

**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 POTENTIAL TRIAL WITNESSES  
CHARLES JOHNSON AND PHIL BARNETT  
FOR ORDER PERMITTING COUNSEL TO SIT IN WELL OF COURT**

Pursuant to Rule 47 of the Federal Rules of Criminal Procedure, potential trial witnesses Charles Johnson and Phil Barnett, through counsel, respectfully move for an order permitting their counsel to sit in the well of the Court during their trial testimony in order to make privilege objections, if necessary, and to present supporting argument, as appropriate.

A proposed Order is attached and oral argument is not requested.

**ARGUMENT**

Messrs. Johnson and Barnett understand that the Department may call one or both of them to testify at trial in this matter. Mr. Johnson was, until his retirement in 2004, the Parliamentarian of the United States House of Representatives. He now serves as a consultant to the current Parliamentarian of the House. Mr. Barnett currently serves as Minority Staff Director for the Committee on Energy and Commerce of the U.S. House of Representatives. At the time of the events alleged in the Indictment, which encompass the period 2005-08, Mr. Barnett served first as Minority Staff Director and Chief Counsel to the House Committee on Government Reform (2005-06), and then as Staff Director to that same committee (2007-08), the name of

which changed in January 2007 to the House Committee on Oversight and Government Reform. (We refer, in the remainder of this Memorandum, to this particular House committee, regardless of its name at any particular time, as “the Committee”).

The Speech or Debate Clause protects Messrs. Johnson and Barnett from being compelled to testify about privileged legislative matters. *See* U.S. Const. art. I, § 6, cl. 1; *Doe v. McMillan*, 412 U.S. 306, 312 (1973) (privilege applies to all activities “within the ‘legislative sphere’”) (quoting *Gravel v. United States*, 408 U.S. 606, 624-25 (1972)); *Gravel*, 408 U.S. at 616, 618 (in applying Speech or Debate Clause privilege, “a Member and his aide are to be treated as one;” protections of Clause apply “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.” (quotation marks omitted)). Such privileged legislative matters would include, but are not necessarily limited to, the Committee’s investigation into steroid use in Major League Baseball, during the course of which Mr. Clemens made statements which led to his indictment in this case. *See* Order (Apr. 27, 2011) (ECF No. 43); Motion of Non-Party [Committee] to Quash Subpoena Duces Tecum . . . (Mar. 18, 2011) (ECF No. 27) (“Motion to Quash”); Reply to Defendant’s Opposition to [Motion to Quash] (Apr. 15, 2011) (ECF No. 35).

As the Court is aware, notwithstanding the Speech or Debate Clause privilege, the Committee itself elected not to assert the privilege with respect to, and produced to the prosecution (and, through the prosecution, to Mr. Clemens), many records of its formal, public investigatory activities concerning steroid use in Major League Baseball. *See, e.g.*, Motion to Quash at 8-10 (ECF No. 27). The Committee, however, did assert the privilege with respect to other confidential Committee communications. *See id.* at 10 (“What the Committee generally

has not provided to the Department are internal Committee notes, memoranda, and communications.”).

We do not anticipate, at this time, that Mr. Johnson will be questioned at trial by the prosecution about matters that are Speech or Debate protected or protected by other privileges (*e.g.*, attorney-client). If Mr. Johnson is questioned about such matters by the prosecution — or if the defense attempts to question Mr. Johnson on cross-examination about matters that are Speech or Debate protected or otherwise privileged — counsel for Mr. Johnson should be permitted to object and present argument as appropriate.

We do anticipate that Mr. Barnett will be questioned by the prosecution about matters that are Speech or Debate protected that are relevant to its case in chief. Mr. Barnett, in keeping with the position taken by the Committee itself, intends in general not to assert the privilege with respect to (i) matters relating to formal, public Committee investigatory activities concerning steroid use in Major League Baseball that are relevant to the prosecution’s case in chief, and (ii) questioning by the defense on cross-examination that is within the subject matter of the direct examination. *See also* Fed. R. Evid. 611(b).<sup>1</sup> If Mr. Barnett is questioned about other matters that are Speech or Debate protected or otherwise privileged (including cross-examination

---

<sup>1</sup> In refraining from asserting the Speech or Debate Clause privilege in response to questions that seek to elicit testimony about any protected matter, Messrs. Johnson and Barnett expressly are not waiving the privilege for any purpose or as to any matter. *See generally United States v. Helstoski*, 442 U.S. 477, 490-94 (1979) (waiver of Speech or Debate Clause privilege may not be possible and, if possible, “can be found only after explicit and unequivocal renunciation of the protection”; no waiver where U.S. Representative produced documentary evidence of legislative acts and testified ten separate times, over more than a two-year time period, before various grand juries, including regarding those legislative acts); Motion to Quash at 22 n.9 (ECF No. 27).

questioning that goes beyond the subject matter of the direct examination), counsel for Mr. Barnett should be permitted to object and present argument as appropriate.

Accordingly, Messrs. Johnson and Barnett seek the Court's permission to have their counsel sit in the well of the Court during their respective appearances at trial, if any, in order to make privilege objections, if necessary, and to present supporting argument, as appropriate.

Respectfully submitted,

KERRY W. KIRCHER, D.C. Bar #386816  
General Counsel

JOHN D. FILAMOR, D.C. Bar #476240  
Senior Assistant Counsel

CHRISTINE M. DAVENPORT  
Senior Assistant Counsel

KATHERINE E. McCARRON, D.C. Bar #486335  
Assistant Counsel

/s/ William Pittard  
WILLIAM PITTARD, D.C. Bar #482949

Assistant Counsel  
KIRSTEN W. KONAR, D.C. Bar #979176  
Assistant Counsel

Office of General Counsel  
United States House of Representatives  
219 Cannon House Office Building  
Washington, D.C. 20515  
Telephone: (202) 225-9700  
Facsimile: (202) 226-1360  
[William.Pittard@mail.house.gov](mailto:William.Pittard@mail.house.gov)

Counsel for Non-Party Potential Trial Witnesses  
Charles Johnson and Phil Barnett

June 22, 2011

**CERTIFICATE OF SERVICE**

I certify that on June 22, 2011, I served one copy of the foregoing Motion of Non-Party Potential Trial Witnesses Charles Johnson and Phil Barnett for Order Permitting Counsel to Sit in Well of Court, and all attachments, by CM/ECF and by electronic mail (.pdf format) on the following:

Russell Hardin, Jr., Esquire  
Andy Drumheller, Esquire  
Derek S. Hollingsworth, Esquire  
Jeremy T. Monthly, Esquire  
RUSTY HARDIN & ASSOCIATES, P.C.  
5 Houston Center  
1401 McKinney, Suite 2250  
Houston, Texas 77010-4035  
[rhardin@rustyhardin.com](mailto:rhardin@rustyhardin.com)  
[adrumheller@rustyhardin.com](mailto:adrumheller@rustyhardin.com)  
[dhollingsworth@rustyhardin.com](mailto:dhollingsworth@rustyhardin.com)  
[jmonthly@rustyhardin.com](mailto:jmonthly@rustyhardin.com)

Michael Attanasio, Esquire  
COOLEY, GODWARD, KRONISH, LLP  
4401 Eastgate Mall  
San Diego, California 92121-1909  
[mattanasio@cooley.com](mailto:mattanasio@cooley.com)

Daniel Pearce Butler, Esquire  
Steven John Durham, Esquire  
UNITED STATES ATTORNEY'S OFFICE  
Judiciary Center Building  
555 Fourth Street, Northwest, Rooms 5231 & 5253  
Washington, District of Columbia 20530  
[daniel.butler@usdoj.gov](mailto:daniel.butler@usdoj.gov)  
[steven.durham@usdoj.gov](mailto:steven.durham@usdoj.gov)

/s/ William Pittard  
William Pittard