UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION TO PROHIBIT RETRIAL AND TO DISMISS THE INDICTMENT

Dozens of government agents and attorneys doggedly investigated Mr. Clemens for two years, resulting in a nineteen-page, six-count indictment. After the trial began poorly for the Government, however, the prosecutors who sought that indictment in this case forced a mistrial by (1) failing to redact precluded testimony from their trial exhibits; (2) publishing that precluded testimony "before the jury" through a dramatic video; and (3) leaving the transcript of that precluded testimony on the juror's monitors for minutes while counsel discussed the prohibited evidence at the bench. *See* Transcript of Jury Trial Proceedings on July 14, 2011, excerpts of which were attached to Defendant's initial motion at Exhibit 6 ("7/14/11 Tr."), at 40–44, 48–50. The mistrial wasted substantial time and resources of this Court, of citizens selected to serve on the jury, of Mr. Clemens, and of the U.S. Attorney's Office and the FBI. The prosecutors' conduct therefore left those in attendance "perplexed," and the Court immediately asked, absent misconduct, "[H]ow would this [evidence] come in?" *Id.* at 36–37.

Over one month after Mr. Clemens's first and preferred trial ground to a halt, the Government still has failed to answer the Court's question. Instead, the Government only focuses on the first of its three errors in its response—the basic, but largely administrative,

failure to redact exhibits in the wake of a critical motion in limine ruling. But nowhere in the response does the Government address its remaining, entirely tactical, provocations, nor do the prosecutors answer the fundamental question posed by the Court or Mr. Clemens in his opening brief. So we ask it again: How is it fair that the only "punishment" exacted on the Government for such an egregious error will be the reward of a second trial in which the Government will be in a much better position to retool its case, improve its jury selection, and attempt to obtain an unjust conviction?

Even the apology offered by the Government for its one admitted mistake raises more questions than it answers. Buried on page 15 of the Opposition, the same highly experienced prosecutors who spear-headed an all-points national investigation of Mr. Clemens and then sought a fact-packed, nineteen-page indictment against him reluctantly and "informal[ly]" explain that their "failure to redact" the Government's trial exhibits was because the content of those exhibits slipped the prosecutors' minds in a flurry of trial activity. *See* D.E. 81 ("Opp.") at 15–17 & n.12. This confession is difficult to credit given the experience of these prosecutors and the vast resources devoted to this case from its inception. It also misses the point. The Government's ministerial "failure to review its exhibits and redact them" did not goad Mr. Clemens into seeking a mistrial. *See id.* at 17. Rather, the Government's presentation of those un-redacted exhibits to the jury caused the mistrial. *See* 7/14/11 Tr. at 49. Even if the prosecutors' failure to *redact* their trial exhibits was an innocent "oversight"—and the record raises doubt about that issue—the prosecutors' deliberate decision to *publish* those exhibits has not yet been explained, and the inferences drawn from the record about that decision have not yet been rebutted.

Instead, the Government's approach to Mr. Clemens's motion—a filing that was requested by the Court *sua sponte*—is to provide the minimum possible explanation for the prosecutors' conduct on July 14, to submit no evidence to support the Government's partial explanation, and to effectively dare the Court to dismiss the case within the admittedly pro-prosecution standard set forth in *Oregon v. Kennedy*, 456 U.S. 667 (1982). The Court should call that dare, bar retrial, and dismiss the indictment for the reasons set forth in Mr. Clemens's initial motion and for five additional reasons raised by the Government's Opposition: (1) the "mistake" the Government explains away is not the only act that provoked the mistrial; (2) the Government's opposition to a mistrial at the time does not negate an improper prosecutorial motive; (3) the Government's retrospective gloss of the trial is inaccurate; (4) the Government's attempt to shift some blame for its conduct is unsupported by the record; and (5) the procedural posture the Government urges here supports dismissal of the indictment instead of a retrial.

ARGUMENT

In its initial motion to bar retrial and to dismiss the indictment, the defense provided objective record evidence and a number of inescapable inferences to meet its initial burden of proving that the Government intended to provoke a mistrial six days into the trial of Mr. Clemens. *See Kennedy*, 456 U.S. at 675; *United States v. Williams*, 472 F.3d 81, 85–86 (3d Cir. 2007). In light of the Government's Opposition, the Court should preclude re-prosecution of Mr. Clemens and dismiss the indictment with prejudice for five additional reasons.

1. The Government's apology for failing to redact Exhibits 3a-2 and 3b-2 does not justify the other misconduct that prompted a mistrial.

In its Opposition, the Government concedes that it failed "to review Exhibit 3b-2 for necessary redactions." *E.g.*, Opp. at 35. According to the Government, the prosecutors would have removed all references to the testimony of Mrs. Pettitte precluded by this Court's pretrial

rulings from Exhibits 3a-2 and 3b-2 "had government counsel adequately focused on it." Opp. at 17. "[T]he chronology of events" and "the press of other trial matters" are to blame for the prosecutors' purported "mistake." Opp. at 17. This confession of negligence falls short, however, in two ways.

First, the record warrants some skepticism regarding the Government's new claim that the failure to redact trial exhibits was a mere "oversight." For one thing, the "chronology of events" set forth in the Opposition is not as innocent as the Government suggests. According to the Government, the prosecutors rehearsed this particular clip with the Government's principal Congressional witness very late in their preparation of this long-gestating case,[1] and it did not serve a copy of the video clip to defense counsel until July 11, 2011—six days *after* the Court's pretrial ruling and one day before Mr. Barnett took the witness stand. *See* Opp. at 7 n.4. The prosecutors were actively working with these exhibits off-and-on for two weeks leading up to Mr. Barnett's testimony on July 14, 2011.

In addition, the record shows that the Government's use of this particular exhibit was premeditated. According to the Government's "chronology," the prosecutors had identified the particular hearing excerpt captured in Exhibits 3a-2 and 3b-2 months before trial. *See* Opp. at 16. Even as early as May 6, 2011, however, this particular hearing excerpt was unique in several respects. For example, the hearing excerpt is excessively long. The testimony quoted in the related obstruction specification is 27 lines, but Exhibit 3a-2 consists of five pages containing 221 lines of testimony. This particular hearing excerpt was also packaged for the jury as

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1 According to page 16 of the Opposition, Mr. Barnett was prepared on June 28, 2011, one week before the July 5, 2011 hearing on pretrial motions and two weeks before Mr. Barnett took the stand at trial. The extensive, tedious, but carefully-worded nature of Mr. Barnett's testimony indicates that the preparations must have consumed substantial hours and involved thorough rehearsal of what Mr. Barnett would say about each video clip, including the offending one.

substantive evidence rather than a demonstrative exhibit. Exhibit 3a-2 is the only one of the transcript excerpts offered *en masse* on July 14, 2011 that was not excerpted, enlarged, and highlighted to emphasize allegedly criminal testimony under Count I of the Indictment. Finally, this hearing excerpt was designed to be provocative. This was a critical video clip for the Government, featuring a strident accuser of Mr. Clemens quoting what is widely (but wrongly) thought to be corroboration of his guilt. In sum, the objective facts work against the credibility of the Government's representation that "these exhibits were not at the forefront of either prosecutor's mind." Opp. at 16.

Second, regardless of the prosecutors' professed intent with respect to redaction, the Government *still* has not explained why it actually *published* evidence it concedes was in violation of the Court's pretrial rulings or why double jeopardy does not apply to that publication.[2] The Court is therefore entitled to consider the arguments and inferences in Mr. Clemens's initial brief regarding that publication to be conceded. *See Fischer v. U.S. Dep't of Justice*, 723 F. Supp.2d 104, 110 (D.D.C. 2010) (treating as conceded arguments raised in a motion that the opposing party failed to address in its opposition); *Buggs v. Powell*, 293 F. Supp.2d 135, 141 (D.D.C. 2003) (same).

Moreover, some of the positions taken in the Opposition provide even more support for a finding that the Government intended to provoke a mistrial when the prosecutors played the full

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2 In its Opposition, the Government takes the position that the prosecutor's contemporaneous statement that "[t]here was no intention to run afoul of any Court ruling" pertained to the Government's failure to redact its exhibits. *See* Opp. at 17 n.14. As Mr. Clemens discussed in footnote 43 of the initial motion, the record supports a different conclusion, namely, that the prosecutor's statement conveys that the Government thought it should be able to get away with putting Mrs. Pettitte's statements before the jury as long as those statements were embedded in otherwise admissible testimony instead of from Mrs. Pettitte herself as a live witness. Indeed, the Opposition concedes that the prosecutors originally

video clip of Representative Cummings to the jury. For example, the statement in the Opposition that "approximately 2/3 of the clip had been played" before the Court halted proceedings hurts the Government's cause. Opp. at 7. Even if the "press of other trial matters" somehow excuses the Government's lack of redaction effort, the length of time spent on Exhibit 3b-2 leading up to the reference to Mrs. Pettitte shows that the Government had ample opportunity to recall where the video testimony was headed and to interrupt the playback of the clip before it reached the content that directly violated the Court's pretrial rulings. The Government chose not to do so and never indicated that it was about to do so. Why should Mr. Clemens be the one who is prejudiced by the Government's decision rather than the Government itself?

Likewise, the Government's response to Mr. Clemens's argument regarding the experience of the prosecutors in this case actually proves the defense's point. *See* Opp. at 18. In the initial motion, the defense did not argue that "only inexperienced counsel can make mistakes." *Id.* The more accurate point is that an experienced trial lawyer would not start playing a video clip he or she had been preparing to show for weeks, let it play for minutes to the jury, but then not interrupt the video when a plainly excluded portion of testimony was on the horizon. Indeed, Mr. Clemens readily concedes that the prosecutors in this case are "cautious and careful," and that they have a propensity toward "endeavoring to understand . . . the exact contours of this Court's rulings." *See* Opp. At 22–23. But those character traits cut two ways. When careful, deliberate, and detail-oriented prosecutors stand idle like the cat that ate the canary while admittedly improper evidence is played for a jury, any innocent explanation for the prosecutors' conduct is rendered implausible.

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interpreted the Court's pretrial ruling regarding Mrs. Pettitte to relate only to live testimony as

Further, in its Opposition, the Government expresses no remorse whatsoever over its decision to continue displaying the video clip to the jury during the parties' first bench conference. *See* Opp. at 8 n.5 & 21 n.17.3 Indeed, the Government even tries to suggest that defense counsel bears some responsibility for "st[anding] silent" instead of instructing the Government's paralegal when and how to play televised evidence during the Government's case-in-chief. *See* Opp. at 21 n.17. In light of the tone of the Government's response, the Court can, and should, infer improper intent from the Government's "inaction." *Id.*

In sum, the Court can find that the prosecutors deliberately introduced trial error in order to provoke a defendant into moving for a mistrial when a superficial explanation by the Government for its conduct is "too lacking" to support an inference of innocent intent. *See United States v. Cornelius*, 623 F.3d 486, 498 (7th Cir. 2010). That is the case here. The Court should therefore find in favor of Mr. Clemens and dismiss the case.

2. The Government's in-trial opposition to a mistrial does not preclude a double jeopardy bar.

Mr. Clemens acknowledges that the Government's perfunctory opposition to Mr. Clemens's compelled request for a mistrial mitigates in favor of a finding that the Government was not trying to obtain a mistrial here. *See United States v. Gilmore*, 454 F.3d 725, 759 (7th Cir. 2006) (noting that Government opposed motion for mistrial and instead sought a limiting instruction). This argument is not determinative of Mr. Clemens's motion as a matter of law, however, especially given the factual circumstances here.

"the most obvious component" of the Court's considered judgment. Opp. at 16–17.

3 The Government accurately states Mr. Clemens's position that the Government's paralegal herself engaged in no bad faith. *See* Opp. at 21 n.17. The proper focus of the Court's inquiry is the supervising prosecutors.

In its Opposition, the Government concedes that "[i]t cannot be the case that the government's opposition to a mistrial can *per se* negate any inference of intent to goad the defense into moving for one." Opp. at 20 (citing *Cornelius*, 623 F.3d at 499). In *Cornelius*, the Seventh Circuit spelled out this concern in greater detail:

> While the fact that the government opposed the mistrial is clearly significant, that alone does not automatically obviate all concerns about the government's motivations regarding what it did with [the offending witness]. It cannot be the case that the government's opposition to a mistrial can *per se* negate any inference of intent to goad the defense into moving for one. If that were so, the government could simply object to a mistrial, present an option it knew to be untenable to the other side (and likely to be rejected by the judge), and thus inoculate itself from accusations of *Kennedy*-style intent in every case.

623 F.3d at 499–500.[4] In other words, if the Government can simply defeat a double jeopardy bar by going through the motions of making self-serving statements in court, then why have a bar at all?

The U.S. Supreme Court has been sensitive to this concern since the *Kennedy* decision was issued. In his concurrence to that decision, Justice Stevens in particular cautioned that a rigid application of the "subjective intent standard" set forth in the plurality opinion would "eviscerate the exception" to the rule permitting reprosecution in spite of the Double Jeopardy Clause. *Kennedy*, 456 U.S. at 688. This case uniquely brings Justice Stevens' concerns into sharp focus. A few statements by the prosecutors to the Court once the Court made its intention

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4 As the Government notes in its Opposition, the Court of Appeals remanded the trial court's denial of Mr. Cornelius's motion to dismiss the indictment on double jeopardy grounds based on a finding that Mr. Cornelius was entitled to an evidentiary hearing regarding the prosecutor's intent. *See* Opp. at 33. The Eastern District of Wisconsin held that evidentiary hearing on May 12, 2011, a subsequent motion to dismiss the indictment on double jeopardy grounds was filed on May 16, 2011, and that motion has been fully briefed and pending decision since June 16, 2011. *See* PACER Docket Report for Case No. 06-CR-264-RTR-2 (E.D. Wis.), electronically available with subscription at https://ecf.wied.uscourts.gov/cgi-bin/DktRpt.pl?975124061408419-L_452_0-1.

to declare a mistrial known should not be allowed to "eviscerate" all of the other objective evidence of prosecutorial intent and Mr. Clemens's double jeopardy protections.

This is especially true given the facts of this case. For example, the Government argues that its request to brief the Court's mistrial decision should remove "any doubt" that the prosecutors did not intend to goad the defense into asking for a mistrial. *See* Opp. at 21. The sequence of events, however, wholly undermines the force of this argument. The Government's briefing request came *after* the Court explained, *sua sponte*, that it would now need to "assess . . . whether the government can now retry this case or whether re-prosecution is barred by double jeopardy." 7/14/11 Tr. at 50. The fact that the prosecutors objected to the mistrial once the Court broached the double jeopardy issue is not a reliable indicator of the prosecutors' intent before the conduct took place. Accordingly, the Government's in-court statements that "[w]e object" and "I think [the prosecutorial error] can be [cured] through an appropriate instruction to the jury" are not conclusive here.

3. The record provides sufficient reasons for the Government to have sought to restart the trial of Mr. Clemens.

In its Opposition, the Government tries to rebut the important consideration of whether the pre-mistrial proceeding "was going badly for the government," *see Kennedy*, 456 U.S. at 690 (J. Stevens, concurring), by portraying the initial days of trial in the favorable possible light. *See* Opp. at 24–30. The Government even goes so far as to argue that "there was *no possible reason* why the government would have wanted a mistrial." Opp. at 13. However, the Government's effort to revise the history of how its case was going fails. The "possible reason[s] why the government would have wanted a mistrial" are ample.[5]

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5 The selected on-line press accounts cited by the Government to suggest that the prosecution was going well obviously do not provide any binding or persuasive authority on this Court. *See* Opp. at 25–26 n. 20. This is especially true in this case, where the press adjudicated

For example, the Government suggests in its Opposition that it was satisfied with the jury, and it argues that the prosecutors were able to successfully exclude the only two potential jurors that may have been objectionable for the prosecution. *See* Opp. at 29–30 n.23. The record belies both assertions. The prosecutors used all of their strikes during jury selection, Mr. Clemens successfully struck more jurors for cause during *voir dire* than the Government, and at least one juror the Government attempted to disqualify for cause ended up on the jury. Contrary to the Government's representations in the Opposition, *see* Opp. at 30 n.23, the Government ended up without sufficient strikes to strike the last non-alternate juror seated (Juror 0612). The prosecutors tried to challenge Juror 0612's qualifications during *voir dire* because he said "it shouldn't be in the government business" to investigate an individual's alleged steroid use and that he would "hold [the Government] to a higher burden of proof." *See* 7/12/11 P.M. Tr. at 37–38. This citizen ended up on the jury, with his time ultimately being wasted like those of his fellow citizens. It is reasonable to infer that the Government would want another *venire*.

The Government also tries to minimize what may be the most valuable benefit to it from a retrial here—the opportunity for the prosecutors to get more time to prepare their case. As the Government acknowledges, prosecutors may want to "precipitate a mistrial" once they "get just far enough into trial to preview the defense." Opp. at 24 (citing *United States v. Jozwiak*, 954 F.2d 458, 460 (7th Cir. 1992)). The Government tries to shrug off this point in two ways. First, the Opposition incorrectly argues that Mr. Clemens "nowhere suggests that the government goaded him into a mistrial in order to glean a 'preview' of his defense," Opp. at 24 n.19, but the initial motion made that very point in its introduction. *See* D.E. 80 at 4.

Mr. Clemens's guilt years before the introduction of evidence and the Court has appropriately limited press access to non-public facts.

Second, the Opposition attempts to make any "preview" gleaned in Mr. Clemens's pretrial motions, pretrial filings, opening statement, and initial cross examination seem inconsequential. *See* Opp. at 24 n. 19 (explaining that the "core defense" put forth in opening statements "was hardly a surprise to the government"). The record suggests otherwise. *See, e.g.*, 7/05/11 Tr. at 42 (statement by prosecutors the day before trial began that Mr. Clemens's theory that Mr. McNamee had a motive to lie and fabricate evidence regarding Mr. Clemens as early as 2001 was unanticipated and "somewhat novel"). Moreover, the very root of the Government's purported "mistake" was the "press of . . . trial matters." Opp. at 17. Indeed, according to communications from the Government at the time, the prosecution of Mr. Clemens was taking up such a great deal of time and energy that the Government was unable to provide basic trial materials like exhibits by the deadlines it promised to the defense or the dates set forth in paragraph 10(k) of the Court's General Order. If nothing else, another trial permits the Government to catch its breath.

4. The Government's attempt to shift some blame for its conduct is unsupported by the record.

Despite some language "accept[ing] responsibility" in court and in its Opposition, *see, e.g.*, Opp. at 17; 7/14/11 Tr. at 37, the Government actually tries to lay some of the blame for its conduct at the feet of defense counsel and the Court for the first time in its Opposition. Neither attack is fruitful.

First, the Government attempts to tie defense counsel to its misconduct by suggesting that, "except for this Court, it appears that all of the key players failed to immediately appreciate the significance of Exhibit 3b-2." Opp. at 21 n.17. This statement is certainly wrong with respect to defense counsel. And for all of the reasons set forth in the initial motion and above, it

is reasonable for the Court to infer that this statement is also false with respect to the prosecutors.[6]

Second, the Government's stubborn efforts to minimize its objectionable conduct during opening statements, *see* Opp. at 10 n.7, implicate both defense counsel and the Court. Mr. Clemens raised the Government's initial violation of the Court's pretrial *in limine* rulings in its initial motion because an important indicator of whether the prosecutors intended to provoke a mistrial is whether there was a "sequence of overreaching" leading up to the misconduct at issue. *See Kennedy*, 456 U.S. at 680 (J. Powell, concurring). In its Opposition, however, the Government tries to excuse its statements during opening by explaining that those statements did not violate the prosecutors' own mistaken "understanding of this Court's resolution of defendant's motion." Opp. at 5–6.[7] The Opposition's treatment of this episode as "a simple misunderstanding" therefore purports to place some responsibility for the prosecutors' conduct on the Court.

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6 The Government also mischaracterizes the "dilemma" faced by defense counsel when the prosecutors placed the offending portions of Exhibit 3b-2 before the jury. Defense counsel was not troubled by the tactical choice between admitting the transcript and objecting during the publication of the video clip as the Opposition suggests. *See* Opp. at 7. Rather, defense counsel was troubled by the "Hobson's choice" of objecting to, and thereby highlighting the potential significance, of plainly objectionable evidence and remaining silent in hopes that the violative evidence would go unnoticed by the jurors. *See Kennedy*, 456 U.S. at 670. Defense counsel also did not "admit[] that he had not reviewed the exhibit before trial," *see* Opp. at 7, because such an admission would have been inaccurate. Defense counsel reviewed transcript excerpts cited by the Government in pretrial correspondence before trial, but that review predated the Court's *in limine* rulings and counsel had every right to assume that any excerpts violating those rulings would have been redacted.

7 The explanation makes no sense. Under the Government's professed understanding of this Court's ruling, *see* Opp. at 4, it would have been permissible for the jury to draw inferences of Mr. Clemens's alleged motives to take illegal steroids from other players' admitted use of HGH, but it would not have been permissible for the jury to draw inferences of Mr. Clemens's alleged motives to take illegal steroids *provided by McNamee* from other players' admitted use of HGH *provided by McNamee*. This is a distinction without a difference, especially considering

This treatment is misplaced. The Court may have softened the blow of the Government's transgressions by advising that a misunderstanding of the scope of the Court's ruling had "maybe" occurred, but the statement in the Opposition that the Court "acknowledged" some role in the prosecutorial error on July 13, 2011 goes too far. *See* Opp. At 22. Immediately after the "misunderstanding" comment, the Court advised that it thought it had made its pretrial ruling "perfectly clear." 7/14/11 Tr. At 39.[8] And as the Court explained during the initial bench conference about the Government's conduct, "I don't particularly like making rulings and lawyers not abiding by those rulings." 7/14/11 Tr. at 37. Accordingly, the Government's efforts to minimize its misconduct here and shift attention to other parties should not distract the Court from finding that the prosecutors had the required intent to bar retrial here.[9]

5. The procedural posture the Government urges here supports dismissal of the indictment instead of a retrial.

Finally, in its Opposition, the Government argues that the Court's inquiry should end with Mr. Clemens's positions because a "one-step" analysis is all that is required under the Double Jeopardy Clause. *See* Opp. at 12 n.9. The Government's procedural argument is

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the concerns shared by Mr. Clemens and the Court that any such inferences would constitute improper "guilt by association" evidence.

8 Likewise, defense counsel did not consent to statements by the prosecutors in opening statements about HGH use by other Major League players. The suggestion to the contrary in the Opposition is misleading. Opp. at 4. Had the Government said in the pretrial hearing what it now says it meant—namely that when prosecutors asked for permission to mention other player witnesses "played for the Yankees during this time period" they really meant to ask for permission to say those players took HGH—the defense certainly would have objected. Indeed, the implication to be drawn from such a statement was the crux of Mr. Clemens's motion *in limine*.

9 The Government's attempt to minimize its error extends to the video clip itself. The Government specifically argues that it "had not attempted to emphasize" the statement by Mrs. Pettitte. Opp. at 21. Of course it did. The Government deliberately introduced a video clip where the salient portions of the statement were read by Representative Cummings.

wrong,[10] but the error is of no moment because the Government has insisted on limiting the Court's analysis to the cold trial record. Such a posture favors dismissal of the indictment.

For example, the Government argues that the prosecutors' "contemporaneous declaration[s]" at trial should be treated with the same gravity as sworn statements under oath. Opp. at 14. But, as Mr. Clemens explained in the initial motion, the comments by the prosecutors at the critical moment the misconduct was raised and objected to reveal that the Government (a) knew the contents of all exhibits it sought to introduce in detail and (b) was willing to go as far as possible until its conduct raised an objection. If the publication of Mrs. Pettitte's statements to the jury was an accident, the natural response would have been for the prosecutors to immediately acknowledge the oversight. That never happened. Instead, the Government first argued that no objection had been lodged to the offensive material, and it next argued that the only reference to Mrs. Pettitte in the exhibits was embedded within an unobjectionable question posed by Representative Cummings on video. *See* 7/14/11 Tr. at 33 & 38. Indeed, as discussed in Point 1 above, the Government still has never claimed that the publication of Mrs. Pettitte's statements to the jury was a mistake.

Accordingly, to the extent the Court renders a decision on Mr. Clemens's motion based solely on the facts before it as of July 14, 2011 and the argument of the parties as the

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10 The one case cited in the Opposition for the proposition that the Court should apply a "one-step" burden of proof actually supports Mr. Clemens more than the Government. Although the Government attempts to marginalize *United States v. Thomas*, 759 F.2d 659, 662 (8th Cir. 1985), and *United States v. Baptista-Rodriquez*, 17 F.3d 1354, 1360 (11th Cir. 1994), as "successive prosecution" double jeopardy cases—*i.e.*, cases where retrial is considered after a jury is unable to reach a verdict—the Government's case *United States v. Coughlin*, 610 F.3d 89 (D.C. Cir. 2010), was appealed in the same posture. *See id.* at 95. Moreover, the page cited by the Government in its Opposition sets forth the defendant's burden with respect to establishing collateral estoppel, not prosecutorial intent. *See id.* at 97. Finally, despite these dissimilarities, the D.C. Circuit actually held in *Coughlin* that double jeopardy *barred* retrial of some of the hung charges against the defendant, making for an unlikely precedent in the Government's brief.

Government urges,[11] the criminal prosecution against Mr. Clemens related to statements he made to the House Oversight Committee should end here. Dismissal of this case pursuant to the Double Jeopardy Clause is not an "extreme measure[]" as the Government argues, *see* Opp. at 35, but it is merely what justice requires.

CONCLUSION

Accordingly, and for each of the reasons set forth above and in Mr. Clemens's initial motion, this Court should dismiss the indictment in this case as a matter of law and prohibit subsequent retrial of Mr. Clemens of the charges in the indictment on the grounds of double jeopardy.

Respectfully submitted,
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11 The Government cites no case authority for its position that an informal litigation position "precludes the need for an evidentiary hearing." Opp. at 31. To the contrary, courts found that "an evidentiary hearing should have been held" in cases referenced in the Opposition. *See, e.g., United States v. Wentz*, 800 F.2d 1325, 1328 (4th Cir. 1986) (cited in Opp. at 31 n.25).