theory that prevails now among most white-collar criminal defense lawyers is that, if you have done reasonably well in establishing some of your defenses during the government's case through cross-examination, or the government's absence of evidence of some important matter, that you should not put your client on the stand because it will turn the case into a credibility contest, and the jury will be deciding the case solely on whether they believed the defendant or thought he was a liar. However,

in those cases, and I've seen many where the defendant did not take the stand, there was a conviction in most of those cases. So the government has won under either theory. My own view is that in most cases, defense counsel tend to think they're doing better during the government's case than they really are, because they are so into their case that little victories on cross-examination and the like appear to them to be much more strong than they are and that therefore probably in many cases it is still a good tactic to put your client on the stand. However, in this case, as Mr. Bosworth has pointed out, there are lots and lots of holes in the government's case and therefore that may have weighed in the other direction.

Coffee: Let's move now to the outcome. The jury was only out for several hours before acquitting Mr. Sussman. A tremendous victory for defense counsel and possibly a humiliating defense for a prosecutor, who, this was the first case that was actually tried in his campaign. What do you think carried the most weight with the jury? What persuaded them?

Bosworth: You know, it's hard for us to say what specific issue convinced them that Mr. Sussman was not guilty because we actually gave them a range of choices. We said there's reasonable doubt about what statement Mr. Sussman made. There was reasonable doubt about whether the statement was false, which was a real problem the government never really took on. We embraced the statement that they charged him with and said, "Yeah, even if he made it, that's true." There's reasonable doubt about intent. There was reasonable doubt about materiality. And it may be that different jurors thought Mr. Sussman was not guilty for different reasons. In fact, one of the jury notes asked that the judge in the case, Judge Casey Cooper, whether they had to be unanimous about the specific reason he was not guilty, or they just had to be unanimous that he wasn't guilty, which is a good note to get. What I do know from some of the interviews that at least the jury foreperson gave to two media outlets after the trial is that, on the whole, the jury felt the government just hadn't proven the case and that from their perspective, this was a waste of time and resources that should have been devoted to other, more serious matters. And certainly that's something that we agreed with and quite so.

Coffee: So basically, a waste of resources. They thought the government should have been chasing other cases. Judge, have you heard that kind of reaction from jurors when you usually talk to them after the trial?

Rakoff: Yes, I have. I remember one case a few years ago brought by the SEC where the jury took the very unusual step of saying we are—it was a civil case, an SEC charge—we are finding that the defendant is not liable, but we don't want this to discourage the SEC from pursuing higher level defendants in the same overall scenario. And what they were saying in effect was, this particular defendant was a schnook, but they sense that at higher levels misconduct had occurred and they wanted to specially send that message. And although it was unusual to have a note like that, I've been told similar things by other jurors in other cases.

Coffee: Well, Mr. Bosworth, where does this defeat leave Mr. Durham. After three years, he has nothing to show for his efforts, other than I guess one FBI agent did plead guilty to a misdemeanor. Do you foresee any further efforts on his part?

Bosworth: Look, I don't have any more visibility into what the special counsel's up to than anyone else, but I do think it stands to reason that it's unlikely he's got more charges to bring against other defendants. His, you know, remit was the election of 2016. Over five years have passed since that election, and most of the statutes of limitations that would apply to the kinds of crimes that they could charge have expired. Time's up. And it's just hard to imagine that there were other crimes he could bring at this point.

Coffee: As an aside, in September, after this dialogue was completed, Mr. Durham announced that he was letting the grand jury expire and it is not clear that he plans to conduct the final trial that had been planned. Instead, he may be focusing more on writing his final report, which he hopes to complete by the end of the year. At that point, it will be up to the attorney general, Merrick Garland, whether or not to publicly release that report. Well, it looks like a shambles. All right, let me move from the specifics of this case to the general issue of reform, or should there be reform. To some—more than a few—there are hints that this investigation was a search for some political revenge, people had sought to charge the Trump administration with close involvement with Russia, and in return, they wanted to go after those people who had that point of view. Now, against that backdrop, which I'd say is only a possibility. Do we really need special counsel? Are they truly a protection against bias and conflicts within the Department of Justice, or are they often, as in this case, perhaps more a tool by which one administration can extend its reach into the next administration? What would you say on that question, Mr. Bosworth?

Bosworth: You know, I generally hope and believe that federal prosecutors do the right thing for the right reasons, in the right way, as my old boss, Preet Bharara, used to say. But I have real worries about any prosecutor, anywhere, whose powers are unchecked, whose discretion is unsupervised, and who is effectively unaccountable. And I worry that in the case of special counsels, that's often what you get. You get special counsels who have free rein to do whatever they want for whatever length of time with no real check. And I think that that's a dangerous concept in a government like ours. I understand, of course, that there are situations in which the leadership of the Department of Justice or others in the Department of Justice might be conflicted, and the appearance of conflicts could cause trouble if, for example, the department has to investigate people associated with others in the executive branch, the attorney general's colleagues, or even his boss, the president, for those in the White House. But there are also other rules in place, like recusals that protect against bias in investigations and prosecution. And I think that the role of the special counsel's really tricky, and there are, unfortunately, more failures than there are success stories.

Coffee: Now, I have some more specific questions, but I want to get the judge's assessment. Do you feel special counsel work well or not so well?

Rakoff: I think, as you might imagine, the history is mixed. I would start with the fact that where you are investigating your boss, namely a sitting president, there is, to my mind, a clear conflict of interest. Not just an appearance of conflict, but an actual conflict. And therefore, the appointment of special prosecutors in that situation seems to me to be wholly justified because you can't reasonably be asked to investigate the

person you're reporting to, who is your boss, without all sorts of difficult forces coming into play. On the other hand, I think where it's not such a direct conflict that I agree with Michael's point, that the special prosecutor has certain incentives, if you will, that will operate perhaps detrimentally, he's got to justify his work. He spends a lot of time doing it, he's got to come up with something. That perhaps is what happened here. Couldn't get anything big, so you indicted some relative small fry to show you've done your job. Now, having said that, we can think of cases, important historical cases, where the decision was made by special prosecutors not to indict. One of my mentors, Leon Silverman, who was the special prosecutor investigating the then-secretary of labor Donovan, concluded that there was not a case, and he didn't indict anyone else. That was the end of it. Robert Fiske, another of my mentors, who was the original Whitewater special prosecutor, had tentatively concluded that there was not a case there, and then it got ripped from him, and in his place, Ken Starr was appointed, and that turned out to be a very different kind of special prosecutor. So some of this will turn on the character, for lack of a better word, of who is appointed the special prosecutor. Nevertheless, I think that overall, the federal Department of Justice has a pretty good overall history. That warrants its being the natural party to go after political figures of either party, and that it has proven repeatedly that the great majority of cases does not operate through political biases. So I would limit special counsel to extreme cases where there's a clear-cut conflict, like going after an investigation of a sitting president.

Coffee: Now there have been a number of proposals made by others, and often they're responding to the fact pattern that it is suggested by this case, that one president can have a prosecutor he's appointed continue on for the whole of the next administration and possibly even further. Thus, some have suggested, and this may have been the law at one time, that before the special prosecutor could continue for a period of greater than X years there'd have to be a panel of judges who would approve his reappointment. What do you think about that kind of time limit perspective and the use of appellate judges as the decision maker?

Rakoff: Well, the one case where that happened was the Fiske-Starr situation, where Fiske was originally appointed by Janet Reno before there was a law. A law was then passed which is no longer in the books that set a time limit and a time for reappointment and asks a three-judge panel to determine whether the prior prosecutor should be reappointed or a new prosecutor, special prosecutor, appointed. And the panel of judges led by David Sentelle, of the D.C. Circuit, determined that Robert Fiske, even though a man supported by both sides of the aisle, so to speak, had a, quote, "appearance of conflict because he had originally been appointed by Janet Reno." That, by the way, notwithstanding the above, Fiske is a Republican, and that therefore they should appoint Ken Starr in his place. And reasonable people could disagree. But I think Ken Starr was largely a disaster as the special prosecutor. So that's just one case. You can't make a rule based just on one case. But based on that rule, I'm a little skeptical that any of these problems can be solved by rules. Another example is the one that Michael referred to earlier. The present rule, which is a regulation, not a statute, says you can't be a member of the United States government to be a special prosecutor. And Mr. Durham clearly was. And so the government fell back on rather amorphous arguments about general supervisory powers and the like. All that shows is how easy it is to bend the rule when you intend to bend it. So I don't think any of these institutional limitations are nearly as important as the character of the person you appoint.

Coffee: Well, it's always better to have an unimpeachable person, but it's hard to find them in advance. Michael, do you have any further thoughts on this theme about changes or legal adjustments?

Bosworth: Yeah, I agree with the judge that there are certainly some instances where it makes sense that an attorney general can defer to a special counsel and appoint somebody. And it's probably a narrower category than the rules permit today; that's one. Two, when you're thinking about ways to impose some checks on the exercise of prosecutorial power, let me be clear: I think Judge Rakoff can do anything, but as a general matter, I'm not sure that the judiciary has the institutional competence or that it's advisable for them to play a role in supervising the appointment or exercise of special counsel power. That's a pretty executive responsibility. The power to investigate prosecutors is pretty core, and involving the judiciary in decisions about whether someone's doing a good enough job or should continue doing a job, or whether there's enough evidence to justify another year of investigating, those seem like decisions that are not necessarily best for judges to make. And the third point I'd make is that I think it's really healthy that in the wake of the Mueller investigation and prosecutions, amidst the Durham investigations and prosecutions, that we're talking about these issues, because they're not going to go away. It certainly pops up. There are calls for special counsels all the time. We read the news. There are multiple calls for special counsels right now. And it's good for more experienced people of all political persuasions and who served in different administrations, as well as academics and others, to really rethink what we can do to shore up the integrity of the special counsel, and if there are changes that need to be made to the rules, then maybe this administration could even make them.

Coffee: Now, you both may have been answering this question, but let me make sure by putting it very specifically. Should the president be able to fire, remove, or replace the special counsel? This is partly a constitutional issue, but it's possibly also an issue about whether or not regulations adopted by the Department of Justice should restrict the president and allow only the attorney general to remove. Let me start first with the judge. Do you think the president should be able to remove a special counsel?

Rakoff: Putting aside the constitutional question, because though it's very unlikely, it's conceivable that someday it might come up before me, and so I don't think I should express an opinion, but on the practical question, I think the answer is no, notwithstanding the dangers that were alluded to earlier. Because the whole point of having a special prosecutor is to assure the public that this matter is going to be free of politics. This matter is going to be free of political input and influence. It's going to be conducted by an independent person. And I might add that most of the special prosecutors, in the history of the federal government at least, have been very distinguished people: Archibald Cox, Leon Jaworski, Bob Fiske, Leon Silverman, and so forth. This is a very distinguished crew, and that's—the point is to give the public reassurance that this is not going to be treated as just another political matter.

Coffee: Michael, do you have any thoughts on this question?

Bosworth: Yeah. You know, I think in the wake of Watergate, presidents and attorneys general have worked hard to protect decisions about investigations and prosecutions and to make clear that decisions about who or what to investigate should be made based on facts and evidence and not on politics. And for decades, rules developed to ensure that there wasn't improper partisan interference with the investigative and prosecutorial decision-making of the Department of Justice. And I think, too, to the current president's great credit, the president and the attorney general have worked hard to restore those norms, which were tested in recent years. I think whether the president has a constitutional power to remove a prosecutor, I'll leave to constitutional scholars to debate. But it seems like a pretty terrible idea for any president to interfere with the business of the Department of Justice on individual cases and individual prosecutors. It just breeds the kind of partisan interference that for decades we've tried to avoid, and we're a whole lot healthier as a constitutional democracy of the kind that we have if it doesn't look like politicians are directing prosecutors to make decisions about who or what to investigate and prosecute.

Coffee: Now, you are presenting it as highly unlikely that a president would remove a special counsel. There are reporters, however, who have reported that Mr. Mueller was threatened on occasion with removal by the Trump administration. And it does seem like the threat could have some chilling effect in that context, particularly if you worked on or 85 percent the way towards writing a very lengthy report.

Bosworth: Yeah. No, I'm not speaking to whether our president might have wanted to do it. I'm just saying that it shouldn't. And whether it's a Republican or Democratic president, if a president is yanking a prosecutor from an investigation, that seems to me like a terrible degradation of the norms of nonpartisan decision-making that we've worked really hard to restore post-Watergate.

Rakoff: So, Jack, you mentioned a couple of times now one respect in which the special prosecutor is different from any other prosecutor, and that is he typically issues a report, whether he indicts or doesn't indict. He will give an overview of what he uncovered and what conclusions or non-conclusions he has reached. And I think that is a very positive thing. I'm not sure that it couldn't be extended to within the normal department approach to controversial cases, but it certainly gives the public the feeling that this is not, that whatever conclusion was reached was not, something that was just a matter of whim or caprice or politics or whatever; it was based on a detailed and now public report of the evidence.

Coffee: Yeah, it's a very good point. But you will recall that the Mueller report came out very slowly, with the attorney general sort of editing it and selectively quoting from it. So it's not a clear-cut measure of responsibility here.

Rakoff: That's true.

Coffee: Let me give you a final and deliberately provocative question for both of you. Assume that Merrick Garland faces a very difficult decision: whether or not to indict former President Trump on any of several possible grounds or on multiple grounds. Rightly or wrongly, Mr. Garland has made himself controversial by authorizing a search warrant for Trump's Florida home. Should the attorney general, as an exercise of

caution and prudence, appoint a special prosecutor to investigate and potentially prosecute Donald Trump rather than do it himself, when he is perceived by some as having already taken a strong position against Donald Trump? So tell me why or why not we should have a special prosecutor to make that decision about the past conduct of Donald Trump. Who wants to go first? A volunteer.

Bosworth: I vote for Judge Rakoff.

Rakoff: I remember when I used to be able to give direction to Mr. Bosworth, and those days are over. So, to some extent, I think the train has already left the station. If there was going to be an appointment of a special prosecutor, it should have been at the outset. There's already, we know, from reports of grand jury subpoenas and other investigative approaches, a lot has been going on. And one of the advantages of a special prosecutor is representing to the public that, see, we're not going to do this with any political agenda. We're going to from the get-go do it in a highly professional, nonpoliticized way. And while those, doesn't say you still couldn't do it, I think some of the advantages have been eliminated. The other point I would make is, I come back to the fact that I think the default position should always be to have the Department of Justice proceed unless there is a clear conflict of interest, which would be true if Mr. Trump were the sitting president, but is not true when he's not the sitting president. So I don't see the same rationale for appointment of a special prosecutor.

Coffee: Well, he's a possible future president, which produces the same conflicts.

Rakoff: Well, that that's . . . . I don't want to comment on that.

Coffee: OK. Well, Michael, any comment on this?

Bosworth: Well, one, I still take direction from Judge Rakoff, whether or not he sees it; maybe I'm just worse than I used to be at demonstrating my obedience. I think this is an obviously thorny question that lots of folks have spent time debating. The only two comments I would make are, one, even that question seems to me very fact specific and depends on some uncertainties that, we may have suspicions about them, that are still uncertainties. Is President Trump running for president again? Is he running against the sitting president such that this president's attorney general would be investigating, potentially, this president's opponent? These are tricky questions. And I think that there are question marks that make this less obvious a call than it might otherwise have been. The second thing is, just as a general matter, I have tremendous respect for the leadership of this Department of Justice. When I served as deputy counsel to President Obama, I had the pleasure of working with Judge Garland as the president's nominee to the Supreme Court. I think he is someone who has tremendous integrity, very thoughtful, and who really understands the institutional concerns that this question puts at issue. And I would hope and trust that he would make the decision that's right based on the facts as he knows them, which are certainly facts that are more complicated than I understand.

Coffee: Well, at this point, I think we have concluded our analysis. I want to thank you both. And let me say to the audience, generally, this podcast simply presents another chapter in our examination of the legal system's use or possible misuse of discretion. In

time, all the chapters about discretionary decisions could add up to quite a long encyclopedia because it is an enduring issue for our legal system. Thank you very much. And this concludes things. *The Cutting Edge* is a production of Columbia Law School and the Blue Sky Blog. This episode was written by John Coffee, who is joined today by Judge Jed Rakoff and our special guest Michael Bosworth. The podcast is produced by John Coffee, Julie Godsoe, Reynolds Holding, and Michael Patullo. Editing and engineering are by Jake Rosati. Special thanks to Nancy Goldfarb, who is helping us in many ways. If you like what you hear, please leave us a review on your podcast platform. The more reviews we have, the more people will listen. If you're interested in learning more about law, white collar crime, and corporate governance, visit us at law.columbia.edu, or follow us on Facebook, Twitter, and Instagram.