

HOUSE OVERSIGHT COMMITTEE LIVEBLOG - ROCKET'S RED GLARE

Folks, I have been a pitiful guest host the last two days, and for that I apologize. There was a medical issue in my family that arose on Monday and it has turned into a nightmare. This country needs to find it's way to a single payer universal healthcare process as soon as possible; else otherwise rational citizens are going to exercise that much ballyhooed Second Amendment right to bear arms and they are going to use them on the health insurance industry. That is all I am going to say for now; perhaps I will revisit all of this at a later date, but what I have seen and been exposed to the last day and a half is eye opening. Even to someone that deals with bad systems as a career, it is eye opening when it is actually you and your family in the breach.

A couple of people have inquired about a liveblog on the Clemens hearings. I was initially fairly uninclined to do that here because we usually deal with more important subjects. But I am fed up with FISA and the dereliction of duty of our Congress on that issue. I also have some time on my hands for a while today and think that there are many issues that really are important that are in play in the Clemens mess; so here we go. I will be posting some updates to the main post and will be here ready to engage and answer any question i can, the best I can in the comments. Feel free to rant and to question.

Update On Constitutional/Due Process Concepts At Play Here: Okay, even I am about Clemensed out after today's hearing, but I want to take just a minute to point out the legal principles I see at play here that I think should be understood and kept in mind.

First off, if the Federal government thinks

Roger Clemens was seriously involved in steroid and HGH use and promulgation, investigate and prosecute him. But the government doesn't give a rat's ass about that, they are hot after Clemens because he had the audacity to challenge the God/Petraeus like Mitchell report. And make no mistake about it, if you can't believe the Clemens portion of the Mitchell report, you have to wonder about the the whole thing (save for a few general recommendations) and the quality of work that went into it. As I said below in the comments, the Congress is vested in the Mitchell report Very heavily, because they think it was the implementation of their last little dog and pony show with McGwire, Sosa and Palmeiro (by the way, you don't see any of those guys being hammered like Clemens do you?) and because George Mitchell is very close to many in the Congressional leadership including, most notably, Henry Waxman. This is all about bucking up the Mitchell report and, additionally, the work of Novitsky, who is in the middle of the whole mess and the Barry Bonds portion, whom they are dying to nail.

The main issue that bugs the bejeebies out of me on this mess is a concept in criminal law known as "parallel prosecution". Simply put, what this means is multiple prosecutions, by multiple coordinated governmental entities, of one individual, at the same time, usually in an effort to gain advantage over him or deny his ability to effectively defend himself. There are many examples of this in the law, the layman simply doesn't think about it in those terms, so never really grasps the implications. One common example in drug crimes is the attempt by the government to civilly seize and forfeit the defendant's property so that he has to give testimony and answer questions in order to keep his property while they are prosecuting him on the underlying criminal case where, of course, he has a 5th Amendment right to silence and to make the government prove his case. The problem with this is that the government is using an artifice to breach the defendant's 5th Amendment right against giving testimony against himself.

If he doesn't stand in and give testimony and subject himself to full examination, he loses his property because of an alleged crime he has not even been convicted on; if he does fight, he is opening himself up to examination that can be used against him.

This is the problem with the Clemens scenario. Clemens was the big fish in the Mitchell report and, make no mistake about it, Mitchell needed a big fish for his report, and preferably a white one to offset some of the complaints made about the major focus on Barry Bonds in the past. It is my understanding that Mitchell did not originally want to name individuals in his report, but did so after being urged very strongly by congress and MLB to do so. The second that Clemens exercised his right to say "Hey, that's not right, I am innocent", the weight of the world was reigned down on him. He immediately was accused of lying and became the subject of discussions of criminal charges because he was challenging the credibility of the mighty Mitchell report. But Clemens was not afforded the opportunity to have the Government put up or shut up with their evidence against him and to have his right to test that evidence for weight and veracity. Instead, he was immediately under the combined microscope of the IRS, FBI, DEA and the Department of Justice (yes they are all actively involved in this; you just don't hear about it). Then, to top it off, the United States Congress starts getting in on the act and compelling testimony under oath. Before he has ever been charged with any crime. All because he had the audacity to say "I am not guilty". And all of this, at the time of the Mitchell Report, was based on the unsubstantiated tales of a known, proven liar and suspected rapist, with no physical evidence and no corroboration. That is pretty chilling if you ask me.

So, the net result of the above is that the government is using both civil and congressional proceedings in order to pursue a criminal case against Clemens. This is not only unseemly, and

a terrible waste of Congressional resources, it may be legally improper; we will see how the facts flesh out when IRS agent Novitsky is finally cross-examined on how he has conducted this witchhunt. So, to wrap up this part, what the government has succeeded in doing is to shift the burden of proof from the government (where the burden should always be, and to a reasonable doubt standard, according to the Constitution, to Clemens, the putative defendant. As a believer and adherent to the Constitution, I find this abhorrent.

Now, for Bay State Liberal, Gulf Coast Pirate and Neil (who I have missed lately) here is how I could potentially explain McNamee being honest on Petite and Knoblauch and not about Clemens. Actually, if you have been around criminal law and aggressive federal investigators much, it is pretty easy to see such a scenario. Here goes the first one off the top of my head. This is not a new investigation; it has been going on for years. It is, in fact, the BALCO investigation that has been after Barry Bonds for years (which, by the way, makes all this babbling about Congress referring, or the DOJ initiating, an investigation laughable. There already is an ongoing investigation; this is flat out stupid talk) and which has also rolled up Victor Conte and Marion Jones. The over zealous, and from what has been described to me by people that have been close to different parts of this over the years, ethically dubious thug, IRS agent Jeff Novitsky has been co-opted, along with many other governmental assets, to assist a completely private business matter, the Mitchell report being done for the baseball owners (of which Mitchell is an owner; a pretty substantial conflict).

Here is how it could have played out. The Mitchell report had to have a big name fish if they were going to name names at all, which, as related above, was pretty much demanded by Congress and MLB. So Novitsky works over his stoolie, MacNamee for a big name. It is pretty much uncontroverted that Novitsky had been

working MacNamee for a quite some time, without anything being related about Clemens. MacNamee wants to insure that he isn't prosecuted. Novitsky tells him, well, that is all well and good, but you will be charged and you will go to prison (remember MacNamee has already admitted serious controlled substance crimes by this point) if you don't give us someone big. He says "gosh i don't know any", to which Novitsky says "you better come up with one, or go get your toothbrush for your prison cell." So MacNamee conjures up the Clemens stuff, knowing that it will fit in and look believable sandwiched with the Petite and Knoblauch information, which appears to be partially true. Now, before you go saying that is patently ridiculous, keep in mind that MacNamee is on record, himself, saying exactly that on at least one, if not multiple, occasions. So, when people babble "why would MacNamee lie when he could face prosecution" the answer is simply because he was facing prosecution if he didn't lie. Oh, by the way, the rumor on the criminal trial lawyer streets I still walk every now and then, is that Novitsky allegedly has a history of exactly this type of behavior; some of it in the BALCO case. To be honest, I would wager pretty good money that his scenario is pretty close to what happened. Despite all that, Clemens is likely guilty; I just loathe the heavy handed dubious way the government is going about it all.