UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

GOVERNMENT'S RESPONSE TO DEFENDANT'S TRIAL MEMORANDUM REGARDING LEGISLATIVE PURPOSE AND COMPETENCE ELEMENTS

The United States agrees with defendant's articulation of the requisite elements of the governing statutes.[1] The United States further agrees that these elements must be submitted to the jury. Finally, the United States agrees that defendant is entitled to present evidence and argument on these elements. However, the United States disagrees with defendant's contention (at 1) that "the proper focus of the jury deliberations is on a question-by-question basis within a proceeding – *instead of a broader context of Congressional inquiry across multiple proceedings*." If defendant intends to contest, for example, the government's proof on the "competent tribunal"element of the perjury count by suggesting that Congress's purpose was illegitimate, the government must – of necessity – be permitted to show the "broader context" surrounding this congressional inquiry.

Analysis

"The power of the Congress to conduct investigations is inherent in the legislative process." Watkins v. United States, 354 U.S. 178, 187 (1957); see also McGrain v. Daugherty, 273 U.S. 135,

[1] Defendant asserts that, under 18 U.S.C. § 1621, the government must prove that the United States House Committee on Oversight and Government Reform was a "competent tribunal." He also asserts that, under 18 U.S.C. § 1505, the government must prove "the due and proper exercise of the power of inquiry" under which the Committee conducted its investigation was obstructed. Defendant finally asserts that, under 18 U.S.C. § 1001, the government must prove that the false statements were made in a matter "within the jurisdiction" of the legislative branch.

175 (1927) ("[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"). Congress's investigative power is thus exceedingly "broad." Watkins, 354 U.S. at 187. "It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling Congress to remedy them." Id.; see also Hutcheson v. United States, 369 U.S. 599, 619 (1962) ("Unless interrogation is met with a valid constitutional objection 'the scope of the power of [congressional] inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.'" (citation omitted)); United States v. Levine, 860 F. Supp. 880, 885 (D.D.C. 1994) ("Quite clearly the U.S. Congress has the power to probe corruption and illegal activities in the industries it regulates . . . ."), rev'd on other grds, 72 F.3d 920 (D.C. Cir. 1995) (unpub. op.). Further, "a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding, or when crime or wrongdoing is disclosed." Hutcheson, 369 U.S. at 618 (citation omitted).

"But, broad as is this power of [congressional] inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress." Watkins, 354 U.S. at 187. Congress is not a "law enforcement or trial agency." Id. Thus, any congressional inquiry "must be related to, and in furtherance of a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." Id..

In the specific context of § 1621 prosecutions for perjury before Congress, the courts have

thus recognized that a "legislative committee is not competent to elicit testimony solely so that it may serve as the cornerstone of a subsequent perjury indictment." United States v. Weissman, 1996 WL 742844, at *7 (S.D.N.Y. 1996); see also Levine, 860 F. Supp. at 884 (recognizing possibility that Subcommittee would not be "acting as a 'competent tribunal' within the meaning" of § 1621 if "Members of the Subcommittee only desired to induce Levine to testify falsely"); United States v. Clarridge, 811 F. Supp. 697, 709 (D.D.C. 1992) (suggesting that committee would not be functioning as "competent tribunal" pursuant to § 1621 if "committees called Mr. Clarridge for the sole purpose of establishing a firmer basis for a perjury conviction"); United States v. Cross, 170 F. Supp. 303, 309 (D.D.C. 1959) (because "recall of Cross was for the purpose of emphasizing the untruthfulness of his prior denial and to render him more liable to criminal prosecution," Cross's alleged false statements were not made before a "competent tribunal"); United States v. Icardi, 140 F. Supp. 383, 388 (D.D.C. 1956) (although a "a committee or subcommittee of the Congress has a right to inquire whether there is a likelihood that a crime has been committed touching upon a field within its general jurisdiction . . . this authority cannot be extended to sanction a legislative trial and conviction of the individual to whom the evidence points the finger").

In light of these authorities, the United States agrees that defendant should be permitted limited leeway on cross-examination to explore the "competency of the tribunal" element of the § 1621 offense. See generally Levine, 860 F. Supp at 884-85 (declining to rule pretrial on defendant's motion to dismiss § 1621 perjury count where record had not yet been developed at trial via "oral testimony and cross-examination by able counsel").

However, if defendant is permitted – via, for example, cross-examination – to question the competency of the Oversight Committee, then the government must be permitted to elicit testimony

about the pressing need for the congressional investigation, including details about the scope of the performance enhancing drug problem. Such evidence will be necessary to rebut defendant's suggestions (at 4-5), for example, that the Committee was "[d]irecting an inquiry primarily to the witness's guilt or innocence of a crime" or that the Committee was simply "[e]xtracting testimony with a view to a perjury prosecution." Cf. United States v. Mitchell, 877 F.2d 294, 300 (4th Cir. 1989) ("The question of whether a given congressional investigation is a 'due and proper exercise of the power of inquiry' for purposes of [18 U.S.C.] § 1505 can not be answered by a myopic focus on formality. Rather, it is properly answered by a *careful examination of all the surrounding circumstances*." (emphasis added)).[2]

To the extent that defendant contends (at 1) that such rebuttal evidence should not be permitted, he is sorely mistaken. As Clarridge demonstrates, if defendant seeks to attack the tribunal in the manner that the Icardi and Cross defendants did, then the United States must be permitted to give the full "context in which [defendant's] testimony occurred." 811 F. Supp. at 709. In Clarridge,

[2] Citing Icardi and Cross, defendant additionally suggests (at 4) that each of his bullet-pointed topics reflects a singular "[e]xample[]" of "Congressional conduct that exceeds the power to investigate." He further suggests (at 4-5) that, if, for example, he demonstrates that the Oversight Committee asked him to "appear before [the] committee to give him an opportunity to tell his side of the story," then – by definition – the tribunal was not functioning as a competent tribunal. He is wrong. As even the most cursory glance at Icardi and Cross demonstrates, it was the *combination* of many of these different factors that led those courts to conclude that the committees in those cases were acting in an incompetent manner. No one factor demonstrated to those courts that the committees were acting outside their legislative authority, as defendant suggests. See, e.g., Icardi, 140 F. Supp. at 388 ("On the basis of *all the evidence before it*, the court therefore finds, as a matter of law, that at the time the subcommittee questioned the defendant Icardi it was not functioning as a competent tribunal." (emphasis added)); Cross, 170 F. Supp. at 309 ("this court finds, as a matter of law, from a reading and realistic construction of the questioning of the witness Cross on July 16, 1957, *in the setting of the record as a whole* . . . that the recall of Cross was for the purpose of emphasizing the untruthfulness of his prior denial and to render him more liable to criminal prosecution" (emphasis added)).

Judge Greene expressed significant "skeptic[ism]" that the defendant could meet "the Cross standard," because of the "context" of Clarridge's testimony, including the necessity for the congressional investigation: "[b]y August 1987, Iran-Contra had developed into one of the most serious political scandals of the decade"; Congress "was under considerable political pressure to leave no stone unturned in its investigation"; and thus "both the House and Senate created special select committees to address this critical issue" and, indeed, the "joint sessions of these committees were televised live on national television." Id. In light of that overarching "context," the Clarridge court opined that it would be "doubtful that these committees called Mr. Clarridge for the sole purpose of establishing a firmer basis for a perjury conviction." Id. at 709; see also Icardi, 140 F. Supp. at 386-89 (in concluding subcommittee was not acting as a "competent tribunal," trial court considered "all the evidence before it," including that the "hearings had been reconvened after a lapse of fourteen months"; "no other witnesses were interrogated as to the Defense Department's conduct of its investigation"; the "contents" of the subcommittee's report "indicate[d] the functioning of the subcommittee as a committing magistrate"; and the testimony of the subcommittee Chairman that "he discussed with his colleagues and counsel for the subcommittee" the "possibility of a perjury indictment as a result of Icardi's testimony").

Generally speaking, if defendant thus calls into question the competency of the congressional tribunal by suggesting that the Committee was not acting with a proper legislative purpose, then the United States must be permitted to explain, among other things, the seriousness of the problem of steroids and other performance enhancing drugs, the national spotlight being cast on this problem,

and the necessity for the congressional inquiry.[3] See generally Weissman, 1996 WL 742844, at *8 ("It is only when [congressional] questioning takes place in circumstances where a legitimate purpose cannot be ascertained, or where other factors appear to show that a subsequent perjury indictment was the true motive of the committee members, that the doctrine established by [the Icardi and Cross decisions] may apply.").

More specifically, if defendant attacks the competency of the tribunal by suggesting, for example, that the Committee "[r]e-question[ed]" him on February 13th "for the purpose of rendering him more liable to criminal prosecution" (see def's memo at 4), then the United States must be permitted to respond to this contention. "There are many reasons why committee members might ask a witness about matters which that witness has already addressed in a prior statement." Weissman, 1996 WL 742844, at *8. "The questioners may wish to view the witness's demeanor in order that they can better make an assessment of his credibility. Moreover, they could believe that the atmosphere of a committee hearing would impress upon the witness the seriousness of the proceedings, and encourage him to amend prior testimony which had not been given with complete candor." Id.

These Weissman considerations have particular resonance here because of the events leading up to the February 13th hearing. As Chairman Henry Waxman outlined in his opening statement that day, Chuck Knoblauch and Andy Pettitte – in prior sworn depositions – both admitted to the committee that Mr. McNamee had accurately recounted that he had previously injected each of them

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[3] For example, among other things, the government would seek to develop testimony related to teenage suicide attributed to anabolic-steroid use and develop more detailed testimony regarding the use of steroids by Jose Canseco, derived from his testimony before the Committee and his book *Juiced*.

with human growth hormone (Hearing Tr. at 3-4). However, defendant denied the accuracy of Mr. McNamee's assertion that he had previously injected defendant with HGH and steroids (id. 4). Accordingly, Representative Waxman explained that the February 13th hearing was "focused on the accuracy of an important section of [the Mitchell] report, the section that is based on information that strength and fitness coach Brian McNamee provided to Senator Mitchell" (id. 2). As Representative Waxman further explained, "if the Mitchell Report is to be the last word on baseball's past, we believe we have a responsibility to investigate a serious claim of inaccuracy" (id. 3). Thus, the February 13th hearing was deemed necessary, in part, so that the Committee could "sort through all of this today" and so that "each Member" could "reach his or her own conclusions" based "not on whether we like or dislike Mr. McNamee or like or dislike Mr. Clemens," but based "on the facts" (id. 7).

* * * * *

In sum, the United States has confidence that its evidence will demonstrate beyond a reasonable doubt that the Oversight Committee was acting as a competent tribunal. The United States concomitantly recognizes that defendant should be permitted the opportunity to demonstrate the opposite. However, as the above-described precedents show, should defendant suggest that the Committee was not acting as a competent tribunal, the United States will be entitled to answer any such attack by eliciting testimony about "all the surrounding circumstances," Mitchell, 877 F.2d at 300, and the full "context" of the February 13th hearing, Clarridge, 811 F. Supp. at 709. As explained, this, in turn, may well mean that the United States should be permitted to elicit testimony about, for example, drug use by other Major League players. Put simply: defendant cannot have it both ways. He cannot, on the one hand, impugn the integrity of the Oversight Committee by

suggesting that its true – singular – motive was a perjury indictment *of him*, but, on the other hand, preclude the United States from explaining to the jury, for example, that the Committee's investigative work was of *national* importance because of the wide-spread problem of steroid and other performance enhancing drug use in Major League Baseball.

Respectfully submitted,

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