IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
v.	)	Case No. 1:10-CR-00223-RBW
WILLIAM R. CLEMENS,	)	
Defendant.	)	

MOTION OF NON-PARTY HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM TO QUASH SUBPOENA *DUCES TECUM* AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

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MOTION OF NON-PARTY HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM TO QUASH SUBPOENA *DUCES TECUM*

Pursuant to Rules 17(c)(2) and 47 of the Federal Rules of Criminal Procedure, the Committee on Oversight and Government Reform of the U.S. House of Representatives ("Committee"), through counsel, respectfully moves for an order quashing the February 10, 2011 subpoena *duces tecum* directed to it by defendant William R. Clemens. The subpoena is attached as Exhibit A to the accompanying memorandum. The Committee so moves because, among other things, the compelled production of the documents Mr. Clemens seeks is barred by the Speech or Debate Clause. *See* U.S. Const. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other Place.").

A proposed order is attached.

MEMORANDUM OF POINTS AND AUTHORITES IN SUPPORT

INTRODUCTION

The Speech or Debate Clause protects "'absolute[ly]'" all congressional activities that fall "'within the legitimate legislative sphere.'" *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416, 419 (D.C. Cir. 1995) (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503, 509 (1975)). This constitutional protection includes, among other things, a privilege against the compelled disclosure of documents created, reviewed, or obtained by a committee in the course of a congressional investigation. *See Eastland*, 421 U.S. at 504 ("[T]he power to investigate . . . plainly falls within that definition [of activities within the legitimate legislative sphere]."). "[T]he power to investigate is inherent in the power to make laws because a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *Id.* (quotation marks and

brackets omitted); *see also, e.g.*, *Brown & Williamson*, 62 F.3d 408 (quashing, on Speech or Debate grounds, subpoena *duces tecum* seeking committee documents); *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856 (D.C. Cir. 1988) (same).

Here, defendant William R. Clemens seeks to compel the Committee to produce documents gathered for a legitimate legislative purpose: an investigation of the abuse of illegal performance-enhancing substances by Major League Baseball players, and the impact of that abuse on young Americans who often try to emulate their athletic heroes. This investigation was integral to Congress' power to legislate on a number of subjects including, but not limited to, public health, education, crime, and interstate commerce. Accordingly, as explained in detail below, the subpoena to the Committee should be quashed.

BACKGROUND

The Committee was at all relevant times, and it remains today, the principal investigatory committee of the House: "[T]he Committee . . . may *at any time* conduct investigations of *any matter* . . . ." H.R. Rule X.4(c)(2), 112th Cong. (2011) (emphases added), *available at* http://democrats.rules.house.gov/ruleprec/112th.pdf (last visited Mar. 18, 2011) (relevant excerpts attached hereto at Exhibit B).[1] "The findings and recommendations of the [C]ommittee in such an investigation shall be made available to any other standing committee having jurisdiction over the matter involved." *Id.*

[1] *See also* H.R. Rule X.4(c)(2), 111th Cong. (2009) (same), *available at* http://www.gpoaccess.gov/hrm/browse_111.html (last visited Mar. 18, 2011); H.R. Rule X.4(c)(2), 110th Cong. (2007) (same), *available at* http://www.gpoaccess.gov/hrm/browse_110.html (last visited Mar. 18, 2011); H.R. Rule X.4(c)(2), 109th Cong. (2005) (same), *available at* http://www.gpoaccess.gov/hrm/browse_109.html (last visited Mar. 18, 2011).

In March 2005, following (1) a flurry of allegations regarding steroid use in professional sports, and particularly professional baseball, and (2) a documented concurrent increase in steroid use by teen athletes, the Committee held hearings on those subjects. *See, e.g.*, *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. (Mar. 17, 2005) ("Mar. 17, 2005 Hr'g Tr."), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg23038/pdf/CHRG-109hhrg23038.pdf (last visited Mar. 18, 2011).[2]

One hearing, focused on Major League Baseball, examined the culture of steroids in baseball and whether new federal policy was necessary to address societal problems created by this culture. *See, e.g.*, Mar. 17, 2005 Hr'g Tr. at 1-8 (opening statement of then-Chairman Tom Davis: "The Centers for Disease Control and Prevention tells us that more than 500,000 high school students have tried steroids, nearly triple the number just 10 years ago."); *id.* at 9-21 (opening statement of then-Ranking Member Henry A. Waxman: "Today's hearing is about steroid use in professional baseball, its impact on steroid use by teenagers and the implications for Federal policy."). During the Committee's review of this issue, Committee Members,

[2] *See also Steroid Use in Sports, Part II: Examining the National Football League's Policy on Anabolic Steroids & Related Substances: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. (Apr. 27, 2005), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg21242/pdf/CHRG-109hhrg21242.pdf (last visited Mar. 18, 2011); *Steroid Use in Sports Part III: Examining the National Basketball Association's Steroid Testing Program: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. (May 19, 2005), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg21484/pdf/CHRG-109hhrg21484.pdf (last visited Mar. 18, 2011); *Eradicating Steroid Use, Part IV: Examining the Use of Steroids by Young Women to Enhance Athletic Performance & Body Image: Hearing Before the Comm. on Gov't Reform*, 109th Cong. (June 15, 2005), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg22241/pdf/CHRG-109hhrg22241.pdf (last visited Mar. 18, 2011).

including the then-Chairman and the then-Ranking Member, urged Major League Baseball to conduct a thorough review of steroid use in professional baseball. *See, e.g.*, *id.* at 1-21.[3]

Following the March 2005 hearing and the passage of relevant legislation by two House committees, *see supra* at 4 n.3, the Commissioner of Major League Baseball agreed that additional investigation of the use of steroids and other performance-enhancing substances was merited, and he tasked former U.S. Senator and Ambassador George J. Mitchell with conducting this investigation. Mr. Mitchell issued a 409-page report on December 13, 2007. *See* George J. Mitchell, 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 (2007) ("Mitchell Report" or "Report"), *available at* http://files.mlb.com/mitchrpt.pdf (last visited Mar. 18, 2011).

The Mitchell Report—based on "interview[s of] more than 700 witnesses in the United States, Canada, and the Dominican Republic," Report at B-4, and the review of more than 100,000 pages of documents, *id.* at B-3, B-4—documented in considerable detail the use of illegal performance-enhancing drugs in Major League Baseball. The Report concluded that

[3] Legislation spurred by the findings of the March 5, 2005 hearing and designed to reduce the use of steroids and other performance-enhancing substances by professional athletes was introduced in, and passed by, two House committees: (1) H.R. 2565, 109th Cong. (2005) ("Clean Sports Act"), sponsored by then-Committee Chairman Davis and co-sponsored by 21 other Representatives, passed the Committee on a voice vote on May 24, 2005, *see* http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR02565:@@@L&summ2=m& (last visited Mar. 18, 2011); and (2) H.R. 3084, 109th Cong. (2005) ("Drug Free Sports Act"), sponsored by Committee Member Christopher Shays and co-sponsored by eight other Representatives, was passed by the House Committee on Energy and Commerce on June 28, 2005. *See* http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR03084:@@@L&summ2=m& (last visited Mar. 18, 2011). Similar legislation was introduced in the Senate. *See* S. 1114, 109th Cong. (2005) (sponsored by Senator John McCain, co-sponsored by Senators Chuck Grassley and Ted Stevens). None of these bills was ultimately enacted into law.

"[t]he use of steroids in Major League Baseball was widespread" at least until the recent advent of mandatory testing, at which time "[m]any players . . . shifted to human growth hormone, which is not detectable in any currently available urine test." *Id*. at SR-35.

The Report discussed the impact of illegal performance-enhancing drugs on baseball players, team owners, and the institution of Major League Baseball, *id.* at 4-15, as well as some of the collateral consequences of such abuse:

> Apart from the dangers posed to the major league player himself, however, his use of performance enhancing substances encourages young athletes to use those substances. Young Americans are placing themselves at risk of serious harm. Because adolescents are already subject to significant hormonal changes, the abuse of steroids and other performance enhancing substances can have more serious effects on them than they have on adults,

id. at SR-8; *see also id.* at 4, 15-17, SR-8–SR-9 ("hundreds of thousands of high school-aged young people are still illegally using steroids"; "[e]very American, not just baseball fans, ought to be shocked into action by that disturbing truth.").

The Mitchell Report also identified by name certain Major League Baseball Players suspected of using performance-enhancing drugs, including Mr. Clemens. *See id*. at 167-75. Mr. Clemens responded by challenging publicly the accuracy of the Report, including via a press conference and an appearance on the network television program "60 Minutes." *See The Mitchell Report: The Illegal Use of Steroids in Major League Baseball, Day 2: Hearing Before the H. Comm. on Oversight & Gov't Reform* at 2, 110th Cong. (Feb. 13, 2008) ("Feb. 13, 2008 Hr'g Tr."), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg43333/pdf/CHRG-110hhrg43333.pdf (last visited Mar. 18, 2011) (opening statement of then-Chairman Waxman: "On the same day the Mitchell Report was released, however, Roger Clemens, through his attorney Rusty Hardin, publicly challenged the accuracy of the section of the report that

presented evidence of his use of steroids and human growth hormone."); *see also id.* at 123 (Rep. Maloney: Noting that, "after [the Mitchell Report] was issued, [Mr. Clemens] began speaking out against these allegations."); Tr. of Dep. of William R. Clemens 9, Feb. 5, 2008 ("Clemens Dep. Tr."), *available at* http://democrats.oversight.house.gov/images/stories/documents/20080213144756.pdf (last visited Mar. 18, 2011) (referencing press conference and 60 Minutes program).

Based on its investigative findings, the Mitchell Report provided to the Commissioner of Baseball a number of specific recommendations designed to "prevent the illegal use of performance enhancing substances in Major League Baseball." Report at 285.

The Committee, in furtherance of its broad investigatory authority, then determined to investigate whether the Mitchell Report was accurate and credible, whether Major League Baseball would implement Mr. Mitchell's recommendations, and whether Congress needed to legislate in this area. The Committee held a hearing in January 2008, at which Mr. Mitchell himself, as well as the Commissioner of Major League Baseball and the Executive Director of the Major League Baseball Players' Union, testified. *See The Mitchell Report: The Illegal Use of Steroids in Major League Baseball: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 110th Cong. (Jan. 15, 2008) ("Jan. 15, 2008 Hr'g Tr."), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg55749/pdf/CHRG-110hhrg55749.pdf (last visited Mar. 18, 2011).[4] The Committee also requested, from Mr. Clemens and others, voluntary

[4] *See also Myths & Facts About Human Growth Hormone, B-12, & Other Substances: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 110th Cong. (Feb. 12, 2008), *available online at* http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg47428/pdf/CHRG-110hhrg47428.pdf (last visited Mar. 18, 2011).

deposition testimony relevant to the Mitchell Report provisions challenged by Mr. Clemens. *See* Memorandum from Chairman Henry A. Waxman, Comm. on Oversight & Gov't Reform, to Democratic Members of the Comm. on Oversight & Gov't Reform at 1 (Feb. 26, 2008), *available at* http://democrats.oversight.house.gov/images/stories/documents/20080227135441.pdf (last visited Mar. 18, 2011); Staff of H. Comm. on Oversight & Gov't Reform, 110th Cong.,Weighing the Committee Record: A Balanced Review of the Evidence Regarding Performance Enhancing Drugs in Baseball at 16 & n.24 (Comm. Print 2008), *available at* http://www.chron.com/content/news/photos/blogs/sportscast/steroidsreport032508.pdf (last visited Mar. 18, 2011).

Mr. Clemens agreed and voluntarily appeared before Committee staff on February 5, 2008, to provide a sworn deposition. *See* Clemens Dep. Tr. at 6-8, 83-84, 86. After the Clemens and other depositions were completed, and additional information pertinent to Mr. Clemens' challenge to the accuracy of the Mitchell Report was collected, the then-Committee Chairman indicated that his inclination was "[to] issue a written report," rather than to hold an additional public hearing. *See* Feb. 13, 2008 Hr'g Tr. at 4, 11. However, the Chairman was "influenced by the view of Mr. Clemens' attorneys, who thought it would be unfair if the Committee issued a report without giving Mr. Clemens the opportunity to testify in public." *Id.*; *see also id.* at 16, 18 (opening statement of then-Ranking Member Davis: "Today we offer a stage to the primary, most vocal challenger."). Accordingly, on February 13, 2008, the Committee held a second hearing on the Mitchell Report, at which hearing Mr. Clemens appeared voluntarily and again provided sworn testimony. *See id*. at 4, 20, 22, 26.

Mr. Clemens' deposition and public hearing testimony raised "significant questions . . . about [his] truthfulness" in the minds of then-Chairman Waxman and then-Ranking Member Davis. *See* Letter from the Honorable Henry A. Waxman, Chairman, and the Honorable Tom Davis, Ranking Member, Comm. on Oversight & Gov't Reform, to the Honorable Michael B. Mukasey, U.S. Attorney General 2 (Feb. 27, 2008) ("Referral Letter"), *available at* http://democrats.oversight.house.gov/images/stories/documents/20080227122923.pdf (last visited Mar. 18, 2011). As a result, Representatives Waxman and Davis jointly requested that the Department of Justice "investigate whether . . . [Mr.] Clemens committed perjury and made knowingly false statements during the . . . Committee's investigation of the use of steroids and performance-enhancing drugs in professional baseball." *Id.* at 1.

Subsequently, the Committee voluntarily produced to the Department, directly and/or by reference to the Committee's public website, a substantial quantity of documents the Committee had obtained, or that it had created or reviewed, in the course of its investigation, including:

(i) Videos of Committee's Jan. 15, 2008 and Feb. 13, 2008 hearings;

(ii) Transcripts of deposition testimony of Mr. Clemens (Feb. 5, 2008), Brian McNamee (Feb. 7, 2008), and Andrew Pettitte (Feb. 4, 2008);

(iii) Transcripts of interview testimony of Melvin Thomas Craig (Feb. 4, 2008), Allan E. Gross, M.D. (Feb. 11, 2008), Rex Allen Jones (Feb. 8, 2008), Edward ("Chuck") Knoblauch (Feb. 1, 2008), David Leo LaBossiere (Feb. 8, 2008), David Lintner, M.D. (Feb. 11, 2008), Eugene Monahan (Feb. 12, 2008), James Joseph Murray (Jan. 31, 2008), Christopher J. Nitkowski (Jan. 27, 2008), Arthur Pappas, M.D. (Feb. 12, 2008), Scott Shannon (Jan. 31, 2008), and Ron Taylor, M.D. (Feb. 4, 2008);

(iv) Executed declarations or affidavits from Jose Canseco (Jan. 22, 2008), Jessica Fisher (Feb. 11, 2008), Andrew Pettitte (Feb. 8, 2008), and Laura Pettitte (Feb. 8, 2008);

(v) Staff counsel interview notes of non-transcribed interviews of Mr. McNamee (Feb. 7, 2008), Jose Canseco (Feb. 10, 2008), Jessica Fisher (Feb. 10, 2008),

James Clodfelter (March 18, 2008), Tommy Craig (March 19, 2008), Glenn Dunn (March 20, 2008), and John Brioux (March 25, 2008);

(vi) Transcript of interview of Mr. McNamee by Mr. Clemens's representatives (Dec. 12, 2007);

(vii) Golf receipt provided to Committee by Mr. Clemens;

(viii) Certain medical records provided to Committee by Mr. Clemens;

(ix) Certain committee communications with Lawrence Yao, M.D.;

(x) Mr. Clemens's 2003 Major League Baseball drug test results;

(xi) Certain emails provided by James Murray concerning Mr. McNamee; and

(xii) Certain emails involving Messrs. Murray, McNamee, and Clemens.

See, e.g., Certain Transmittal Letters, attached collectively as Exhibit C.[5]

In producing these materials voluntarily, the Committee strove to provide the Department with all relevant factual information, regardless of which way that information might cut. *See, e.g.*, Mar. 26, 2008 Transmittal Letter at 1 ("The Department of Justice (DOJ) has requested relevant Committee materials . . . . [¶] To assist the Department in this investigation, I am providing . . . ."); Apr. 1, 2008 Transmittal Letter at 1 (substantially identical). The documents include, for example, a number of documents that could be more useful to Mr. Clemens' defense than to the prosecution. These include (1) notes of a non-transcribed interview of Mr. McNamee regarding an instance in which he acknowledged lying to police investigators; and (2) notes of

[5] Most of the documents itemized above remain publicly available at http://democrats.oversight.house.gov/index.php?option=com_content&view=article&id=3605:committee-holds-second-day-of-hearings-on-the-mitchell-report-and-steroids-in-baseball&catid=42:hearings&Itemid=2 (last visited Mar. 18, 2011), and http://democrats.oversight.house.gov/index.php?option=com_content&view=article&id=3833:hearing-on-steroids-in-major-league-baseball-and-the-mitchell-report&catid=42:hearings&Itemid=2 (last visited Mar. 18, 2011), among other locations.

non-transcribed interviews of several individuals whose statements tend to corroborate Mr. Clemens's statement that he did not attend a particular event at the home of Mr. Canseco, and a golf receipt tending to do the same. The Committee understands that all documents it provided to the Department have been provided to Mr. Clemens. *See* Tr. of Status Conf. 4, Dec. 8, 2010 ("THE COURT: Counsel, are there requests that you've made of [Department] counsel that have not been satisfied? [¶]MR. HARDIN: Not that the [Department] is in possession of."), attached as Exhibit D.

Notwithstanding the substantial quantity of Committee documents already in his possession, Mr. Clemens now seeks from the Committee, as to 20 listed individuals:

> 1. [A]ll interview summaries, notes and memoranda related to *Hearing on the Mitchell Report: The Illegal Use of Steroids in Major League Baseball* (February 2008) and all related proceedings . . . .
>
> 2. All communications between each of the [listed individuals] or any person acting on behalf of any [listed individual], on the one hand, and the Committee on Oversight and Government Reform, United States House of Representatives, and its staff, on the other hand, relating to *Hearing on the Mitchell Report: The Illegal Use of Steroids in Major League Baseball* (February 2008), and all related proceedings.

Subpoena Attachment (Exhibit A). For all but one of the 20 listed witnesses (Kirk Radomski), the Committee, to the best of its knowledge, already has provided all witness statements, whether in the form of deposition transcripts, interview transcripts, declarations, affidavits, and/or letters. As to Mr. Radomski, the Committee possesses no statement because he never provided one. What the Committee generally has not provided to the Department are internal Committee notes, memoranda, and communications.

ARGUMENT

The documents that Mr. Clemens asks this Court to compel the Committee to produce are self-evidently integral to a Committee investigation that is plainly "within the sphere of legitimate legislative activity." *Eastland*, 421 U.S. at 501 (quotation marks omitted). Accordingly, the Speech or Debate Clause requires that the subpoena be quashed.

I. The Constitutional Framework: Brief Overview of Speech or Debate Clause.

"[T]he whole American fabric has been erected" on the principle of Separation of Powers. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). "[N]one of [the three branches of the federal government] ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it." The Federalist No. 48 (James Madison).

The Founders were acutely aware that simply dividing the government into three separate branches would not suffice to guarantee American liberty. Accordingly, they also included in the Constitution concrete mechanisms to make the Separation of Powers principle work, that is, mechanisms that would "provide some practical security for each [branch], against the invasion of the others." *Id*.; *see also* The Federalist No. 51 (James Madison) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."). One such concrete, practical mechanism is the Speech or Debate Clause.

A. History and Purpose of the Clause.

The Speech or Debate Clause privilege is rooted in the epic struggle for parliamentary independence in Sixteenth- and Seventeenth-century England. *See United States v. Johnson*, 383 U.S. 169, 178 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) ("As Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger. . . . In 1689, the Bill of Rights declared in unequivocal language: 'That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.'"). As a result of the English experience, "[f]reedom of speech and action in the legislature was taken as a matter of course" by the Founders, and reflected in the Speech or Debate Clause of our Constitution. *Tenney*, 341 U.S. at 372.

The purpose of the Clause

> is to insure that the legislative function the Constitution allocates to Congress may be performed independently.
> . . . .
> T]he "central role" of the Clause is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary. . . ."

Eastland, 421 U.S. at 502 (quoting *Gravel v. United States*, 408 U.S. 606, 617 (1972)). "In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *Johnson*, 383 U.S. at 178.[6]

[6] *See also Youngblood v. DeWeese*, 352 F.3d 836, 839 (3d Cir. 2003) ("Ensuring a strong and independent legislative branch was essential to the framers' notion of separation of powers . . . . The Speech or Debate Clause is one manifestation of this practical security for protecting the independence of the legislative branch."); *United States v. Myers*, 635 F.2d 932, 935-36 (2d Cir. 1980) ("[T]he Speech or Debate Clause . . . serves as a vital check upon the Executive and Judicial Branches to respect the independence of the Legislative Branch, not merely for the

(continued . . . .)

Because "the guarantees of th[e Speech or Debate] Clause are vitally important to our system of government," they "are entitled to be treated by the courts with the sensitivity that such important values require." *Helstoski v. Meanor*, 442 U.S. 500, 506 (1979). Accordingly, the Supreme Court has "[w]ithout exception . . . read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501; *see also Doe v. McMillan*, 412 U.S. 306, 311 (1973); *Gravel*, 408 U.S. at 624; *Johnson*, 383 U.S. at 179-80; *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

This broad reading has included extending the protections of the Clause "not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Gravel*, 408 U.S. at 618; *see also id*. at 616 (in applying the Speech or Debate Clause, "a Member and his aide are to be treated as one." (citations and quotation marks omitted)). This is so because "it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants." *Id*. at 616; *see also Eastland*, 421 U.S. at 507 ("We draw no distinction between the Members and the Chief Counsel."). Moreover, Speech or Debate protections do not evaporate when a Member or aide leaves his or her position in Congress. *See, e.g., Miller v. Transam. Press, Inc.*, 709 F.2d 524, 529 (9th Cir. 1983) (barring questioning of former Member of Congress about matters covered by the privilege; "His present status with regard to public office . . . is irrelevant.").

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benefit of the Members of Congress, but, more importantly, for the right of the people to be fully and fearlessly represented by their elected Senators and Congressmen.").

B. The Protections of the Clause.

In practice, the Speech or Debate Clause privilege comprises three broad protections, only one of which is pertinent here: a non-disclosure privilege which operates to protect those to whom it applies from being compelled to provide privileged testimony, *Gravel*, 408 U.S. at 615-16; *United States v. Helstoski*, 442 U.S. 477, 488-89 (1979), or to produce (or have seized from them) privileged documents. *See, e.g., United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 655-56, 660-62 (D.C. Cir. 2007); *Brown & Williamson*, 62 F.3d at 419-21; *MINPECO S.A.*, 844 F.2d at 859-61; *Pentagen Techs. Int'l, Ltd. v. Comm. on Appropriations*, 20 F. Supp. 2d 41, 43-44 (D.D.C. 1998), *aff'd per curiam*, 194 F.3d 174 (D.C. Cir. 1999); *United States v. Peoples Temple of the Disciples of Christ*, 515 F. Supp. 246, 248-49 (D.C. Cir. 1981).[7]

The Supreme Court draws no distinctions among the three protections. Rather, it has stated unequivocally that, when the Speech or Debate Clause applies, its protections are "absolute." *Eastland*, 421 U.S. at 501, 503, 509-10, 510 n.16; *Gravel*, 408 U.S. at 623 n.14; *Barr v. Matteo*, 360 U.S. 564, 569 (1959).

[7] The Clause also provides (i) an immunity from lawsuits or prosecutions for all "actions within the 'legislative sphere,'" *McMillan*, 412 U.S. at 312, an immunity which extends to both criminal prosecutions and civil suits, *Helstoski*, 442 U.S. 477 (criminal prosecution); *United States v. Brewster*, 408 U.S. 501 (1972) (same); *Johnson*, 383 U.S. 169 (same); *Eastland*, 421 U.S. 491 (civil suit); *McMillan*, 412 U.S. 306 (same); *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (same), and (ii) a non-evidentiary use privilege that bars prosecutors in a criminal case – and parties to a civil suit – against a Member from introducing evidence of a legislative act to advance their case against the Member." *Helstoski*, 442 U.S. at 490; *see also Eastland*, 421 U.S. at 502-03; *Johnson*, 383 U.S. at 173.

C. The Scope of the Clause.

The protections afforded by the Speech or Debate Clause apply to all activities "within the 'legislative sphere,'" *McMillan*, 412 U.S. at 312 (quoting *Gravel*, 408 U.S. at 624-25), which includes all activities that are

> "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."

Eastland, 421 U.S. at 504 (quoting *Gravel*, 408 U.S. at 625).

The courts have construed broadly the concept of "legislative activity" to include much more than words spoken in debate. The cases "have plainly not taken a literalistic approach in applying the privilege. . . . Committee reports, resolutions, and the act of voting are equally covered." *Gravel*, 408 U.S. at 617. Importantly, committee investigations and hearings have been held to be activities within the legislative sphere, *Eastland*, 421 U.S. at 505-06, as has information gathering – both formal and informal – in furtherance of legislative responsibilities because "'[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.'" *Id*. at 504 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)).

II. The Speech or Debate Clause Protects the Committee, Absolutely, from Being Compelled to Produce Documents Here.

The Speech or Debate Clause requires the Court to quash a subpoena *duces tecum* to a congressional committee where the documents subpoenaed were created, reviewed, or obtained "within the sphere of legitimate legislative activity." *Eastland*, 421 U.S. at 501 (quotation marks omitted). This plainly is the case here.

A. Document Subpoenas to Congressional Committees Must Be Quashed Where the Subpoenaed Documents Were Created, Reviewed, or Obtained "Within the Sphere of Legitimate Legislative Activity."

In *Eastland*, the Supreme Court considered a First Amendment challenge to a congressionally-issued subpoena. The Court concluded that the Speech or Debate Clause precluded the judiciary from interfering with enforcement of the subpoena because the investigatory activities of the congressional actors fell within the "sphere of legitimate legislative activity." 421 U.S. at 503 (quotation marks omitted). It so found because it concerned a matter "on which legislation could be had." *Id*. at 504 n.15 (quoting *McGrain*, 273 U.S. at 177). "*The power to investigate . . . plainly falls within th[e] definitio*n" of legitimate legislative activity. *Id.* at 504 (emphasis added). "This Court has often noted that the power to investigate is inherent in the power to make laws because a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *Id*. (quotation marks omitted).

In *Brown & Williamson*, the D.C. Circuit quashed a subpoena for tobacco company documents that had come into the possession of the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce. 62 F.3d at 412. The Court noted that "the [Speech or Debate] Clause confers on Members of Congress immunity for all actions within the legislative sphere," *id.* at 415 (quoting *McMillan*, 412 U.S. at 312-13); that *Eastland* had held that "Congress was authorized to investigate any subject 'on which legislation could be had,'" *id.* at 416 (quoting *Eastland*, 421 U.S. at 504 n.15); that the Clause protects congressional documents, as well as oral testimony, because "[d]ocumentary evidence can . . . be as revealing as oral communications . . . . indications as to what Congress is looking at provide clues as to what Congress is doing . . . ," *id*. at 420; and, that the legislative privilege is

"'absolute'" where applicable. *Id.* at 416 (quoting *Eastland*, 421 U.S. at 509). In affirming the district court order quashing the document subpoena at issue, the Court necessarily concluded that the Subcommittee's possession of the tobacco company documents was within the legislative sphere.

In *MINPECO*, the D.C. Circuit similarly affirmed a district court order quashing a subpoena *duces tecum* for congressional subcommittee documents. The Court noted that the Speech or Debate Clause applies to document subpoenas as well as compelled in-person testimony, and applies no matter how obtrusive or unobtrusive a subpoena may be. 844 F.2d at 859-60. "*Any* questioning about legislative acts . . . would interfere by having a chilling effect on Congressional freedom of speech." *Id.* at 860 (quotation marks omitted) (emphasis added); *see also Peoples Temple*, 515 F. Supp. at 249 (granting congressional motion to quash document subpoena; "Otherwise, Members of Congress conducting investigations would be forced to consider at every turn whether evidence received pursuant to the investigation would subsequently have to be produced in court. This would imperil the legislative independence protected by the [Speech or Debate] Clause." (quotation marks omitted)); *Pentagen*, 20 F. Supp. 2d at 44 (dismissing action seeking public disclosure of committee documents; "[T]he law is clear that use of documents by the committee staff in the course of official business is privileged legislative activity. . . . [¶]Defendants [congressional committee and its chairman] thus argue persuasively that since the reports are documents that were used by the Committee in the course of its official business, the reports are protected from compulsory disclosure by the Speech or Debate Clause." (quotation marks omitted)); *United States v. Ehrlichman*, 389 F. Supp. 95, 96-98 (D.D.C. 1974) (Speech or Debate Clause protected House Committee from being compelled to produce transcript of its proceedings in criminal trial: "Since the requested transcript would

reveal the deliberative and communicative processes by which Members of Congress participate in committee and House proceedings, judicial efforts to compel production of that document would, under the present circumstances, violate the Speech or Debate Clause. . . ." (quotation marks, brackets, and ellipsis omitted)).

B. Here, the Subpoenaed Documents Were Created, Reviewed, and/or Obtained "Within the Sphere of Legitimate Legislative Activity."

The documents at issue were created, reviewed, and/or obtained within the legitimate legislative sphere inasmuch as the Committee's investigation originated in concerns about the health of American youth, concerns that were aggravated with the release of the Mitchell Report:

> Every American, not just baseball fans, ought to be shocked into action by that disturbing truth [of the abuse of performance enhancing drugs by hundreds of thousands of teenage athletes, a problem aggravated, at the least, by the abuse of performance enhancing drugs by Major League Baseball players].

Mitchell Report, at SR-8—SR-9; *see also id.* at 4, 15-17. Given the place of Major League Baseball in the cultural life of the nation, the Report also raised issues relating to education, crime, and interstate commerce (among others). When the credibility and conclusions of the Mitchell Report were challenged by certain Major League Baseball players, including Mr. Clemens himself, the Committee appropriately responded by investigating, as it was explicitly authorized by House Rules to do. That is the end of the matter, for at least two reasons.

First, any judicial inquiry as to whether a particular congressional investigation falls within the "sphere of legitimate legislative activity" is a very narrow one. *Eastland*, 421 U.S. at 501 (quotation marks omitted). "The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province." *Id.* at 506

(quotation marks omitted); *see also id.* ("The propriety of making USSF a subject of the investigation . . . is a subject on which the scope of our inquiry is narrow.").[8]

Second, under *any* standard of review, the Committee's investigation—in the course of which the documents sought here were created, reviewed and/or obtained—falls well within the scope of the Committee's legitimate legislative functions. Indeed, this is not even remotely a close question.

The Committee was authorized expressly by House rules to investigate "*any matter*" at "*any time*," H.R. Rule X.4(c)(2), 110th Cong. (2007) (emphases added), and issues related to public health, education, crime and interstate commerce are self-evidently within Congress' legitimate legislative purview. The Supreme Court's unambiguous holding that "[t]he power to investigate . . . plainly falls within that definition [of activity within the sphere of legitimate legislative activity]," *Eastland*, 421 U.S. at 501, 504, recognizes the common sense need for Congress to investigate the subject matter of potential legislation prior to legislating.

Moreover, while the "legitimacy of a congressional inquiry [is not] to be defined by what it produces," *Eastland*, 421 U.S. at 509 ("The very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises."), the Committee's investigatory activities in this instance in fact led to several legislative initiatives. As noted above, in 2005, legislation addressing the use and abuse of steroids and other performance-enhancing substances in professional sports was introduced in

[8] Expressly outside the scope of any such judicial inquiry is the motive(s) for the Committee's investigation. *See, e.g.*, *Johnson*, 383 U.S. at 180 (Speech or Debate Clause forecloses from inquiry question of congressman's motives in undertaking particular legislative act); *Eastland*, 421 U.S. at 508-09 ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it. . . . [T]he claim of an unworthy purpose does not destroy the privilege.").

and passed by two House committees, *see supra* at 4 n.3, and, in 2008, other legislation pertaining to the Committee's investigation and the Mitchell Report findings was introduced in the House and Senate:

> There are a number of bills that have been introduced that we wholly support, including Representative Lynch's bill, H.R. 4911; Senator Schumer and the Senate bill 877; Senator Grassley, Senate bill 2470; and Senator Biden's bill, Senate bill 2237. I'd like to personally thank Representative Lynch for introducing the bill that would make HGH a Schedule III controlled substance, which I believe is an important legislative initiative.

Jan. 15, 2008 Hr'g Tr. 95, 110 (testimony of Comm'r of Major League Baseball).

* * *

For all these reasons, the Committee's investigation, authorized by and conducted in accordance with explicit House Rules, sits at the core of the legitimate legislative sphere. It follows that the documents Mr. Clemens seeks to have this Court compel the Committee to disclose are absolutely privileged against such compelled production.

C. Mr. Clemens's Status as a Defendant in a Criminal Case Does Not Alter the Outcome Here.

The fact that Mr. Clemens is a criminal defendant does not affect the application of the Speech or Debate Clause privilege. As noted above, the Supreme Court has held repeatedly that *whenever* a Member is acting within the legislative sphere, the protections of the Clause are absolute. *See supra* at 14-20.

Moreover, the Courts, without hesitation, have quashed subpoenas directed to Members by defendants in criminal cases. *See, e.g.*, Order, *United States v. Moussaoui*, Crim. No. 01-455 (LMB) (E.D. Va. Mar. 2, 2006) (quashing document subpoena directed to House Member in capital prosecution), attached as Exhibit E; Order, *United States v. Arthur Andersen, LLP*, Crim.

No. 02-121 (MH) (S.D. Tex. May 14, 2002) (quashing document subpoena directed to House Committee on Energy and Commerce in criminal case arising out of Enron scandal), attached as Exhibit F.

Similarly, in *Ehrlichman*, a criminal defendant moved to strike certain testimony because a House committee had declined to provide a document relevant to that testimony. *See* 389 F. Supp. at 96. Though *Ehrlichman* preceded the Supreme Court's decision in *Eastland* and the D.C. Circuit's application of that precedent in *Brown & Williamson* and *MINPECO*, the Court nevertheless declined to strike the testimony at issue:

> [S]ince the requested transcript would reveal the deliberative and communicative processes by which Members of Congress participate in committee and House proceedings, judicial efforts to compel production of that document would, under the present circumstances, . . . violate the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1. That provision clearly prohibits the Court from forcing the Chairman of the Subcommittee or the Speaker to answer questions concerning the testimony at issue, and it would appear to follow that they cannot be required to produce at trial the official record of that testimony [a proposition confirmed by *Eastland*, *Brown & Williamson*, and *MINPECO*, among other subsequent authorities].

Id. at 97-98 (quotation marks, brackets, ellipsis, and citation omitted).

In light of nature and the substantial volume of documents that the Committee has already produced, and the fact that all those documents are in the hands of Mr. Clemens's attorneys, Mr. Clemens will not be disadvantaged by the quashing of his subpoena *duces tecum* to the Committee. However, even if the Court were to conclude otherwise, it would not matter: "The Speech or Debate Clause was designed neither to assure fair trials nor to avoid coercion. Rather, its purpose was to preserve the constitutional structure of separate, coequal, and independent branches of government." *Helstoski*, 442 U.S. at 491; *see also Eastland*, 421 U.S. at

509-10 n.16 (once "activity is found to be within the legitimate legislative sphere, balancing plays no part"); *id*. at 510 (Clause is absolute and must be broadly applied, notwithstanding any associated costs because that was "'the conscious choice of the Framers' buttressed and justified by history").[9]

III. The Subpoena Also Should Be Quashed on Grounds of Lack of Specificity.

Even if the Speech or Debate Clause did not require that the subpoena be quashed—which it does—the subpoena should be quashed on grounds of lack of specificity. A criminal subpoena must seek relevant and material documents, *with specificity*. *See United States v. Nixon*, 418 U.S. 683, 699 (1974) ("[I]n order to require production prior to trial, the moving

[9] Mr. Clemens may also attempt to argue that the Committee, by previously producing documents on a voluntary basis, has waived the protections of the Speech or Debate Clause. That argument, if it is forthcoming, would also be incorrect.

First, a waiver of the Speech or Debate privilege, if possible at all, "can be found only after explicit and unequivocal renunciation of the protection." *Helstoski*, 442 U.S. at 491. *Helstoski* held that a congressman's ten grand jury appearances, voluntary production of legislative documents to the grand jury, and grand jury testimony about legislative activities were all insufficient to constitute an "explicit and unequivocal" waiver. *Id*. at 492. *See also Johnson*, 383 U.S. at 184-85 (congressman's introduction of legislative speech did not permit prosecutors to rely on speech in indictment and prosecution); *Brown & Williamson*, 62 F.3d at 421 n.11 (Representative Waxman did not waive Speech or Debate privilege by "statements made [voluntarily] during a radio broadcast interview"); *Pittston Coal Grp., Inc. v. Int'l Union, UMWA*, 894 F. Supp. 275, 278 n.5 (W.D. Va. 1995) (rejecting plaintiff's assertion that Senator waived privilege by voluntarily disclosing certain records to defendant in litigation; in quashing subpoena to Senator's aide, characterizing that argument as "meritless."; "Pittston [has] produced no evidence that Senator Rockefeller renounced his privilege, let alone made the 'explicit and unequivocal expression' required to waive it.").

If the actions of Congressmen Helstoski, Johnson, and Waxman and Senator Rockefeller were insufficient to constitute a waiver, then the Committee's voluntary production of documents, particularly while asserting that no waiver was intended, *see, e.g.*, Mar. 26, 2008 Transmittal Letter at 1-2; Apr. 1, 2008 Transmittal Letter at 1-2, cannot possibly constitute an "explicit and unequivocal renunciation" of the Committee's privilege.

party must show . . . that the documents are evidentiary and relevant . . . and . . . that the application is made in good faith and is not intended as a general 'fishing expedition.'").

Mr. Clemens already possesses written statements from all but one of the 20 witnesses referenced in the subpoena, as well as a range of other Committee documents. Notwithstanding, he has now issued a broad and unfocused subpoena which he presumably hopes will result in the discovery of some as yet unidentified document which may aid his defense in some as yet undetermined manner, or alter the meaning of some witness statement in some as yet undetermined way. Vague and inchoate hopes of this nature are an insufficient foundation for the present subpoena, and effectively define the subpoena for what it is—a fishing expedition. *See id*. at 698 (in criminal cases, subpoena *duces tecum* "not intended to provide a means of discovery"; "its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials"); *see also United States v. Hardy*, 224 F.3d 752, 756 (8th Cir. 2000) (quashing criminal subpoena where police officer would have been required to listen to 17.5 hours of audio tape; *i.e.*, where "the burden of producing subpoenaed records greatly outweighs any relevance they may have to the case").

CONCLUSION

For all the foregoing reasons, the subpoena *duces tecum* directed to the Committee on Oversight and Government Reform by Mr. Clemens should be quashed.

Respectfully submitted,

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March 18, 2011

CERTIFICATE OF SERVICE

I certify that on March 18, 2011, I served one copy of the foregoing Motion of Non-Party House Committee on Oversight and Government Reform to Quash Subpoena *Duces Tecum*, Memorandum of Points and Authorities in Support, and all attachments by CM/ECF and by electronic mail (.pdf format) and first class mail, postage prepaid, on the following:

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