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 OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STRIKE PORTIONS OF THE INDICTMENT (DKT. NO. 11)

The United States of America, through its attorney, the United States Attorney for the District of Columbia, respectfully submits this response in opposition to defendant William R. Clemens's motion to dismiss or, in the alternative, to strike portions of the Indictment. Dkt. No. 11. Defendant's primary allegation is that Count One of the Indictment, which charges Obstruction of Congress, is duplicitous. Id. at 1-2, 4-10. A secondary, related argument is that Count One is impermissibly vague. Id. at 2-3, 4, 10-11. From these arguments, defendant submits that not only Count One, but the remaining five counts, are negatively affected and the entire Indictment should be dismissed. Id. at 11-12.

Defendant's motion is without merit and should be denied because Count One, as noted below, is neither duplicitous nor impermissibly vague. That is, two or more acts, each of which would constitute an offense standing alone and which therefore could be charged as separate counts in an Indictment may instead be charged in a single count if those acts can be characterized as part of a single, continuing scheme. In this case, defendant's false or misleading statements on February 5 and 13, 2008, were all part of a continuing scheme to obstruct or impede a Congressional investigation of the use of performance enhancing drugs in Major League Baseball, specifically

questions as to defendant's use of such substances.[1] Furthermore, Count One more than adequately informs defendant of that with which he has been charged and needs to defend against. To the extent the Court has any concerns of potential duplicity or vagueness in that count, the obvious remedies – which defendant acknowledges as potential remedies, id. – are a jury instruction as to unanimity and a special verdict form as to what acts the jury finds to be obstructive. In other words, dismissal is an inappropriate remedy because the potential harms caused by duplicity or vagueness are non-existent in this case or, at worst, can easily be addressed through proper jury instructions and a jury verdict form like the one submitted by the government as an attachment to this pleading (Attachment #1).

A. Factual Background

1. On August 19, 2010, a District of Columbia Grand Jury returned a six-count Indictment against defendant. Dkt. No. 1. The Indictment charged one count of Obstruction of Congress, in violation of 18 U.S.C. §§ 1505 and 1515(b), three counts of False Statements, in violation of 18 U.S.C. §§ 1001(a)(2) and (c)(2), and two counts of Perjury in violation of 18 U.S.C. § 1621(1). Id.

[1] Charging these individual statements as separate counts would run the risk of multiplicity, exposing defendant to multiple punishments for a single criminal episode. See United States v. Klat, 156 F.3d 1258, 1266 (D.C. Cir. 1998) ("[defendant's] argument with respect to the duplicity rule would require the government to file a separate count for each allegedly threatening statement, letter, and voice-mail message, thereby producing the danger of inappropriate multiple punishments for a single criminal episode") (citation and internal quotation marks omitted). The maximum punishment for Count One as charged is five years in prison and a fine of $250,000. 18 U.S.C. § 1505. If the Court granted defendant's request to dismiss the Indictment without prejudice, Dkt. No. 11-1 (proposed Order), and the government then obtained a superseding Indictment charging fifteen counts of Section 1505 instead of one, the maximum punishment for those counts would be 75 years in prison and a fine of $3,750,000, thus unduly increasing defendant's criminal exposure by 70 years and $3.5 million.

2. As detailed in the Indictment, this case arises from defendant's statements in a 2008 Congressional investigation and hearing, conducted by the United States House of Representatives Committee on Oversight and Government Reform ("Committee"), titled "The Mitchell Report: The Illegal Use of Steroids in Major League Baseball." Id. at 7, 9-12. That hearing, as suggested by the title, related to a Congressional investigation resulting from a report released by former Senator George Mitchell on December 13, 2007, as to the use of performance-enhancing drugs ("PEDs") by players in Major League Baseball ("MLB"), including defendant. Id. at 8-9. As referred to in the Indictment, and as will be shown at trial, from the day the Mitchell Report was issued, and continuing thereafter, defendant, in response to the allegations in that Report, issued a series of public statements denying those allegations and attacking those who made or reported them. Id. at 9.

3. As set forth in the Indictment:

> During the course of the Committee's 2008 continuing investigation and hearing, the following matters, among others, were material and pertinent to the Committee investigation:
>
> i. The accuracy of the Mitchell Report as it related to the use of PEDs by CLEMENS and other MLB players;
>
> ii. The existence of PED use in MLB, including PED use by CLEMENS and other well-known players;
>
> iii. PED use by teenage athletes; and
>
> iv. Whether MLB planned to adopt the recommendations in the Mitchell Report and whether additional measures were needed to detect PED use in MLB.

Id. at 9-10.

4. As part of the Congressional investigation and hearing, discussed above, defendant provided a sworn deposition on February 5, 2008, to Committee staff and sworn testimony before the Committee on February 13, 2008. Id. at 10-12.

5. Count One of the Indictment, in relevant part, charges that:

> Between on or about February 5, 2008, and on or about February 13, 2008, in the District of Columbia, defendant . . . did corruptly endeavor to influence, obstruct, and impede the due and proper exercise of the power of inquiry under which an investigation was being held by a Committee of the United States House of Representatives by making the following statements, among others, that [defendant] knew to be false and misleading to Committee Members and staff[.]

Id. at 12, ¶ 19. Count One then lists fifteen statements made by defendant in the Congressional deposition on February 5, 2008, or in his hearing testimony on February 13, 2008, before the Committee.[2] Id. at 12-14. These statements include defendant's (a) denial of use, discussions or knowledge of human growth hormone (HGH), that he allegedly admitted use of HGH to a teammate, and that he had knowledge of his wife's use of HGH prior to her use (##1-4, 12, 13); (b) denial of use of anabolic steroids (##5-6); (c) claims that he had received and had access to injections of vitamin B-12 and lidocaine (##7-11); (d) denial of knowledge that Senator Mitchell wanted to talk with him about the use of PEDs by MLB players (#14); and (e) denial that he was at Player #1's house in south Florida on or about June 9, 1998 (#15). Id.

6. On August 30, 2010, defendant was arraigned before the Court on the charges in the Indictment. Dkt. Entry 8/30/10. Trial in this matter is scheduled for July 6, 2011, with a motions hearing set for the day before that date. Dkt. No. 7.

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[2] Defendant contends that "the Government seeks to convict Mr. Clemens for denying statements in a private report [the Mitchell Report] accusing Mr. Clemens of using performance-enhancing drugs . . . ." Dkt. No. 11 at 4. Notably, defendant's denials came in the form of false and misleading statements to a Congressional Committee on two occasions.

7. On January 21, 2011, defendant filed the present motion seeking to dismiss or, in the alternative, to strike portions of the Indictment. Dkt. No. 11.

B. Legal Discussion: Defendant's Motion to Dismiss Count One – The Obstruction of Congress Count – Should Be Denied

Defendant moved to dismiss Count One of the Indictment, the count charging Obstruction of Congress, in violation of 18 U.S.C. §§ 1505 and 1515(b). He moved on two grounds. First, he claims that Count One is duplicitous. Second, he alleges that it is impermissibly vague. Defendant's claims, which are without merit, will be addressed in order below.

1. General Considerations Relative to the Motion to Dismiss

Pursuant to Fed. R. Crim. P. 7(c)(1), an "indictment . . . must be a plain, concise and definite written statement of the essential facts constituting the offense charged . . . ." The requirements that an Indictment must meet to survive a pretrial challenge to its sufficiency are well-established. The Supreme Court has held that "[a]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974); see United States v. Fitzgerald, 1995 WL 495994, at *1 (D.D.C. 1995) ("It is well-settled in this Circuit that an indictment is sufficient if it contains the elements of the offense in enough detail to apprise the defendant of the offense with which he is charged"). "An Indictment need only track the language of the statute and, if necessary to apprise the defendant of the nature of the accusation against him, . . . [and to] state time and place in approximate terms." United States v. Covino, 837 F.2d 65, 69 (2nd Cir.1988) (internal quotations and citations omitted). Importantly, in this case, the Indictment

tracks the language of the Obstruction of Congress statute. Moreover, Count One provides specific details as to the dates of the obstructive acts within the Count, and the nature of the accusation against him. See Dkt. No. 1 at 12-14, ¶ 19. Defendant's arguments here, in part, appear to be about matters bound up with the factual proof in this case. Disposition of those matters, however, needs to await the evidence at trial. "If a pretrial claim is substantially founded upon and intertwined with 'evidence concerning the alleged offense, the motion falls within the province of the ultimate finder of fact and must be deferred.'" United States v. Wilson, 26 F.3d 142, 159 (D.C. Cir. 1994).

The Obstruction of Congress statute, 18 U.S.C. § 1505, requires proof of the following three essential elements for a conviction in this case:

> First, that on or about the date set forth in the Indictment, a proceeding was pending before the House Committee on Oversight and Government Reform;
>
> Second, the defendant knew that proceeding was pending before the House Committee on Oversight and Government Reform; and
>
> Third, that the defendant did corruptly endeavor to influence, obstruct or impede the due and proper exercise of the power of inquiry under which the hearing entitled "The Mitchell Report: The Illegal Use of Steroids in Major League Baseball" was being had by the House Committee on Oversight and Government Reform.

Modern Federal Jury Instructions – Criminal § 46.02.

> As used in section 1505, 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).

Count One of the Indictment addressed the three elements. Furthermore, it gives the defendant sufficient notice of that with which he is charged.

2. Count One Is Not Duplicitious

Defendant makes three arguments regarding duplicity. Dkt. No. 11 at 4-10. First, he alleges that Count One charges separate and distinct acts, that is, false or misleading statements, in one count. Id. at 5-7. Second, he then contends that those false or misleading statements are not united by a common scheme or pattern. Id. at 7-8. Finally, he alleges that charging together those discrete false or misleading statements would unduly prejudice him. Id. at 8-10.[3]

a. Count One charges false or misleading statements as individual obstructive acts

Count One alleges defendant made fifteen false or misleading statements in the course of obstructing the Committee's investigation. "[T]here is no mechanical rule that requires each of these statements to be charged as separate offenses under separate counts. If a defendant's conduct can be reasonably construed as part of a single, continuous course of conduct, such conduct may be charged in a single count." United States v. Watt, 911 F. Supp. 538, 550 (D.D.C. 1995). Such a count is not duplicitous.[4]

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[3] Defendant relies on United States v. Watt, 911 F. Supp. 538, 549 (D.D.C. 1995), for this analytical framework. In Watt, however, as will be discussed in more detail below, the court found that, under the facts of that case, charging multiple misrepresentations in a single count was not duplicitous. Defendant acknowledges the court's finding, but then unsuccessfully tries to distinguish this case from Watt. Dkt. No. 11 at 5, n. 1 ("[t]he nine statements at issue in Watts [sic] also 'dealt with the same subject matter,' id. at 538, while the fifteen statements listed in Count One do not"). For the reasons discussed below, the statements in Count One all do deal with the same subject matter.

[4] The two cases cited other than Watt in this part of defendant's argument, Dkt. No. 11 at 5-7 – United States v. Empak, 95 F. Supp. 1012, 1014 (D.C. Cir. 1951) (rejecting a defense claim of multiplicity), and United States v. Bonds, 2008 WL 61911 at *1 (N.D. Cal. 2008) (addressing the perjury counts, which require specificity, as discussed below in the "vagueness" section, but not the obstruction count, see id. at *2, n.1; see below subsequent decisions in the Bonds case) – do not directly address the issue of whether the obstruction count is duplicitous. As discussed below, it is not. See United States v. Bonds, 2011 WL 511387, at *1-*3 (N.D. Cal. Feb. 15, 2011) (obstruction

b. The false or misleading statements are united by a common scheme or pattern

"Duplicity is the joining in a single count of two or more distinct and separate offenses." United States v. Hubbell, 177 F.3d 11, 14 (D.C. Cir. 1999); see United States v. Klat, 156 F.3d 1258, 1266 (D.C. Cir. 1998); United States v. Mangieri, 694 F.2d 1270, 1281 (D.C. Cir. 1982). However, "it is well established that two or more acts, each of which would constitute an offense standing alone and which therefore could be charged as separate counts of an indictment, may instead be charged in a single count if those acts could be characterized as part of a single, continuing scheme." United States v. Shorter, 809 F.2d 54, 56 (D.C. Cir. 1987) (cites and internal quotation marks omitted); see Klat, 156 F.3d at 1266 ("several acts may be charged in a single count if the acts represent a single continuing scheme that occurred within a short period of time and that involved the same defendant") (citation and internal quotation marks omitted); United States v. Bruce, 89 F.3d 886, 889-90 (D.C. Cir. 1996) (holding that an act that could be viewed as an independent execution of common scheme need not be charged in a separate count to avoid duplicity); United States v. Sunia, 643 F. Supp. 2d 51, 71 (D.D.C. 2009) (Walton, J.) ("separate acts united by a common scheme or pattern may be charged together without any concern or impermissible duplicity so long as this practice does not implicate 'the purposes of the prohibition against duplicity,'" citing Bruce, 89 F.3d at 890); United States v. Poindexter, 725 F. Supp. 13, 24 (D.D.C. 1989). This principle is reflected in Fed. R. Crim. P. 7(c), which provides that "[a] count may allege that the . . . defendant committed [the offense] by one or more specified means." (Emphasis added).

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count based in part on four false statements before the grand jury charged in other counts of the Indictment not duplicitous nor unconstitutionally vague); United States v. Bonds, 580 F. Supp. 2d 925, 932 (N.D. Cal. 2008) (obstruction count based in part on false statements alleged in fourteen other counts not duplicitous nor unconstitutionally vague).

When separate acts are united by a common scheme or pattern, they may be charged together without any concern of impermissible duplicity so long as this practice does not implicate "the purposes of the prohibition against duplicity." Bruce, 89 F.3d at 890. These purposes include "(1) the prevention of double jeopardy, (2) an assurance of adequate notice to the defendant, (3) the provision of a basis for appropriate sentencing, and (4) the danger that a conviction was produced by a verdict that may not have been unanimous as to any one of the crimes charged." Id. As discussed below, the way Count One is charged does not implicate the purposes of the prohibition against duplicity.

In his motion, defendant concedes that it is appropriate to charge in one count a common scheme or pattern of more than one act. Dkt. No. 11 at 7 ("[u]nder D.C. Circuit law, it may be acceptable for the Government to charge several acts as such a 'course of conduct' if the offenses being charged were part of a 'continuing' scheme . . . and were taking place 'within a short period of time.'"). He contends, however, that "[n]o court has expressly decided whether a violation of 18 U.S.C. § 1505 is necessarily a 'course of conduct' crime or a single offense crime. See United States v. North, 708 F. Supp. 372, 374 (D.D.C. 1988) (citing Seventh Circuit law to suggest that a violation of Section 1505 can be charged either way)." Dkt. No. 11 at 7-8.

Actually, North provides strong support for the government in this matter. In North, the defendant asserted that within each obstruction count under Section 1505, there was more than one violation alleged, that the counts were duplicitous, and should therefore be dismissed. 708 F. Supp. at 373. The court rejected this argument and denied the motion. The court stated:

> Defendant urges that counts must be dismissed for duplicity if a separate element is involved for the different offenses within a single count. This Blockburger test is inapposite for an offense which may be continuing, such as

> obstruction of a congressional inquiry. Just as cheating on one's taxes year after year involves a separate element – a distinct year – but can be characterized as a single count for tax evasion, as in Shorter, [defendant's] efforts to impede or obstruct separate congressional inquiries closely related in time may also constitute a single violation of § 1505 in each instance.
>
> The Court finds no prejudice to the defendant in the Independent Counsel's approach. All concerns expressed by [defendant] on grounds of duplicity can readily be met by the guidance the Court would normally give the petit jury and appropriate instructions that the jury unanimously agree that there was at least one obstruction of a single committee inquiry. [Defendant's] motion to dismiss is denied.

Id. at 375 (footnote omitted); see id. at 374 ('[o]bstruction of justice, in its various statutory forms, may be charged by stating a continuous course of conduct or by stating in separate counts specific identified events occurring over a period of time. . . . Under federal law a prosecutor has considerable discretion in choosing whether to charge obstruction as a continuing course of conduct or as separate events") (citations omitted).

North is consistent with another Section 1505 case from this District, United States v. Poindexter, 725 F. Supp. 13 (D.D.C. 1989). In Poindexter, the court rejected a duplicity challenge to a charge under Section 1505. Count Three, which charged obstructing a Congressional investigation, was premised on a variety of obstructive acts. Id. at 23-24. Applying the Circuit holdings in Shorter and Mangieri, the court held that the count was not duplicitous, ruling that:

> it does not follow that, because a count alleges several acts, each of which could constitute a separate offense, each such act must be charged as a separate count or be dismissed for duplicity. On the contrary, . . . two or more acts which could be charged as a single offense if those acts can legitimately be characterized as part of a single, continuing scheme or course of conduct. . . . Indeed, a contrary rule would risk unfairness to the defendant who might otherwise be subjected to multiple punishments for a single criminal episode. Any dangers presented by the prosecution of a defendant by way of a single count with more than one allegation of criminal conduct – such as the possibility that the jury would render a guilty verdict without unanimity regarding the events in question – can be more than adequately controlled through instructions to the jury.

Id. at 24 (emphasis added); see United States v. Browning, 572 F.2d 720, 721-22, 724 (10th Cir. 1978) (counts in Indictment charging obstruction under Section 1505 not duplicitous merely because they alleged that there were several years of fraudulent conduct).

In light of the fact that Section 1505, as defined by Section 1515(b), includes false or misleading statements, as charged in Count One, it is appropriate to look to other federal false statement statutes. Cases under those statutes are consistent with the holding in North, discussed above. As an example, in United States v. Hubbell, 177 F.3d 11 (D.C. Cir. 1999), defendant was charged with violating 18 U.S.C. § 1001 (false statements) for deceiving bank regulators and the Federal Deposit Insurance Corporation. Defendant complained that the Indictment was duplicitous for charging "numerous false statements and acts of concealment" in a single count. Id. at 14. The court rejected this argument, holding "this construction of the indictment makes sense only if § 1001 does not state an offense for a scheme crime – which it clearly does." Id.

Similarly, in United States v. Mangieri, 694 F.2d 1270 (D.C. Cir. 1982), each count of 18 U.S.C. § 1014 (false statements in loan and credit applications) concerned a specific loan application and specified a number of separate false statements in support of the application. The court held that making several false statements in a single application constituted a single violation in that the statute was "targeted at fraudulent loan transactions, rather than the particular falsehood used to achieve the illegal transaction." Id. at 1281-82. See, e.g., Bruce, 89 F.3d at 889-90 (four fraudulent loan applications charged in single count charging bank fraud under 18 U.S.C. § 1344); Shorter, 809 F.2d at 58 (12 years of false tax returns charged in single count of tax evasion under 26 U.S.C. § 7201). See also Klat, 156 F.3d at 1266 (court rejected defendant's contention that both

counts of Indictment were duplicitous where counts charged in single counts repeated threats over a period of six months, respectively, against the Clerk of the United States Supreme Court and the Chief Justice of the United States; "acts charged constitute a common scheme to threaten").

Finally, in Watt, 911 F. Supp. at 551-52, defendant alleged that counts charging perjury and obstruction of justice for his acts in a grand jury proceeding were duplicitous where the government combined nine separate perjurious and false statements under each count. The court rejected this claim, holding that:

> Contrary to defendant's assertions, a review of the nature of defendant's conduct provides compelling evidence that defendant's actions were indeed part of a single, continuous course of conduct that can be properly grouped and charged on a single-count basis. . . . All nine statements, however, were made on the same day during the same grand jury investigation proceeding. Moreover, all nine statements dealt with the same subject matter – the Kingsley Park, Maryland Project. Presumably, defendant shared the same motivation for making each of these nine statements: to mislead the grand jury about his role in the project and to obstruct the grand jury's investigation into the matter. The nature of defendant's actions therefore suggests that this series of allegedly perjurious and obstructive statements made in relation to one particular project should be construed a single course of conduct rather than a loose collection of unrelated statements.

Id.

In this case, the Indictment charges, Dkt. No. 1 at 9, ¶ 9, and the evidence at trial will show, that defendant attacked the findings in the Mitchell Report and his main accuser in that report, Brian McNamee, as well as the memory and hearing ability of a New York Yankees teammate (id. at 13, ¶ 19(12)), from the day it was issued and thereafter up to and through the Congressional hearing. That hearing was called to determine what weight, if any, that report should carry in Congress's ongoing interest in the use of PEDs by athletes, including MLB players. Id. at 9-10, ¶ 12. All of defendant's false and misleading statements alleged in Count One were made to a single Congressional Committee on two occasions, eight days apart. Id. at 10-11, ¶¶ 15-17. Defendant's

statements were made in a short period of time, were all aimed at a common audience (the Committee), all aimed at a common goal (concealing from the Committee the true facts of defendant's use of PEDs), and involved a common method (false and misleading statements). Defendant's statements constituted a common scheme to obstruct. See Klat, 156 F.3d at 1266 ("acts charged constituted a common scheme to threaten").

The alleged false and misleading statements were all part of a scheme or pattern by defendant to deny he was injected with PEDs by McNamee, to come up with an alternative, innocent theory of what the injections he did receive might have been, i.e., B-12 and lidocaine, or to attack the credibility of the Mitchell Report's statements regarding defendant, especially the credibility or trustworthiness of the statements of McNamee and a New York Yankees teammate. Id. at 12-14, ¶ 19. In other words, all the false or misleading statements referenced relate to with what defendant was injected, i.e., PEDs or something else, his knowledge of PEDs, and the credibility of those who claimed he had taken PEDs.[5] These statements were made by defendant as part of a corrupt endeavor, as the Indictment charges, "to influence, obstruct, and impede the due and proper exercise of the power of inquiry under which an investigation was being had by a Committee of the United States House of Representatives by making the following false statements, among others, that [defendant] knew to be false and misleading to Committee Members and staff[.]" Id.

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[5] Defendant's denial that he was at Player #1's house in south Florida on or about June 9, 1998, relates to a direct attack on the credibility of the Mitchell Report and McNamee's credibility as to whether and with what he injected defendant. As defendant's counsel said at the Congressional deposition of defendant on February 5, 2008 (relevant pages attached; Attachment #2), whether McNamee could be believed as to whether defendant was at this player's house on the date specified was critical to the integrity of the Mitchell investigation and, more specifically, McNamee. Attachment #2 at 90-91 ("quality of the investigation", "The whole house of cards falls"). As the government will prove at trial, defendant was in fact at Player #1's house on the day in question.

c. The charging of individual obstructive acts in Count One does not cause any undue prejudice to defendant

Defendant contends that Count One, as charged, would prejudice him. Id. at 8-10. Specifically, he contends the count could result in a less than unanimous jury verdict, and cites the North case as support for his contention. Id.

The opinion in North, however, supports the government's position. As previously discussed, the court in North denied defendant's motion to dismiss for duplicity. Most relevant for this argument, however, is the finding by the court that:

> The Court finds no prejudice to the defendant in the Independent Counsel's approach. All concerns expressed by [defendant] on grounds of duplicity can readily be met by the guidance the Court would normally give the petit jury and appropriate instructions that the jury unanimously agree that there was at least one obstruction of a single committee inquiry.

708 F. Supp. at 375 (emphasis added).

Similarly, in United States v. Poindexter, discussed above, the court held that:

> [a]ny dangers presented by the prosecution of a defendant by way of a single count with more than one allegation of criminal conduct – such as the possibility that the jury would render a guilty verdict without unanimity regarding the events in question – can be more than adequately controlled through instructions to the jury.

725 F. Supp. at 24 (emphasis added); see United States v. Watt, 911 F. Supp. at 553-54 (similar holding, citing Poindexter).

In this case, any potential danger that might result from prosecuting defendant on Count One – that the jury might render a verdict on that count without unanimity on any single obstructive act – can be more than adequately controlled by providing a proper unanimity instruction to the jury. Beyond the remedy suggested in the three cases cited above, the government is also proposing a special verdict form to protect against any duplicity issues and has attached a proposed form. These

steps will more than adequately protect defendant's interests in this regard and defendant's motion to dismiss therefore should be denied.

3. Count One Sufficiently Informs Defendant of that With Which He Has Been Charged

Defendant's secondary argument is that Count One is impermissibly vague. Dkt. No. 11 at 10-11. Specifically, he claims that "ten of the fifteen statements predicating Count One are described so vaguely that it is not possible to determine what specific question(s) and answer(s) are charged. Id. at 10. Further, he contends that:

> In order to carry its burden to prove that these statements are criminal, however, the Government must prove that Mr. Clemens uttered a statement under oath which is a clearly false answer to an unambiguous question. See Bronston, 409 U.S. at 361-62. A response that is merely incomplete, misleading, or non-responsive is not sufficient to prove this crime. Id. Without more detail, there is no sure way to test the statements alluded to in . . . Count One.

Id. at 11; see id. at 2-3, at 6, n. 3.

Defendant's contentions are wrong legally and factually. First, Section1515(b), states in relevant part that, "[a]s used in section 1505, the term 'corruptly' means acting with an improper purpose, personally . . . including making a false or misleading statement . . . ." 18 U.S.C. § 1515(b) (emphasis added). Contrary to what defendant contends, the Obstruction of Congress statute in Section 1505 encompasses both false and misleading statements. See Dkt. No. 1 (Indictment) at 12 ("by making the following statements, among others, that CLEMENS knew to be false and misleading to Committee Members and staff").

Second, the only case defendant cites in support of his contentions in this regard is Bronston v. United States, 409 U.S. 352 (1973). Dkt. No. 11 at 11; see id. at 3.[6] Bronston, however, is a

[6] The only other case cited in this part of defendant's motion is United States v. North, 708 F. Supp. 372, 373 n.1 (D.D.C. 1988). Dkt. No. 11 at 10. Defendant cites North simply for the

perjury case under 18 U.S.C. § 1621, dealing with the specificity that statute requires for proof of a violation. It is not a case involving Obstruction of Congress, nor does it discuss what is required to be proved to show a violation of Section 1505. By way of example, perjury cannot be shown by proving that the defendant intended to mislead the questioner, as long as his or her answer is literally true. Bronston, 409 U.S. at 360-61. On the other hand, obstruction, as discussed above, can be shown by proving defendant intended to mislead the questioner on a material matter. See United States v. Upton, 856 F. Supp. 727, 744 (E.D.N.Y. 1994) ("[b]ecause these counts allege a violation of 18 U.S.C. § 1505, and not the perjury statute, . . . defendant's arguments are inapplicable).

Finally, the other courts that have addressed arguments similar to those of defendant in the context of a motion to dismiss an Indictment charging a violation of Section 1505 have rejected those arguments. See, e.g., United States v. Tallant, 547 F.2d 1291, 1299 & n.18 (5th Cir. 1977) (obstruction count under Section 1505 alleging defendant, over a period of time, impeded a proceeding before the Securities and Exchange Commission ("SEC") where he caused certain stockholder ledger records to be falsified and presented to SEC investigators); United States v. Alo, 439 F.2d 751, 756 (2nd Cir. 1971) (court denied motion to dismiss, rejecting defendant's argument that Indictment lacked the requisite specificity; Indictment tracked the language of Section 1505, and "these general allegations were fleshed out with the phrase 'by giving false and evasive answers to questions put to him as a witness in such proceeding,' and with the appropriate specifics as to date, statute, and names of the administrative agency and proceeding."); United States v. Hassoun, 477 F.

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proposition that one of the vices of a duplicitous charge is that "defendant is not adequately informed of the true nature and cause of the accusation." Dkt. No. 11 at 10. As discussed above, in North, the court rejected the defendant's argument that the obstruction count was duplicitous. 708 F. Supp. at 375. Moreover, the court stated that it would address any concerns in that regard with guidance from the court, including a unanimity jury instruction.

Supp.2d 1210, 1227 (S.D. Fla. 2007) (Section 1505 obstruction count sufficient where it informed defendant of the nature of the accusations against him; count charged that, over a period of about three and a half months, defendant corruptly endeavored to impede an immigration court proceeding in which he provided testimony; court held that if defendant believed the charge did not adequately apprise him of the nature of the charge, the appropriate remedy would be a bill of particulars); United States v. Upton, 856 F. Supp. at 743-44 (court rejected defendant's argument that the Section 1505 obstruction "counts should be dismissed because they do not meet the standards for charging perjury in that the charging paragraph does not describe with particularity the falsehood which forms the basis of the offense"; "Indictment in this action sets forth the time, place and essential elements of the crime and is therefore valid").

Here, the Indictment, which tracks the language of Section 1505, would be sufficient if it merely charged that defendant gave false and misleading testimony to the Committee on February 5 and 13, 2008.[7] Instead, the Indictment goes further by giving fifteen specific instances in which defendant provided false and misleading testimony. Accordingly, defendant's motion to dismiss on

[7] Defendant contends, citing no authority, that the "among others" language in the Indictment prior to the fifteen specific examples of false and misleading statements fails to give him adequate notice of what is charged. Defendant's argument is without merit. See Bonds, 580 F. Supp. 2d at 932 (defendant argued that obstruction of grand jury count was "duplicitous and unconstitutionally vague because it was founded on statements 'including but not limited to the false statements' detailed in the Indictment. The government responds that Count Fifteen rests solely on defendant's grand jury testimony, and this basis provides defendant with adequate notice of the charges against him. The Court agrees.") (emphasis added). See also Bonds, 2011 WL 522387 at *2-*3 (rejecting defendant Bonds renewed effort to have struck the words "including but not limited to" from the count charging obstruction of the grand jury). At most, defendant might seek to file a bill of particulars, not seek to dismiss the Indictment. See Hassoun, 477 F. Supp.2d at 1227.

this basis should also be denied.[8] See Hubbell, 177 F.3d at 12, 13 (defendant argued, as to a false statement count, that Indictment lacked specificity in identifying the particular facts concealed; court of appeals found Indictment sufficiently informed defendant of the charges against him and reversed district court's dismissal of Indictment); Bonds, 2011 WL 511387 at *2 ("indictment in this case contains all the elements of the [obstruction] offense. Additionally, the indictment limits the obstruction charge to grand jury testimony provided by defendant '[o]n or about December 4, 2003.' This sufficiently apprises defendant of what he must be prepared to meet. Additionally, it is sufficiently specific that jeopardy-related complications should not arise"); Bonds, 580 F. Supp. 2d at 932 (obstruction count "rests solely on defendant's grand jury testimony, and this basis provides defendant with adequate notice of the charges against him").[9]

C. Conclusion

WHEREFORE, for the foregoing reasons, the United States opposes defendant's motion and respectfully submits that it should be denied. Count One is neither duplicitous nor impermissibly

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[8] In a catch-all type of argument, defendant then attempts to claim that the other counts in the indictment must also be dismissed because they "are inextricably intertwined with the broad and unconstitutional allegations in Count One." Dkt. No. 11 at 12. As discussed above, Count One is constitutionally valid. Furthermore, any defect in Count One would not undermine the other five counts and defendant makes no legitimate argument that it does. In the one case defendant cites, Bonds, 2008 WL 618911 at *2 (N.D.Cal. 2008), the challenge as to duplicity was as to all the counts in the Indictment, not just the obstruction count. Moreover, the subsequent decisions in the Bonds case have found the respective Indictments neither duplicitous nor unconstitutionally vague. See footnote 4 above. In the other case cited by defendant, United States v. Weathers, 186 F.3d 948, 954-55 (D.C. Cir. 1999), the issue was whether defendant had waived an argument that the indictment was impermissibly multiplicitous, and the court found that defendant had waived that argument. Id.

[9] Similarly, in this case, as in the two opinions in the Bonds case cited immediately above, the obstruction count, Count One, rests solely on defendant's Congressional testimony on February 5 and 13, 2008, and this basis provides defendant with adequate notice of the charge against him.

vague and, to the extent there are any concerns as to either defense argument, those concerns can be properly and adequately addressed by an appropriate unanimity instruction and a special verdict form.[10]

Respectfully Submitted,

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/ s /

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[10] Among the five potential remedies suggested by defendant for the alleged flaws in Count One, two of which the government does not object are a specific jury instruction as to unanimity and a special verdict form. Dkt. No. 11 at 11-12. See United States v. North, 708 F. Supp. at 375 ("[a]ll concerns expressed by [defendant] on grounds of duplicity can readily be met by the guidance the Court would normally give the petite jury and appropriate instructions that the jury unanimously agree that there was at least one obstruction of a single committee inquiry").

Attachment 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PROPOSED JURY VERDICT FORM

The government hereby submits the following proposed jury verdict form.

COUNT 1 – Obstruction of Congress:

As to count 1 of the grand jury indictment, charging defendant William R. Clemens with Obstruction of Congress, we find the defendant:

______GUILTY   ______NOT GUILTY

Unanimity Finding: The jury agrees or does not agree that defendant made the following statement or statements, which defendant knew to be false or misleading, in an endeavor to influence, obstruct, or impede the inquiry by a Committee of the United States House of Representatives.

(1) CLEMENS's sworn Deposition testimony on February 5, 2008, that he had never used HGH (Deposition at 24-25):

_______AGREE   ______NOT AGREE

(2) CLEMENS's sworn Deposition testimony on February 5, 2008, that he never spoke to Strength Coach #1 about HGH (Deposition at 67):

_______AGREE   ______NOT AGREE

(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 68):

_______AGREE ______NOT AGREE

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

_______AGREE ______NOT AGREE

(5) CLEMENS's sworn Deposition testimony on February 5, 2008, that he had never used anabolic steroids (Deposition at 24):

_______AGREE ______NOT AGREE

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

_______AGREE ______NOT AGREE

(7) CLEMENS's sworn Deposition testimony on February 5, 2008, that Strength Coach #1 injected him with vitamin B12 (Deposition at 37-38):

_______AGREE ______NOT AGREE

(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 146):

_______AGREE ______NOT AGREE

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

_______AGREE ______NOT AGREE

(10) CLEMENS's sworn Deposition testimony on February 5, 2008, that Strength Coach #1 injected him with lidocaine (Deposition at 43-44):

_______AGREE ______NOT AGREE

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

_______AGREE ______NOT AGREE

(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):

_______AGREE ______NOT AGREE

(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 175-177):

_______AGREE ______NOT AGREE

(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 115):

_______AGREE ______NOT AGREE

(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 17):

_______AGREE ______NOT AGREE

COUNT 2 – False Statements during Deposition concerning HGH:

As to Count 2 of the grand jury indictment, charging defendant William R. Clemens with false statements, we find the defendant:

_____GUILTY _____NOT GUILTY

COUNT 3 – False Statements during Deposition concerning steroids:

As to Count 3 of the grand jury indictment, charging defendant William R. Clemens with false statements, we find the defendant:

_____GUILTY _____NOT GUILTY

COUNT 4 – False Statements during Deposition concerning vitamin B12:

As to Count 2 of the grand jury indictment, charging defendant William R. Clemens with false statements, we find the defendant:

_____GUILTY _____NOT GUILTY

COUNT 5 – Perjury during Hearing concerning HGH:

As to Count 5 of the grand jury indictment, charging defendant William R. Clemens with perjury, we find the defendant:

_____GUILTY _____NOT GUILTY

COUNT 6 – Perjury during Hearing concerning steroids:

As to Count 6 of the grand jury indictment, charging defendant William R. Clemens with perjury, we find the defendant:

______GUILTY ______NOT GUILTY

____
FOREPERSON/JUROR NO.

____
DATE

Attachment 2

RPTS JOHNSON

DCMN MAGMER

COMMITTEE ON OVERSIGHT AND

GOVERNMENT REFORM,

U.S. HOUSE OF REPRESENTATIVES,

WASHINGTON, D.C.

DEPOSITION OF: WILLIAM ROGER CLEMENS

Tuesday, February 5, 2008

Washington, D.C.

The deposition in the above matter was held in Room 2157 Lounge, Rayburn House Office Building, commencing at

can't recall everything but I've --

Q Do you know that there was a party while you all were away?

A I do. I do. I do now.

Q You don't recall Canseco having a party?

Mr. Hardin. We don't really want to hide behind this. Quite frankly, if you hadn't brought it up, we would have brought it up at the hearing. So there's no reason for us to lay behind the log on this.

We did several things. We go down and we send people out to talk to Canseco to find out. When he read that portion of the report, he goes, That's a lie. We think, Well, how do you know? He said, Roger wasn't at that party. We said, How do you know he wasn't at that party? Because that's the only party I ever gave at my home there for the team. Roger was supposed to come and he didn't come. And I heard later he was out playing golf.

We then -- and I say, Well, how can we show that? Because we know that Canseco in some corners, people have different views. Canseco's father says, I think that game the next day, I think it was talked about on TV. We then go to Baseball to get their TV records, and we find on the broadcast that two announcers are laughing about the fact that Canseco had this party for the team the day before at his pool, and Roger didn't come. And the other announcer

says, That's right, I saw him playing golf. And then he's going back to the scene. So then we go look at his credit cards because we believe -- and it shows that he played golf that day.

The other thing about it is that we have no answer for is, McNamee tells our investigators that he told the Mitchell people to take that out of the report because he was not at that party. And they refused to do so, saying that other people had told them that. So they left it in. But the report, if McNamee is telling the truth about that, put something in that McNamee tells them is not true.

And now we know -- and he didn't know, because he was not at the party. And I don't know whether McNamee is telling the truth about what he told the Mitchell people or not. We don't know. The one thing we know is, this report has that in there, and if McNamee is telling the truth, they were told from the beginning that McNamee couldn't sponsor it. But more importantly, for the quality of the investigation, which as I was talking to the Congressman about, is they never checked on that. They never called Canseco when they have that information and say, Was Roger Clemens at your party? If they had, they could have found out and started doing the same thing we did.

So there's TV coverage, there's an audio, there's a video. Roger was never at that party. And the key thing to

remember is that's where he's supposed to have begun to get stuff that he's later delivered. The whole house of cards falls.

Q Okay. I appreciate that. Thank you.

A Sorry.

Q That's fine. Can you tell me about your relationship with Jose Canseco?

A He was a teammate in, I think, the early years. I think I said '95 in Boston. I think for -- I think he was there the full year. Toronto, a full year. 2000, I don't -- I think he was either traded or we picked him up. When I say "we," the Yankees.

And I knew Jose. I faced him as a visiting player. I've played golf with him probably -- I've golfed with him, and not just him, but him and other guys on the team. We've gone out in foursomes probably, maybe more than a handful of times, maybe five, six times. And he's been in a golf group, sometimes not with me, in a golf group of 12, or 12 guys playing.