

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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

**DEFENDANT’S TRIAL MEMORANDUM REGARDING
LEGISLATIVE PURPOSE AND COMPETENCE ELEMENTS**

Defendant William R. Clemens respectfully submits this memorandum of law to address questions raised on April 13 and April 17, 2012 regarding the scope of juror instruction and evidence appropriate at trial related to the Government’s burden to prove three things:

1. Under 18 U.S.C. § 1621, the U.S. House Committee on Oversight and Government Reform was a “competent tribunal”;
2. Under 18 U.S.C. § 1505, “the due and proper exercise of the power of inquiry” under which the Committee conducted its investigation was obstructed; and
3. Under 18 U.S.C. § 1001, false statements were made in a matter “within the jurisdiction” of the legislative branch.

As discussed below and in oral argument dating back to at least July 12, 2011, each of these three points is a separate element the Government is required to prove beyond a reasonable doubt in order to sustain a conviction of Mr. Clemens; all three elements must go to the jury for adjudication; Mr. Clemens is entitled to present evidence and argument on all three elements; and the proper focus of the jury deliberation is on a question-by-question basis within a proceeding—instead of a broader context of Congressional inquiry across multiple proceedings.

POINTS AND AUTHORITIES

Mr. Clemens is charged with obstruction of Congress, false statements, and perjury. Although the specific elements of each of these alleged crimes are different, the statutory text of each charged offense places at issue the competency of the proceedings at which the defendant provided allegedly obstructive, false, or perjurious testimony. Because a determination by the Court that Mr. Clemens should be permitted to develop evidence at trial rebutting any one of the competency aspects of these offenses will have the same practical effect before the jury as a finding with respect to all three offenses, Mr. Clemens will address only one offense in this memorandum for the sake of efficiency—perjury.

The perjury statute requires that an oath be taken before “a competent tribunal[.]” *See* 18 U.S.C. § 1621. Thus, a “competent tribunal” is an essential element of a perjury charge. *United States v. Debrow*, 346 U.S. 374, 376 (1953); *United States v. Reinecke*, 524 F.2d 435, 437 (D.C. Cir. 1975); *United States v. Cross*, 170 F. Supp. 303, 304 (D.D.C. 1959); *United States v. Icardi*, 140 F. Supp. 383, 384 (D.D.C. 1956). At the July 12, 2011 hearing regarding the draft jury instructions in the initial trial of this matter, the Government conceded that “competent tribunal” is a proper element in a Section 1621 offense. *See* July 12, 2011 A.M. Tr. at 3:12-17 (also conceding that “due and proper exercise of authority” is a proper element in a Section 1505 offense). As a result, the Court found that competency was “an element” of the offenses charged in this case. *See id.* at 20:20–21.

As an essential element of a perjury charge, the jury, rather than the Court, must decide whether a tribunal is “competent.” *United States v. Levine*, 72 F.3d 920, 1995 WL 761834, at *2 (D.C. Cir. Dec. 4, 1995) (reversing a perjury conviction after the United States confessed error because the jury was not permitted to determine the competency of a tribunal); *see United States v. Gaudin*, 515 U.S. 506, 522-23 (1995) (“The Constitution gives a criminal defendant the right

to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged.”). Again, on July 12, 2011, the Government conceded that whether the “competent tribunal” element has been proven is a jury question under D.C. Circuit law. *See* July 12, 2011 A.M. Tr. at 5:21–22; *see also id.* at 5:6–17 (conceding that “matters within jurisdiction” is a jury question under D.C. Circuit law). And again, the Court therefore found that this question is “something I have to tell the jury has to be proven.” *See id.* at 20:21–22; *see also id.* at 45:21 – 46:3 (referring to the need for “the jury’s assessment” as to whether the “due and proper proceedings” element in the obstruction of Congress count had been proven).

Whether a tribunal was “competent” to conduct an inquiry of Mr. Clemens must be determined by the evidence presented at trial. *See Cross*, 170 F. Supp. at 304–05; *Icardi*, 140 F. Supp. at 386. The Court already reached this conclusion in July 2011:

See I don’t think I’m going to be able to, at this point, make a decision as to whether the questions are appropriate or not until I hear what those questions are. I do agree with the defense that, considering how the statute is worded, that this is an element. * * * So I mean I’m not going to be prepared I think to place restrictions on what the defense can ask on cross-examination of these witnesses.

July 12, 2011 A.M. Tr. at 27:19 – 28:24; *see also id.* at 40:22–24 (“I don’t think I can restrict the scope of your cross-examination seeking to establish the point that you’re trying to make.”).

Under controlling law, whether a tribunal is “competent” to conduct an inquiry of Mr. Clemens is also determined on a question-by-question basis. As this district court stated in the *Cross* case:

The validity of this perjury case must be tested by the purpose of the Committee *in propounding the specific questions upon which the indictment is based*, at the time they were asked.

Cross, 170 F. Supp. at 309 (emphasis added). A tribunal is “competent” to ask a particular question if the question seeks to elicit facts in aid of legislation:

The narrow question presented . . . is whether . . . when the defendant . . . gave the alleged false testimony upon which the indictment is based, the Committee propounded the questions to the defendant . . . for the purpose of eliciting from him facts which might aid in legislation.

Id. at 306; *see also Icardi*, 140 F. Supp. at 388 (holding that a committee is not a “competent tribunal” unless it is pursuing a bona fide legislative purpose when questioning a witness). Indeed, counsel and the Court discussed this issue at length in July 2011.

Although “a legitimate legislative purpose will be presumed when the general subject of investigation is one concerning which Congress can legislate and when the information sought might aid the congressional consideration, . . . *any presumption in a criminal case may be controverted by adequate evidence to the contrary.*” *Cross*, 170 F. Supp. at 306 (emphasis added). The Court has acknowledged that the competency of the House Committee at issue in this case has bounds. *See, e.g.*, July 12, 2011 A.M. Tr. at 2:24 – 3:3 (“I think I’d agree that Congress’ authority is not unlimited. Under the Constitution, obviously their activity has to be related to their legislative function.”).

Examples of Congressional conduct that exceeds the power to investigate include:

- Exercising the powers of law enforcement, which are assigned under our Constitution to the Executive and the Judiciary, *see Cross*, 170 F. Supp. at 306;
- Questioning a witness solely for a purpose other than to elicit facts in aid of legislation, *see id.*;
- Usurping *the* functions of a magistrate or prosecuting attorney in the guise of legislative investigation, *see id.* at 309;
- Re-questioning a witness for the purpose of rendering him more liable to criminal prosecution, *see id.*;
- Conducting a hearing for an actual purpose different than a stated purpose, *see Icardi*, 140 F. Supp. at 386–87;
- Directing an inquiry primarily to the witness’s guilt or innocence of a crime, *see id.* at 387;

- Adjudication of the witness's guilt prior to his testimony, *see id.*;
- Adjudication of a crime in a report that results from a hearing, *see id.* at 387–88;
- Asking a witness to appear before a committee to give him an opportunity to tell his side of the story, *see id.* at 388;
- Affording a witness a forum in which to protest his innocence, *see id.* at 388;
- Extracting testimony with a view to a perjury prosecution, *see id.*; and
- Conducting a legislative trial of a witness, *see id.*

Because it is an essential element of the Government's case, Mr. Clemens has a Constitutional right to elicit evidence on these and similar subjects in defense of the Government's allegations of perjury, false statements, and obstruction of Congress.

Respectfully submitted,

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