UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
v.	:	**Criminal No. 10-223 (RBW)**
	:	
WILLIAM R. CLEMENS,	:	
	:	
Defendant	:	

GOVERNMENT'S TRIAL MEMORANDUM

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, hereby submits the following memorandum outlining the facts, evidentiary matters, and other matters to be considered pretrial. Trial is scheduled to commence with jury selection on Wednesday, July 6, 2011, at 9 a.m.

I. **Factual Background**

On August 19, 2010, a federal grand jury sitting in the District of Columbia handed up a 6 count indictment charging defendant with one count of obstruction of Congress, three counts of making false statements during a sworn deposition to a Congressional Committee staff, and two counts of perjury at a public Committee hearing. These charges arise out of defendant's voluntary appearance in February, 2008, before the House Committee on Oversight and Government Reform ("the Committee"). As set forth in the grand jury indictment, the Committee was investigating the use of performance enhancing drugs in Major League Baseball and other professional sports.

In March, 2005, the Committee held a hearing titled "Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use." A purpose of this hearing was to investigate the use of PEDs in professional baseball as part of Congress's

authority to regulate commerce and evaluate the nation's drug laws. The Committee's primary focus was the health and safety of teenagers who emulate their sports heroes.

On March 30, 2006, the Commissioner of MLB, partially in response to concerns raised by the Committee during its 2005 hearing, engaged former Ambassador, United States Senator, United States District Judge, and United States Attorney George J. Mitchell and empowered him to conduct a comprehensive investigation of PED use in MLB. On December 13, 2007, Senator Mitchell issued a 409-page report titled "Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball" ("the Mitchell Report"). The Mitchell Report contained multiple allegations of PED use in MLB over the years preceding its release. Among other allegations, the Mitchell Report stated that defendant, while a member of the Toronto Blue Jays and New York Yankees, used anabolic steroids on multiple occasions in 1998, 2000, and 2001, and HGH on multiple occasions in 2000. The Mitchell Report also set forth a series of recommendations to the Commissioner of MLB addressing PED use in MLB.

On December 13, 2007, in response to the allegations set forth in the Mitchell Report, defendant issued the first of a series of public statements explicitly denying his use of performance enhancing steroids. Defendant made numerous other public statements denying his use of performance enhancing drugs and condemning the Mitchell Report in the days and weeks that followed. Among other things, defendant released statements through his representatives, posted an internet video, participated in a television interview with *60 Minutes* correspondent Mike Wallace, and called a press conference which was broadcast on national television. He stated publicly that he would appear before the Committee to answer any questions. On January

15, 2008, the Committee held a hearing titled "The Mitchell Report: The Illegal Use of Steroids in Major League Baseball." At that hearing, Senator Mitchell testified as to the findings in the Mitchell Report. The Committee invited defendant to testify in connection with its continuing investigation of the use of performance enhancing drugs in Major League Baseball.

Defendant appeared voluntarily in Washington and gave a sworn deposition to Committee staff on February 5, 2008. On February 13, 2008, defendant appeared voluntarily before the Committee at a Hearing titled, "The Mitchell Report: The Illegal Use of Steroids in Major League Baseball, Day 2." Defendant's testimony at the Deposition and the Hearing are the basis for the charges in the grand jury indictment.

Count One of the indictment charges defendant with obstruction of the Committee's investigation under 18 U.S.C. § 1505.[1] Count One alleges 15 separate statements made by defendant under oath that are either false or misleading. They are:

(1) CLEMENS's sworn Deposition testimony on February 5, 2008, that he had never used HGH (Deposition at 23);

(2) CLEMENS's sworn Deposition testimony on February 5, 2008, that he never spoke to

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[1]The elements of obstruction of Congress are: (1) there was a proceeding pending before a Committee of the United States Congress; (2) the defendant knew of or had a reasonably founded belief that the proceeding was pending; and (3) the defendant corruptly endeavored to influence, obstruct, or impede the due and proper administration of the law under which the proceeding was pending.

The term "corruptly" means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information. 18 U.S.C. § 1515(b) (emphasis added).

Strength Coach #1 about HGH (Deposition at 66);

(3) CLEMENS's sworn Deposition testimony on February 5, 2008, that with respect to HGH, "I couldn't tell you the first thing about it" (Deposition at 67);

(4) CLEMENS's sworn Hearing testimony on February 13, 2008, that he had never taken HGH (Hearing at 21);

(5) CLEMENS's sworn Deposition testimony on February 5, 2008, that he had never used anabolic steroids (Deposition at 22-23);

(6) CLEMENS's sworn Hearing testimony on February 13, 2008, that he had never taken steroids (Hearing at 21);

(7) CLEMENS's sworn Deposition testimony on February 5, 2008, that Strength Coach #1 injected him with vitamin B12 (Deposition at 36-37);

(8) CLEMENS's sworn Deposition testimony on February 5, 2008, that "four or five needles" containing vitamin B12 would be "already lined up ready to go" in the trainers' room after games (Deposition at 145);

(9) CLEMENS's sworn Hearing testimony on February 13, 2008, that Strength Coach #1 injected him with vitamin B12 (Hearing at 96);

(10) CLEMENS's sworn Deposition testimony on February 5, 2008, that Strength Coach #1 injected him with lidocaine (Deposition at 42-43);

(11) CLEMENS's sworn Hearing testimony on February 13, 2008, that Strength Coach #1 injected him with lidocaine (Hearing at 122);

(12) CLEMENS's sworn Hearing testimony on February 13, 2008, that a New York Yankees teammate "misheard" or "misremember[ed]" when CLEMENS told this teammate in or

about 1999 or 2000 that he (defendant CLEMENS) had taken HGH (Hearing at 86-87);

(13) CLEMENS's sworn Deposition testimony on February 5, 2008, that Strength Coach #1 injected CLEMENS's wife with HGH in 2003 inside CLEMENS's home in Houston without defendant CLEMENS's prior knowledge or approval (Deposition at 173-181);

(14) CLEMENS's sworn Deposition testimony on February 5, 2008, that he had "no idea" that Senator Mitchell wanted to talk to him in connection with Senator Mitchell's investigation of PED use in MLB (Deposition at 113-114); and

(15) CLEMENS's sworn Deposition testimony on February 5, 2008, that he was not at Player #1's house in south Florida on or about June 9, 1998 (Deposition at 16).

The government must prove that defendant made at least one false or misleading statement.

Counts 2, 3 and 4 charge defendant with making false statements to Committee staff during his Deposition on February 5, 2008 in violation of 18 U.S.C. § 1001.[2] Counts 5 and 6 charge defendant with perjury during his Hearing testimony on February 13, 2008 in violation of

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[2]The elements of making a false statement are:

First, that the defendant made a statement or representation;

Second, that the statement or representation was false, fictitious or fraudulent;

Third, that the statement or representation was material;

Fourth, that the defendant acted knowingly and willfully; and

Fifth, that the statement or representation pertained to a matter within the jurisdiction of the legislative branch of the United States government.

18 U.S.C. § 1621.[3]

II. **Manner of Proof**

The presentation of evidence will be testimonial, documentary, and scientific. The government anticipates calling witnesses that have first hand knowledge of defendant's use of performance enhancing drugs and other relevant matters. The government expects to call approximately 45 witnesses in its case-in-chief. The government expects that it may be able to further pare down the number of witnesses it calls. For example, defense counsel has indicated a willingness to stipulate to the authenticity of certain items such as transcripts and other official House records. As a result, we do not expect to call official House stenographers or other personnel to authenticate official House records.[4] We are also working with defense counsel to achieve stipulations on chain of custody on several relevant items.

The government's witnesses will provide a broad range of relevant testimony. These witnesses will consist of officials from the House of Representatives,[5] an individual who assisted

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[3]The elements of perjury are:

First, the defendant must be under oath during the testimony;

Second, the defendant made a false statement;

Third, the defendant willfully made the false statement with knowledge of its falsity, rather than as a result of confusion, mistake or faulty memory;

Fourth, the false statement must be material to the proceedings.

[4]Likewise, the government has indicated to the defense that it will not require the defense to authenticate any transcripts or other official records that it may wish to use.

[5]The government intends to call a former senior staff member of the House Committee on Oversight and Government Reform. This witness will provide testimony on, among other things, the materiality of defendant's sworn statements to the Committee. In connection with the

in the preparation of the Mitchell Report, employees and former employees of several Major League Baseball teams, former Major League Baseball players, expert witnesses from relevant scientific fields, witnesses who corroborate the testimony of other witnesses, as well as others.

A portion of the government's case will consist of business records and other documents. Among other items, these documents will include team medical records, team business records, financial records, electronic mail, audio and video recordings, photographs, summary charts, and pedagogical exhibits. The government has previously provided defendant with access to all of these materials as part of discovery in this matter.[6] In addition, the government will file with the Court and the defense its exhibit list. At trial, we will use the courtroom's electronic system to display exhibits.

The government expects in its case-in-chief to introduce into evidence a substantial volume of relevant statements made by the defendant at various points in time. These statements – which are admissible as non-hearsay statements of a party-opponent under Fed. R. Evid. 801(d)(2) – take several forms, including:

- sworn statements from defendant's Deposition and Hearing testimony;
- statements from recorded voice media such as interviews and telephone calls;
- written statements memorialized in authenticated emails and other materials;
- statements made by defendant's agents or servants concerning a matter within the scope

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hearing on April 21, 2011, the Court has addressed the limitations imposed by the Speech or Debate Clause. We also expect that House Counsel will be present for the staff member's examination to address any Speech or Debate issues that may arise at trial.

[6]As set forth in its formal notice filed on January 21, 2011, the government will seek to admit certain business records pursuant to Fed. R. Evid. 902(11).

of the agency or employment, made during the existence of the relationship.

All of these materials have been disclosed to the defense and will be designated on the government's proposed exhibit list.

The government expects its case-in-chief to last approximately 4 weeks, depending on the length of cross examination and other legal issues which may arise.

III. **Legal/Evidentiary Matters**

The government directs the Court's attention to the following legal or evidentiary matters:

- Defendant's Motion to Dismiss the Indictment – On January 21, 2011, defendant filed a motion to dismiss the indictment or provide alternate relief. After full briefing and argument, the Court denied this motion and directed the government to provide the defendant with a bill of particulars setting forth the precise statements the government alleges are false or misleading in count one of the indictment, obstruction of Congress. The government has provided these particulars to defendant by letter dated May 6, 2011 and will submit an amended special jury verdict form that conforms with these specifications.

- Government's Motion to Permit FBI Special Agent John Longmire to Remain at Counsel Table During Trial – The Court has granted the government's motion.

- Third Party Motions to Quash Defense Rule 17 Trial Subpoenas – On March 2, 2011, defendant issued Rule 17 trial subpoenas to (1) the House Committee on Oversight and Government Reform and (2) DLA Piper in its role as counsel for Senator Mitchell. On March 18, 2011, both third parties moved to quash those subpoenas asserting the Speech or Debate privilege (the Committee) or the work product privilege (DLA Piper). After full briefing and argument, the Court granted the House's motion to quash the subpoena. With respect to the DLA Piper motion to quash, the Court ordered *in camera* inspection of certain documents to determine whether DLA Piper's assertion of the work product privilege could be sustained.

- Government's Motion in Limine Regarding Cross Examination of Brian McNamee – This motion is pending before the Court.

- Government's Legal Memorandum Regarding Use of Evidence of Defendant's Character – The government filed this memorandum of law to outline the relevant case law governing use of evidence of this type.

IV. **Expert Witnesses**

The government anticipates calling several expert or opinion witnesses pursuant to Fed. R. Evid. 702. These experts will testify about relevant scientific examinations they conducted and the results of those examinations. As part of discovery, we have provided the defense with the names and qualifications of these experts as well as summaries of their respective testimony and the underlying reports and work product that form the bases of their opinions.

As of the date of this Memorandum, government counsel has not received any discovery from defendant, nor has government counsel been notified of an intention to introduce any expert testimony at trial.

V. **Issues Related to the Court's Criminal Standing Order**

Opening statement: The Court's standing order in criminal cases limits the length of opening statements to 30 minutes per side "[e]xcept for especially complex cases, or otherwise authorized by the court." Standing Order, ¶ 10(d). The government seeks leave of Court to enlarge the duration of its opening statement in this case to 60 minutes. The presentation of this case requires the development of relevant background information about the legislative branch of the United States government, the operation of Congressional Committees generally, the House Committee on Oversight and Government Reform, the Committee's hearings on the use of performance enhancing drugs in professional sports, the Mitchell Report, and Major League Baseball, among other things. Moreover, the factual presentation covers significant parts of defendant's 24 year, 4 team career in MLB. As set forth herein and elsewhere in the record, there is a large volume and variety of evidence that makes this case out of the ordinary and unlike

many other white collar criminal cases over which the Court presides. This enlargement of time would apply equally to the defense.

Counsel in the courtroom: The Court's standing order restricts counsel from leaving the courtroom without the Court's express permission while the Court is in session. Standing Order, ¶ 10(p). At trial, the United States will be represented by both undersigned counsel. Government counsel have divided equally responsibilities for witnesses and arguments. In order to ensure that there is no delay in any phase of the government's presentation of evidence, it would be from time to time advantageous for one prosecutor to leave the courtroom.[7] Government counsel seeks leave of Court to excuse one of the prosecutors from the courtroom at certain times to achieve this goal.

Rule on witnesses: The Court's standing order directs that "Except for the parties and their representatives, all witnesses shall remain outside the courtroom except while testifying." ¶ 10(n). The government requests that this rule remain in effect throughout the trial of this matter.

[7]The large majority of government witnesses in this case are from outside the immediate metropolitan area. We are coordinating travel arrangements with each of these individuals and expect no delays in the presentation of testimony.

Respectfully submitted,

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